RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
SALIM AHMED HAMDAN

ALSO KNOWN AS:

SALIM AHMAD HAMDAN
SALIM AHMED HAMDAN
SALEM AHMED SALEM HAMDAN
SAQR AL JADAWY
SAQR AL JADDAWI
KHALID BIN ABDALLAH
KHALID WL'D ABDALLAH

NO. 040004

VOLUME ___ OF ___ TOTAL VOLUMES

2ND VOLUME OF REVIEW EXHIBITS (RE)—
RE 21-29
FOR NOVEMBER 8, 2004 SESSION
(REDACTED VERSION)

United States v. Salim Ahmed Hamdan, NO. 040004

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A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.

The volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to this administrative certification.

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III*	DoD Decisions on Commissions including Appointing Authority orders and decisions
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In RE 15, the Presiding Officer ordered that most of RE 22-A-1 be sealed. The sealed portion of RE 22-A-1 has been marked with the following page numbers in the bottom right corner:

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UNITED STATES OF AMERICA	)	
	)	
	)	**GOVERNMENT MOTION**
v.	)	**TO COMPEL DISCOVERY**
	)	
	)	
SALIM AHMED HAMDAN	)	1 October 2004
	)	

The Prosecution in the case of the *United States v Salim Ahmed Hamdan* provides this Motion to Compel Discovery and, in support of that Motion avers the following:

1. This Motion is timely filed in accordance with the POM 4.

2. Relief Requested: The Prosecution respectfully requests that the Commission compel reciprocal discovery as requested on 30 July 2004 and as required by MCI No. 8, §6.

3. Facts:

a. The Defense submitted its initial request for discovery on 18 December 2003.

b. On 18 December 2003, the Prosecution provided over 122 pages of discovery to the Defense in an effort to begin meeting its discovery obligation.

c. On 30 July 2004, the Prosecution provided an additional 979 pages of discovery to the Defense in an effort to meet its discovery obligation. This batch of discovery also included a compact disc with over 900 pages. Later that day, an additional 7 documents were served on the Defense

d. On 9 August 2004, the Prosecution provided an additional 91 pages to the Defense in an effort to meet its discovery obligation.

e. On 10 September 2004, the Prosecution provided an additional 350 pages to the Defense in an effort to meet its discovery obligation.

f. On 16 September 2004, the Prosecution provided an additional 63 pages to the Defense in an effort to meet its discovery obligation.

g. The Prosecution continues diligently to provide discovery as quickly as it gains information and the authority from controlling agencies to release it.

h. On 30 July 2004, the Prosecution provided the Defense with a Request for Reciprocal Discovery seeking materials required to be provided to them pursuant to MCI No. 8, §6. (copy attached).

i. On 21 September 2004, detailed defense counsel, LCDR Charles Swift, provided a memorandum to the Convening Authority for the Combatant Status Review Tribunal (hereinafter "CSRT") requesting that he be allowed to testify at his client's CSRT hearing. (copy attached). In that request, LCDR Swift claims "As a result of the investigation of Mr. Hamdan's case, detailed counsel has acquired exculpatory evidence directly bearing on Mr. Hamdan's status as a combatant." See 21 September 2004 memorandum at paragraph 2.

j. As of the date of this Motion, the Defense has provided absolutely no discovery whatsoever to the Prosecution.

k. The Defense has filed notice of two separate speedy trial motions.

4. Discussion.

Military Commission Instruction (MCI) No. 8, §6 sets out the discovery obligations of the parties to military commissions. §6A requires counsel for the Defense to provide to the Prosecution copies of all information intended for presentation as evidence at trial. The same paragraph requires that disclosure happens upon order of the Presiding Officer for good cause or *at least* one week prior to trial. As of the date of this Motion, discovery pursuant to §6A has been a one way street.

The Prosecution has been working diligently to obtain discoverable materials, obtain permission from the controlling agencies to release that material in discovery, and to produce those materials to the defense. The Prosecution's effort in that regard is evidenced by the delivery of over 1,615 pages of discovery in over 6 disclosures over the past 9 months. In stark contrast, the defense has turned over nothing.

The Defense's failure to disclose cannot be attributed to their not having possession of discoverable materials. By the Defense's own admission in their memorandum to the convening authority for the CSRT, they have in their possession evidence that allegedly exculpates their client. This material is in Defense hands, apparently ready to divulge to the CSRT, but has not been turned over in discovery. This is true despite the fact that such materials clearly fall into the purview of MCI No. 8, §6.

The Defense may argue that they are not obligated to furnish such materials until one week prior to trial and this is technically true. However, there is nothing to be gained by holding onto discoverable materials until the deadline when they are already in the Defense's possession. As such, the Presiding Officer has good cause to compel the Defense to produce the discoverable materials that they posses at this time and should do so. The grant of this Motion is in keeping both with the Presiding Officer's charge to conduct the proceedings expeditiously pursuant to MCI No. 8, §5, and the mandate of a full and fair trial pursuant to President's Military Order and MCO No. 1.

5. Attachments to this Motion:

a. Memorandum dated 30 July 2004, subject: Request for Reciprocal Discovery, *United States v. Hamdan*

b. Memorandum dated 21 September 2004, subject: Combatant Status Review Tribunal For Salim Ahmed Hamdan

6. Oral argument is neither required nor requested. However, the Prosecution is prepared to offer argument on this issue if the Defense requests it.

7. Authority Cited:

a. President's Military Order of 13 November 2001: Detention, Treatment, and Trial of Certain Non-citizens in the War against Terrorism

b. MCO No. 1

c. MCI No. 8

8. No witnesses are necessary for resolution of this Motion.

Review Exhibit 21A

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DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

July 30, 2004

MEMORANDUM FOR Commander Charles D. Swift, Defense Counsel, Office of Military Commissions

SUBJECT: Request for Reciprocal Discovery, *United States v. Hamdan*

The United States of America, by and through Commander Scott Lang, Prosecutor, hereby makes a formal request for reciprocal discovery. The United States asks that the defense provide a written response to this request, production of requested matters, and notice of any inability or intent not to comply.

Production includes the opportunity to inspect, photograph, and copy.

As used in this discovery request, the phrase "all documents and information" includes, but is not limited to, any writings (in hardcopy or electronic format), books, papers, sketches, drawings, photographs, video recordings, audio recordings, laboratory tests and results, or copies thereof; any oral statements; any tangible objects; and names and contact information of anyone possessing information about the requested matters.

As used in this request, the term "witness" includes persons who provide testimony in person or by some other means to include Video teleconferencing,

1. Pursuant to Military Commission Instruction 8, paragraph 6(A), copies of all documents and information intended for presentation as evidence at trial. This request includes, but is not limited to, the following:

a. Notice of any request or intent to request that the commission take conclusive notice of facts that are not subject to reasonable dispute;

b. Notice of any evidence, to include testimony, documents or physical evidence that the defense intends to introduce on either the merits or in sentencing that may constitute classified or protected information;

c. Copies of any demonstrative evidence that the defense intends to introduce on either the merits or in sentencing;

d. The Curriculum Vitae for any expert the defense intends to call as a witness on the merits or in the sentencing phase;

e. A copy of any statements, signed, reviewed, or adopted that relate to this prosecution in any manner of a witness that the defense intends to call on either the merits of the sentencing phase;

f. For any witness that the defense desires the government to produce on their behalf, a synopsis of testimony that the witness is expected to provide (note that the defense should not rely on the fact that a witness appears on the prosecution's witness list to mean that the witness will, in fact, be present. Should the defense wish to examine witnesses on the prosecution witness list they should specifically request them and provide the required information); and

g. All documents and information used by a witness to prepare for trial, to include any writings or documents used by any witness to refresh memory for the purpose of testifying, either while testifying or prior to testifying.

2. Pursuant to Military Commission Instruction 8, paragraph 6(C), notice of any intent to raise any affirmative defense.

3. Pursuant to Military Commission Instruction 8, paragraph 6(D), notice of intent to raise a defense of lack of mental responsibility or to introduce expert testimony regarding the accused's mental condition. This request includes, but is not limited to, the results of any mental health examinations performed by any psychological professional with respect to the accused.

This discovery request is continuing and shall apply to any additional items, requested herein, which become known to the defense at a later date.

The United States reserves the right to make additional continuing discovery requests.

[redacted]

Commander, U.S. Navy
Prosecutor
Office of Military Commissions

Attachment 1 to RE 21A

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DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

21 September 2004

From: LCDR Charles D. Swift, Detailed Defense Counsel
To: Convening Authority, Combatant Status Review Tribunal

Subj: COMBATANT STATUS REVIEW TRIBUNAL FOR SALIM AHMED HAMDAN

Ref: (a) Deputy Secretary of Defense Order of 7 July 2004
(b) Secretary of the Navy Implementing Directive of 29 July 2004
(c) My ltr of 21 July 2004
(d) Your ltr of 20 September 2004

Encl: (1) UNITED STATES V. HAMDAN: PROSECUTION RESPONSE TO DEFENSE MOTION FOR DISMISSAL (FAILURE TO ACCORD THE ACCUSED A STATUS REVIEW HEARING BEFORE A MILITARY COMMISSION)

1. This letter is provided in response to reference (a), a portion of which denies a portion of reference (b). Reference (b) requests that detailed defense counsel will serve as the personal representative for Mr. Hamdan pursuant to references (c) and (d).

2. Reference (b) provides in the alternative that, if the request to serve as personal representative was denied, detailed defense counsel for Mr. Hamdan would serve as a witness. As a result of the investigation of Mr. Hamdan's case, detailed counsel has acquired exculpatory evidence directly bearing on Mr. Hamdan's status as a combatant. Under references (b) and (c) Mr. Hamdan is entitled to call reasonably available witnesses to testify on his behalf. My understanding from consultation with Mr. Hamdan is that he desires me to testify on his behalf and appreciate that reference (a) does not prevent such testimony.

3. My understanding based on the representation of the government in enclosure (1) is that Mr. Hamdan's combatant status review hearing is scheduled for 3 December 2004. I am available at that date and will be present to testify. Should Mr. Hamdan's status review hearing be moved, I respectfully request to notify me at the earliest opportunity, so I may adjust my schedule accordingly to be at that proceeding.

4. With regards to my testimony, I understand from reference (a)'s denial that the combatant status review hearing is administrative and will not implicate judicial proceedings pending before the Military Commission. As such, my understanding is that my testimony and associated documentary evidence will not be forwarded or made available in any form to the Military Commission or the prosecutor for use in those proceedings.

5. In order to facilitate my testimony, I respectfully request that Mr. Hamdan's personal representative when assigned be advised of my work phone number, (703)607-1521 ext. 191# (DSN 327); after hours phone number (703) 244-8777 and email address swiftc@dodgc.osd.mil.

Attachment 2 to RE 21A

Page 1 of 2

so that he/she may contact me in order to properly advise and assist Mr. Hamdan in obtaining witnesses pursuant to references (c) and (d).

6. Nothing in this letter is meant to waive any right or privilege under the Constitution and laws of the United States, nor is it intended to waive any ethical claims that may arise out of un-counseled attorney/client contact.

C.D. SWIFT
LCDR, JAGC, U.S. Navy
Detailed Defense Counsel

Attachment 2 to RE 21A

Page 2 of 2

PS HAMDAN MOTION

Hodges, Keith

OCA EMAIL

From: Hodges, Keith [redacted]
Sent: Friday, October 22, 2004 2:31 PM
To: [redacted] Swift, Charles, LCDR, DoD [redacted] COL, DoD OGC; [redacted] Mr, DoD OGC; [redacted] Cpt, DoD OGC; Swann, Robert, COL, DoD OGC
Cc: [redacted] PO1, DoD OGC
Subject: Hamdan Prosecution Reply and input for P-6 Motion to Compel discovery

P-6 of the Motions Inventory in US v. Hamdan has been annotated to reflect:
"Prosecution's previous reply of 20 Oct adopted as government reply to defense response of 22 Oct."

Keith Hodges

-----Original Message-----
From: [redacted] CDR, DoD OGC [redacted]
Sent: Friday, October 22, 2004 1:15 PM
To: 'Hodges, Keith'; [redacted] Gunn, Will, Col, DoD OGC; [redacted] COL, [redacted] CDR, DoD OGC; Swann, Robert, COL, DoD OGC
Cc: [redacted] [redacted] PO1, DoD OGC
Subject: Hamdan Prosecution Reply and input for P-6 Motion to Compel discovery

Sir,

We adopt our earlier reply to the Motion to compel discovery and renew our request that both the names of witnesses and the documentary evidence the Defense intends to introduce be ordered by the Presiding Officer to be provided 30 days prior to trial. The Prosecution is handing over evidence as it becomes available and authorized to turn over and feels that 95 percent of our evidence will have been provided to the Defense 30 days prior to trial.

In addition, with respect to issues concerning the Accused's psychiatric state and the Defense assertion that psychiatric experts are not getting access to their client, the Prosecution is unaware of any motions or requests being submitted to the Commission concerning this issue. Furthermore, if this does not get resolved in a timely manner, it could seriously jeopardize our December trial schedule as per MCI No. 8, the Prosecution is entitled to have a military psychiatrist perform an examination of the Accused if this issue surfaces.

We are also aware that based on the voir dire questioning of the Defense, the Defense intends to call experts on "social customs and practice [and] living conditions in Yemen. Voir Dire page 36. As the Defense apparently knows the identities of these experts and intends to call them, we ask that this information be disclosed as soon as possible as the Defense promised in their motion response that they would be "mindful of the Presiding Officer's urging to provide the names of witnesses as soon as they can be identified."

VR

CDR [redacted]

-----Original Message-----
From: Hodges, Keith [mailto [redacted]
Sent: Friday, October 22, 2004 12:17
[redacted]

APO ATTACHMENT to RE21A (3 pgs)

[redacted]

Subject: Award for Capt Autorino and Hamdan - Defense Response to P6 (Motion to Compel Discovery)

I award Capt Autorino the first-ever (yet still highly coveted) "I am paying attention award," for having seen the value of the Motions Inventory number and including that number in the: email subject line; body of the email, style of her filing; and filename of the attachment. Oak leaf clusters for subsequent awards are available.

The defense response to P6 has been added to Motions Inventory.

Government: Do you wish to adopt your earlier reply or substitute?

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

-----Original Message-----
From: Kristine.Autorino@[redacted]
Sent: Friday, October 22, 2004 11:35 AM
[redacted]

Subject: RE: Hamdan - Defense Response to P6 (Motion to Compel Discovery)

Col Brownback/Mr. Hodges,

Please see attached Defense Response to P6.

Respectfully, Kristine

-----Original Message-----
From: Hodges, Keith
[redacted]

Sent: 10/20/2004 2:08 PM
Subject: RE: Hamdan - Defense Response to P6 (Motion to Compel Discovery)

The Prosecution has the right to a response to their P6 motion, and they have not received it.

Provide a response in accordance with, and by the timeframes established, in paragraph 8, POM 4-2. Since you just joined the defense team, we will establish the "received date" as today (even though it was received long ago.)

Prosecution, once you receive the defense response, you may adopt the reply you provided earlier or submit another. Advise then of your decision.

An updated Motions Inventory will be sent later today.

By Direction of the Presiding Officer

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

-----Original Message-----
From: Kristine.[redacted]
Sent: Wednesday, October [redacted]
Subject: RE: Hamdan - Defense Response to P6 (Motion to Compel Discovery)

Sir,

Yes, this is the only reply to date. When I sent this response on 15 Oct 04 from Gitmo, I noted in my e-mail that it was our understanding the motion to compel was moot by us responding with the attached document.

I understand [redacted] position that it is not.

But again, this is our only written response to date.

Respectfully, Kristine

-----Original Message-----
From: Hodges, Keith
To: Will Gunn Col; [redacted] Hodges, Keith
Sent: 10/20/2004 12:20 PM
Subject: Hamdan - Defense Response to P6 (Motion to Compel Discovery)

Defense, I have the attached as the defense response to P6, motion to compel discovery.

Is that the only response you provided to the government's motion? If not, please attach.

keith Hodges

<<P6 Hamdan Defense memo reply request for reciprocal discovery.pdf>>

<<P6 Hamdan Defense memo reply request for reciprocal discovery.pdf>>

UNITED STATES OF AMERICA	)	
	)	DEFENSE RESPONSE TO
	)	GOVERNMENT MOTION TO
v.	)	COMPEL DISCOVERY (P6)
	)	
	)	
SALIM AHMED HAMDAN	)	22 October 2004
	)	

1. Timeliness. This response is filed timely in accordance with POM 4-2, given the date of receipt imputed to the Defense was 20 October 2004.

2. Relief Sought. That the Defense is in compliance with the discovery requirements as found in Military Commission Instruction Number 8.

3. Facts (The Defense Responds to the Government's Original Request for Reciprocal Discovery, 30 July 2004).

a. The Defense shall provide notice of any request or intent to request the commission take conclusive notice of facts not subject to reasonable dispute to the prosecution at least one week prior to the start of the Military Commission in this case, or sooner if so ordered by the Presiding Officer.

b. The Defense shall provide notice of any evidence, to include testimony, documents or physical evidence that the Defense intends to introduce on either the merits or in sentencing that may constitute classified or protected information to the prosecution at least one week prior to the start of the Military Commission in this case, or sooner if so ordered by the Presiding Officer.

c. The Defense shall provide copies of any demonstrative evidence that the Defense intends to introduce on the merits or in sentencing in compliance with MCI 8, paragraph 6(A).

d. The Defense has provided and will continue to provide all Curriculum Vitaes for our requested experts.

e. The Defense is not required to provide such statement/documentation (statements, signed, reviewed, or adopted that relate to this prosecution in any manner of a witness that the defense intends to call on either the merits or the sentencing phase) unless the Defense intends to introduce such evidence at trial.

f. The Defense has provided a synopsis of witness testimony with our lay witness requests and our expert witnesses. Since our original requests, we have supplemented them with additional expected testimony and relevancy to the case.

g. The Defense shall provide the requested documents and information (all documents and information used by a witness to prepare for trial, to include any writings or documents used

Review Exhibit 21B

to refresh memory for the purpose of testifying, either while testifying or prior to testifying) to the prosecution at least one week prior to the start of the Military Commission in this case.

4. Law and Discussion.

a. The Defense is aware of its discovery obligations under Military Commission Instruction (MCI) 8. At present the Defense has either provided or is not required to provide any of the material requested by the Prosecution. In accordance with the requirements set out by the Presiding Officer, the Defense has provided the names, contact information, a summation of testimony and a Curriculum Vitae for all expert witnesses that the Defense intends to call in support of its motions during the 8 November hearing.

b. The Prosecution is not entitled to further Discovery at this time. Specifically:

1) Regarding the Prosecution's demand that the Defense provide a list of witnesses and a summation of their testimony pursuant to (MCI) 8. the Presiding Officer has set a date of 30 days prior to trial for the Defense to request from the government all witnesses that it intends to request be produced for trial. Accordingly the Defense is not obligated to provide the names of its witnesses at trial until 8 November 2004. The Defense, however, is mindful of the Presiding Officer's urging to provide the names of witnesses as soon as they may be identified to prevent delay in the proceedings and as such is providing the names of witnesses, summations of testimony and contact information for witnesses as such witnesses are identified. To date the Defense has provided the government with three fact witnesses and will continue to provide such information when identified.

2) Documentary evidence. Pursuant to MCI 8 the Defense is required to provide the documentary evidence it intends to admit at least one week prior to trial.

3) Copies of previous statements made by witness intended to be called by the Defense. MCI 8 does not require the .production of such statements. It should be noted that the Prosecution has similarly refused to produce agent notes, recording of interviews or other documents from which the reports of interrogation of Mr. Hamdan and other detainees were produced. To require the defense to produce statements of its witnesses when the Prosecution will not produce all writings and recordings of the government's agents is hardly comporting with a "full and fair trial."

4) Notification of potential defense based lack of mental responsibility. The Defense requested appointment of a forensic psychiatric team in April 2004 and renewed its request on 17 September 2004. The defense was notified of partial approval of its request on 20 October 2004. Upon completion of said exam the defense will provide the appropriate notice of if applicable. Until such an examination has been preformed we cannot provide notice.

5. Files Attached. None.

6. Oral Argument. The Defense agrees with the Prosecution that oral argument is neither required nor requested.

7. Authority Cited.

MCI No. 8

8. Witnesses/Evidence Required. None.

9. Additional Information. None.

CHARLES D. SWIFT
Lieutenant Commander, JAGC, US Navy
Detailed Military Defense Counsel
Office of Military Commissions

Review Exhibit 21B

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DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

15 October 2004

MEMORANDUM FOR CDR [redacted] JAGC, USN, PROSECUTOR

SUBJECT: Response to Government's Request for Reciprocal Discovery dated 30 July 2004, *United States v. Hamdan*

1. The Defense responds to the Government's Request for Reciprocal Discovery dated 30 July 2004 with the same paragraph numbers and paragraph letters found in the request.

a. - c. In accordance with Military Commission Instruction 8, paragraph 6(A), the Defense shall provide notice to the prosecution at least one week prior to the start of the Military Commission in this case, or sooner if so ordered by the Presiding Officer.

d. The Defense has provided and will continue to provide all Curriculum Vitaes for our requested experts.

e. In accordance with the Military Commission Instruction 8, paragraph 6(A) the Defense is not required to provide such statements/documentation unless the Defense intends to introduce such evidence at trial.

f. The Defense has provided a synopsis of witness testimony with our lay witness requests (Muhammed Ali Qassim al-Qal'a, Umat al-Subur 'Ali Qassim al-Qal'a, and Taqia Muhsin al-Ansi) and our expert witnesses. As additional witnesses are identified, we shall request them and include a synopsis of his/her testimony.

g. The Defense shall provide the requested documents and information to the prosecution at least one week prior to the start of the Military Commission in this case, in accordance with the Military Commission Instruction 8, paragraph 6(A).

2. The Defense shall so comply.

3. The Defense shall so comply.

The Defense recognizes its discovery obligations and shall continue to comply.

CHARLES D. SWIFT
LCDR, JAGC, USN
Detailed Defense Counsel

ATTACHMENT
Review Exhibit 21B

Page 1 **Of** 1

UNITED STATES OF AMERICA	)	
	)	PROSECUTION REPLY TO
v.	)	DEFENSE RESPONSE TO
	)	PROSECUTION'S MOTION TO
SALIM AHMED HAMDAN	)	COMPEL DISCOVERY
	)	
	)	October 19, 2004

1. Timeliness. This reply is being filed in a timely manner within the parameters established by the Presiding Officer.

2. Relief Sought. The Prosecution seeks an Order requiring the Defense to disclose the names and contact information of the witnesses they intend to call at trial and to disclose and provide copies of or access to any documentary or other evidence they intend to introduce no later than 7 November 2004.

3. Overview. The Prosecution has been seeking discovery from the Defense since 30 July 2004. The Defense, while demanding a speedy trial, seems poised to wait until the last possible minute permitted to respond to the Prosecution's request. Meanwhile, the Prosecution has provided the Defense with literally thousands of pages of discovery and has disclosed approximately 85 percent of their witnesses to the Defense. The Prosecution will not delay in providing the names of the other 15 percent when these witnesses are solidified and contact information is obtained.

4. Additional Facts

a. In response to a formal motion brought by the Prosecution on 1 October 2004 to compel discovery, the Defense responded with a memorandum response on15 October 2004 to the Prosecution's discovery request of 30 July 2004.

b. To date, the Defense has not responded to the Prosecution's Motion to Compel Discovery in accordance with POM 4.2.

c. In response to the Prosecution request for disclosure of evidence the Defense intends to use or introduce at trial, the Defense responded that they would provide it one week prior to trial and only sooner if ordered to do so by the Presiding Officer.

d. The Defense made a demand for a speedy trial in February of 2004.

e. The Defense filed motions to dismiss based on speedy trial violations on 1 October 2004.

f. The Defense filed a motion to abate these proceedings on 1 October 2004.

5. Analysis

If the Defense is truly sincere in their quest for a speedy trial, it is unfathomable as to why they would wait until the last possible moment to provide discovery in this case. However, absent an order from the Presiding Officer, that is exactly what they intend to do. (Defense reply to Prosecution Request for Reciprocal Discovery dated 15 October 2004). Ironically, the Presiding Officer has issued just such an order in POM 10 which requires the Defense to provide the names of witnesses **not later than 30 business days** before the first session in which the witness is first needed to testify.

This unwillingness to provide discovery coupled with the Defense Motion to Abate the proceedings brings into question whether the Defense truly desires or is prepared to go to trial in December. Experienced trial practitioners such as the Defense Counsel in this case are well aware that with such late disclosure, the Prosecution will need additional time to prepare. Failure of the Commission to grant this additional time to the Prosecution would only detract from the "full and fair" trial the Defense has expressed they so deeply desire.

While denying the request of the Prosecution for discovery at this time, the Defense provided no viable reason as to why they needed the additional time before disclosure. They did not say that they did not possess the requested information, only that they were unwilling to disclose until the last possible moment. One can only surmise that there is some apprehension in providing the Prosecution a reasonable amount of time to investigate and test the credibility of the evidence the Defense intends to introduce.

6. Witnesses. None

7. Oral Argument. The Prosecution believes this issue can be resolved without requiring oral argument.

[redacted]
Commander, JAGC, USN
Prosecutor

Review Exhibit 21-C

Page 2 **Of** 2

UNITED STATES	)	
	)	MOTION TO PRE-ADMIT EVIDENCE
v.	)	
	)	
SALIM AHMED HAMDAN	)	
	)	October 1, 2004

1. Timeliness. This motion is being filed in a timely manner within the parameters established by the Presiding Officer.

2. Relief Sought. The Prosecution requests that the evidence identified in this motion be pre-admitted into evidence in the cased of United States v. Hamdan.

a. The following evidence the Prosecution seeks to pre-admit is attached to this motion (or it is specifically stated that it is not attached). Those pieces of evidence marked as For Official Use Only or Law Enforcement Sensitive are Protected Information in accordance with the Presiding Officer's Protective Order #2 of August 27, 2004. As such they are filed under seal at this point in time. References to "Bates" numbers are to serve as a reference for Defense Counsel with respect to the previously provided discovery. For purposes of this motion, it is described as follows:

[redacted]

Review Exhibit 22-A

[redacted]

[redacted]

b. In addition to the protected information we seek to pre-admit above, the Prosecution also seeks to pre admit the following additional evidence which is not filed under seal:

- Al Fadl transcript of Embassy Bombing trial testimony (Bates 122). This is not attached to this motion as it consists of 996 pages.
- 1998 Fatwa with Arabic translation (Bates 130-133)
- Islamic Nuclear Bomb with Arabic Translation (Bates 134-136)
- 1996 Declaration of Jihad with translation (Bates 137-167)
- Address by President Clinton on Military Actions Against Terrorist Sites in AF and Sudan on August 20, 1998 (Bates 168-170)
- INS Determination that Accused is not a naturalized U.S. citizen (Bates 171-182) (assumes no stipulation as to citizenship)
- Al Quds newspaper article of May 14, 1998 with translation (Bates 276-284)
- Transcript and tape of ABC news interview of bin Laden aired on June 10, 1998 (transcript at Bates 285-294)
- Transcript of CNN interview of bin Laden aired on May 10, 1997 (Bates 295-303)
- Statement of Abu Jandal to al Quds (Bates 1508-1535)

3. Facts

b. The Prosecution has provided extensive discovery to the Defense commencing in December of 2003. To date over 2000 pages of materials have been provided.

c. The Prosecution anticipates seeking to admit into evidence Federal Bureau of Investigation (FBI) 302's and Criminal Investigation Task Force (CITF) Forms 40 documenting interviews of various people (most prevalent those documenting interviews of the Accused).

d. The Prosecution will also seek to admit other evidence that has also previously been provided to the Defense in discovery.

4. Law Supporting the Request for Relief Sought

Under Military Commission Order (MCO) No. 1, section 6(D)(1), the standard of admissibility for evidence is "probative value to a reasonable person." The Prosecution is confident that this standard can be met with respect to the evidence described above. While we understand that the Defense might contest the factual accuracy of this evidence, we feel there is little doubt that it is admissible. It will be for the Members of the Commission to decide the weight to give to this evidence.

As is evident from the list above, this case involves a voluminous amount of evidence. In the interest of judicial economy the Prosecution seeks to pre-admit this evidence. Taking this step is even more crucial in light of the remote trial and the detrimental impact that uncertainty and having to confront unforeseen issues mid-trial will create.

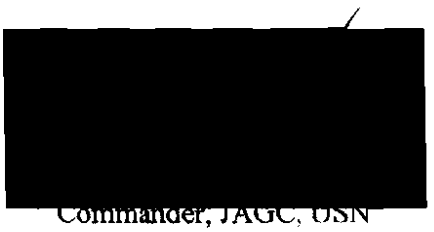
Pre-admitting evidence is clearly favored in both the U.S Federal and courts-martial systems. Rule 104 of the Federal Rules of Evidence (and the comparable Military Rules of Evidence) clearly contemplates the pre-admission of evidence and even allows relaxed rules in making admissibility determinations.

It will be to the benefit of all parties to identify those pieces of evidence where admissibility is not contested. For those portions of the proposed evidence above where the Defense does contest admissibility, the Prosecution intends to lay the appropriate foundation during testimony on the merits. It is not our desire to bring all of the sponsoring witnesses to Guantanamo on two separate occasions.

5. Oral Argument. The Prosecution is prepared to provide oral argument on this motion but is optimistic that these issues can be resolved without the necessity of oral argument.

6. Legal Authority.

a. MCO No. 1
b. Federal Rule of Evidence 104
c. Military Rule of Evidence 104



Commander, JAGC, USN
Prosecutor
Office of Military Commissions

Review Exhibit 22A

Page 4 Of 4

REVIEW EXHIBIT 22-A-1

Review Exhibit (RE) 22-A-1 has two parts—a sealed portion and an unsealed portion.

In RE 15, the Presiding Officer ordered that most of RE 22-A-1 be sealed (RE 15 is attached to this page). Pages 2 and 3 of RE 15 (pertaining to the release of information about investigators and interrogators) were classified "For Official Use Only." On September 23, 2005, the classifier requested that pages 2 and 3 of RE 15 not be released for posting on the Department of Defense (DoD) Public Affairs web site. The sealed portion of RE 22-A-1 has been marked with the following page numbers in the bottom right corner:

1ST VOLUME: REPORT OF INVESTIGATION (336 PAGES)

1 - 86
88 - 101
104 - 119
171 - 243
321 - 366
370 - 470

2ND VOLUME: REPORT OF INVESTIGATION (275 PAGES)

471 - 526
533 - 539
545 - 560
577 - 620
633 - 635
639 - 640
880 - 932
1451 - 1465
1472 - 1485
1552 - 1615

The unsealed portion of RE 22-A-1, which is releaseable for posting on the DoD Public Affairs web site, has been marked with the following page numbers in the bottom right corner:

1ST AND ONLY VOLUME: REPORT OF INVESTIGATION (98 PAGES)

122
130 - 170
276 - 303
1508 - 1535

Office of the Presiding Officer
Military Commission

August 27, 2004

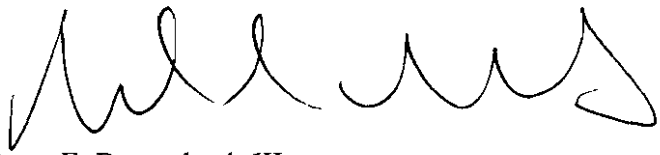
Order of the Presiding Officer

UNITED STATES v. SALEM AHMED SALEM **HAMDAN**

Attached are three Protective Orders in the above-styled case. All counsel agreed to the Presiding Officer's having signed the said Orders, and all parties have received copies of the said Orders.

The orders are: Protective Order #1; Protective Order # 2; and Protective Order # 2A.

The reporter will append this Order, and the three attached, Protective Orders to the Record of Trial in the above styled case as the Review Exhibits next in order.



Peter E. Brownback III
COL, JA, USA
Presiding Officer

UNITED STATES OF AMERICA	)	
v.	)	PROTECTIVE ORDER # 2
SALIM AHMED HAMDAN	)	August 27, 2004

The following Order is issued to protect from unauthorized disclosure documents and information provided to the Defense in the above-captioned Military Commission case, and is therefore directed to the Defense.

For the purpose of this Order, the term "you" or "your" shall pertain to all members of the Military Commission Defense team.

This Protective Order pertains to all documents and information previously provided to the Military Commission Defense team as well as any documents or information that may be provided to the Military Commission Defense team in the future. It shall remain in effect throughout your representation of Mr. Hamdan unless specifically modified or cancelled.

UNCLASSIFIED SENSITIVE MATERIALS

IT IS HEREBY ORDERED that all documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall only be disseminated to the following individuals:

- Members of the Military Commission Defense team to include paralegals, designated investigators, designated experts and administrative staff, with an official need to know. Additionally dissemination is authorized to the Accused;
- Other members of the U.S. Government Executive and Judicial branches where disclosure is deemed necessary by a Military Commission Defense Attorney of Record for the purpose of preparing the defense of this Military Commission case;
- Disclosure to individuals outside the Military Commission Defense team and these other Executive and Judicial branch employees requires the Defense to file a motion to the Commission requesting such disclosure. The Defense shall provide justification in this motion as to why such disclosure is necessary for the preparation of the defense. Input from the agencies having ownership interests in the information will be obtained prior to the Commission authorizing any such disclosure. Absent extraordinary circumstances and specific authorization from the Commission, any approved disclosures will not

permit the actual documents or other media containing the information to be provided directly to these individuals. The appropriate method of dissemination will be verbal;

- The Military Commission panel and parties to the case in the course of Military Commission proceedings.

IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Defense shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

CLASSIFIED MATERIALS

IT IS FURTHER ORDERED that you shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All classified documents (those marked "CONFIDENTIAL," "SECRET," or "TOP SECRET") and the information contained therein shall only be disseminated to the following individuals:

- Members of the Military Commission Defense team who have the appropriate security clearance and an official need to know the information to assist the Defense in the representation of the Accused before a Military Commission; and
- The Military Commission panel in the course of Military Commission proceedings. It shall be your responsibility to ensure that if you are presenting classified information to the panel, that you take appropriate measures to protect such information.

IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Defense or shared with any authorized person by the Defense must and shall be returned to the government at the conclusion of the review and final decision by the President or, if designated, the Secretary of Defense, in each case.

BOOKS, ARTICLES, OR SPEECHES

FINALLY, IT IS ORDERED that members of the Military Commission Defense team shall not divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Military Commission Defense team shall submit any book, article, speech, or other publication derived from, or based upon experience or information gained in the course of representation of Salim Ahmed Hamdan to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a Protective

Order. This restriction will remain binding after the conclusion of any proceedings that may occur against Salim Ahmed Hamdan.

BREACH

Any breach of this Protective Order may result in disciplinary action or other sanctions.

Peter E. Brownback III
Colonel, JA, U.S. Army
Presiding Officer

Review Exhibit 15

Page 6 **Of** 9

UNITED STATES OF AMERICA	)	
v.	)	PROTECTIVE ORDER # 2-A
SALIM AHMED HAMDAN	)	August 27, 2004

The following Order is issued to protect from unauthorized disclosure documents and information in the possession of the Prosecution in the above-captioned Military Commission case, and is therefore directed to the Prosecution.

For the purpose of this Order, the term "you" or "your" shall pertain to all members of the Military Commission Prosecution Office involved in the prosecution of Mr. Hamdan.

This Protective Order pertains to all documents and information previously provided to the Military Commission Defense team as discovery as well as any documents or information that may be provided to the Military Commission Defense team as discovery in the future. It shall remain in effect throughout the Military Commission of Mr. Hamdan unless specifically modified or cancelled.

UNCLASSIFIED SENSITIVE MATERIALS

IT IS HEREBY ORDERED that all documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall only be disseminated to the following individuals:

- Members of the Military Commission Prosecution Office to include attorneys, paralegals, designated investigators, designated experts and administrative staff, with an official need to know.
- Other members of the U.S. Government Executive and Judicial branches where disclosure is deemed necessary by a Military Commission Prosecution Attorney of Record for the purpose of preparing the Prosecution of this Military Commission case;
- Disclosure to individuals outside the Military Commission Prosecution Office and these other Executive and Judicial branch employees requires the Prosecution to file a motion to the Commission requesting such disclosure. The Prosecution shall provide justification in this motion as to why such disclosure is necessary for the preparation of the Prosecution. Input from the agencies having ownership interests in the information will be obtained prior to the Commission authorizing any such disclosure. Absent extraordinary circumstances and specific authorization from the Commission, any approved disclosures will not

permit the actual documents or other media containing the information to be provided directly to these individuals. The appropriate method of dissemination will be verbal;

- The Military Commission panel and parties to the case in the course of Military Commission proceedings.

IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Prosecution shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

CLASSIFIED MATERIALS

IT IS FURTHER ORDERED that you shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All classified documents (those marked "CONFIDENTIAL," "SECRET," or "TOP SECRET") and the information contained therein shall only be disseminated to the following individuals:

- Members of the Military Commission Prosecution Office who have the appropriate security clearance and an official need to know the information to assist the Prosecution in the representation of the Accused before a Military Commission; and
- The Military Commission panel in the course of Military Commission proceedings. It shall be your responsibility to ensure that if you are presenting classified information to the panel, that you take appropriate measures to protect such information.

IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Prosecution or shared with any authorized person by the Prosecution must and shall be returned to the government at the conclusion of the review and final decision by the President or, if designated, the Secretary of Defense, in each case.

BOOKS, ARTICLES, OR SPEECHES

FINALLY, IT IS ORDERED that members of the Military Commission Prosecution Office shall not divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Military Commission Prosecution Office shall submit any book, article, speech, or other publication the contents of which in a whole or part is derived from information subject to this ordered to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a

Protective Order. This restriction will remain binding after the conclusion of any proceedings that may occur against Salim Ahmed Hamdan.

BREACH

Any breach of this Protective Order may result in disciplinary action or other sanctions.

Peter E. Brownback III
Colonel, JA, U.S. Army
Presiding Officer

Review Exhibit 15

Page 9 **Of** 9

OFFICE OF THE CHIEF PROSECUTOR
OFFICE OF MILITARY COMMISSIONS
DEPARTMENT OF DEFENSE

U.S. V. USAMA BIN LADIN:
TESTIMONY OF JAMAL AL FADL

000122

U.S. V. HAMDAN

GOVERNMENT EXHIBIT

DFM/39-9 TRANSLATION

In the Name of God, the Compassionate, the Merciful

The International Islamic Front
for Jihad against the Jews and the Crusaders

A Legal Fatwa

Praise be to God, who revealed the Book [the Qur'an], who moves the clouds, who defeats the enemies, and who said in His book: **"But when the forbidden months are past, then fight and slay the pagans wherever ye find them, seize them, beleaguer them, and lie in wait for them in every stratagem (of war);..."** [*Surat At-Tauba* 5], and blessings and peace be upon our prophet, Mohamed bin Abdullah, who said: "I have been sent with the sword between my hands to ensure that no one but God is worshiped, who put my livelihood under the shadow of my spear, and who inflicts humiliation and scorn on those who disobey my orders."

The Arabian peninsula has never, since God created it, made it flat, and its desert, and encircled it with seas, been stormed by any forces like the Crusader armies that have spread throughout it like locusts, consuming its riches and destroying its peaceful state. All this is happening at a time when nations are attacking Muslims like insects swarming over a large plate of food. In light of this grave situation, and the lack of support, we are obliged to discuss current events with you, and we must all agree on how to resolve the issue.

Our Muslim Nation

No one can argue today about three facts that are known to everyone. We will mention them here as a reminder:

First: The United States has been occupying the most sacred area of Islamic land, the Arabian peninsula, for about seven years, robbing it of its riches, dictating to its rulers, humiliating its people, terrorizing its neighbors, and making its bases on the peninsula into a spearhead with which to fight the Islamic peoples nearby. While some may have argued about the reality of this occupation in the past, all the people on the peninsula acknowledge it now. There is no better proof of this than the Americans' continued aggression against the people of Iraq, with the peninsula as a staging ground. Despite the fact that all its rulers reject the use of their land for that [purpose], they are helpless.

Second: Despite the major devastation inflicted on the Iraqi people at the hands of the Crusader-Jewish alliance, despite the horrifying number of those killed, which exceeds one million–despite all that, the Americans are trying once again to repeat these horrific massacres, as though they were not satisfied with the long, drawn-out blockade [imposed] after the ferocious [Gulf] War, or the fragmentation and devastation [it caused]. So, here they come today, to wipe out what is left of this people and to humiliate its Muslim neighbors.

Third: If the Americans' aims behind these wars are religious and economic, then they are also to serve the Jews' petty state, and divert attention from [that state's] occupation of Jerusalem and its killing of Muslims. There is no better proof of this than their eagerness to destroy Iraq, the most powerful Arab state nearby, and their efforts to fragment all the states in the region, such as Iraq, Saudi Arabia, Egypt and the Sudan into small paper states, whose divisiveness and

weakness would guarantee Israel's survival and continuation of the brutal Crusader occupation of the peninsula.

Our Muslim Nation

All of these crimes and sins are a clear declaration of war by the Americans against God, His messenger, and Muslims.

Throughout Islamic history the Ulema [religious scholars] have been in agreement that Jihad is an individual's duty if the enemy raids Muslim countries. This has been conveyed by Imam Ibn Qadama in "Al-Mughni," Imam Al-Kashani in "Al-Badaie," Imam Al-Qurtubi in his interpretation [of the Qur'an] and Sheikh Al-Islam in his selections, in which he wrote: "as for fighting to repulse [an enemy], it is the most extreme form of repulsing attackers from the Holy Places and religion and agreed [by the Ulema] as a duty. Except for belief, there is no higher duty than repulsing attackers who would corrupt religion and everyday life." In light of that, and in following the command of Almighty God, we are issuing the following fatwa to all Muslims:

The judgement to kill Americans and their allies, both civilian and military, is the individual duty of every Muslim able to do so, and in any country where it is possible, to liberate Al-Aqsa Mosque and The Holy Mosque from their grip, and to expel their armies from all Islamic territory, defeated and incapable of threatening any Muslim. This is in following the words of the Almighty: "...and fight the Pagans all together as they fight you all together" [Surat Al-Tauba 36], **and "And fight them on until there is no more persecution, and religion becomes Allah's in its entirety..."** [Surat Al-Anfal 39], **and "And why should ye not fight in the cause of Allah and of those who, being weak, are ill-treated (and oppressed)?- Men, women, and children, whose cry is: 'Our Lord! Rescue us from this town. Whose people are oppressors; and raise for us from Thee one who will protect; and raise for us from Thee one who will help!'"** [Surat An-Nisaa 75].

Our Muslim Nation

We, in the name of God, call on every Muslim who believes in God and desires to be rewarded, to follow God's order to kill Americans and plunder their wealth wherever and whenever they find it. We also call on the sincere Muslim Ulema and leaders and faithful youth and soldiers to launch an assault on the Satanic American troops and their allies that are in support of Satan, and to drive away those behind them so they remember.

[Almighty God said:] **"O ye who believe! give your response to Allah and His Messenger, when He calleth you to that which will give you life; and know that Allah cometh in between a man and his heart, and that it is He to Whom ye shall (all) be gathered."** [*Surat Al-Anfal* 24] **"O ye who believe! what is the matter with you, that, when ye are asked to go forth in the Cause of Allah, ye cling heavily to the earth? Do ye prefer the life of this world to the Hereafter? But little is the comfort of this life, as compared with the Hereafter. Unless ye go forth, He will punish you with a grievous penalty, and put others in your place; but Him ye would not harm in the least, for Allah hath power over all things."** [*Surat At-Tauba* 38-39] **"So lose not heart. Nor fall into despair: for ye must gain mastery if ye are true in Faith."** [*Surat Al-Imran* 139]

Our final prayer is praise be to God, Lord of the universe.

On their behalf

1. Sheikh Usama Ben Laden.
2. Dr. Ayman Al-Zawahiri, leader, Jihad Group in Egypt
3. Sheikh Abu Yasir Rifai Ahmed Taha, one of the leaders of the Islamic Group in Egypt
4. Mawlana Mir Hamza, secretary, The Ulema Society of Pakistan
5. Mawlana Fazlulrahman Khalil, leader, The Supporter's Movement of Pakistan
6. Sheikh Abd al-Salam Mohamed, leader, The Jihad Movement in Bangladesh

Sunday, [25 Shawwal, 1418] H - 2/12/1998 AD

GOVERNMENT EXHIBIT
(12)

بسم الله الرحمن الرحيم

الجبهة الإسلامية العالمية لجهاد اليهود والصليبيين

فتوى شرعية

الحمد لله منزل الكتاب ومجري السحاب وهازم الأحزاب والقائل في محكم كتابه: ﴿فإذا انسلخ الأشهر الحرم فاقتلوا المشركين حيث وجدتموهم وخذوهم واحصروهم واقعدوا لهم كل مرصد﴾ والصلاة والسلام على رسوله القائل: ﴿بعثت بالسيف بين يدي الساعة حتى يعبد الله وحده وجعل رزقي تحت ظل رمحي وجعل الذل والصغار على من خالف أمري﴾.

أما بعد فمنذ أن دعى الله جزيرة العرب وعلق فيها صخراً وحفها ببحارها لم تدهها غاشية كهذه الحملة الصليبية التي انتشرت فيها كالجراد ترجم أرضها وتأكل ثرواتها وتبيد أصقاعها وكل ذلك في وقت تداعت فيه على المسلمين الأمم كما تداعى الأكلة إلى قصعتها. ويلزمنا حين عظم الخطب وقل الناصر أن نقف وإياكم على مكنون الأحداث الجارية كما يجب أن نتفق جميعاً على فصل القضاء فيها.

أمتنا المسلمة

لا أحد يجادل اليوم في حقائق ثلاث توافرت عليها الشواهد وأطبق عليها المنصفون ونحن نذكرها ليتذكر من تذكر وليهلك من هلك ويحيى من حي عن بينة وهي:

أولاً: منذ ما يربو على سبع سنين وأمريكا تحتل أراضي الإسلام في أقدس بقاعها، جزيرة العرب، وتنهب خيراتها وتملي على حكامها وتذل أهلها وترعب جيرانها وتجعل من قواعدها في الجزيرة رأس حربة تقاتل بها شعوب الإسلام المجاورة. وإذا كان في الماضي من جادل في حقيقة هذا الاحتلال فقد أطبق على الاعتراف به أهل الجزيرة جميعاً. ولا أدل عليه من تمادي الأمريكان في العدوان ضد شعب العراق انطلاقاً من الجزيرة رغم أن حكامها جميعاً يرفضون استخدام أرضهم لذلك ولكنهم مغلوبون.

ثانياً: رغم الدمار الكبير الذي حل بالشعب العراقي على يد التحالف الصليبي اليهودي رغم العدد القطيع من القتلى الذي جاوز المليون رغم كل ذلك يحاول الأمريكان مرة أخرى معاودة هذه المجازر المروعة وكأنهم لم يكتفوا بالحصار الطويل بعد الحرب العنيفة ولا بالتمزيق والتدمير فهاهم يأتون اليوم ليبيدوا بقية هذا الشعب وليذلوا جيرانه من المسلمين.

ثالثاً: وإذا كانت أهداف الأمريكان من هذه الحروب دينية واقتصادية فإنها كذلك تأتي لخدمة دويلة اليهود وبصرف النظر عن احتلالها لبيت المقدس وقتلها للمسلمين. ولا أدل على ذلك من حرصهم على تدمير العراق أقوى الدول العربية المجاورة وسعيهم لتمزيق دول المنطقة جميعاً كالعراق والسعودية ومصر والسودان إلى دويلات ورقية تضمن بفرقتها وضعفها بقاء إسرائيل واستمرار الاحتلال الصليبي الغاشم لأرض الجزيرة.

أمتنا المسلمة

إن كل تلك الجرائم والبوائق هي من الأمريكان إعلان صريح للحرب على الله ورسوله وعلى المسلمين.

وقد أجمع العلماء سلفاً وخلفاً عبر جميع العصور الإسلامية على أن الجهاد فرض عين إذا دهم العدو بلاد المسلمين وممن نقل ذلك الإمام ابن قدامة (المغني) والإمام الكاشاني (البدائع) والإمام القرطبي في تفسيره وشيخ الإسلام في اختياراته حيث قال: «أما قتال الدفع فهو أشد أنواع دفع الصائل عن الحرمة والدين واجب إجماعاً فالعدو الصائل الذي يفسد الدين والدنيا لا شيء أوجب بعد الإيمان من دفعه». ونحن بناءً على ذلك وامتثالاً لأمر الله تعالى نفتي جميع المسلمين بالحكم التالي:

إن حكم قتل الأمريكان وحلفائهم مدنيين وعسكريين فرض عين على كل مسلم أمكنه ذلك في كل بلد تيسر فيه وذلك حتى يتحرر المسجد الأقصى والمسجد الحرام من قبضتهم وحتى تخرج جيوشهم عن كل أرض الإسلام مقتولة الجند، كسيرة الجناح، عاجزة عن تهديد أي مسلم امتثالاً لقوله تعالى: ﴿وقاتلوا المشركين كافة كما يقاتلونكم كافة﴾ وقوله تعالى: ﴿وقاتلوهم حتى لا تكون فتنة ويكون الدين لله﴾ وقوله تعالى: ﴿ومالكم لا تقاتلون في سبيل الله والمستضعفين من الرجال والنساء والولدان الذين يقولون ربنا أخرجنا من هذه القرية الظالم أهلها واجعل لنا من لدنك ولياً واجعل لنا من لدنك نصيراً﴾.

أمتنا المسلمة

إننا باسم الله ندعوا كل مسلم يؤمن بالله ويرغب في ثوابه إلى امتثال أمر الله بقتل الأمريكان ونهب أموالهم في أي مكان ويجدهم فيه في كل وقت أمكنه ذلك.

كما ندعوا علماء المسلمين وقادتهم المخلصين وشبابهم وجنودهم المؤمنين إلى شن الغارة على جنود إبليس من الأمريكان ومن تحالف معهم من أعوان الشيطان وأن يشردوا بهم من خلفهم لعلهم يذكرون.

﴿يا أيها الذين آمنوا استجيبوا لله وللرسول إذا دعاكم لما يحييكم واعلموا أن الله يحول بين المرء وقلبه وأنه إليه تحشرون﴾ ﴿يا أيها الذين آمنوا مالكم إذا قيل لكم انفروا في سبيل الله اثاقلتم إلى الأرض أرضيتم بالحياة الدنيا من الآخرة فما متاع الحياة الدنيا في الآخرة إلا قليل* إلا تنفروا يعذبكم عذاباً أليماً ويستبدل قوماً غيركم ولا تضروه شيئاً والله على كل شيء قدير﴾ ﴿ولا تهنوا ولا تحزنوا وأنتم الأعلون إن كنتم مؤمنين﴾.

وآخر دعوانا أن الحمد لله رب العالمين.

عنهم

١- الشيخ أسامة بن محمد بن لادن.
٢- الدكتور أيمن الظواهري أمير جماعة الجهاد بمصر.
٣- الشيخ أبو ياسر رفاعي أحمد طه أحد قادة الجماعة الإسلامية بمصر.
٤- مولانا مير حمزة سكرتير جمعية علماء باكستان
٥- مولانا فضل الرحمن خليل أمير حركة الأنصار بباكستان
٦- الشيخ عبدالسلام محمد أمير حركة الجهاد ببنجلاديش

الأحد ٢٥ شوال ١٤١٨هـ ١٩٩٨/٢/١٢م

GOVERNMENT
EXHIBIT
1610-T (ID)

PLW/32-221 TRANSLATION

Fax Header:
From: Panasonic Fax System Phone No. Jun. 22 1998 6:34pm P1
30-May-98 11:02 Page 1

The World Islamic Front Communiqué #2

The Islamic Nuclear Bomb

Indeed the Muslims were pleased, and their hearts were filled with joy at the news of the five Pakistani nuclear explosions which came in response to the tyrannical Indian aggression. This is the aggression which frightened the Muslims with its provocative explosions and its inflammatory declarations. If only Allah would crush these gangs of Indian cheats and liars who have tried since India's inception to solve their problems by threatening their Muslim neighbors, and by fanning the flames of war and stirring up the flames of conflict.

On this great and joyous occasion we salute the Islamic Nation in general, and the people of Pakistan specifically, for the first possession of a nuclear weapon by the Muslims in their history. For these explosions, which were announced on the 3rd of Safar, 1419 hd, restored the international balance (of power) and tipped the scales of the struggle which the nations of the infidels was fighting against the nations of Islam. And we praise God that the Pakistani people did not give in to the heavy pressures of America. For it has been known for some time now that the American government exerted much pressure to keep Pakistan from acquiring nuclear weapons. And we take advantage of this opportunity to remind Pakistan that India is just her traditional and apparent enemy. In reality, her enemy is the Crusader-Israeli alliance headed by America that occupies the holy lands (referring here to Saudi Arabia) and Israel which is occupying by force the lands upon which we prayed in peace. For Israel is the head of the Jews, and it is they who supported the Indian nuclear program. And America is the head of the crusaders, and it is they who gave India the green light during Bill Richardson's last visit to the area.

The nature of the unjust Indian system, and the greedy ambitions of the Crusader-Jewish alliance which supports it, is that they will not stop at the limits of reason, and their encroachments upon Pakistan will continue. But what is desired is that India knows that Pakistan will not stand alone. All the Muslims will stand behind Pakistan with all their might, their supplies, their people and their money. The Muslim Nation sent 12,000 Arab freedom fighters to help our Muslim people's struggle in Afghanistan, and they fought until Allah allowed the Soviet Union to lose. So this blessed nation is now more than capable of defending our Muslim people in Afghanistan and of liberating our besieged brothers in India. For with the struggles, and the preparations and the propaganda against Allah's enemies, Victory will be realized (God willing). And the word of Allah will ring out. And the people of Islam, whose nations in the past had been pounced upon, will be secure. And the wise ones and the scholars must reveal this general explanation in the Muslim Nation and open the military camps to support the people of Pakistan and the oppressed Muslims under Indian Occupation. They also must strongly pressure the governments to open the doors for Muslim volunteers who, God willing, would erupt with zealousness from every direction. And lastly, they must instruct the Pakistani people to rally

MS 04/02/6

around Allah, and do away with their enemies. And it is better that the Muslims remain poor but dignified instead of living in humiliation [with outside support].

And finally we call upon all Muslims to adhere to Allah, and to stand with Pakistan and with the third of the Muslims besieged on the Indian sub-continent, in order to liberate them from the Hindus who are supported by the Crusader-Jewish alliance that has engaged us in a war in Palestine and in Saudi Arabia. And we call upon them to follow the example of Pakistan and not hesitate in acquiring nuclear and biological weapons. And what is desired is that they know the deal in signing the agreements prohibiting the spread of nuclear weapons. Because they (their agreements) don't mean they can't be bound by the enemy, and these agreements won't keep the Muslims secure from the 200 nuclear warheads that the Jews in Israel have. And they won't be delivered from the weapons of mass destruction that the tyrannical Christian nations have (headed by America and Britain). So the Muslims must get ready for the terrorism of Allah's enemies. And with that, Allah says: "Come! And pay no heed to those who were once infidels, in that they are not capable. And be ready for them with all the strength and unity you are capable of. You are frightened of the enemy of Allah and your enemies and others beside them. You do not teach them, Allah teaches them. And what you do for Allah comes back to you, and you will not be oppressed."

Date: 2/4/1419 hd
Equals: 5/29/1998 AD

OSAMA BIN MOHAMMED BIN LADEN
(Signature)

بسم الله الرحمن الرحيم

الجبهة الإسلامية العالمية لجهاد اليهود والصليبيين

قنبلة الإسلام النووية

بيان رقم (٣)

لقد أثلجت صدور المسلمين وامتلأت قلوبهم فرحة بأنباء التفجيرات النووية الباكستانية الخمسة التي هي رد على العدوان الهندي الباغي. هذا العدوان الذي روع المسلمين بتفجيراته الاستفزازية وبالتصريحات النارية التي أعقبته. ويأبى الله إلا أن يكبت شرذمة العمالة والدجل الهندية التي سعت لحل مشاكل الهند المستعصية منذ عقود بتهديد جيرانها المسلمين و بإشعال فتيل الحرب وتأجيج نار الصراع.

ونحن بهذه المناسبة العظيمة والمفخرة الجسيمة نهنئ الأمة الإسلامية عامة والشعب الباكستاني المسلم خاصة بامتلاك المسلمين للسلاح النووي لأول مرة في تاريخهم. فبهذه التفجيرات التي أعلن عنها في الثالث من صفر لعام ١٤١٩هـ اختل التوازن الدولي وتغيرت موازين الصراع التي كانت أمم الكفر تحرص على إبعاد الأمة المسلمة بجميع شعوبها عن التأثير فيها. ونحن نحمد الله على أن الشعب الباكستاني لم يستسلم للضغوط الامريكية الخائنة والمنافقة. فالمعروف منذ مدة أن الحكومة الأمريكية ضغطت بكل ثقلها للحيلولة دون امتلاك باكستان للقوة النووية. وننتهز هذه الفرصة للفت نظر المسلمين في باكستان إلى أن الهند ليست إلا عدو باكستان الظاهر والإقليمي، أما عدوها الحقيقي فهو التحالف الصليبي اليهودي وعلى رأسه أمريكا التي تحتل بلاد الحرمين وإسرائيل التي تغتصب مسرى نبينا عليه الصلاة والسلام. فإسرائيل رأس اليهود هي التي دعمت البرنامج النووي الهندي وأمريكا رأس الصليبيين هي التي أعطت إشارة الضوء الأخضر لبدء استخدامه خلال زيارة بل ردشاردسون الأخيرة للمنطقة.

وطبيعة النظام الهندي الغاشم وأطماع التحالف الصليبي اليهودي الذي يسنده لن تقف عند حد معقول وستبقى تحرشاتهم بباكستان مستمرة. ولكن الذي ينبغي أن تعيه الهند جيدا هو أنها لن تواجه باكستان وحدها معزولة بل إن المسلمين جميعا سيقفون بكل مايملكون من عتاد ورجال ومال مع شعبنا المسلم في باكستان. والامة المسلمة التي بعثت إثني عشر ألف مجاهد من العرب لدعم جهاد شعبنا المسلم في أفغانستان فجاهدوا مع إخوانهم الأفغان وغيرهم من المسلمين حتى منّ الله بهزيمة الاتحاد السوفيتي فتفكك وأصبح أثرا بعد عين: فهذه الأمة المباركة قادرة اليوم على الدفع بأكثر من ذلك بكثير لدعم شعبنا المسلم في باكستان ولتحرير شعوبنا المسلمة المحاصرة في الهند. فبالجهاد والإعداد والتحريض على قتال أعداء الله تتحقق الانتصارات -بإذن الله- وتعلو كلمة الله وتأمن شعوب الإسلام التي تكالبت عليها الأمم في هذا الزمان. ويجب على العلماء وطلبة العلم خاصة أن يعلنوا النفير العام في الأمة المسلمة و يفتحوا المعسكرات لدعم جهاد الشعب الباكستاني وشعوب المسلمين المنكوبة تحت الاحتلال الهندي. كما يجب عليهم أن يضغطوا بقوة على الحكومات لتفتح أبواب الجبهات أمام المتطوعين من المجاهدين المسلمين الذين سيتوافدون -بإذن الله- من كل حدب وصوب. وواجبهم أخيراً أن يربوا الشعب الباكستاني على الافتقار إلى الله وعلى الاستغناء عن أعدائه، وخير للشعوب المسلمة أن تبقى فقيرة عزيزة بدل أن تعيش على موائد أعدائها ذليلة.

وندعوا أخيرا كافة المسلمين دولا وشعوبا إلى الاعتصام بالله بلزوم شرعه وإلى الوقوف مع باكستان ومع ثلث المسلمين المحاصر في شبه القارة الهندية حتى يتحرروا من هيمنة الهندوس المدعومين من طرف التحالف الصليبي اليهودي الذي تخوض أمتنا ضده حربا شرسة في فلسطين وفي أرض الحرمين. كما ندعوهم أن يحذوا حذو باكستان فلا يقصروا في امتلاك الأسلحة النووية والكيميائية والبيولوجية. وما ينبغي أن يعوقهم عن الشروع في ذلك توقيعهم على الاتفاقيات التي تمنع من انتشار الأسلحة النووية فإنها لا تلزمهم لعدم تقيد الأعداء بها ولأنه بدون هذا السلاح لا يأمن المسلمون من مئتي رأس نووي يملكها اليهود في إسرائيل ولا يسلمون مما لا يبلغه الحصر من أسلحة الدمار الشامل المكدسة عند الأمم النصرانية الظالمة وعلى رأسها أمريكا وبريطانيا. فواجب المسلمين إعداد المستطاع من القوة لإرهاب أعداء الله وفي ذلك يقول الله تعالى «ولا يحسبن الذين كفروا سبقوا إنهم لا يعجزون وأعدوا لهم ما استطعتم من قوة ومن رباط الخيل ترهبون به عدو الله وعدوكم وآخرين من دونهم لا تعلمونهم الله يعلمهم وما تنفقوا من شيء في سبيل الله يوف إليكم وأنتم لا تظلمون»

وآخر دعوانا ان الحمد لله رب العالمين.

التاريخ : ٤/ ٢/ ١٤١٩ هـ
الموافق : ٢٩/ ٥/ ١٩٩٨ م

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إسامة بن محمد بن لادن

GOVERNMENT EXHIBIT 1610 (ID)

GOVERNMENT EXHIBIT
1626 BT (10)

GMW/1-1 to GMW/1-11 TRANSLATION

Declaration of Holy War Against the Americans Who are Occupying the Land of the Two Holy Places

"Expel the polytheist out of the Arabian Peninsula."

A message from Usama Bin Muhammed Bin Laden to his Muslim brethren world wide and specially in the Arabian Peninsula.

In the name of Allah, the most beneficent, the most merciful.

The thanks are all to God, He who we seek help, gratitude, and forgiveness. We seek refuge in Allah from our evil temptations and wrong deeds. Whomever been guided by Allah will not be mislead, and whomever has been misguided, he will never be guided. And I bear witness that there is no deity but Allah Who has no partner and I bear witness that Mohammed is His slave servant and messenger.

"Ye who believe, fear Allah as He should be feared, and die not except in a state of Islam." "O People! Reverence your guardian lord who created you from a single being. Created of like nature, His mate, and from them twain scattered countless men and women. Fear Allah through whom ye demand your mutual rights, the wombs, for Allah ever watches over you." "O ye who believe fear Allah, and say a word directed to the right. That He may make your conduct whole and sound, and forgive your sins. And he that obeys Allah and His Messenger, has already attained the highest achievement." Praise the Lord Who says, "I only desire (your) betterment to the best of my power; and my success (in my task) can only come from Allah. In Him I trust, and unto Him I look." (Hud:88) Praise the Lord who says: "Ye are the best of people evolved for mankind, enjoining what is right, forbidding what is wrong, and believing in Allah." (Al-Imran:110)

Allah's blessing and salutations unto His slave and servant who said, "The people are close to an all encompassing punishment from Allah if they see the oppressor and fail to restrain him." (Narrated by Abu Da'oud. Al-Tarmathi, and Al-Nisa'i)

Furthermore:

It is not hidden from you what the people of Islam have been suffering of oppression, injustice, and aggression by the Jews and Christians alliance and their collaborators until the Muslim blood became the cheapest, and their wealth and property is being blundered by the enemies. Here is their blood being shed in Palestine, Iraq, and the horrifying images of the Qana massacre in Lebanon are still fresh in the minds. Also, the massacres in Tajikistan, Burma, Kashmire, Assam, Philippines, Fatani, Ogadin, Somalia, Eriteria, Chechnya, and Bosnia Herzegovina, where massacres, which left the body shivering and the consciousness shaking, occurred against Muslims while the whole world stood out there watching and listening. Not only that but also, America and its allies clearly conspired hiding under the unjust United Nations, to stop weapons from reaching the dispossessed people. So the people of Islam became aware that they have become the main target of the aggression of the Jewish-Crusader alliance; and all the lies and

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propaganda about human rights had vanished by the strikes and the massacres that were committed against Muslims every where.

The most recent of these aggression was the worst against Muslims since the death of the Prophet, peace be upon him, that is the occupation of the land of the two Holy Places -the very house of Islam, the place of the revelation, the source of the message, where the blessed Ka'ba that all Muslims direct their prayers to- by the armies of the American Christians and their allies; there is neither might nor any power except with Allah.

Under the shadow of this reality that we are all part of, and under the shadow of the enormous and blessed awakening, which included every spot in the world, particularly in the Islamic World. I meet with you today after having been compelled to be way for a lengthy absence because of the unjust Crusaders' campaign, led by America, against Muslim scholars and Islamic advocates fearing that these scholars and advocates would provoke the Muslim Umma to fight back its enemies, resembling predecessor scholars, May God have mercy on their soul, such as Ibn Taymiyya and Ezz Bin Abid-al-Salaam. And so, the Crusader-Jewish alliance killed and arrested the symbols of honest scholars and active advocates-and we sanctify no one but Allah. The alliance had killed the Mujahid sheikh Abdullah Azzam; and arrested the Mujahid sheikh Ahmed Yasseen in the land where the Prophet, peace be upon him, ascended to Heaven; and the Mujahid sheikh Omar Abid-al-Rahman in America. Also, a very big number of religious scholars, advocates, and youths, were arrested in the land of the two Holy Places by American insinuation, most prominently sheikh Salman Aoda and sheikh Safar al-Hawali and their brethren-there is neither might nor any power except with Allah. We too have been stricken by some of this injustice by forbidding us to talk to Muslims, and pursued us in Pakistan, Sudan, and Afghanistan, which causes this lengthy absence from you. However, with God's grace, now there is a secured base available in Khurasan over the Hindu-Kush peaks. Over these very peaks, with God's grace, the most powerful atheists military force, was destroyed, and the myth of super powers was withered in front of the Mujahideens' cries- God is great- .
And today, from this very peaks , from Afghanistan, we are working on lifting aggression, which has fallen over the Umma because of the Crusaders-Jewish alliance, and especially after they occupied the place from which the Prophet, peace be upon him, ascended to Heaven, and after they granted themselves the right to be in the land of the two Holy Places. We ask God to grant us victory, He is the grantor and the capable.

Here we are today from Afghanistan starting to talk and take action, and discuss back and forth the means to reformation of what had happened to the Muslim world, generally, and to the land of the two Holy places, specifically. We want to study together the means by which the situation can be restored to its normal path, and by which the rights can be returned to their owners after the people have suffered great damage and severe aggression in their religious and life matters. It has affected every class of people; it affected civilians as well as military and security personnel. It has affected employees as well as merchants. It has affected the young as well as the old, it affected school pupils as well as university students. It has affected university graduates who are unemployed and counts in hundred of thousands where they currently compose a considerable portion in the society.

It has affected the manufacturers as well as farmers. It has affected the suburbs as well as the country sides, and the Bedouins as well as wool makers. Every one is complaining about almost everything and the conditions in the land of the two Holy Place is similar to a massive

volcano that is about to erupt and destroy in its way infidelism and corruption regardless to their sources. And the two explosions of Riyadh and Khubar were only a warning of this falling eruption that was emerged out of suffering, severe suppression, subjugation, serious oppression, unjust humiliation, and poverty.

The people have been fully concerned about their every day living. The talks about a deteriorating economy, inflation, ever increasing debts, and jails full of prisoners is everybody's talk. Employees with limited income could tell you about their debts amounts to tens and hundreds of thousands of Riyals, and they complain about the devaluation of the purchasing power of the Riyal when it is compared to other most major currencies. On the other hand, big merchants and contractors could tell you that the government owes them hundreds and thousands of millions of Riyals-the national deficit has reached up to 340,000 Riyals, and raising daily because of usury interest, not to mention, the foreign deficit-people are wondering whether we are really the biggest oil-exporting country?! Not only that but also, they feel that this is a punishment from God that came down upon them because they kept quite to the regime's subjugation and its illegitimate activities. For instance, and most obvious activities are its reluctance to judge by God's Law, depriving people of their legitimate rights, permitting the occupying Americans into the land of the two Holy Places, and imprisoning honest religious scholars, who are considered the heir of the Prophets, unjustly and aggressively. However, this grand tragedy had been realized by good and gracious people from among the experts on religious matters, including scholars and religious advocates, and other experts including merchants, economists, and prominent figures. Each group tried its best to move quickly and contain the situation. There is a unanimous agreement that the country is moving toward a deep hole and there is a sever catastrophe awaiting it, and only God knows its end. Quoting one big merchant, he said, "The king is driving this country toward sixty catastrophes." There is neither might nor any power except with Allah. Also, many of the princes share the people's despair and have expressed in their own private meetings their objection to what goes on in the country of terror, repression, and corruption. Personal competition between the influential princes has destroyed the country. The regime, with its own hands, has torn off its own legitimacy by many actions, most importantly:

1. Nullified the Shari'a and replaced it with secular laws despite the bloody opposition of sincere scholars and gracious young men-we chose no one above God.
2. Its inability to protect the country, and allowing the enemies of the Umma, the American Crusader forces to stay for many years. The Crusaders became the main cause for our all disastrous conditions particularly in the economic aspect due to the unjustified heavy spending on these forces. As a result of the policy imposed on the country, particularly the oil policy, by determining level of production and price production to suite its own economic interest but not the country's, and as a result of the high cost of weapon deals that are imposed on the regime, until people started to asking what is justification for the existence of this regime then?

Each party tried its best to move as quickly to contain the situation and to avoid the danger. They advised secretly and openly, using literature and poetry, together and separate, they sent petition after petition, memorandum after memorandum, they tried every possible means, and they invited every influential person to join them so to move about reformation. And they were tactful in their writing; asking with kindness and gentleness; sincere in offering a good

advice; calling for reformation and refraining from grand abominations and great immorality, which include the exclusion of religious duty and legitimate rights of the citizens.

However, with great regrets, they got back nothing but opposition, objection, and even sarcasm and ridicule. The matter did not stop only at mocking them but also, former violations became prominent, further abominations became bigger and more obvious-all of this is taking place in the land of the two Holy Places!! Hence, silence is no longer palatable and ignoring it became unacceptable.

After the violations reached that high and bypassed the major breaches of conduct and the grave offenses that reached **Islam's Clear Offenses**, a group of scholars and advocates, who have been fed up with the voices of stray that plugged their ears, ignoring oppression that blinded their eyes and the smell of corruption that stuffed their noses, then there came a vow of rejection and the voices of reform got louder urging to contain the situation and change the course of the status Quo. Hundreds of educated people, prominent figures, merchants, and former officials joined them to send the king complaints and memorandums asking for reformation. In 1411 Hijri, during the time of the Gulf War, they sent the king a complaint which was signed by about 400 individuals from among these groups, asking him to remedy the situation in the country, and to lift oppression off the people. However, he ignored the advice and ridiculed those who issued it, and the situation went on getting worse then worst.

Then those who gave their advise repeated the same action all over again by sending more complaints and memorandums of which the most important was The Advice Memorandum that was handed to the king in Muharam 1413 Hijri. The Memorandum diagnosed the disease and prescribed the medicine for it by relying on firm legal arguments and pure scientific presentation. The Memorandum emphasized the enormous gabs in the thinking of the regime and the major weaknesses within the regime's supporting entities. The Memorandum made it clear how the society's pro reform symbols and leaders, such as scholars, advocates, tribal leaders, merchants, prominent figures, and university professors, have been marginalized and put aside and even persecuted and restricted.

The Memorandum explained the status of the country's institutions and systems, and the sort of violations they represent, **which include what is legitimate and illegitimate legislation that has nothing to do with Allah.**

The Memorandum touched on the mass media in the country which **has become a tool to praise individuals and the highborn**, to cover up facts, to misrepresent reality, to demoralize the truthful, to cry over the Umma's causes in order to deceive the people without serious action, and to implement the enemies' plans which aim at corrupting the people and distance them from their religion, and to spread abominations among the believers-God almighty says, "Those who love (to see) abomination spread among the believers, will have a grievous penalty in this life and in the hereafter: Allah knows, and ye know not." (Al-Noor, verse:19).

Also, the Memorandum touched on the people's legitimate rights, which have been violated and confiscated in this country.

It talked about the bureaucracy which has been dominated by apathy and corruption. **It explained the economic and financial status in the country and the horrifying and severe outcome awaiting it as a result of debts, which are subject to usury. So far the debts have broken the regime's back, and not to mention, the extravagant spending of the nation's money,** especially to satisfy personal interests!! **However, the people still have to pay taxes, fees, duty,** and so forth!! The Prophet, peace be upon him, said about a woman who had committed adultery and repented then punished according to the Law, **"She repented so sincere that if a man who imposes duty on people would repent as sincerely as she had done, God would have forgiven him."** (Narrated by Ahmad). This indicates how hideous the crime of imposing duty on people. However, some people still pray for the imposer of duty who publicly legalizes the great offense of usury, which that is a deviation from God's Commandments-there is no might nor any power except with Allah.

The Memorandum unveiled the status of public services in the country which are despicable, and they have persisted and widened since the Memorandum, especially the water problem. Water is supposedly a basic thing in life.

The Memorandum talked about the armed forces and what the Persian Gulf crisis had revealed about them; they have small number of enlists, **they were fragile and ill prepared, and their high commanders were powerless despite the astronomical and unthinkable figures spent on them, these figures could never be hidden?!**

Concerning the justice system and courts, the Memorandum revealed **how many of the Shariah laws were replaced by secular ones.**

Concerning foreign policies, the Memorandum uncovered how they are particularly inconclusive and ignorant of issues related to other Muslims, but in the meanwhile they are supportive of the enemies' policies to work against **the Muslims, and (Gaza-Jericho), and the Communists in South Yemen, are few examples.**

Everyone is aware that relying on secular laws, and supporting the disbelievers against Muslims are part of Islam's Ten Articles of Renunciation. This has been decided by the religious scholars-and the Most High says, **"... If any do fail to judge by (the light of what Allah hath revealed, they are (no better than) unbelievers." (Al-Ma'ada:44)** Also, the Most High says, **"But no, by the Lord, they can have no (real) faith, until they make thee judge in all disputes between them, and find in their souls no resistance against thy decisions, but accept them with the fullest conviction." (Al-Nisa'a:65)**

The Memorandum explored all of this with a gentile approach and compassionate gesture to remind them about God and It offered rectitude in delicate fashion and in a truthful narrative, and despite the importance of advice in Islam and its significance to whoever leads the people, and despite the number of people who signed the Memorandum and their prominence, and its adherents, they still got no response except their grievances were met with condemnation and dismissal, and those who signed and braced them were ridiculed, punished, and imprisoned.

Clearly and without a doubt, the reformers and advocates for the Faith were keen on following the appropriate reformation means to keep the country undivided and to spare lives. Why is it then the regime closes all peaceful route and pushed the people towards armed actions?! Which is the only choice for them to implement righteousness and justice. To whose benefit does Prince Sultan and Prince Nayef push the country into a civil war that would destroy the dry and the green? And why consulting he who ignite internal feuds in his own country, playing the people against each other and instigate the policemen, the sons of the nation, to abort the reform movement over there, while the main enemy in the region, meaning the Jewish-American alliance, remained in peace and security after it found such traders who implement the policy dictated by the alliance in order to bleed the financial human resources of the Umma?!

The man whom prince Nayif, the Interior Minister, is consulting with is a pariah in his own country because of his great filth and his infringement upon the rights of his own people. He was sacked there, then went to be humbly welcomed by Prince Nayf! He went there to help with transgression and rancor, and he filled prisons with the nation's best children-tears were shed by the mothers whom children were unlawfully, unjustly, maliciously, and wrongfully imprisoned-does the regime want to flare up conflict between civilians and armed forces as it happened in some neighboring countries?! There is no doubt, that is the strategy of the American-Israeli alliance, the main beneficiary if it happened. However, by Allah's grace, the majority of the public, including civilians and armed forces, are aware of such malicious strategy, and they are far more superior than becoming an instrument in the hands of the enemy to kill one another so the main enemy's plan, the American-Israeli alliance, could be carried out with the help of its agent, the Saudi regime.

Everyone agrees that *the shadow of a stick cannot be straighten as long as the stick is crooked*. Hence, it is imperative to focus on attacking the main enemy who put the Umma in perpetual cycle and left it disoriented for few decades. Ever since the enemy divided the Umma into states and mini-states, any rise of reform movements in Muslim countries would become subject to the Crusade-Jewish alliance where it would push its agents from among the leaders in the region to weaken and destroy the movements with all available means and with whatever would suit it. Sometimes the alliance would destroy a movement by dragging it into an armed conflict after having had calculated the time and place of battle, then abolishes it in its infancy.

Other times, the alliance would launch its men from local interior ministries, who would be graduates of religious law, to create doubts about the movement so the Umma and the public would remain alienated from it. They also would cone some respected individuals to indulge in verbal war with the movement's scholars or its symbols to drain everybody's strength. Meanwhile the Great Pagans remains in control of the Umma to mislead it further. And while this debate over secondary things continues, consortium to Allah, attending to His Faith, and applying His laws remain nonexistent. Not to mention, indulging in arguments and counter-arguments would bring out ambiguity about what is "right" and "wrong," and they often lead to personal animosity because people wind-up taking sides either with this or that. This would only divide the Umma and weaken it further, and the priorities for Islamic work are ignored. Hence, caution of these devilish games, and them alike, played by the interior ministry should be carefully thought out.

The right reply for the situation that we are living in is to follow what have been decided by the people of knowledge, as was said by Ibn Taymiyyah, God have Mercy on his soul, that people of Islam should join forces and support each other to get rid of the Great Pagan, which is controlling the Muslim world, and to bear the lesser damage in order to get rid of the Great Pagan. If there are more than one duty to be carried out, then the most important one should receive priority. After faith there is no more important duty then pushing the American occupier out, and nothing else should proceed it as it was decided by the religious scholars. Also, Sheikh al-Islam Ibn Taymiyyah said, "And the Defensive War is the most important kind to resist an aggressor because it protects sanctity and faith. Hence, it is a total obligation upon everyone, because a hostile enemy who spoils life and religion has to be pushed back, and this is the most important duty after faith and nothing else. Also, the enemy could never be granted any conditions and must be pushed back with all available means."(608/4, Mulhaq Bil-Fatawa al-Kubra (Addendum: Grand Religious Decrees), Al-Ikhtirat al-Ilmiyya (Rational Choices Book) If the hostile enemy has to be pushed back and it needs all Muslims, including the weak and strong, to rally together to defeat the enemy, it has to be done and it is an obligation upon every Muslim. Hence, Muslims have to ignore their differences concerning any hanging issues because it is less harmful at this time than having the greatest evil in control of Muslim lands. To this Ibn Taymiyya, the sheikh of Islam, explained this point when described the status of holy fighters and other Muslims. He said, even if some soldiers are very much immoral, they cannot be excused from joining the holy war against a hostile enemy. His assertion to this great matter must be cautiously considered; by working on resisting the greatest of both evils but containing the other.

Furthermore, Ibn Taymiyyah, God have mercy on his soul, after mentioning the Tatar and their behavior in changing the law of Allah: the ultimate aim of pleasing Allah, raising his word, instituting his religion and obeying his messenger, peace be upon him, is to fight the enemy , in every aspect and in complete manner: if the danger to the religion from not fighting is greater than that of fighting, then it is a duty to fight them even if the intention of some of the fighters is not pure i.e., fighting for the sake of leadership or if they do not observe some of the rules and commandments of Islam. Pushing back the greatest of the two dangers on the expense of the lesser one is an Islamic principle that should be observed. Followers of the Sunna and Jama'ah should carry out military expeditions with righteous and immoral individuals because Allah supports His religion with or without a wicked man or an immoral nation as the Prophet, peace be upon him, was told. Hence if a military expedition cannot be done without immoral leaders or highly unscrupulous soldiers, one choice has to be made: Either to exclude them, which might lead to a conquest by outsiders, who could cause utmost harm to life and religion, or to include them so to push back the most harmful of the two and preserve most existing Islamic laws. Even if all Islamic laws are not being enforced, still the obligation is to follow this case scenario and other similar scenarios. Not to mention, many military expeditions after the time of the Rightly Guided Caliphs were actually similar to this case scenario." (Majmouh Al-Fatawi 506/28).

Now, mass corruption have spread and plenty of grand violations have been committed-they cannot be denied by either the blind or the deaf-how about being denied by someone who can see and hear when the most unpardonable aggression of all is real, that is the disbelief in

Allah and having granted themselves the right to legislate for the people. Allah says, **"Behold, Luqman said to his son by way of instruction: O my son! Join not in worship (others) with Allah: For false worship is indeed the highest wrongdoing."** (Luqman:13) And yet secular laws had been legislated to permit what Allah has forbidden; usury and among other things. Even in the land of the two Holy Places and near the Holy Mosque, the banks that charge usury have crammed the Twin-Shrines-standing there and waging war on Allah, unyielding to His command. Allah says: **"But Allah has permitted trade and forbidden usury..."** the verse (Albaqara:275) Almighty Allah had warned people about committing the grand offense of usury in His Holy Book. His warning to Muslims is so severe that no other punishment is comparable to it. Almighty Allah says in His Holy Book, **"Ye who believe! Fear Allah, and give up what remains of your demand for usury, if ye are indeed believers. If ye do it, take notice of war from Allah and His messenger..."** the verse (Al-Baqara:278-279) This warning is for the Muslim that uses usury-how about someone who makes himself rival to Allah and gives himself the right to legislate laws that permit what God has forbidden? Despite all of these things, we note that the regime still gets either some righteous scholars or religious activists to deviate from the truth, and drag them further into the sin so they would not talk about this grand offense-there is neither might nor any power except with Allah.

What is needed in this situation is that everyone should offer his/her best effort to provoke and charge the Umma against the hostile enemy, and the monstrous disbelief, which is hovering over the lands spoiling life and religion. There is no other priority after Faith but to push back the American-Israeli alliance that is occupying the land of the two Holy places and where the Prophet, peace be upon him, took his miraculous journey to Heaven. Also, everyone should alert Muslims about indulging in local wars against each other within the Muslim Umma, because they could have severe consequences and most importantly are:

1. Exhaustion of man power. Most casualties and injuries would be from the Muslim community.
2. Depletion of financial resources.
3. Destruction in the country's infrastructure.
4. Chaos in the community.
5. Destruction of the oil industry. Though the military presence of American-crusaders in the Islamic Gulf countries, either in the air, on the ground, or in the sea, is extremely dangerous and most threatening to the biggest oil reserve in the world. Indeed, their presence also provokes the locals and undermines their religion, feelings, and pride. This presence has pushed the locals to wage an armed-holy war against this occupying invader. And if the fighting from one country spread throughout the region, the oil would be at the risk of burning, which would hurt the economic interests of Gulf countries as well as the land of the two Holy places. Not only that but also, it would lead to severe economic setbacks to world economy. We stop here to think, and we urge our brothers, Mujahideens, and sons of the community, to protect this resource, and not to attack it at time of war because it is a great Islamic resource and giant economic power, that will be vital to the coming Muslim state, God's willing. And we strongly warn the United States of America, the aggressor, not to destroy this Islamic resource once the war is over, just because they fear it would wind up in the hands of its legitimate owners, or because they want to hurt their economic competitors in Europe and in the Far East, particularly Japan, since it is the main importer of oil from this region.
6. The land of the two Holy Place could be divided and Israel might steal its north part. The

Crusader-Jewish alliance has urgently aimed on partitioning the country, because having a large country like this size with these resources under a true upcoming Islamic rule, God's willing, would mean danger to the Jewish entity in Palestine, since the land of the two Holy Places is a symbol of unity for the entire Islamic World since the holy Ka'aba to which all Muslims collectively pray to is located there. Also, the land of the two Holy Places represents an important economic power in the Islamic World because it has the biggest oil-reserve in the world. Not to mention, people in this land are linked to their ancestors, the Companions of the Prophet, God have mercy on their souls, and they consider their ancestors' history a model worthy of repetition to have the Umma's glory resurrected, and Allah's commandments be most high as they were in the past.

Furthermore, in Happy Yemen, there are deep strategic ties, and there is great number of human resource that is willing to fight in Allah's name, which also poses danger to the presence of the Crusade-Jewish alliance in the region. The Prophet, peace be upon him, said, **"Surely there will appear 12,000 people in Aden who will support God and His Messenger. They will be as righteous as the people surrounding me and the best amongst their people."**
7. Any internal fighting, and no matter what the reasons for it are, is a big mistake while having the occupying American forces present, which will take advantage of the situation to decide the war for international infidelism.

Our brothers in the armed forces and national guard: God bless you all and preserve you to protect Islam and Muslims: You are the guards of the Call for one God and guardians of the Faith. You are the breed of the ancestors, who had carried the light of True Path and spread it throughout the world. You are the offspring of Sa'ad Ibn Abi Waqas, Muthana Ibn al-Haritha, al-Shibani, al-Qa'qa' Ibn Amru al-Tamimi, and the exceptional Companions who joined them in the Jihad for God's name-you too rushed in and joined the army and the guard because you wanted to Jihad in God's name so Allah's commandments be most high, and to defend the frontiers of Islam and the land of the two Holy Places from invaders and occupiers-that is the highest thing to do in the Faith. However, the regime turned the scales up side down, reversed the concepts, humiliated the Umma, and defied the public during a time when the Umma still cannot take back its First Qiblah from which the Prophet, peace be upon him, ascended to Heaven. The regime had made many promises during in this last half century to take back the First Qiblah, however, the generation that made those promises has long been gone and was replaced by another with newer but different promises, and the Aqsa was handed to the Jews, meanwhile, the Umma's wounds never stopped bleeding ever since. Despite all of this, the Saudi regime frightened the Umma even further over what is left of its sanctuaries, holy Mecca and the Prophetic Mosque, and it brought forces of Christian women to defend it, and it permitted the land of the two Holy Places to the Crusaders-it is not surprising, when the king himself wore the cross! He allowed them to freely wonder about in the land and it became basis for American forces and their allies, because the king has become unable to stand on his own without their help-you know better than anyone else about this American presence, its size, its objectives, and its danger-he had betrayed the Umma and made these unbelievers his allies, and collaborated and supported them against Muslims-this is obviously one of Islam's Ten Renunciations. Also, he went against the Prophet's instruction to his Umma when he was on his death bed, peace be upon him, by allowing Crusaders into the Arabian Peninsula. He said, "Force the polytheist out of the

Arabian Peninsula." (Narrated al-Bukhari). Also, he said, "If I live longer, God's willing, I would force out the Jews and Christians from the Arabian Peninsula." (Sahih Al-Jame'e Al-Saghyr).

And the claim that the presence of Crusaders forces over the land of the two Holy Places is an absolute necessity and temporary matter to defend the country has expired, especially after Iraq had savagely been destroyed along with its military as well as its civilian entities. This has shown the degree of resentment the Crusaders and Jews had for Muslims and their children. The claim has also become invalid since the regime strongly rejected the replacement of Crusaders forces by Muslim ones made of locals and others. Not to mention, this very claim does not exist because the roots of its very foundations have been terminated after what has been said by the leaders of disbelief in America on many occasions. The latest was what William Perry, Secretary of Defense, said after the Khobar bombing against American soldiers there. He said, their presence in the land of the two Holy Places is to protect America's interests. Sheikh Safr al-Hawali, God grants him speedy release, wrote a seventy-page book in which he analyzed evidence and facts and found that American presence in the Arabian Peninsula is a previously planned military occupation. And their claim is only another trick which the regime wants to sell to Muslims as it had done so with the Palestinian Mujahideens. That very trick was the reason that led to the loss of the al-Aqsa Mosque. When the Palestinian Muslim people launched a comprehensive holy war against the British occupation in 1354 H, 1936, Britain was unable to stop the Mujahideens or fight them back. However, there came their devil and inspired them to merely seek the help of their agent, king Abid-al-Aziz, to stop the holy armed-Jihad in Palestine, and he alone could trick the Mujahideens. The king, in return, carried out his mission by sending out his two sons to meet with the Mujahideen leaders in Palestine to tell them that the king guarantees the British government's commitment to leave if the Mujahideens stop fighting and their demands would be met-that is how king Abid al-Aziz became the reason behind the loss of the Muslims' First Qubilah by collaborating with Christians against Muslims and letting the Mujahideens down instead of embracing the cause of the Aqsa Mosque and supporting and helping them to liberate it-they were fighting in God's name! And today, his son, king Fahid, is trying to sell the second trick to Muslims so whatever left of our sanctuaries would be lost. He lied to scholars who issued fatwas concerning the American presence, and he lied to great number of scholars and prominent figures from the Muslim World as well when they met at the al-Rabita conference in holy Mecca after the Muslim World denounced the entry of Crusaders forces into the land of the Holy Places claiming to defend it. The king told them at the conference that American and its allies will leave in few months-here we are and going on seven years and the regime cannot make them leave. He does not want to admit to his own people that he is unable but continues to lie to the people claiming that they will leave-how preposterous! How preposterous! A believer does not get stung twice from the same hole-and the happy man is he who learns from others.

The regime is suppose to charge the army, national guards, and security forces to confront the occupier, but instead they were made to protect the occupier which stressed humiliation, and ultimate disgrace and betrayal-there is no might or any power except for Allah. We remind the small number of people in the army, the guards, and police, who are being used and pressured by the regime to kill Muslims or violate their rights, that in a Hadith Qudsi: "Whoever made an

enemy of any righteous believer of mine, I permit war against them." (Narrated al-Bukhari). Also, the Prophet, Peace be upon him, said, "A man shows up holding hands with his killer and Allah asks the killer: Why did you kill him? The killer replies: Because I wanted to glorify you. Then Allah says: I am glorious. Another man shows up holding hands with his killer and says: This man killed me. Then Allah asks the killer: Why did you kill him? The killer replies: To glorify so and so. Then Allah says: The glory is not for so and so and the killer is punished." (Narrated by al-Nisa'e in a sound Hadith). Also al-Nasa'e mentioned in a different version that the Prophet, peace be upon him, said, "In Judgment Day, the victim of a murder shows up hanging on to his killer and Allah asks about the reason for the killing then the killer says: I acted on behalf of king so and so."

Today your brothers and children from the land of the two Holy Places have started the Jihad for God's sake to force out the occupying enemy from the land. There is no doubt that you would like to join them in this mission so the Umma's dignity can be restored and its occupied holy places can be liberated. As you know, at this stage there is a need for appropriate fighting tactics, considering how incompatible our conventional armed forces with that of the enemy's. Hence, fast and light forces must be used and must operate in absolute secrecy. In other words, to launch guerrilla attacks by the society's sons and not the armed forces. And you also know that it is wise at this stage to avoid involving the armed forces entering into a conventional war with the Crusader enemy. The only exception is when individuals from the armed forces would carry out independent, daring, and effective operations without the deployment of various traditional armed forces so the counter-reaction would be minimized. Unless the chances are great to destroy and severely damage the enemy's threshold and will, and can be forced out humiliated, subdued, and defeated. It is extremely important to avoid killing Muslims during this process.

What your Mujahedin brothers and sons hope for at this point is all the help you can give them, including information, material, and necessary weapons for their work. And they, specially, hope that the police would keep a blind eye on them, to deceive and spread rumors within enemy lines, and to do anything that could be helpful to the Mujahedin against the occupying enemy.

We warn you that the regime might resort to stir up trouble by doing something against some individuals either from the armed forces or police and claim that the Mujahideens had done it, you should never let them get away with such thing.

Though we know that the regime is fully responsible for what had happened to the country and to its tiresome people but the cause of the disease and its tribulation is the occupying American enemy so all effort must be directed at this enemy, kill it, fight it, destroy it, break it down, plot against it, ambush it, and God the almighty willing, until it is gone.

And the time will come, God's willing, when you will play your part and be in charge, and when God's word would be the highest, and the unbelievers' word would be the lowest, and you will strike with an iron fist against the aggressors and restore tranquility, rights to its legitimate owners, and you will carry on with your true Islamic duty-we will, God's willing, have

a separate talk concerning these issues.

My Muslim brother everywhere and particularly in the Arabian Peninsula:
* The money you pay to buy American goods is turned into bullets against the chests of our brethren in Palestine, and tomorrow against the chests the sons of the land of the two Holy Places.
* By buying their goods, we are strengthening their economy while we become poorer and increasingly dispossessed.

My Muslim brother in the Land of the two Holy Places:
Is it reasonable that our country is America's largest buyer of arms from America in the world, and it's the area biggest commercial partner of the Americans in the region, those who are occupying the Land of the two Holy Places and supporting their Jewish brothers with money, weapons, and men to continue the occupation of Palestine, and to kill and disperse Muslims there?!
* Depriving them from this big revenue by stopping to do business with them would be very important help to the Jihad against them. And it is also a substantial moral gesture to express our anger and hate for them. By doing this, we would have taken part in helping to purify our sanctuaries from Jews and Christians and force them by the permission of God, to leave our land disappointed and defeated.

*We expect women in the land of the two Holy Places and elsewhere to also play their part by boycotting American goods.

If this economic boycott is intertwined with the Mujahideens' military strikes, then the enemy's defeat will be near, by the permission of God. However, if Muslims do not cooperate and support their Mujahideen brothers by stopping economic dealings with the American enemy's, they will be in fact supplying the army of the enemy with financial help and extending the war and increasing the suffering of the Muslims.

* All the security and intelligence forces in the world could never force a single citizen to buy his/her enemy's goods.

Economic boycotting of the American enemy's goods is highly effective weapon that could weaken and hurt him, and this weapon could never be manipulated or controlled by any of the oppressive apparatuses.
Before closing, we have an important and very serious word with the youth of Islam, the men of the brilliant future of the Umma of Muhammed, peace be upon him. We want to talk to them about their obligation during this difficult time in our history. During this time only the youth, God bless them, came forward to fulfill their duty in all areas after many people who were suppose to come forward declined to support Islam to save themselves and their money from the government's on going hostility, aggressiveness, unfair, unfounded, and terrorist practices. Not to mention, the government manipulation of the media to keep the Umma oblivious to what goes on in the country. However, the youth, God bless them, came forward to carry the Jihad banner up high and proud against the American-Jewish alliance, that is occupying Islam's sanctuaries.

On the other hand, others came forward to legitimize the decision to allow the occupation of the land of the two Holy Places because they were either terrorized by the government or tempted by some worldly compensations. That was the greatest betrayal and biggest disaster of all-and there is no might or any power but with Allah. So it is not surprising or unusual to see the youth come forward-were not Mohammed's Companions, peace be upon him, but young?! Those youths are the best successor to the best predecessors-who killed the Umma's Pharaoh, Aba Jahil, but the youths!

Abid al-Rahman Ben Aouf, may Allah be pleased with him, said, "When I was in the front line at the battle of Bader, I saw two teenagers, one to my right and the other to my left. I felt that they should not be there, but one of them asked me in secret so the other can not hear him: Show me Aba Jahil, then I said, what would you do with him? He replied: I was told that he curses the Prophet, and I swear by God who owns my life if I see him, I would not let my shadow leave his until one of us is dead. I was surprised. Then the other teenager winked at me and told me the same thing. Suddenly I saw Aba Jahil walking between the people, I said, do you see him, this is the man whom you asked me about? Then they attacked him with their swords until he was dead."

God is great! This is the kind of enthusiasm the youth had, God have mercy on them. This is the kind of enthusiasm our children have-the two teenagers were very young but had great enthusiasm, completely fearless and sound, and most protective of God's religion. These two teenagers were keen on killing the most important enemy, that is the killing of Aba Jahil, the Umma's Pharaoh, and the leader of polytheist in Badir. And Ben Aouf's role was assisting them in pointing Aba Jahil out-this is the kind of help needed from experienced and knowledgeable people who could guide their sons and brothers about the enemy's vital spots. Then each youth could repeat "I swear by God Who owns my life if I see the enemy, I would not let my shadow leave his until either one of us is killed." Also, Ben Aouf had similar encounter with Bilal, God bless him, who insisted on killing Umaya Ben Khaluf, the head of the disbelievers. Bilal said, "The head of the disbelievers is Umaya Ben Khaluf ... Either me or him live."

Few days ago... on the news, the American-crusader-occupier Defense Secretary said in a press conference that he had learned one lesson from the bombings in Riyadh and Khobar, that is to never give in to the coward terrorists. We say to the Defense Secretary that this sort of talk makes a grieving mother who just lost her only son laughs, and this obviously shows how worried you are-where was your courage in Beirut after the bombing incident in 1403 Hijiri, 1983 A.D., which scattered you in all directions, utterly helpless, and left you with corpses of 241 soldiers most of them were from the Marines. Your courage is fake. And where was your fake courage in Aden after the two bombings that made you leave without hesitation in less than twenty four hours.

However, your biggest humiliation was in Somalia. It came at times when the Cold War had ended and there was extensive media theatrics about how powerful America has become, and that it was the leader of the New World Order. You deployed tens of thousands of international forces, including twenty eight thousand of your own, to Somalia.

But after small few confrontations when tens of your soldiers were killed, including the pilot who was dragged throughout the streets of Mogadishu, you left Somalia with humiliation and defeat-you took your dead ones and left behind a trail of shame, loss, and nightmare. Then Clinton appeared before the world promising to retaliate. But his promises were only preliminary things for withdrawal. God humiliated you and you left, and this had seriously shown that you are incompetent and weak. Seeing you defeated in these three Islamic cities, "Beirut, Aden, and Mogadishu," brought joy to every Muslim's heart and sense of relief to any group of believers.

And I say: if the sons of the two Holy Places had gone to Afghanistan to fight the Russians, to Bosnia Hezogovina to fight the Serbs, in Chechnya where God has granted them victory- thanks to God for that- and defeated the Russians, who have become your allies, in Tajikistan... And I say: "If the children of the two Holy Places have strong feelings and believe about fighting disbelief everywhere, hence, they would be in greater numbers and with more strength and enthusiasm on their own homeland, where they were born, to defend its greatest sanctuaries-the Ka'bah to which all Muslims direct their prayers to. They also know that all Muslims in this world will support them and stand by their great cause. This cause is every Muslim's cause which is to liberate Islamic sanctuaries, as well as an obligation upon every Muslim in the world."

I say this to you, William:"those youths love to die as much as your people love to live. Those youths inherited dignity, chastity, courage, generosity, honesty, boldness, and sacrifice, from a chain of great men. Those youths are patient in war, and give its best when confronted. All these characteristics were inherited from the youths' ancestors of the pre-Islamic era, and when Islam came, it reinforced and approved of these moral characteristics." The Prophet, peace be upon him, said, "I was sent to you to sustain good manners." (Sahih al-Jami' Al-Saghyr) And when King Amru Ben Hend meant to degrade Amru Ben Kalthoum, the latter beheaded the king with a sword refusing to be humiliated, oppressed, or ill-treated. He then wrote an ode, and here is some of it:

Even if this king is capable of bringing down the sky over the people, we still would refuse to live in humiliation
Amru Ben Hend: What sort of reasons do you have for wanting us to be most unworthy...
Amru Ben Hend: What sort of reasons do you have for wanting us to be belittled and slandered...
Amru: Our running stream has passed through the enemy way before you have came to be our king...

Those youths believes in Heaven after death. Those youths believes that going to fight is not going to excel or delay their death. And Almighty God says, "Nor can a soul die except by Allah's leave, the term begin fixed as by writing..." (Al-Imran:145). This youth also believes in what the Prophet, peace be upon him, said in his Hadith to a young man, "O Young man, I shall teach you some words [of advice]: Be mindful of Allah, and Allah will protect you. Be mindful of Allah, and you will find him in front of you. If you ask, ask of Allah; if you seek help, seek help of Allah. Know that if the Umma were to gather together to benefit you with anything, it would benefit you only with something that Allah had already prescribed for you. And that if

they gather together to harm you with anything, they would harm you only with something Allah had already prescribed for you. The pens have been lifted and the pages have dried." (Sahih Al-Jami' Al-Saghyr).

Those youths apply to themselves what a poet had said:
"Since death is imminent, then it is of helplessness to die cowardly..."
And another said:
"If a person does not get killed with a sword, he dies because of different reasons,
There are many reasons behind dying but death is death..."

Those youths believes in what Allah told His Messenger, peace be upon him, said about the great reward awaiting the Mujahid and martyr. Almighty Allah says, **"But those who are slain in the way of Allah, He will never let their deeds be lost. He will guide them and improve their conditions and admit them into the garden which He has announced for them."** (Mohammed 4-6) Also, Almighty God says, "And say not of those who are slain in the way of Allah they are dead. Nay, they are living, though ye perceived not." (Al-Baqare:154) The Messenger, peace be upon him, said, "In Paradise, there are one hundred levels made for the Mujahideens who fight for God's sake. The distance between each level is as big as the distance between earth and heaven." (Sahih Al-Jami' Al-Saghyr) The Messenger, peace be upon him, also said, " The best martyrs are those who when confronted in the line would not turn their faces away until they are killed. Those will be staying in the highest rooms in Paradise and God smiles upon them-if God smiles upon a person in life, he/she would never be punished. (Related by Ahmed in Sanad Sahih). The Messenger also said, "A martyr does not feel pain when he is killed. He would only feel little discomfort as little as when one of you get pinched." (Sahih Al-Jami' Al-Saghyr) "God has many awards for a martyr: He is forgiven for his sins with the first gush of his blood, he is given a seat in Paradise and will be decorated with the jewels of faith, he is married to Heavenly Brides, he is spared from the grave punishment, he is secured during the Greatest Horror, he is crowned with the Crown of Saltitude, that one of its ruby is worth more than the world and everything in it, he is married to 72 Heavenly Brides, and he can plead on behalf of seventy people from his relatives." (Authentic Hadith narrated by Ahmed and Tarmathy).

Those youths knows that fighting you will double their reward, unlike fighting others, who are not People of the Book. The youths only want one thing, to kill you so they can go to Paradise, and enemy of God like you, cannot be in the same hell with his righteous executioner. The youth recites and chants the Almighty God's words: "Fight them and Allah will punish them by your hands, cover them with shame, help you over them, heals the breasts of believers.(Al-Tuba:14) The youth recites what the Messenger of God said to the Muslims during Badir, "I swear by Him who owns Mohammed's life that today if a man is killed while fighting and moving forward and enduring the danger, and he does not flee, God will surely reward him with Paradise." And then, he told them: (Raise up and go to Paradise, which is as wide as heavens and earth.)

Also, the youths are now reciting His Almighty God's words, "Therefore, when you meet the unbelievers smite at their necks..." (Mohammed 4) And those youths do not like to talk to

you or complain to you. The tongue of each one of them says this to you:

"There is nothing for us to talk about, only to smite the necks and stab the kidneys..."

The youth also says to you what their grandfather, Harun al-Rasheed, the Commander of all Believers, said to your grandfather, Nakfur, after the latter had sent a letter threatening and promising to attack the Muslims. The response of al-Rasheed was: From Harun al-Rasheed, the Commander of all Believers, to Nakfur, the dog of the Byzantines. The answer is what you will see and not hear. Then al-Rasheed led the forces of Islam to meet Nakfur and his army, and God defeated and deeply humiliated Nakfur.

The youths that you described as "cowards" say this to you:

"Do not clatter with words or point out your strength because the answer is what you will see and not hear."

The youth is competing to fight you just like the people of al-Oss and Khazruj did when they competed to fight the polytheist. One of the youth said:
"The army of the Cross appeared bungled when we detonated the Khobar with courageous youth who is not afraid of danger....
If one says: You may get killed by the tyrants, he replies: My death is a victory...
I did not betray that king, but he betrayed our Qubla'a...
And allowed that holy country to be exposed to the aggression of the filthiest type of people...
I had sworn by Allah, the Greatest, to fight whoever rejects Islam..."

The youths had carried weapons on their shoulders for ten years in Afghanistan, and they had promised Allah to continue carrying them against you until you leave, humiliated, defeated, and devastated, if God's willing-as long as the youths have one beating vain or a blinking eye. The youths will say:

William: Tomorrow, you will know which youth will confront your
brothers, who have been deceived by their own weakness, will face
This youth enters the heart of war smiling, and returns with the spear covered with blood...
May Allah keep me close to knights, humans in peace, demons in war...
Lions in Jungle but that are only compares to spears and Indian swords...
And the Horses vouch for me that I push hard forward while the strikes are like the sparks of a burning fire...
And the dust of the battle bears witness for me, so also the fighting, the pens and the books.

Your scorning of the grandsons of the Companions, God bless them all, by describing them as "cowards," and challenging them not to leave the Land of the two Holy Places indicate unbalanced thinking and an apparent madness, which Islam's youths can prescribe medicine for it. Those youths have been described as:

I sacrificed myself and wealth for knights who never disappointed me...

Knights who are never deterred by death, even if the mill of war turns...
In the heat of the battle they do not care, and cure the insanity of the enemy by their insane courage.

Further, our terror against, while you are carrying arms on our land, is a legal obligation, and reasonable reaction. It is a legitimate right in accordance with all human conventions and every living thing. Your example and our example is similar to the tale of a sneak that entered a man's house so he killed it-a coward is that who would leave you walking over his land carrying your weapons feeling peaceful and secured.

Those youths are different from your soldiers. Your problem is finding ways to convince your soldiers to go to war, while our problem is finding ways to convince our youths to wait their turn to fight and carry out operations. Those youths give their efforts to God, hence, they are the people who should be complimented and praised because they stood up to defend the religion when the government deceived prominent figures in the community and conned them to issue fatwas which were not based on either Allah's Book nor His Messenger's Sunna, peace be upon him. These fatwas legitimized the handing over of al-Aqsa Mosque to the Jews and permitted the Christian forces to enter the land of the two Holy Places. Even if the content is put differently, it doesn't change this fact. One poet condemns those who do nothing and praises the Mujahideens by saying:

I denounce all those who are impassive and who from the True Path
have diverted...
And when the fire crawls between their hands, arguments start...
Some of them are not only deceived, but confused thinking that
they have arrived...
I admire those who have arrived, and trouble does not concern them...
And their objectives are well-defined despite the hardship along
the way...
By their blood the halls of confusion were enlightened...
My Jerusalem's wound is still on my side infected, and the
injured part is like fire burning the inner body...
I did not betray God's covenant while other countries have done
so...

And their grandfather their grandfather's, Assim Ben Thabit, God have mercy on his soul, said this when the polytheist asked him to negotiate and stop fighting:

Why would I want to do that when I am the skin of an arrow and a
strong string of a bow(Strong).
Death is a right and life is extinct, and if I do not fight you, my mother must be clueless.
Bereaved of a child (mother).

The youth holds you responsible for all what your Jewish brothers are doing in Palestine and Lebanon of killing, expulsion, and disrespecting of Muslims' holy sites. You have supported

your Jewish brothers with capital and weapons without any preservation. More than 600,000 of Iraqi children had died because of shortages of food and medicine as a result of your unjust embargo against Iraq. Its people are our children and you and the Saudi regime bear the responsibility for the blood of those innocent children. All of this makes any agreement made with you null. God's Prophet, peace be upon him, had decided to nullify the Hudibya Agreement after Qurish helped Bani Bakir against Khuza'ah, who were the Prophet's allies, peace be upon him. Then he fought Qurish and conquered Mecca. Also, he nullified an agreement with Bani Qaynaqa' because one Jew from Bani Qaynaqa' touched a woman in the market-how about you killing hundred of thousands of Muslims and warranting yourselves the right to be on their holy sites? Those who claim that the blood of the American enemy, who is occupying Muslim lands, is forbidden are apparently and reluctantly repeating what has been dictated to them by the regime, fearing persecution and fearing for their lives. It is an obligation upon every tribe in the Arabian Peninsula to Jihad in God's sake and clean their land from the occupiers-Allah knows that their blood is lawful and taking their properties is lawful as well. Whoever kills one of them, should take the dead man's property. Almighty God says in Iyat al-Sayif, "But when the forbidden months are past, then fight and slay the pagans wherever you find them. And seize them, beleaguer them, and lie in wait for them in every stratagem."(Al-Tawbah, verse 5). The youths know that they only can change and put a stop to the humiliation of Muslims, resulted from occupying their holy sites by a holy war and by explosives-they are reciting one poet's words:

The walls of disgrace could only be knocked down by a shower of bullets....
A free man does not delegate leadership to a polytheist and immoral person...
Without blood-shed, shame could never be erased....

I say to the youths of Islam, who fought in Afghanistan and Bosnia Herzegovina with their lives, money, tongues, and pens, that the battle is not over yet. I want to remind them with the conversation Gabriel had with Allah's Messenger, peace be upon him, after the Ahzab Expedition. "When Allah's Prophet, peace be upon him, left to Medina and as he lied down his arms, Gabrielle came and said to the Prophet, 'You have laid down your arms-by Allah, the angels have not laid their weapons down yet. So set out for Banu Quraiza and I am going first to put fear in their hearts and shake their fortress on them.' Then Gabrielle walked first followed by the Prophet and he was followed by the Mujahjiroon and Ansar..." (Narrated Al-Bukhari)

These youths know that if one is not to be killed one will eventually die, and the most honorable death is to killed in the sake of God. After the four heros were killed when they bombed Americans in Riyadh-these four lifted the Umma's head up high and their heroic operation disgraced its occupying American enemy, the youth have been reciting what their grandfather, the Companion and virtue Abidallah Ben Rawaha, God have mercy on his soul, said:

O my soul if you do not get killed, you are going to die any way...
This is the pool of death in front of you!
You are getting what you have wished for before, and you follow the example of the previous two you were rightly guided...

Also, they recite what Ja'afar said, God have mercy on his soul:

I wish for Paradise and soon
It has good and cold drinks
The Romans will always be Romans, and punishing them is over due
I must strike them whenever I meet them

Concerning our mothers, sisters, wives, and daughters, they are followers of the Prophet, peace be upon him, and the virtuous female Companions, God have mercy on them all. They imitate their courage, sacrifice, and spending in support of Allah's religion, He is the Almighty and Most High. They remember the courage and strength of Fatima Bint al-Khatab, God have mercy on her soul, when she stood for the truth in front of her brother, Omar Bin al-Khatab, before he became a Muslim. She challenged him after he had learned about her conversion to Islam, and told him, "Have you ever found the truth in a religion other than yours?" They also remember Assma' Bint Abu Bakir on the day of Migration, when she tore her belt in two halves, one for her and the other to use to wrap the things the Prophet, peace be upon him, and her father, Abu Bakir, were taking on their journey. She was nick-named "The Dual belt." They remember Nusibih Bint Ka'ab on the day of Uhud (when she defended the Prophet, peace be upon him, and as a result she had 12 wounds one of which was so deep in her shoulder. They also remember the virtuous female Companions' efforts and the selling of their jewelry to support the Muslim expedition forces who fought in God's name. Today, our women have shown great examples in spending in God's sake, and in urging their sons, brothers, and husbands to fight in God's sake, just like what they did for Afghanistan, Bosnia Herzegovina, Chuchnya, and else where. We ask Allah to accept their deeds, to free, their sons, fathers, husbands, and brothers, and to strengthen their faith on this path, the path of dedication and sacrifice, so God's word would be the highest.

Our women moan only over men who died fighting in God's name, as it has been said put it:
Do not moan on any one except a lion in the woods, courageous in the burning wars...
Let me die dignified during battle, honorable death is better than my life...

When the women urge their brothers to Jihad in God's name, they repeat what another poet said:

Prepare yourself well for the coming struggle because the matter is no longer avoidable
Will you leave us when the wolves of polytheism have increased, and they are eating off my wings
And the wolves of polytheism increasingly invite the sons of evil from every where!
Where are the free from my religion's sons to protect the free women with weapons
And it is better to die than live in humiliation, and some shame could never be otherwise eradicated.

Our Muslim brethren all over the world:
Your brothers in the land of the two Holy Places and in Palestine are calling upon your support, and they ask you to help them in their Jihad against your enemies and their enemies, the Israelis and the Americans. They have to be fought with every possible means so they can be forced out, defeated, and humiliated, from the Islamic holy places. Each can help with one own means and

ability. Exalted be to Allah who said: "But if they (the believers seek your aid in religion, it is your duty to help them." (Al-Anfal:72)

So let Allah's horse ride ...And this is the time of hardship, so be tough. And know that your uniting and cooperating toward in order to liberate Islamic sanctuaries is the right step to unite the Umma under the banner of God.

All we can do at this point is to respectfully raise our hands up high and ask the Almighty God for guidance and success in this all.
O Almighty: The sincere Muslim scholars and the Umma's pious young men have fallen prisoners. O Almighty: Free them, ease on their families, give them strength.
O Almighty: The people of the Cross have come, some riding and some walking, and granted themselves the right to enter the land of the two holy places, and the Jews are living immoral life in the Aqsa Mosque from which the Prophet, peace be upon him, ascended to Heaven. Almighty God: Alienate their harmony and disperse their union, and give us the power to be over them. Almighty God: Shake off the ground from underneath their feet. Almighty God: We ask You to defeat them and make us far away from their evil deeds.

Almighty God: Show us a black day in them. Almighty God: Make us witness Your super punishment comes down upon them. Almighty God: You who revealed the Book, You who moves the clouds, and You who defeated the Ahzab-defeat them and grant us victory over them.

Almighty God: You are our backing and ally, by You we roam and fight-in Allah we trust and He is the best Guardian.
Almighty God: Those youths have gathered to boost your religion and raise your banner up high-
Almighty God: Give them Your support and strengthen their hearts.
Almighty God: Grant the youth of Islam solidarity, union, bind them together, and unite their lines. Almighty God: Grant us patience and strengthen our feet and help us defeat the polytheist people. Almighty God: Have mercy over us and we ask You not to punish us as You had done to the people before us.
Almighty God: Have mercy on us because we can only handle what our abilities allow us to.
Almighty God: Forgive us and bless us. You are our master-help us defeat the polytheist people.
Almighty God: Guide this Umma to a favorable outcome which would commend those who believe in You and disgrace those who do not. Grant us a favorable day that when there will be an enforcement of Your compassion and an avoidance of wrong-doings. Your great prayers and blessings be unto Mohammed, Your servant and Messenger, and unto his Companions all the blessings.

Our last prayer: God is whom we thank; He is the sustainer of both worlds.

Usama Ben Mohammed Ben Ladin
(Signature)

Friday:9/4/1417 Hijri
As:23/8/1996 A.D.

al-Hindu kush Peak-Afghanistan-Khurasan

بسم الله الرحمن الرحيم

إعلان الجهاد على الامريكيين المحتلين لبلاد الحرمين

«أخرجوا المشركين من جزيرة العرب»(١)

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رسالة من أسامة بن محمد بن لادن
إلى إخوانه المسلمين في العالم كافة وجزيرة العرب خاصة ..

إن الحمد لله نحمده ونستعينه ونستغفره ونعوذ بالله من شرور انفسنا وسيئات اعمالنا ، من يهده الله فلا مضل له ، ومن يضلل فلا هادي له ، وأشهد أن لا إله الا الله وحده لاشريك له وأشهد أن محمداً عبده ورسوله .
«ياأيها الذين آمنوا اتقوا الله حق تقاته ولاتموتن إلا وأنتم مسلمون» «ياأيها الناس اتقوا ربكم الذي خلقكم من نفس واحدة وخلق منها زوجها وبث منهما رجالاً كثيراً ونساء واتقوا الله الذي تساءلون به والأرحام إن الله كان عليكم رقيباً» «ياأيها الذين آمنوا اتقوا الله وقولوا قولاً سديداً يصلح لكم أعمالكم ويغفر لكم ذنوبكم ومن يطع الله ورسوله فقد فاز فوزاً عظيماً».
الحمد لله القائل «إن أريد إلا الإصلاح ما استطعت وما توفيقي إلا بالله عليه توكلت وإليه أنيب» [هود:٨٨].
الحمد لله القائل «كنتم خير أمة أخرجت للناس تأمرون بالمعروف وتنهون عن المنكر وتؤمنون بالله» [آل عمران:١١٠].
والصلاة والسلام على عبده ورسوله القائل: «إن الناس إذا رأوا الظالم فلم يأخذوا على يده أوشك أن يعمهم الله بعقاب منه» [رواه أبوداود والترمذي والنسائي].
أما بعد :-
فلا يخفى عليكم ما أصاب أهل الاسلام من ظلم وبغي وعدوان من تحالف اليهود والنصارى وأعوانهم حتى اصبحت دماء المسلمين أرخص الدماء، وأموالهم وثرواتهم نهباً للأعداء ، فها هي دماؤهم قد سُفكت في فلسطين والعراق ومازالت الصور الفظيعة لمجزرة قانا في لبنان عالقة بالأذهان ، وكذلك المجازر في طاجيكستان ، وبورما ، وكشمير ، وأسام ، والفلبين ، وفطاني ، والأوجادين ، والصومال ، وأريتريا ، والشيشان ، وفي البوسنة والهرسك ، حيث جرت مذابح للمسلمين هناك تقشعر لها الأبدان ، ويهتز من هولها الوجدان ، وذلك على مرأى ومسمع من العالم أجمع ، بل وبتآمر واضح من أمريكا وحلفائها بمنعهم السلاح عن المستضعفين هناك تحت ستار الأمم المتحدة الظالمة ، فانتبه أهل الاسلام إلى أنهم الهدف الرئيسي لعدوان التحالف اليهودي الصليبي ، وزالت كل تلك الدعايات الكاذبة عن حقوق الإنسان تحت الضربات والمجازر التي ارتكبت ضد المسلمين في كل مكان .
وكان آخر هذه الاعتداءات أن أصيب المسلمون بمصيبة من أعظم المصائب التي أصيبوا بها منذ وفاة النبي صلى الله عليه وسلم ألا وهي احتلال بلاد الحرمين -مقر دار الإسلام ومهبط الوحي ومنبع الرسالة وبها الكعبة المشرفة قبلة المسلمين أجمعين- وذلك من قبل جيوش النصارى من الأمريكيين وحلفائهم ولاحول ولاقوة إلا بالله .
في ظلال هذا الواقع الذي نعيشه ، وفي ظل الصحوة المباركة العارمة التي شملت بقاع العالم ، والعالم الاسلامي خاصة ألتقي اليوم معكم بعد طول غياب فرضته الحملة الصليبية الظالمة التي تتزعمها أمريكا على علماء الاسلام ودعاته خشية أن يحرضوا الامة الاسلامية ضد أعدائها تأسياً بعلماء السلف رحمهم الله كابن تيمية والعز بن عبدالسلام ، وهكذا قام هذا التحالف الصليبي اليهودي بقتل واعتقال رموز العلماء الصادقين والدعاة العاملين -ولانزكي على الله احداً- فقام بقتل الشيخ المجاهدعبدالله عزام واعتقال الشيخ المجاهد أحمد ياسين في مسرى النبي عليه الصلاة والسلام ، والشيخ المجاهد عمر عبدالرحمن في أمريكا، كما اعتقل بايعاز من أمريكا عدداً كبيراً جداً من العلماء والدعاة والشباب في بلاد الحرمين من أبرزهم الشيخ سلمان العودة والشيخ سفر الحوالي وإخوانهم ولاحول ولاقوة إلا بالله ، وقد أصابنا بعض ذلك الظلم بمنعنا من الحديث مع المسلمين ومطاردتنا في باكستان والسودان وأفغانستان ، مما أدى الى هذا الغياب الطويل ولكن بفضل الله تيسر وجود قاعدة آمنة في خراسان فوق ذرى الهندكوش ، تلك الذرى التي تحطمت عليها -بفضل الله- اكبر قوة عسكرية ملحدة في الأرض وتلاشت عليها أسطورة القوى الكبرى أمام صيحات المجاهدين -الله اكبر- واليوم من فوق نفس الذرى من افغانستان نعمل على رفع الظلم الذي وقع على الأمة من التحالف اليهودي الصليبي وخاصة بعد احتلاله مسرى النبي عليه الصلاة والسلام واستباحته بلاد الحرمين ونرجو الله أن يمن علينا بالنصر إنه ولي ذلك والقادر عليه.
وهانحن اليوم نبدأ منها الحديث والعمل والتذاكر لبحث سبل الاصلاح لما حل بالعالم الاسلامي عامة وببلاد الحرمين خاصة ، ونريد أن نتدارس السبل التي يمكن بسلوكها إعادة الأمور إلى نصابها ، والحقوق الى أصحابها بعد أن اصاب الناس ماأصابهم من خطب عظيم وضرر جسيم في أمور دينهم ودنياهم ، أصاب الناس بجميع

(١) رواه البخاري

GOVERNMENT EXHIBIT
1626B (ID)

فتاتهم، أصاب المدنيين كما أصاب العسكريين ورجال الأمن، أصاب الموظفين كما أصاب التجار ، وأصاب الصغار والكبار ، أصاب طلاب المدارس والجامعات كما أصاب المتخرجين من الجامعات العاطلين عن العمل وهم بمئات الألوف ، بل أصبحوا يشكلون شريحة عريضة في المجتمع .

أصاب أهل الصناعة كما أصاب أهل الزراعة ، وأصاب أهل الحضر والمدر ، كما أصاب أهل البادية والوبر، والكل يشتكي من كل شيء تقريباً وبات الوضع في بلاد الحرمين أشبه ببركان هائل يكاد أن يتفجر فيقضي على الكفر والفساد مهما كانت مصادره وما انفجارا الرياض والخبر إلا نذر لهذا السيل الهادر الذي تولد عن المماطلة والكبت المرير والقهر والظلم الفادح والبغي المذل والفقر.

وقد شغل الناس بأمور معاشهم شغلاً عظيماً فالحديث عن التردي الاقتصادي وغلاء الأسعار وكثرة الديون وامتلاء السجون هو حديث الجميع فحدث عنه ولاحرج ، فهؤلاء موظفون من ذوي الدخل المحدود يحدثونك عن ديونهم بعشرات ومئات الألوف من الريالات ويشتكون من التدني الهائل والمستمر لقيمة الريال الشرائية مقابل معظم العملات الرئيسية بينما يحدثك كبار التجار والمقاولين عن ديونهم بمئات وآلاف الملايين من الريالات على الدولة وقد بلغت الديون الداخلية للمواطنين على الدولة اكثر من ثلاثمائة وأربعين ألف مليون من الريالات تزداد يومياً بسبب الفوائد الربوية ناهيك عن ديونها الخارجية والناس يتساءلون : أحقاً نحن اكبر دولة مصدرة للنفط ؟! بل ويشعرون أن هذا عقاب من الله عليهم لأنهم سكتوا عن ظلم النظام وتصرفاته غير الشرعية ومن أبرزها عدم التحاكم الى شرع الله ومصادرة حقوق العباد الشرعية وإباحة بلاد الحرمين للمحتلين الأمريكيين وإيداع العلماء الصادقين ورثة الانبياء السجون ظلماً وعدواناً . هذا المصاب العظيم قد تنبه له أهل الفضل والخير من المختصين في أمور الدين ، كالدعاة والعلماء ، وكذلك من المختصين في أمور الدنيا كالتجار والاقتصاديين والوجهاء ، فبذلت كل فئة جهدها للتحرك السريع لتدارك الموقف والجميع مجمع على أن البلاد تسير نحو هوة سحيقة ومصيبة فظيعة لايعلم مداها إلا الله وعلى حد تعبير كبار التجار(إن الملك يقود البلاد إلى ستين داهية) ولاحول ولاقوة الا بالله ، كما أن العديد من الأمراء يشاركون الشعب همومه ويعبرون في مجالسهم الخاصة عن اعتراضهم على مايجري في البلاد من إرهاب وقمع وفساد وإن تنافس الأمراء المتنفذين على المصالح الشخصية قد دمر البلاد وأن النظام قد مزق شرعيته بيده بأعمال كثيرة أهمها :

١- تعطيله لأحكام الشريعة الإسلامية واستبدالها بالقوانين الوضعية ، مع نفوذه في مواجهة دامية مع العلماء الصادقين والشباب الصالحين ولانزكي على الله احداً.

٢- عجزه عن حماية البلاد وإباحتها السنين الطوال لأعداء الأمة من القوات الصليبية الأمريكية التي أصبحت السبب الرئيسي في نكبتنا بجميع نواحيها وبخاصة الاقتصادية نتيجة الانفاق الثقيل عليها بغير حق ونتيجة للسياسات التي تفرضها على البلاد وخاصة السياسة النفطية حيث تحدد الكمية المنتجة من البترول والسعر بما يحقق مصالحهم الاقتصادية ويهمل مصالح البلاد الاقتصادية ونتيجة لصفقات الاسلحة باهظة التكاليف التي تفرض على النظام حتى اصبح الناس يتساءلون: مافائدة وجود النظام إذاً؟.

فبذلت كل فئة جهدها للتحرك السريع لتدارك الموقف ، وتلافي الخطر ، فنصحوا سراً وجهراً ، ونثراً وشعراً زرافات ووحداناً ، وأرسلوا العرائض تتلوها العرائض ، والمذكرات تتبعها المذكرات وماتركوا سبيلاً إلا ولجوه ولا وجلاً مؤثراً إلا وأدخلوه معهم في تحركهم الإصلاحي وقد كانوا متوخين في كتاباتهم أسلوب الرفق واللين بالحكمة والموعظة الحسنة داعين الى الاصلاح والتوبة من المنكرات العظام والمفاسد الجسام التي شمل فيها التجاوز محكمات الدين وحقوق المواطنين الشرعية.

ولكن -للأسف الشديد- لم يجدوا من النظام إلا الصدود والإعراض ، بل والسخرية والاستهزاء ولم يقف الأمر عند حد تسفيههم فقط بل تجوزت المخالفات السابقة بمنكرات لاحقة أكبر وأكثر، كل ذلك في بلاد الحرمين!! فلم يعد السكوت مستساغاً ولاالتغاضي مقبولاً.

ولما بلغ التجاوز مابلغ وتعدى حدود الكبائر والموبقات إلى نواقض الاسلام الجليات قامت مجموعة من العلماء والدعاة الذين ضاقت صدورهم ذرعاً بما صم آذانهم من أصوات الضلال وغشي أبصارهم من حجب الظلم وأزكم أنوفهم من رائحة الفساد ، فانبعثت نذر الرفض ، وارتفعت أصوات الإصلاح داعية لتدارك الموقف وتلافي الوضع وانضم إليهم في ذلك المئات من المثقفين والوجهاء والتجار والمسؤولين السابقين فرفعوا الى الملك العرائض والمذكرات المتضمنة المطالبة بالإصلاح ففي سنة ١٤١١هـ إبان حرب الخليج رفعت إلى الملك عريضة وقعها حوالي أربعمائة شخصية من هؤلاء تدعوه لإصلاح أوضاع البلاد ، ورفع الظلم عن العباد ، غير أنه تجاهل النصح واستهزأ بالناصحين وظلت الأوضاع تزداد سوءاً على سوء .

وحينئذ أعاد هؤلاء الناصحون الكرة من جديد بمذكرات وعرائض أخرى كان من أهمها مذكرة النصيحة التي سلمت للملك في محرم ١٤١٣هـ والتي شخصت الداء ووصفت الدواء في تفصيل شرعي قويم وعرض علمي سليم فتناولت بذلك الفجوات الكبرى في فلسفة النظام ومواضع الخلل الرئيسية في معالم الحكم فبينت مايعانيه رموز المجتمع وقياداته الداعية للإصلاح -كالعلماء والدعاة وشيوخ القبائل والتجار والوجهاء

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وتعرضت لوضع الإعلام في البلاد الذي أصبح وسيلة لتقديس الأشخاص والذوات وأداة لطمس الحقائق وتزييف الوقائع والتشهير بأهل الحق والتباكي على قضايا الأمة لتضليل الناس دون عمل جاد وتنفيذ خطط الأعداء لإفساد الناس وإبعادهم عن دينهم وإشاعة الفاحشة في الذين آمنوا ، قال تعالى «إن الذين يحبون أن تشيع الفاحشة في الذين آمنوا لهم عذاب أليم في الدنيا والآخرة والله يعلم وأنتم لا تعلمون» [النور آية١٩].

وتطرقت إلى حقوق العباد الشرعية المهدورة المصادرة في هذه البلاد .

وتناولت الوضع الإداري ومايحكمه من عجز ويشيع فيه من فساد .

وأبانت حالة الوضع المالي والاقتصادي للدولة والمصير المخيف المرعب الذي ينتظره في ظل الديون الربوية التي قصمت ظهر الدولة ، والتبذير الذي يبدد أموال الأمة إشباعاً للنزوات الشخصية الخاصة!! ثم تفرض الضرائب والرسوم والمكوس وغير ذلك على الشعب ؟!! وقد قال صلى الله عليه وسلم عن المرأة التي زنت وتابت وأقام عليها الحد :«لقد تابت توبة لو تابها صاحب مكس لغفر له» [رواه أحمد]. مما يبين عظم ذنب صاحب المكس بينما لازال بعض الناس يدعون على المنابر لصاحب المكس المجاهر بكبيرة الربا المشرّع لها وذلك كفر، ولاحول ولاقوة إلا بالله.

وكشفت عن حالة المرافق الاجتماعية المزرية داخل البلاد والتي استفحلت بعد المذكرة وتفاقمت وبخاصة خدمات المياه أهم مقومات الحياة .

وعرضت حالة الجيش وماكشفته أزمة الخليج من قلة أفراده ، وضعف إعداده وعجز قائد قواده ، رغم ماأنفق عليه من أرقام فلكية لاتعقل!! ولاتخفى!!.

وعلى مستوى القضاء والمحاكم بينت المذكرة تعطيل العديد من الاحكام الشرعية واستبدالها بالقوانين الوضعية

وعلى صعيد سياسة الدولة الخارجية كشفت المذكرة ماتميزت به هذه السياسة من خذلان وتجاهل قضايا المسلمين بل ومن مناصرة وموازرة الأعداء ضدهم وليست (غزة-أريحا) والشيوعيون في جنوب اليمن عنا بعيد وغيرهما كثير .

ولايخفى على احد أن تحكيم القوانين الوضعية ومناصرة الكافر على المسلم معدودة من نواقض الاسلام العشرة كما قرر ذلك أهل العلم وقد قال تعالى «ومن لم يحكم بما أنزل الله فأولئك هم الكافرون»[المائدة٤٤] وقال تعالى ايضاً «فلا وربك لا يؤمنون حتى يحكموك فيما شجر بينهم ثم لا يجدوا في أنفسهم حرجاً مما قضيت ويسلموا تسليماً» [النساء٦٥].

ومع أن المذكرة عرضت كل ذلك بلين عبارة ولطف إشارة مذكرة بالله واعظة بالحسنى في أسلوب رقيق ومضمون صادق ورغم أهمية النصيحة في الإسلام وضرورتها لمن تولى أمر الناس ورغم عدد ومكانة الموقعين على هذه المذكرة والمتعاطفين معها ، فان ذلك لم يشفع لها إذ قوبل مضمونها بالصد والرد وموقعوها والمتعاطفون معها بالتسفيه والعقاب والسجن.

وهكذا ظهر بكل وضوح حرص الدعاة والمصلحين على سلوك سبل الإصلاح السلمية حرصاً على وحدة البلاد وحقناً لدماء العباد. فلماذا يوصد النظام جميع سبل الاصلاح السلمية ويدفع الناس دفعاً نحو العمل المسلح؟! وهو الباب الوحيد الذي بقي أمام الناس لرفع الظلم واقامة الحق والعدل ولمصلحة من يقحم الامير سلطان والامير نايف البلاد والعباد في حرب داخلية تأكل الاخضر واليابس ويستعين ويستشير من أشعل الفتن الداخلية في بلاده ، وجيّش أبناء الشعب والشرطة لإجهاض الحركة الإصلاحية هناك وضرب أبناء الشعب بعضهم ببعض ، وبقي العدو الرئيسي في المنطقة وهو التحالف اليهودي الامريكي في أمن وأمان بعد أن وجد أمثال هؤلاء الخائنين لأمتهم ينفذون سياساته لاستنزاف طاقات الأمة البشرية والمالية داخلياً.

وهذا الذي يستشيره وزير الداخلية الأمير نايف لم يتحمله الشعب في بلده لشدة قذاراته وبغيه على شعبه فأقبل من منصبه هناك ولكنه جاء ليجد صدراً رحباً لدى الامير نايف!!! للتعاون على الإثم والعدوان فملأ السجون بخيرة أبناء الأمة وذرفت لذلك العيون ، عيون الأمهات اللواتي سُجنّ أبناؤهن بغير حق ظلماً وزوراً وبهتاناً فهل يريد النظام أن يضرب الشعب من المدنيين والعسكريين بعضهم ببعض كما حصل في بعض البلدان المجاورة؟! لاشك ان هذه سياسة العدو التحالفي الاسرائيلي الأمريكي وهو المستفيد الأول من ذلك ولكن بفضل الله فإن الغالبية العظمى من الشعب من مدنيين وعسكرين منتبهون لهذا المخطط الخبيث ويربؤون بأنفسهم أن يكونوا أداة لضرب بعضهم بعضاً تنفيذاً لسياسة العدو الرئيسي التحالف الأمريكي الاسرائيلي غير وكيله في البلاد النظام السعودي .

ولذا اتفق الجميع على أنه [لايستقيم الظل والعود اعوج] فلابد من التركيز على ضرب العدو الرئيسي الذي أدخل الأمة في دوامات ومتاهات منذ بضعة عقود بعد أن قسمها إلى دول ودويلات وكلما برزت حركة إصلاحية

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في الدولة الإسلامية دفع هذا التحالف اليهودي الصليبي وكلاءه في المنطقة من المكام لاستنزاف وإجهاض هذه الحركة الإصلاحية بطرق شتى وبما يتناسب معها فأحيانا يجهضها بجرها إلى الصدام المسلح محدداً الزمان والمكان لهذه المعركة فيقضي عليها في مهدها .

وأحيانا يطلق عليها رجاله من وزارة الداخلية والذين تخرجوا من كليات شرعية ليشوشوا على المسيرة الإصلاحية وليشتتوا الأمة والشعب عن هذه المسيرة وأحياناً يستزلون أقدام بعض الصالحين للدخول في حوب كلامية مع علماء ورموز الحركة الإصلاحية ليستنزف طاقة الجميع ويبقى الكفر الأكبر مسيطراً على الأمة مظللاً لها وتستمر المناقشات في الفروع بينما توحيد الله بالعبادة والتحاكم إلى شريعته مغيب عن الواقع وفي ظل هذه المناقشات والردود يلتبس الحق بالباطل وكثيراً ما تنتهي إلى عداوات شخصية يتحزب الناس مع هذا أو ذاك مما يزيد الأمة انقساماً وضعفاً إلى ضعفها وتغييب الأولويات في العمل الاسلامي فينبغي التنبه إلى هذه الحيل الشيطانية وأمثالها التي تنفذها وزارة الداخلية. والصواب في مثل هذه الحالة التي نعيشها هو كما قرره أهل العلم ومن ذلك ماذكره شيخ الاسلام ابن تيمية رحمه الله وهو تكاتف جميع أهل الاسلام للعمل على دفع الكفر الأكبر الذي يسيطر على بلاد العالم الاسلامي مع تحمل الضرر الأدنى في سبيل دفع الأكبر ألا وهو الكفر الأكبر وإذا تزاحمت الواجبات قدم أكدها ، ولايخفى أن دفع هذا العدو الأمريكي المحتل هو أوجب الواجبات بعد الإيمان فلا يقدم عليه شئ كما قرر ذلك أهل العلم ومن ذلك ما ذكره شيخ الاسلام ابن تيمية حيث قال : «وأما قتال الدفع فهو أشد أنواع دفع الصائل عن الحرمة والدين ، فواجب إجماعاً فالعدو الصائل الذي يفسد الدين والدنيا لاشئ أوجب بعد الإيمان من دفعه فلايشترط له شرط بل يدفع بحسب الإمكان» [كتاب الاختيارات العلمية ملحق بالفتاوى الكبرى ٦٠٨/٤] فإذا تعذر دفع العدو الصائل إلا باجتماع المسلمين بقضهم وقضيضهم وغثهم وسمينهم كان ذلك واجباً في حقهم مع التغاضي عن بعض القضايا الخلافية والتي ضرر التغاضي عنها في هذه المرحلة أقل من ضرر بقاء الكفر الأكبر جاثماً على بلاد المسلمين ولذا قال شيخ الاسلام مبيناً هذه المسألة منبهاً على أصل عظيم ينبغي مراعاته وهو العمل على دفع أعظم الضررين بالتزام أدناهما واصفاً حالة المجاهدين والمسلمين وإن كان فيهم عسكر كثير الفجور فإنه لايعفى من ترك الجهاد ضد العدو الصائل .

فقال رحمه الله بعد أن ذكر شيئاً من أحوال التتار وماهم عليه من تبديل شرائع الله [فإن اتفق من يقاتلهم على الوجه الكامل فهو الغاية في رضوان الله وإعزاز كلمته وإقامة دينه وطاعة رسوله صلى الله عليه وسلم وإن كان فيهم من فيه فجور وفساد نية بأن يكون يقاتل على الرياسة أو يتعدى عليهم في بعض الأمور وكانت مفسدة ترك قتالهم أعظم على الدين من مفسدة قتالهم على هذا الوجه كان الواجب أيضا قتالهم دفعاً لأعظم المفسدتين بالتزام أدناهما فإن هذا من أصول الاسلام التي ينبغي مراعاتها ولهذا كان من أصول أهل السنة والجماعة الغزو مع كل بر وفاجر فإن الله يؤيد هذا الدين بالرجل الفاجر وبأقوام لاخلاق لهم كما أخبر بذلك النبي صلى الله عليه وسلم لأنه إذا لم يتفق الغزو إلا مع الأمراء الفجار أو مع عسكر كثير الفجور فإنه لابد من أحد أمرين إما ترك الغزو معهم فيلزم من ذلك استيلاء الآخرين الذين هم أعظم ضرراً في الدين والدنيا وإما الغزو مع الأمير الفاجر فيحصل بذلك دفع الأفجرين وإقامة أكثر شرائع الاسلام وإن لم يمكن إقامة جميعها فهذا هو الواجب في هذه الصورة وكل ماأشبهها بل كثير من الغزو الحاصل بعد الخلفاء الراشدين لم يقع إلا على هذا الوجه] [مجموع الفتاوى ٥٠٦/٢٨].

وبرغم أن المفاسد العظام قد فشت والمنكرات الجسام قد طغت ولاينكر وجودها أعمى أو أصم ناهيك عن أن ينكرها سميع بصير حتى وصلت إلى الظلم العظيم وهو الشرك بالله ومشاركة الله في تشريعه للناس ، قال تعالى «وإذ قال لقمان لابنه وهو يعظه يابني لاتشرك بالله إن الشرك لظلم عظيم» [لقمان١٣] فشرعت التشريعات الوضعية تبيح ماحرم الله كالربا وغيره حتى في البلد الحرام عند المسجد الحرام حيث إن بنوك الربا تزاحم الحرمين مجاهرة لله بالحرب معاندة لأمر الله القائل «واحل الله البيع وحرم الربا...» الاية [البقرة٢٧٥] وقد توعد الله سبحانه وتعالى صاحب كبيرة الربا في كتابه الكريم بوعيد لم يتوعده احداً من المسلمين في كتابه فقال سبحانه وتعالى «ياأيها الذين آمنوا اتقوا الله وذروا مابقي من الربا إن كنتم مؤمنين فإن لم تفعلوا فأذنوا بحرب من الله ورسوله ...» الاية [البقرة ٢٧٨-٢٧٩] هذا للمسلم المرابي فكيف لمن جعل من نفسه نداً لله وشريكاً يشرع ويحلل لعباد الله ماحرم وبهم عليهم، برغم ذلك كله نرى الدولة تستزل اقدام بعض الصالحين من العلماء والدعاة وتجرهم بعيداً عن إنكار المنكر الأعظم الأكبر ولاحول ولاقوة إلا بالله .

والذين ينبغي في مثل هذه الحالة أن يبذل الجميع قصارى الجهد في تحريض وتعبئة الأمة ضد العدو الصائل والكفر الأكبر المخيم على البلاد والذي يفسد الدين والدنيا ولاشئ أوجب بعد الإيمان من دفعه . ألا وهو التحالف الاسرائيلي الأمريكي المحتل لبلاد الحرمين ومسرى النبي صلى الله عليه وسلم وتذكير المسلمين بتجنب الدخول في قتال داخلي بين أبناء الأمة المسلمة وذلك لما له من نتائج وخيمة من أهمها :

١- استنزاف الطاقات البشرية «حيث إن معظم الإصابات والضحايا ستكون من أبناء الشعب المسلم».

٢- استنزاف الطاقات المالية.

٣- تدمير البنية التحتية للدولة .
٤- تفكك المجتمع .
٥- تدمير الصناعات النفطية حيث إن تواجد القوات العسكرية الصليبية والأمريكية في دول الخليج الاسلامي يراً وجواً وبحراً هو الخطر الأعظم والضرر الأضخم الذي يهدد اكبر احتياطي بترولي في العالم حيث أن هذا التواجد يستفز أهل البلاد ويعتدي على دينهم ومشاعرهم وعزتهم وقد دفعهم نحو الجهاد المسلح ضد الغزاة المحتلين وإن انتشار القتال في تلك الأماكن يعرض البترول لمخاطر الاحتراق مما يؤدي للإضرار بالمصالح الاقتصادية لدول الخليج ولبلاد الحرمين بل وأضرار جسيمة للاقتصاد العالمي . ونقف هنا وقفة ونهيب بإخواننا أبناء الشعب المجاهدين بأن يحافظوا على هذه الثروة وبأن لايتصدوها في المعركة لكونها ثروة اسلامية عظمى وقوة اقتصادية كبرى هامة لدولة الاسلام القادمة بإذن الله كما نحذر وبشدة الولايات المتحدة الامريكية المعتدية من إحراق هذه الثروة الاسلامية في نهاية الحرب خوفاً من سقوط هذه الثروة في أيدي اصحابها الشرعيين وإضراراً منها بمنافسيها الاقتصاديين في اوروبا والشرق الاقصى وبخاصة اليابان الذي يعتبر المستهلك الرئيسي لبترول المنطقة .
٦- تقسيم بلاد الحرمين واستيلاء إسرائيل على الجزء الشمالي منها حيث إن تقسيم بلاد الحرمين يعتبر مطلباً ملحاً للتحالف اليهودي الصليبي لأن وجود دولة بهذا الحجم وهذه الطاقات تحت حكم اسلامي صحيح قادم بإذن الله يمثل خطورة على الكيان اليهودي في فلسطين حيث إن بلاد الحرمين تمثل رمزاً لوحدة العالم الاسلامي نظراً لوجود الكعبة المشرفة قبلة المسلمين أجمعين وكذلك فإن بلاد الحرمين تمثل قوة اقتصادية هامة في العالم الاسلامي لوجود اكبر احتياطي بترول في العالم فيها كما أن أبناء الحرمين يرتبطون بسيرة اجدادهم من الصحابة رضوان الله عليهم ويعتبرونها قدوة لهم ومثلاً في إعادة مجد الأمة وإعلاء كلمة الله من جديد بالإضافة إلى وجود عمق استراتيجي ومدد بكثافة بشرية مقاتلة في سبيل الله في اليمن السعيد وقد قال صلى الله عليه وسلم ميخرج من معن ابين اثنا عشر الفاً ينصرون الله ورسوله هم خير من بيني وبينهم (رواه احمد بسند صحيح) مما يسبب خطورة على تواجد التحالف اليهودي الصليبي في المنطقة .
٧- وأن أي قتال داخلي مهما تكن مبرراته مع وجود قوات الاحتلال الأمريكي يشكل خطأ كبيراً حيث إن هذه القوات ستعمل على حسم المعركة لصالح الكفر العالمي .
إخواننا في القوات المسلحة والحرس الوطني حفظكم الله ذخراً للاسلام والمسلمين :
ياحماة التوحيد وحراس العقيدة ياخلف اولئك السلف الذين حملوا نور الهداية ونشروه على العالمين ، ياأحفاد سعد بن ابي وقاص والمثنى بن حارثة الشيباني والقعقاع بن عمرو التميمي ، ومن جاهد معهم من الصحابة الاخيار لقد تسابقتم للانضمام الى الجيش والحرس رغبة في الجهاد في سبيل الله لتكون كلمة الله هي العليا ولتذودوا على حياض الاسلام وبلاد الحرمين ضد الغزاة والمحتلين وذلك ذروة سنام الدين إلا أن النظام قلب الموازين وعكس المفاهيم وأذل الأمة وعصى الملة ففي الوقت الذي لم تسترجع الأمة بعدُ قبلتها الاولى ومسرى نبيها عليه الصلاة والسلام بعد الوعود التي قطعها منذ مايقرب من نصف قرن باسترجاعها حتى ذهب ذلك الجيل وجاء جيل جديد تبدلت معه الوعود وسُلم الاقصى لليهود ولا زالت جراحات الأمة تنزف دماً هناك منذ ذلك الوقت ، رغم هذا كله إذ بالنظام السعودي يقجع الأمة بما تبقى لها من مقدسات مكة المكرمة والمسجد النبوي بأن جلب نساء جيوش النصارى للدفاع عنه وأباح بلاد الحرمين للصليبيين -ولاعجب بعد أن لبس الملك الصليب- وفتحها بطولها وعرضها لهم فامتلأت بقواعد جيوش أمريكا وحلفائها لأنه أصبح عاجزاً أن يقف بدون مساعدتهم وأنتم أعلم الناس بهذا التواجد وحجمه وأهدافه وخطورته فخان بذلك الأمة ووالى الكفار وناصرهم وظاهرهم على المسلمين ولايخفى أن ذلك معدود في نواقض الاسلام العشرة وقد خالف بإباحته الجزيرة العربية للصليبيين الوصية التي أوصى بها رسول الله صلى الله عليه وسلم أمته وهو على فراش الموت حيث قال اخرجوا المشركين من جزيرة العرب (رواه البخاري). وقد قال ايضاً اخرجوا اليهود والنصارى من جزيرة العرب (صحيح الجامع الصغير).
وإن الادعاء بأن تواجد القوات الصليبية على أرض الحرمين ضرورة ملحة ومسألة مؤقتة للدفاع عنها قضية قد تجاوزها الزمن وخاصة بعد تدمير العراق تدميراً وحشياً أصاب البنية العسكرية والمدنية وأظهر مدى الحقد الصليبي اليهودي على المسلمين وأطفالهم وبعد الإصرار على عدم استبدال تلك القوات الصليبية بقوات اسلامية من أبناء البلاد وغيرهم ثم إن هذا الادعاء أزيل من أساسه وهدمت أركانه بعد التصريحات المتتالية لأئمة الكفر في أمريكا وكان اخرها تصريح وزير الدفاع الامريكي وليام بيري بعد انفجار الخبر للجنود الامريكيين هناك بأن وجودهم في بلاد الحرمين إنما هو لحماية المصالح الامريكية وقد ألف الشيخ سفر الحوالي -فرج الله عنه- كتاباً من سبعين صفحة ساق فيه الأدلة والبراهين على ان تواجد الامريكيين في الجزيرة العربية هو احتلال عسكري مخطط له من قبل . وإن هذا الادعاء هو خدعة أخرى يريد النظام أن تنطلي على المسلمين كما انطلت خدعته الاولى على المجاهدين الفلسطينيين وكانت سبباً في ذهاب المسجد الاقصى وذلك أنه لما هب الشعب المسلم في فلسطين في جهاده الكبير ضد الاحتلال البريطاني عام ١٣٥٤هـ الموافق لعام ١٩٣٦م

عجزت بريطانيا أن تقف امام المجاهدين أو أن توقف جهادهم ثم أوحى إليهم شيطانهم أنه لاسبيل إلى إيقاف الجهاد المسلح في فلسطين إلا بواسطة عميلهم الملك عبدالعزيز والذي في استطاعته خداع المجاهدين وقد قام الملك عبدالعزيز بمهمته تلك حيث أرسل ابنيه فالتقيا مع قادة المجاهدين في فلسطين وأبلغاهم بتعهد الملك عبدالعزيز بضمان وعود الحكومة البريطانية بأنها ستخرج إذا اوقفوا الجهاد وستلبي مطالبهم وهكذا تسبب الملك عبدالعزيز في ضياع القبلة الاولى للمسلمين ووالى النصارى ضد المسلمين وخذل المجاهدين بدلاً من تبني قضية المسجد الاقصى ونصرة المجاهدين في سبيل الله لتحريره . واليوم يحاول ابنه الملك فهد أن تتطلي الخدعة الثانية على المسلمين ليذهب ماتبقى لنا من مقدسات فكذب على العلماء الذين افتوا بدخول الامريكان وكذلك على الجمع العظيم من علماء وقيادات العالم الاسلامي في مؤتمر الرابطة في مكة المكرمة بعد أن استنكر العالم الاسلامي دخول القوات الصليبية بلاد الحرمين بحجة الدفاع عنها حيث قال لهم إن الامر يسير وأن القوات الامريكية وقوات التحالف سوف تخرج بعد بضعة اشهر، وهانحن اليوم ندخل في السنة السابعة بعد مجيئهم والنظام عاجز عن إخراجهم ولايريد أن يعترف لشعبه بعجزه فاستمر يكذب على الناس ويدعي أن الامريكيين سيخرجون ، وهيهات هيهات فإن المؤمن لايلدغ من جحر مرتين والسعيد من اتعظ بغيره .

وبدلاً من أن يدفع النظام الجيش والحرس ورجال الأمن لمواجهة المحتلين جعلهم حماة لهم إمعاناً في الإذلال ومبالغة في الإهانة والخيانة ولاحول ولاقوة إلا بالله ، ونذكر اولئك النفر القليل من الجيش والشرطة والحرس والأمن الذين يستزلهم النظام ويضغط عليهم ليعتدوا على حقوق المسلمين ودمائهم بقوله تعالى في الحديث القدسي « من عادى لي ولياً فقد آذنته بالحرب » (رواه البخاري) وقوله صلى الله عليه وسلم «يجيء الرجل آخذاً بيد الرجل فيقول : يارب هذا قتلني فيقول الله له : لم قتلته فيقول : قتلته لتكون العزة لك فيقول : فإنها لي ويجيء الرجل آخذاً بيد الرجل فيقول اي رب إن هذا قتلني فيقول الله : لم قتلته فيقول : لتكون العزة لفلان فيقول : إنها ليست لفلان فيبوء بإثمه» (رواه النسائي بسند صحيح) وفي لفظ عن النسائي ايضاً «يجيء المقتول يوم القيامة متعلقاً بقاتله فيقول الله : فيم قتلت هذا فيقول : في ملك فلان».

واليوم قد بدأ إخوانكم وأبناؤكم من أبناء الحرمين الجهاد في سبيل الله لإخراج العدو المحتل من بلاد الحرمين ولاشك أنكم ترغبون في القيام بهذه المهمة لإعادة العزة للأمة وتحرير مقدساتها المحتلة غير أنه لايخفى عليكم أن المرحلة تستدعي اتباع اساليب قتالية مناسبة نظراً لعدم التوازن بين قواتنا النظامية المسلحة وقوات العدو وذلك بواسطة قوات خفيفة سريعة الحركة تعمل في سرية تامة وبعبارة اخرى شن حرب عصابات يشارك فيها أبناء الشعب من غير القوات المسلحة وتعلمون أنه من الحكمة في هذه المرحلة تجنب قوات الجيش المسلحة الدخول في قتال تقليدي مع قوات العدو الصليبي، ويستثنى من ذلك العمليات القوية الجريئة التي يقوم بها أفراد من القوات المسلحة بصورة فردية أي بدون تحريك قوات نظامية بتشكيلاتها التقليدية بحيث لا تنعكس ردود الافعال بشكل قوي على الجيش مالم تكن هناك مصلحة كبيرة راجحة ونكاية عظيمة فادحة في العدو تحطم أركانه وتزلزل بنيانه وتعين على إخراجه مهزوماً مدحوراً مقهوراً مع الحذر الشديد من أن تسفك في ذلك دماء مسلمة .

والذي يرجوه إخوانكم وأبناؤكم المجاهدون منكم في هذه المرحلة هو تقديم كل عون ممكن من المعلومات والمواد والأسلحة اللازمة لعملهم ويرجون من رجال الأمن خاصة التستر عليهم وتخذيل العدو عنهم والإرجاف في صفوفه وكل ما من شأنه إعانة المجاهدين على العدو المحتل .

وننبهكم الى أن النظام قد يلجأ إلى افتعال أعمال ضد أفراد القوات المسلحة أو الحرس أو الأمن ويحاول نسبتها للمجاهدين للوقيعة بينهم وبينكم فينبغي تفويت هذه الفرصة عليه .

وفي الوقت الذي نعلم أن النظام يتحمل المسؤولية كاملة في ماأصاب البلاد وأرهق العباد إلا أن أساس الداء ورأس البلاء هو العدو الامريكي المحتل فينبغي تركيز الجهود على قتله وقتاله وتدميره ودحره والتربص به والترصد له حتى يهزم بإذن الله تعالى .

وستأتي المرحلة -بإذن الله- التي تقومون فيها بدوركم بحسم الأمور لتكون كلمة الله هي العليا وكلمة الذين كفروا السفلى ، والضرب بيد من حديد على المعتدين وإعادة الامور الى نصابها والحقوق الى أصحابها والقيام بواجبكم الاسلامي الصحيح وسوف يكون لنا حديث مستقل بإذن الله حول هذه القضايا .

اخي المسلم في كل مكان وفي جزيرة العرب خاصة:

-إن الإموال التي تدفعها ثمناً للبضائع الأمريكية تتحول إلى رصاصات في صدور إخواننا في فلسطين وغداً أبناء بلاد الحرمين.

- إننا بشراء بضائعهم نقوي اقتصادهم بينما نزداد نحن فقراً وضنكاً .

اخي المسلم في بلاد الحرمين :

هل يعقل أن تكون بلادنا أكبر مشتري للسلاح في العالم من أمريكا كما أنها أكبر شريك تجاري للأمريكان في المنطقة ، الذين يحتلون بلاد الحرمين ويساندون بالمال والسلاح والرجال إخوانهم اليهود في احتلال فلسطين وقتل وتشريد المسلمين هناك ؟!!

- إن حرمان هؤلاء المعتلين من العوائد الضخمة لتجارتهم معنا إنما هو مساعدة هامة جداً في الجهاد ضدهم وهو تعبير معنوي هام في إظهار غضبنا عليهم وكرهنا لهم ونكون بذلك قد ساهمنا في تطهير مقدساتنا من اليهود والنصارى وأرغمناهم على مغادرة أراضينا مهزومين مدحورين مخذولين بإذن الله .
- وننتظر من النساء في بلاد الحرمين وغيرها أن يقمن بدورهن في ذلك بمقاطعة البضائع الأمريكية .
وإذا تضافرت المقاطعة الاقتصادية مع الضربات العسكرية للمجاهدين فإن هزيمة العدو تكون قريبة بإذن الله والعكس صحيح ، فإذا لم يتعاون المسلمون مع إخوانهم المجاهدين ويشدوا من أزرهم بقطع التعامل الاقتصادي مع العدو الامريكي فإنهم بذلك يدفعون إليه بالأموال التي هي عماد الحرب وحياة الجيوش وبذلك يطول أمد الحرب وتشتد الوطأة على المسلمين .
-إن كل أجهزة الأمن والاستخبارات في العالم لايمكنها أن ترغم مواطناً على شراء بضائع أعدائه .
فالمقاطعة الاقتصادية لبضائع العدو الأمريكي هي سلاح فعّال للغاية لإضعاف العدو والإضرار به ومع ذلك فهو سلاح لايقع تحت طائلة أجهزة القمع .
وقبل الختام لنا حديث هام وهام جداً مع شباب الاسلام رجال المستقبل المشرق لأمة محمد عليه الصلاة والسلام حديثنا مع الشباب عن واجبهم في هذه المرحلة العصيبة من تاريخ أمتنا ، هذه المرحلة التي لم يتقدم فيها لأداء الواجبات في جميع الاتجاهات إلا الشباب حفظهم الله فبعد أن تزهد بعض الذين يُشار إليهم بالبنان عن اداء الواجب للذود عن الاسلام وإنقاذ أنفسهم وأموالهم من الظلم والبغي والقمع والإرهاب الذي تمارسه الدولة مع استخدام الإعلام لتغييب وعي الأمة تقدم الشباب حفظهم الله لرفع راية الجهاد عالية خفاقة ضد التحالف الأمريكي اليهودي الذي احتل مقدسات الإسلام -في الوقت الذي تقدم غيرهم نتيجة لإرهاب الدولة لهم او من زلت أقدامهم طمعاً في دنيا فانية تقدموا ليضفوا الشرعية على هذه الخيانة العظمى والمصيبة الكبرى على احتلال بلاد الحرمين ولاحول ولاقوة الا بالله- ولاغرو ولا عجب من هذا الإقدام وهل كان أصحاب محمد صلى الله عليه وسلم إلا شباباً ، وهؤلاء الشباب هم خيرخلف لخير سلف وهل قتل فرعون هذه الأمة ابا جهل إلا الشباب؟!
يقول عبدالرحمن بن عوف -رضي الله عنه- إني لفي الصف يوم بدر إذ التفت فإذا عن يميني وعن يساري فتيان حديثا السن فكأني لم آمن بمكانهما إذ قال لي أحدهما سراً من صاحبه ياعم أرني ابا جهل فقلت فما تصنع به قال أُخبرتُ انه يسب رسول الله صلى الله عليه وسلم قال : والذي نفسي بيده لئن رأيته لايفارق سوادي سواده حتى يموت الأعجل منا فتعجبت لذلك قال : وغمزني الآخر فقال لي مثلها فلم اتشب أن نظرت إلى أبي جهل يجول في الناس فقلت ألا تريان ؟ هذا صاحبكما الذي تسألاني عنه قال فابتدراه بسيفيهما فضرباه حتى قتلاه .
الله أكبر - هكذا كانت همم الفتيان رضي الله عنهم وهكذا كانت همم أبنائنا فهذان فتيان صغيرا السن كبيرا الهمة والمرأة والعقل والغيرة على دين الله يسأل كل واحد منهما عن أهم مقتل للعدو ألا وهو قتل فرعون هذه الأمة وقائد المشركين في بدر أبي جهل وكان دور عبدالرحمن بن عوف رضي الله عنه هو دلالتهما على أبي جهل وهذا هو الدور المطلوب من أهل المعرفة والخبرة بمقاتل العدو بأن يرشدوا أبناءهم وإخوانهم إليها وبعد ذلك سيقول الشباب كما قال سلفهم «والذي نفسي بيده لئن رأيته لا يفارق سوادي سواده حتى يموت الأعجل منا».
وفي قصة عبدالرحمن بن عوف مع أمية بن خلف يظهر مدى إصرار بلال رضي الله عنه على قتل رأس الكفر حيث قال : «رأس الكفر أمية بن خلف - لانجوت إن نجا».
وقبل ايام نقلت وكالات الأنباء تصريحاً لوزيرالدفاع الامريكي الصليبي المعتل قال فيه إنه تعلم درساً واحداً من انفجاري الرياض والخبر وهذا الدرس هو عدم الانسحاب أمام الارهابيين الجبناء .
فنقول لوزير الدفاع إن هذا الكلام يضحك الثكلى التي مات وحيدها، وظاهر منه حجم الخوف الذي يعتريكم فأين هذه الشجاعة الزائفة في بيروت بعد حوادث التفجير عام ١٤٠٣ هـ الموافق لعام ١٩٨٣م والتي جعلتكم شذر مذر وقطعاً وأشلاء بمقتل ٢٤١ جندياً أغلبهم من المارينز، وأين هذه الشجاعة الزائفة في عدن بعد حادثي انفجار جملاكم تخرجون لاتلوون على شئ في اقل من أربع وعشرين ساعة .
ولكن فضيحتكم الكبرى كانت في الصومال فبعد ضجيج إعلامي عنيف لعدة أشهر عن قوة أمريكا بعد الحرب الباردة وتزعمها للنظام العالمي الجديد دفعتم بعشرات الألوف من القوات الدولية منها ثمانية وعشرون ألف جندي أمريكي إلى الصومال .
ولكن بعد معارك صغيرة قُتل فيها بضع عشرات من جنودكم وسُحل طيار أمريكي في أحد شوارع مقديشو خرجتم منها مهزومين مدحورين تحملون قتلاكم وتجرون أذيال الخيبة والخسران والهوان ولقد ظهر جلياً مدى عجزكم وضعفكم ، ولقد كان منظركم وانتم تنهزمون في هذه المدن الاسلامية الثلاث (بيروت وعدن ومقديشو) يدخل السرور على قلب كل مسلم ويشفي صدور قوم مؤمنين .
واقول: لئن كان أبناء بلاد الحرمين قد خرجوا لقتال الروس في أفغانستان والصرب في البوسنة والهرسك

وهم يجاهدون اليوم في الشيشان وقد فتح الله عليهم ونصرهم على الروس المتحالفين معكم ، ويقاتلون بفضل الله ايضاً في طاجيكستان أقول ، «لئن كان أبناء الحرمين عندهم شعور وإيمان بضرورة الجهاد ضد الكفر في كل مكان فهم أكثر ما يكونون عدداً وقوةً وحماسةً على أرضهم التي ولدوا عليها للدفاع عن أعظم مقدساتهم -الكعبة المشرفة قبلة المسلمين أجمعين- ويعلمون أن المسلمين في العالم أجمع سينصرونهم ويؤازرونهم في قضيتهم الكبرى ، قضية كل المسلمين ألا وهي تحرير مقدساتهم وأن هذا هو واجب كل مسلم في العالم»

وأقول لك ياوليام :«إن هؤلاء الشباب يحبون الموت كما تحبون الحياة وقد ورثوا العزة والإباء والشجاعة والكرم والصدق والإقدام والتضحية كابراً عن كابر ، وإنهم لصبرٌ في الحرب صدقٌ عند اللقاء وقد ورثوا هذه الصفات عن أجدادهم في الجاهلية وجاء الاسلام فأقر تلك الاخلاق وكملها» كما قال رسول الله صلى الله عليه وسلم «إنما بُعثت لأتمم صالح الأخلاق» (صحيح الجامع الصغير) وعندما أراد الملك عمرو بن هند أن يذل عمرو بن كلثوم أخذ عمرو بن كلثوم السيف وقطع رأس الملك رافضاً للذل والهوان والضيم وأنشد قصيدة منها :

إذا ما الملك سامَ الناس خسفاً أبينا أن نُقر الذلّ فينا
بأي مشيئة عمرو بن هند تريد بأن نكونَ الأرذلينا
بأي مشيئة عمرو بن هند تطيعُ بنا الوشاةَ وتزدرينا
فإن قناتنا ياعمرو أعيت على الأعداء قبلك أن تلينا

هؤلاء الشباب يؤمنون بالجنة بعد الموت ويؤمنون بأن الأجل لايقدّمه إقدامهم على القتال ولايؤخره تأخرهم كما قال تعالى : «وماكان لنفس أن تموت إلا بإذن الله كتاباً مؤجلاً» الاية (آل عمران١٤٥) ويؤمنون بحديث رسول الله صلى الله عليه وسلم «ياغلام إني أعلمك كلمات : إحفظ الله يحفظك إحفظ الله تجده تجاهك إذا سألت فاسأل الله وإذا استعنت فاستعن بالله واعلم أن الأمة لو اجتمعت على أن ينفعوك بشئ لم ينفعوك إلا بشئ قد كتبه الله لك ولو اجتمعوا على أن يضروك بشئ لم يضروك إلا بشئ قد كتبه الله عليك رُفعت الأقلام وجفت الصحف» (صحيح الجامع الصغير).

ويتمثلون قول الشاعر :

إذا لم يكن من الموت بدٌ فمن العجز أن تموت جباناً

وقول الآخر :

من لم يمت بالسيف مات بغيره تعددت الأسباب والموت واحدٌ

هؤلاء الشباب يؤمنون بما أخبر الله به ورسوله صلى الله عليه وسلم عن عظيم أجر المجاهد والشهيد حيث يقول الله عز وجل :«والذين قُتلوا في سبيل الله فلن يضل أعمالهم سيهديهم ويُصلح بالهم ويُدخلهم الجنة عرفها لهم»(محمد٤-٦) ويقول تعالى ايضاً «ولاتقولوا لمن يُقتل في سبيل الله أموات بل أحياء ولكن لاتشعرون» (البقرة١٥٤) ويقول رسول الله صلى الله عليه و سلم «إن في الجنة مائة درجة أعدها الله للمجاهدين في سبيل الله مابين الدرجتين كما بين السماء والأرض» (صحيح الجامع الصغير) ويقول ايضاً «الشهيد لايجد ألم القتل إلا كما يجد أحدكم من القرصة» صحيح الجامع الصغير ويقول ايضاً «أفضل الشهداء الذين إن يلقوا في الصف لايلفتون وجوههم حتى يُقتلوا ،أولئك يتلبطون في الغرف العلى من الجنة ويضحك إليهم ربك ، وإذا ضحك ربك إلى عبد في الدنيا فلاحساب عليه»(أخرجه احمد بسند صحيح) ويقول أيضاً «إن للشهيد عند الله خصالاً ، أن يُغفر له من أول دفعة من دمه ويُرى مقعده من الجنة ويُحلى حلية الإيمان ويُزوج من الحور العين ويُجار من عذاب القبر ويأمن من الفزع الأكبر ويوضع على رأسه تاج الوقار الياقوتة منه خيرٌ من الدنيا وما فيها ويُزوج اثنتين وسبعين من الحور العين ويُشفع في سبعين إنساناً من أقاربه»(أخرجه احمد والترمذي بسند صحيح).

هؤلاء الشباب يعلمون أن أجرهم في قتالكم مضاعف عن أجرهم في قتال غيركم من غير أهل الكتاب ، ولاهم لهم إلا دخول الجنة بقتلكم ، فلا يجتمع الكافر وقاتله في النار.

وهم يرددون ويتلون قوله تعالى «قاتلوهم يعذبهم الله بأيديكم ويخزهم وينصركم عليهم ويشف صدور قوم مؤمنين» (التوبة١٤) وقول رسول الله صلى الله عليه وسلم وهو يحرض المسلمين في بدر «والذي نفس محمد بيده لايقاتلهم اليوم رجل فيُقتل صابراً محتسباً مقبلاً غير مدبر إلا أدخله الله الجنة» وقوله لهم بعد ذلك : «قوموا إلى جنة عرضها السموات والأرض» .

وهم يرتلون ايضاً قوله تعالى «فإذا لقيتم الذين كفروا فضرب الرقاب...»الاية (محمد٤) وهؤلاء الشباب لايحبون الكلام معكم والعتاب لكم، لسان كل واحد منهم يقول لكم:

ليس بيني وبينكم من عتابٍ سوى طعن الكلى وضرب الرقاب

وهم يقولون لك ماقال جدهم أمير المؤمنين هارون الرشيد لجدك نقفور عندما تهدد وتوعد المسلمين في رسالته إلى هارون الرشيد فرد عليه هارون الرشيد برسالته التي جاء فيها «من هارون الرشيد أمير المؤمنين إلى نقفور كلب الروم الجواب ماترى لاماتسمع» ثم سار بجيوش الإسلام إلى ملاقاة نقفور وجيشه فهزم الله نقفور هزيمة منكرة .

فهؤلاء الشباب الذين تقول عنهم إنهم جبناء يقولون لك «لايُقمقَعُ لنا بالشنان ولايُلوح لنا بالسنان والجواب ماترى لاماتسمع» فهم يتنافسون على قتالكم كتنافس الأوس والخزرج في قتال المشركين وقد قال أحدهم :

جيش الصليب غدا هباءً يوم فجرنا الغُبرُ

بشباب إسلام كُمَاة لايهابون الخطر
إن قيل يقتلك الطغاة يقول في قتلي ظفر
أنا ماغدرت بذا المليك إذ بقبلتنا غدر
وأباح ذا البلد الحرام لشر أنجاس البشر
أقسمت بالله العظيم بأن أقاتل من كفر

وهم قد حملوا السلاح على اكتافهم عشر سنوات في افغانستان وهم قد عاهدوا الله على أن يستمروا في حمله ضدكم حتى تخرجوا خائبين مهزومين مدحورين -بإذن الله- مادام فيهم عرق ينبض أو عين تطرف ولسان حالهم يقول :

غداً ستعلم ياوليام أي فتى يلقى أخاك الذي قد غره العصبُ
فتى يخوض غمار الحرب مبتسماً وينثني وسنان الرمح مختضبُ
لاأبعد الله عن عيني غطارفة إنسا إذا نزلوا جناً إذا ركبوا
ليوثٌ غاب لكن لانيوب لهم إلا الأسنة والهندية القضبُ
والخيل تشهد لي أني أكفكفها والطعن مثل شرار النار يلتهبُ
والنقع يوم طراد الخيل يشهد لي والطعن والضرب والأقلام والكتبُ

وإن شتمك أحفاد الصحابة رضي الله عنهم بوصفهم بالجبن وتحديك لهم بعدم الخروج من بلاد الحرمين فيه عدم اتزان وتظاهر بالجنون دواؤه عند شباب الاسلام حيث يقال فيهم :

فدت نفسي وما ملكت يميني فوارس صدقوا فيهم ظنوني .
فوارس لايملون المنايا وإن دارت رحى الحرب الزبون
وإن حمي الوطيس فلا يبالوا وداووا بالجنون من الجنون

وإن إرهابنا لكم وأنتم تحملون السلاح على أرضنا هو أمر واجب شرعاً ومطلوب عقلاً وهو حق مشروع في أعراف جميع البشر بل والكائنات الحية ومثلكم ومثلنا كمثل افعى دخلت دار رجل فقتلها ، وإن الجبان من يترككم تمشون على أرضه بسلاحكم أمنين مطمئنين .

وهؤلاء الشباب يختلفون عن جنودكم فمشكلتكم هي كيفية إقناع جنودكم بالإقدام الى الحرب أما مشكلتنا فهي كيفية إقناع شبابنا بانتظار دورهم في العمليات والقتال .

فلله در هؤلاء الشباب فهم أهل للمدح والثناء حيث وقفوا لنصرة الدين يوم أضلت الدولة كبار الناس واستزلتهم لإصدار فتاوى ليس لها سند في كتاب الله ولافي سنة نبيه صلى الله عليه وسلم بتسليم اليهود المسجد الاقصى وإباحة بلاد الحرمين لجيوش النصارى ، وإن لي أعناق النصوص لن يغير من هذه الحقيقة شيئاً ففيهم -أي في ذم القاعدين- وفي مدح المجاهدين يقول الشاعر:

كفرت بكل من عذلوا وعن درب الهدى عدلوا
ومن بنديهم والنار تزحف يكثر الجدل
ومن يالوهم رغم التيه ظنوا أنهم وصلوا
وأكبرت الذين مضوا وعما شق ماسألوا
وعن غاياتهم رغم اعتساف الدرب مانكلوا
ومن دمهم أضيئت في دياجي الحيرة الشعل
أنا مازال جرح القدس في جنبي يعتمل
ووقد مصابها كالنار في الأحشاء يشتعل
انا ما خنت عهد الله لما خانت الدول

وقد قال جدهم عاصم بن ثابت رضي الله عنه عندما طلب منه الكفار المفاوضة وعدم القتال:

ماعلتي وأنا جلد نابل والقوس فيها وتر عنابل
الموت حق والحياة باطل إن لم أقاتلكم فأمي هابل

وإن الشباب يعتبرونكم مسؤولين عن كل مايقوم به إخوانكم اليهود في فلسطين ولبنان من قتل وتشريد وانتهاك لحرمات المسلمين حيث إنكم تمدونهم بالمال والسلاح جهاراً نهاراً وإن أطفال العراق والذين قد مات منهم أكثر من ستمائة ألف بسبب نقص الغذاء والدواء نتيجة حصاركم الظالم على العراق وشعبه هم اطفالنا فأنتم تتحملون بذلك مع النظام السعودي دماء هؤلاء الأبرياء كل ذلك يجعل كل عهد لكم معنا منقوضاً فإن رسول الله عليه الصلاة والسلام اعتبر صلح الحديبية لاغياً بعد ان ساعدت قريش بني بكر على خزاعة حلفاء رسول الله صلى الله عليه وسلم فقاتل قريشاً وفتح مكة وقد اعتبر العهد مع بني قينقاع منقوضاً لأن يهودياً منهم أذى امرأة في السوق فكيف بقتلكم مئات الألوف من المسلمين واستباحتكم لمقدساتهم وبذلك يظهر أن الذين يزعمون أن دماء جنود هذا العدو الامريكي المحتل لبلاد المسلمين معصومة إنما يرددون مكرهين مايمليه النظام عليهم خوفاً من بطشه وطمعاً في السلامة . والواجب على كل قبيلة في جزيرة العرب أن تجاهد في

سبيل الله وتطهر أرضها من هؤلاء المحتلين وعلم الله أن دماءهم مهدورة وأموالهم غنيمة ومن قتل قتيلاً فله سلبه وقد قال تعالى في آية السيف :«فإذا انسلخ الأشهر الحرم فاقتلوا المشركين حيث وجدتموهم وخذوهم واحصروهم واقعدوا لهم كل مرصد ...»الآية [التوبة٥] والشباب يعلمون أن هذه المهانة التي لحقت بالمسلمين باحتلال مقدساته لاتزول ولاتدك بغير الجهاد والتفجيرات وهم يرددون قول الشاعر:

جذر المذلة لاتدك بغير زخات الرصاص
والعز لايلقي القياد لكل كفار وعاصي
وبغير نقع الدم لايمحى الهوان من النواصي

وأقول لشباب الإسلام الذين جاهدوا في افغانستان والبوسنة والهرسك بأموالهم وأنفسهم وألسنتهم وأقلامهم بأن المعركة لم تنته بعد ، وأذكرهم بحديث جبريل مع رسول الله صلى الله عليه وسلم بعد غزوة الأحزاب «فلما انصرف رسول الله صلى الله عليه وسلم إلى المدينة لم يكن إلا أن وضع سلاحه فجاءه جبريل فقال ، أوضعت السلاح ؟ والله إن الملائكة لم تضع أسلحتها بعد، فانهض بمن معك إلى بني قريظة فإني سائر أمامك أزلزل بهم حصونهم واقذف الرعب فسار جبريل في موكبه من الملائكة ورسول الله صلى الله عليه وسلم على أثره في موكبه من المهاجرين والأنصار.....»[رواه البخاري].

وهؤلاء الشباب يعلمون أن من لم يقتل يموت وإن أشرف ميتة عندنا هي القتل في سبيل الله ويرددون قول جدهم الصحابي الجليل عبدالله بن رواحة رضي الله عنه وخاصة بعد قتل الأبطال الأربعة الذين فجروا الامريكيين في الرياض أولئك الشباب الذين رفعوا رأس الأمة شامخاً وأذلوا أعداءها من الأمريكيين المحتلين بعمليتهم الشجاعة تلك :

يانفس إلاتقتلي تموتي هذي حياض الموت قد صليت
وما تمنيت فقد أعطيت إن تفعلي فعلهما هديت

وقول جعفر رضي الله عنه:

ياحبذا الجنة واقترابها طيبة وبارد شرابها
والروم روم قد دنا عذابها عليّ إن لاقيتها ضرابها

وأما عن أمهاتنا وأخواتنا ونسائنا وبناتنا فهن يتخذن من الصحابيات الجليلات رضي الله عنهن قدوة لهن بعد رسول الله صلى الله عليه وسلم ويقتبسن من سيرتهن الجرأة والتضحية والإنفاق لنصرة دين الله عز وجل ويتذكرن جرأة وصلابة فاطمة بنت الخطاب رضي الله عنها في الحق امام اخيها عمر بن الخطاب قبل أن يسلم وتحديها له بعدما علم بإسلامها بقولها له «أرأيت إن كان الحق في غير دينك ياعمر» ويتذكرن موقف أسماء بنت أبي بكر يوم الهجرة حيث شقت نطاقها نصفين وعلقت بأحدهما السفرة التي أخذها رسول الله صلى الله عليه وسلم وأبوبكر معهما في رحلتهما إلى المدينة وسميت بذلك ذات النطاقين . ويتذكرن موقف نسيبة بنت كعب وهي تدافع عن رسول الله صلى الله عليه وسلم يوم أحد حتى أصابها اثنا عشر جرحاً بينها جرح أجوف في عاتقها ويتذكرن بذل الصحابيات وإنفاقهن لعليهن لتجهيز جيوش المسلمين الغازية في سبيل الله وقد ضربت نساؤنا في هذا العصر مثلاً رائعاً في الانفاق في سبيل الله وفي تحريض أبنائهن وإخوانهن وأزواجهن على الجهاد في سبيل الله وذلك في افغانستان وفي البوسنة والهرسك والشيشان وغيرها. فنسأل الله أن يتقبل منهن ويفرج عن أبنائهن وأبائهن وأزواجهن وإخوانهن وأن يزيدهن إيماناً على هذا الطريق طريق التضحية والفداء لتكون كلمة الله هي العليا .

ولاتؤثمنّ إلا ليث غاب شجاعاً في الحروب الثائرات
دعوني في الحروب أمت عزيزاً فموت العز خير من حياتي

وهن يحرضن إخوانهن على الجهاد في سبيل الله متمثلات قول الشاعر :

تأهب مثل أهبة ذي كفاح فإن الأمر جلّ عن التلاحي
أتتركنا وقد كثرت علينا ذئاب الكفر تأكل من جناحي
ذئاب الكفر مافتئت تؤلب بني الأشرار من شتى البطاح
فأين العز من أبناء ديني يذود عن العرائر بالسلاح
وخير من حياة الذل موت وبعض العار لايمحوه ماح

إخواننا المسلمين في العالم أجمع :

إن إخوانكم في بلاد الحرمين وفلسطين يستنصرونكم ويطلبون منكم مشاركتهم في جهادهم ضد أعدائهم وأعدائكم من الإسرائيليين والأمريكيين بالنكاية فيهم بكل ما من شأنه أن يخرجهم مهزومين مدحورين من المقدسات الإسلامية كل بحسب استطاعته قال تعالى «وإن استنصروكم في الدين فعليكم النصر...»الآية [الأنفال٧٢].

فياخيل الله اركبي .. وهذا أوان الشد فاشتدوا واعلموا ان اجتماعكم وتعاونكم من أجل تحرير مقدسات الإسلام هو خطوة صحيحة نحو توحيد كلمة الأمة تحت راية كلمة التوحيد .

ولايسعنا ونحن في هذا المقام إلا أن نرفع أكف الضراعة سائلين المولى عز وجل أن يرزقنا السداد والتوفيق في الأمر كله .

اللهم إن علماء الإسلام الصادقين وشباب الأمة الصالحين قد وقعوا في الأسر اللهم فرج عنهم ، اللهم ثبتهم ، اللهم اخذلهم في أهلهم بخير .
اللهم إن أهل الصليب قد جاءوا بخيلهم ورجلهم واستباحوا بلاد الحرمين وإن اليهود يعيثون فساداً في المسجد الاقصى مسرى رسول الله صلى الله عليه وسلم ، اللهم شتت شملهم وفرق جمعهم وامتحنا اللهم أكتافهم ، اللهم زلزل الأرض من تحت أقدامهم ، اللهم إنا نجعلك في نحورهم ونعوذ بك من شرورهم .
اللهم أرنا فيهم يوماً أسوداً ، اللهم أرنا فيهم عجائب قدرتك .
اللهم منزل الكتاب ومجري السحاب وهازم الاحزاب اهزمهم وانصرنا عليهم .
اللهم أنت عضدنا ، وأنت نصيرنا ، بك نجول وبك نصول وبك نقاتل ، حسبنا الله ونعم الوكيل .
اللهم هؤلاء الشباب قد اجتمعوا لنصرة دينك ورفع رايتك، اللهم أمدهم بمدد من عندك واربط على قلوبهم .
اللهم ثبت شباب الاسلام وسدد رميهم اللهم ألف بين قلوب المسلمين ووحد بين صفوفهم ، ربنا أفرغ علينا صبراً وثبت أقدامنا وانصرنا على القوم الكافرين ، ربنا ولاتحمل علينا إصراً كما حملته على الذين من قبلنا ، ربنا ولاتحملنا ما لاطاقة لنا به ، واعف عنا واغفر لنا وارحمنا انت مولانا فانصرنا على القوم الكافرين .
اللهم أبرم لهذه الأمة أمر رشد يعز فيه أهل طاعتك ويذل فيه أهل معصيتك ويؤمر فيه بالمعروف وينهى فيه عن المنكر .
وصل اللهم على عبدك ورسولك محمد وعلى آله وصحبه وسلم تسليماً كثيراً .
وآخر دعوانا أن الحمد لله رب العالمين

الجمعة : ٩/٤/١٤١٧هـ
الموافق : ٢٣/٨/١٩٩٦م

أسامة بن محمد بن لادن

ذرى الهندكوش - افغانستان - خراسان

Appendix 5 A

ADDRESS BY PRESIDENT CLINTON ON MILITARY ACTIONS AGAINST TERRORIST SITES IN AFGHANISTAN AND SUDAN ON AUGUST 20, 1998

August 20, 1998

Good afternoon. Today I ordered our Armed Forces to strike at terrorist-related facilities in Afghanistan and Sudan because of the imminent threat they presented to our national security.

I want to speak with you about the objective of this action and why it was necessary. Our target was terror. Our mission was clear, to strike at the network of radical groups affiliated with and funded by Usama bin Ladin, perhaps the preeminent organizer and financer of international terrorism in the world today.

The groups associated with him come from diverse places but share a hatred for democracy, a fanatical glorification of violence, and a horrible distortion of their religion to justify the murder of innocents. They have made the United-States their adversary precisely because of what we stand for and what we stand against.

A few months ago, and again this week, bin ladin publicly vowed to wage a terrorist war against America, saying, and I quote, " We do not differentiate between those dressed in military uniforms and civilians. They're all targets."

Their mission is murder and their history is bloody. In recent years, they killed American, Belgian, and Pakistani peacekeepers in Somalia. They plotted to assassinate the President of Egypt and the Pope. They planned to bomb six United States 747's over the Pacific. They bombed the Egyptian Embassy in Pakistan. They gunned down German tourists in Egypt.

The most recent terrorist events are fresh in our memory. Two weeks ago, 12 Americans and nearly Kenyans and Tanzanians lost their lives, and another 5000 were wounded, when our embassies in Nairobi and Dar es Salaam were bombed. There is convincing information from our intelligence community that the bin-Ladin terrorist network was responsible for these bombings. Based on this information, we have high confidence that the bombings were planned, financed, and carried out by the organization bin Ladin leads.

America has battled terrorism for many years. Where possible, we've used law enforcement and diplomatic tools to wage the fight. The long arm of American law has reached out around the world and brought trial those guilty of attacks in New York and Virginia and in the Pacific. We have quietly disrupted terrorist groups and foiled their plots. We have isolated countries that practice terrorism. We've worked to build an international coalition against terror.

But there have been and will be times when law enforcement and diplomatic tools are simply not enough, when our very national security is challenged, and when we must tal extraordinary steps to protect the safety of our citizens. With compelling evidence that the bin Ladin network of terrorist groups was planning to mount further attacks against American and other freedom-loving people, I decided America must act.

And so this morning, based on the unanimous recommendation of my national security team, I ordered our Armed Forces to take action to counter an immediate threat from the bin Ladin network. Earlier today, the United States carried out simultaneous strikes against terrorist facilities and infrastructure in Afghanistan. Our forces targeted one of th most active terrorist bases in the world. It contained key elements of the bin Ladin network's infrastructure and has served as a training camp for literally thousands of terrorist leaders was to take place there today, thus underscoring the urgency of our actions.

Our forces also attacked a factory in Sudan associated with the bin Ladin network. The factory was involved in the production of materials for chemical weapons.

The United States does not take this action lightly. Afghanistan and Sudan have been warned for years to stop harboring and supporting these terrorist groups. But countries that persistently host terrorists have no right to be safe havens.

Let me express my gratitude to our intelligence and law enforcement agencies for their hard, good work. And let me express my pride in our Armed Forces who carried out this mission while making every possible effort to minimize the loss of innocent life.

I want you to understand, I want the world to understand that our actions today were not aimed against Islam, the faith of hundreds of millions of good, peace-loving people all around the world, including the United States. No religion condones the murder of innocent men, women, and children. But our actions were aimed at fanatics and killers who wrap murder in the cloak of righteousness and in so doing profane the great religion in whose name they claim to act.

My fellow Americans, our battle against terrorism did not begin with the bombing of our Embassies in Africa, nor will it end with today's strike. It will require strength, courage, and endurance. We will not yield to this threat. We will meet it, no matter how long it may take. This will be long, ongoing struggle between freedom and fanaticism, between the rule of law and terrorism. We must be prepared to do all that we can for as long as we must.

America is and will remain a target of terrorists precisely because we are leaders, because we act to advance peace, democracy, and basic human values, because we're the most open society on Earth, and because, as we have shown yet again, we take an uncompromising stand against terrorism.

But of this I am also sure: The risks from inaction, to America and the World, would be far greater then action, for that would embolden our enemies, leaving their ability and their willingness to strike us intact. In this case, we knew before our attack that these groups already had planned further actions against us and others.

I want to reiterate: The United States wants peace, not conflict. We want to lift lives around the world, not take them. We have worked for peace in Bosnia, in Northern Ireland, In Haiti, in the Middle East and elsewhere. But in this day, no champion for peace can succeed without a determination to fight terrorism. Let our actions today send this message loud and clear: There is no expendable American targets; threw will be no sanctuary for terrorists; we will defend our people, our interests, and our values; we will help people of all faiths, in all parts of the world, who want to live free of fear and violence. We will persist, and we will prevail.

Thank you. And may God bless our country.

GOVERNM
EXHIBI
1602-

BM/3-49 TRANSLATION

Al-Quds Al-Arabi newspaper, May 14, 1998

"Clergymen in Afghanistan Issue a Fatwa calling for the Removal of American Forces from the Gulf"

"Saudi Opposition Member Usama Bin Laden Supports it"

London--Clergymen in Afghanistan issued a fatwa calling for the removal of American forces from the Gulf. The fatwa was issued by the Union of Afghan Clerics following a session that was held the day before yesterday headed by Sheikh Abdullah Al-Zakri. A copy of this fatwa, which was received by Al-Quds Al-Arabi, stated that "it is prohibited by their religion for Muslims to seek help from the infidel." It was referring to the fact that the Arabian Gulf states, who had sought help from American military forces, had violated the writings of the Qur'an and the traditions of the Prophet, as well as the teachings of the nation's religious scholars. According to the fatwa, "American military forces, which are heavily stationed in the holy land of the Hijaz, are spreading atheism among the youth and are carrying out sinister and corrupt acts."

Those who issued the fatwa have drawn support for their statement from a number of verses from the Qur'an, such as "Believers should not have the infidels as friends [and guardians]," and "O ye who believe: do have those who are my enemy and yours as friends," and "There are no people who believe in Allah and the Day of Judgement while they befriend those who disobey Allah and His prophet."

They also referred to sayings of the prophet, God's blessings and peace be upon him, such as: "Expel the polytheist from the Arabian peninsula." In addition, the teachings of such noted clerics as Al-Shoukani, who said: "As to the religious unacceptability of seeking help from the infidel, some groups believe that this is absolutely unacceptable, one of whom is Ahmed. They abide by the teachings of Aisha, may Allah be pleased with her, which is the teaching of Malik, ben Munzie, and Al-Jozjani. Of great interest in the statement is Malik's teaching that it is not permissible to seek help from the infidel [even] when invading."

These clergymen feel that "the leaders of the Arab Islamic countries should have sought the help of other Islamic countries in the world to confront the enemies of Islam, because believers are supposed to help their brothers in belief." They refer to the fact that "Muslims all over the world would sacrifice themselves to protect and defend the land of the Hijaz. And right now, if the American forces were to leave the Arabian peninsula, Muslims would come to fight for it and sacrifice themselves to protect the two Holy Places."

The fatwa addressed Muslims all over the world, saying: "The enemies of Islam are not limited to one particular sect, or to a particular party. All infidels are enemies of Islam, and they are loyal to each other."

After the clergymen related several historical events in their fatwa, they added that "the governments in the area have forgotten the long-standing animosity between Muslims and the infidels. These governments have also forgotten the guidance of God and the detailed references given by the Prophet before. As a result, the Arabian peninsula has become a military outpost for

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the enemy soldiers of Islam in the American army, which are equipped with naval and land weapons."

They also said that "through this fatwa, the Union of Afghan Clerics is reminding the Islamic Nation of its responsibility toward the Arabian Gulf issue, and alerting it to the fact that it is not only the responsibility of Saudi Arabians, but it concerns all Muslims worldwide, including Muslim rulers and their subjects, and Muslim clergymen and their congregations."

The Afghan clergymen declared "Jihad against America and those behind it, in accordance with the shari'a [Islamic law]." They demanded that Muslim governments carry out their religious duty of "armed Jihad against the enemies of Islam," pointing out that "if Muslims were to shun their responsibility, the enemies of Islam would invade *the* two Holy Places [in Saudi Arabia] as well as Al-Aqsa Mosque [in Jerusalem]."

In a statement accompanying the fatwa, the clergymen affirmed that "this fatwa, with all the evidence and solid premises that support it, along with the fact that all the Muslim clergy support it, goes beyond being merely a fatwa issued by the clergy of a particular Muslim country, and is a legally sanctioned fatwa that every Muslim should accept and act on accordingly," in their words.

Usama Bin Laden, the Saudi opposition figure now living in Afghanistan, regards this fatwa as "a positive response to the issue of American forces stationed in the land of the two Holy Places, an issue that is becoming more serious and complicated." He said in a statement sent to "Al-Quds Al-Arabi" that "the fatwa makes it clear, through legitimate and decisive evidence, that allowing American forces in this country was not religiously permissible, and that they must be expelled."

He observed that the fatwa issued by the Union of Afghan Clerics "is the same fatwa that was issued by the sincere clergymen and seekers of knowledge in the land of the two Holy Places when these forces were admitted eight years ago. At the head of them were Sheikhs Salman Al-Awda and Safar Al-Hawali," and pointed out that the recent sermon by the Imam at the Mosque of the Prophet was only "one example of the rejection of this presence expressed by the nation."

He said that "the Imam at the mosque invalidated the claims that these forces were brought in for security purposes when he said, 'The security of the region should be left to the countries in the region because it is their right.' The only cause of the problems and instability in the region is the super powers, who fabricate events. They station themselves here every time an event is staged, under the guise of rectifying the situation or averting a threat. They are the greatest threat. How can a wolf be a shepherd for the sheep?"

After Bin Laden expressed his support for the fatwa, he called on "everyone to act accordingly and carry it out, because it is the teaching of God's messenger, may God's blessings and peace be upon him, before being a fatwa issued by the clergy. As [the prophet] said on his deathbed, 'Expel the polytheist from the Arabian peninsula.'"

التقرير الصحفي

ليوم الخميس ١٤ مايو ١٩٩٨م

القدس العربي

- رجال الدين في أفغانستان يصدرون فتوى بوجوب اخراج القوات الأمريكية من الخليج.
- الملك فهد يعين ابنه الأصغر وزيراً للدولة بلا حقيبة.
- ويلتقي الرئيس أفورقي.
- السعودية تعيد للخدمة ١٥ طائرة بوينغ بعد فحصها.
- السعودية تتجه لربط شبكاتها الكهربائية بكلفة ٦٠٠ مليون دولار.

الشرق الأوسط

- الأمير سعود الفيصل يزور طهران ٢٦ مايو ويوقع اتفاقية للتعاون المشترك.
- يماني: رفع طاقة التوليد الكهربائي في السعودية يحتاج إلى استثمار ١٦ مليار ريال سنوياً.
- الأمير سلمان: السعودية التزمت حرية حركة المال والتجارة ابان حرب الخليج رغم ما حدث من سحوبات.

الحياة

- تعيين الأمير عبدالعزيز بن فهد وزير دولة.
- السعودية: الديوان الملكي ينعى الأميرة العنود بنت عبدالعزيز.
- رسالة من بلير للأمير عبدالله.
- السعودية: الزيادة المتوقعة في توليد الكهرباء تتطلب استثمار ١٧ بليون ريال سنوياً.

GOVERNMENT EXHIBIT 1602

القدس العربي

السنة العاشرة ـ العدد 2801 الخميس 14 ايار (مايو) 1998 ـ 18 محرم 1419 هـ

أيدها المعارض السعودي اسامة بن لادن

رجال الدين في افغانستان يصدرون فتوى بوجوب إخراج القوات الأمريكية من الخليج

لندن ـ «القدس العربي»:

اصدر رجال الدين في افغانستان فتوى تقضي بوجوب إخراج القوات الأمريكية من منطقة الخليج. وقالت الفتوى التي اصدرها «إتحاد علماء افغانستان» بعد جلسة عقدوها امس الأول برئاسة الشيخ عبد الله الذاكري، وتلقت «القدس العربي» نسخة منها، إن «استعانة المسلمين بالكافرين حرام»، مشيرة الى ان الدول العربية الخليجية «ارتكبت مخالفة الآيات القرآنية والأحاديث النبوية الشريفة وأقوال فقهاء الأمة»، باستعانتها بالقوات العسكرية الأمريكية «التي ارتكزت ارتكازا قويا في أرض الحجاز المقدسة، ينشرون الإلحاد بين شبابها ويقومون بأعمال خبيثة مفسدة».

واستند هؤلاء في فتواهم الى عدد من الآيات القرآنية، مثل قوله تعالى «لا يتخذ المؤمنون الكافرين أولياء من دون المؤمنين»، و«يا ايها الذين آمنوا لا تتخذوا عدوي وعدوكم أولياء»، و«لا تجد قوما يؤمنون بالله واليوم الآخر يوادون من حاد الله ورسوله».

كما اشاروا الى احاديث النبي صلى الله عليه وسلم، مثل الحديث الشريف «عن ابن عباس رضي الله عنه قال: قال رسول الله صلى الله عليه وسلم: أخرجوا المشركين من جزيرة العرب». إضافة الى أقوال فقهاء الأمة المشهورين مثل قول الشوكاني «وإلى عدم جواز الاستعانة بالمشركين والكفار ذهب جماعة من العلماء وهو مروي عن الشافعي وفي نصب الراية في تخريج احاديث الهداية، فذهب جماعة الى منع الاستعانة مطلقا بالمشركين، ومنهم احمد، وتمسكوا بحديث عائشة رضي الله عنها، وهذا مذهب مالك وابن المنذر والجوزجاني. وفي روائع البيان: مذهب مالك انه لا يجوز الاستعانة بالكفار في الغزو».

ورأى هؤلاء انه «كان يجب على زعماء الدول الاسلامية العربية ان يستعينوا في مقابلة اعداء الاسلام بالدول الاسلامية في العالم، لأن المؤمن يعاون اخاه المؤمن»، مشيرين الى ان «المسلمين في العالم كلهم يفدون انفسهم لحماية أرض الحجاز والدفاع عنها، والآن ايضا ان خرجت القوات الأمريكية عن جزيرة العرب يحضر المسلمون للكفاح عنها، ويقدمون أرواحهم فداء للحرمين الشريفين».

وخاطب هؤلاء المسلمين في العالم قائلين «إن أعداء الاسلام لا يتحصرون في طائفة معينة ولا حزب معين، إن الكافرين كلهم أعداء الاسلام وبعضهم أولياء بعض».

وتابعوا بعد ان سردوا عددا من الأحداث التاريخية «لكن حكومات المنطقة نسيت عداوة هؤلاء العريقة، كما نسيت التوجيهات الإلهية والاشارات النبوية التي سبق ذكرها تفصيلا، فأصبحت الجزيرة العربية معسكرا لجنود اعداء الاسلام من الجيش الأمريكي المجهز بأسلحة برية وبحرية».

وقالوا «إن اتحاد علماء افغانستان يوجه الأمة الاسلامية باصدار الفتوى الشرعية المذكورة الى مسؤوليتهم تجاه مسألة الخليج العربي، وينبههم أن مسؤوليتها لا تخص السعوديين فحسب، بل تعم المسلمين في العالم كلهم، ولاتهم ورعاياهم، علماءهم وعوامهم».

وأعلن العلماء الأفغان «الجهاد طبق أصول الشريعة ضد أمريكا وأذنابها»، وطالبوا الحكومات الاسلامية بتأدية فريضة «الجهاد المسلح ضد اعداء الاسلام»، مشيرين الى انه «لو تساهل المسلمون في مسؤوليتهم هذه لاحتل أعداء الاسلام الحرمين الشريفين ايضا، كما احتلوا المسجد الأقصى».

وأكدوا في بيان ارفق مع الفتوى إن «هذه الفتوى بما استندت اليه من الأدلة، واعتمدت عليه من الحيثيات، وأفتى بها العلماء السابقين واللاحقين، تتجاوز كونها مجرد فتوى من علماء بلد من بلاد المسلمين، الى كونها الفتوى الشرعية التي يجب على كل مسلم الأخذ بها والعمل بمقتضاها»، على حد قولهم.

الشيخ اسامة بن لادن

ورأى المعارض السعودي اسامة بن لادن الذي يقيم في افغانستان ان هذه الفتوى تأتي «تجاوبا مع قضية القوات الأمريكية لبلاد الحرمين التي تزداد تفعالا وتعمقا». وقال في بيان ارسل لـ«القدس العربي» إن «الفتوى بينت بالأدلة الشرعية القاطعة عدم جواز دخول هذه القوات الى هذه البلاد، ووجوب اخراجها منها».

ولاحظ ان الفتوى التي اصدرها اتحاد علماء افغانستان «هي الفتوى نفسها التي افتى بها العلماء وطلاب العلم الصادقون من ابناء بلاد الحرمين عند دخول هذه القوات قبل ثماني سنوات، وفي مقدمتهم الشيخ سلمان العودة، والشيخ سفر الحوالي»، مشيرا الى أن خطبة امام الحرم النبوي الشريف الأخيرة ليست الا «نموذجا للتعبير عن مستوى الرفض الذي تقابل به الأمة هذا التواجد».

وقال ان امام الحرم فند المزاعم التي تدعي ان هذه القوات جاءت لدواع امنية لأهل المنطقة، عندما قال «أمن المنطقة لدول المنطقة وهو من حقهم، وما سبب المشاكل للمنطقة والزعزعة الا الدول الكبرى التي تفتعل الأحداث وتتواجد كلما افتعلت حدثا بذريعة انها تقوم بذلك لاصلاح الوضع او درء خطر، وهي اكبر خطر، وكيف يكون الذئب راعيا للغنم؟».

ودعا بن لادن بعد ان عبر عن تأييده لهذه الفتوى «الجميع للعمل بمقتضاها وتنفيذها، لأنها قبل ان تكون فتوى من علماء، فهي وصية رسول الله صلى الله عليه وسلم، حيث قال وهو على فراش الموت: اخرجوا المشركين من جزيرة العرب».

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القدس العربي

السنة العاشرة ـ العدد 2801 الخميس 14 ايار (مايو) 1998 ـ 18 محرم 1419 هـ

الملك فهد يعين ابنه الاصغر وزيرا للدولة بلا حقيبة

■ الرياض ـ ا ف ب: اعلنت وكالة الانباء السعودية امس الاربعاء ان العاهل السعودي الملك فهد بن عبد العزيز عين ابنه الاصغر الامير عبد العزيز بن فهد وزيرا للدولة بلا حقيبة.

وكان الامير عبد العزيز البالغ من العمر 28 عاما يشغل حتى الان منصب مستشار في الديوان الملكي برتبة وزير.

وقالت الوكالة ان الامير عبد العزيز سينضم الى مجلس الوزراء السعودي وسيشارك في اجتماعاته الاسبوعية التي يرئسها عادة العاهل السعودي.

يشار الى ان الملك فهد درج على اصطحاب ابنه الامير عبد العزيز في تنقلاته داخل البلاد وفي زياراته الى الخارج.

..ويلتقي الرئيس افورقي

■ جدة (السعودية) ـ ا ف ب: ذكرت وكالة الانباء السعودية أن العاهل السعودي الملك فهد بن عبد العزيز بحث امس الثلاثاء في جدة التطورات على الساحتين الاقليمية والدولية مع الرئيس الاريتري اسياس افورقي. أضافت الوكالة أن الملك فهد وافورقي بحثا في سبل تعزيز العلاقات بين البلدين.

ووصل افورقي امس الى جدة على البحر الاحمر في زيارة رسمية الى السعودية. واستقبله في المطار ولي العهد السعودي الامير عبد الله بن عبد العزيز.

ويرافق الرئيس افورقي وفد يضم كبار المسؤولين من بينهم وزراء الطاقة والصحة والمال والسياحة.

السعودية تعيد للخدمة 15 طائرة بوينغ بعد فحصها

■ دبي ـ رويترز: صرح مسؤول بشركة الخطوط الجوية السعودية بأن جميع طائرات البوينغ 737 / 200 التي أوقفت لاجراء فحص طارئ عادت الى الخدمة امس الاربعاء.

وكانت الشركة قد أوقفت 15 طائرة من بين 18 طائرة بوينغ 737 / 200 بعد ان طلبت ادارة الطيران الاتحادي الامريكية فحص الطائرات القديمة من هذا الطراز خوفا من تلف أسلاكها.

وصرح سعد الشهري المسؤول عن سلامة طائرات الشركة «عدنا اليوم للعمل بصورة طبيعية».

وقال لرويترز في اتصال هاتفي من جدة «عادت الطائرات الخمس عشرة الى الخدمة. عادت 12 طائرة الليلة قبل الماضية وأعقبها الباقي في ساعة مبكرة من صباح الاربعاء».

وأضاف ان الفحص أدى الى تأخير وتبديل الثلاثاء والغاء رحلات يوم الاثنين.

وسئل عما اذا كان قد تم اكتشاف أي عيوب في الطائرات التي خضعت للفحص فأجاب «كلا. ليس هناك شيء له صلة بتلف الاسلاك بفعل عامل الزمن أو ذو صلة بالمفصلات أو الوصلات».

وصرح بأن جميع الطائرات الثماني عشرة ستخضع للفحص بما يتماشى مع طلب ادارة الطيران الاتحادي.

وطلبت ادارة الطيران الامريكية يوم الخميس الماضي فحص طائرات البوينغ 737 / 100 وطائرات 737 / 200 التي حلقت في الاجواء لاكثر من 50 الف ساعة واصلاح اللازم فيها. ووسعت الادارة نطاق الطلب يوم الاحد ليشمل البوينغ 737 / 300 و400 و500 التي حلقت لما يتراوح بين 40 الف و50 الف ساعة.

وقال الشهري «هذه الطائرات الخمس عشرة هي التي طارت أكثر من 50 الف ساعة من الاسطول. وثلاث من طائرات الاسطول طارت ما بين 40 الف و50 الف ساعة».

وتابع ان الطائرات الثلاث ستخضع للفحص فور توافر أطقم الصيانة.

وسلطت الاضواء على مصادر الاشتعال ذات الصلة بخزانات الوقود منذ تحطم طائرة بوينغ 747 تابعة لشركة الخطوط الجوية العالمية قرب نيويورك عام 1996 في حادث قتل فيه 230 شخصا على متن الطائرة اثر انفجار وقع فيما يبدو في خزان الوقود الاوسط.

وطائرات البوينغ 737 هي الاكثر شيوعا في العالم اذ توجد منها 2716 طائرة مسجلة في شتى انحاء العالم و1088 طائرة مسجلة في الولايات المتحدة.

السعودية تتجه لربط شبكاتها الكهربائية بكلفة 600 مليون دولار

الدمام ـ من عباس سلمان:

قال هاشم بن عبد الله بن هاشم يماني وزير الصناعة والكهرباء السعودي امس الاربعاء ان السعودية تعتزم تنفيذ مشروع لربط شبكتي الكهرباء في منطقتين شمالي الرياض بتكاليف تبلغ 600 مليون دولار.

وقال للصحافيين في الدمام بعد افتتاح مؤتمر عن الكهرباء في دول الخليج العربية انه تم الاتفاق على ربط حائل والقصيم في اطار مشروع لربط شبكات الكهرباء للمناطق الاربع في المملكة.

واضاف انه تم بالفعل ربط المنطقتين الشرقية والوسطى من خلال خط مزدوج بقدرة 1800 ميغاوات وان هذا الخط يستخدم على نطاق واسع في الصيف.

ومضى الوزير يقول ان ما تبقى من المشروع هو الربط بين المنطقتين الوسطى والغربية وبين المنطقتين الغربية والجنوبية.

واضاف يماني حيدنا تعزيز الربط بين القصيم والرياض وسوف نربط القصيم بعد ذلك بالمنطقة الغربية».

واوضح انه يجري دراسة مشروعين رئيسيين للكهرباء أحدهما محطة طاقتها 1750 ميغاوات في الشعيبة بالمنطقة الجنوبية ومحطة طاقتها 1000 ميجاوات في شقيق بالمنطقة الغربية.

ولم يذكر تفاصيل. لكن مسؤولين سعوديين قالوا في وقت سابق ان محطة الشعيبة ستكون واحدة من أوائل المشروعات التي تقام في المملكة على أساس نظام البناء والتشغيل ثم نقل الملكية (بي. او. تي). وتقدر مصادر صناعية ان المحطة ستتكلف نحو ملياري دولار.

وقال يماني انه يتوقع ان تزداد الكهرباء التي يتم توليدها في البلاد بمعدل 2000 ميغاوات سنويا خلال ربع القرن المقبل. واضاف ان ذلك سيحتاج الى استثمارات ضخمة تبلغ 17 مليار ريال (4.53 مليار دولار) سنويا منها تسعة مليارات لمشروعات التوليد وخمسة مليارات للنقل وثلاثة مليارات للتوزيع.

ومضى يقول ان المستقبل واعد وان الطلب على الكهرباء في المملكة يتزايد. وأوضح ان هناك 150 مصنعا تنتج المعدات الكهربائية في البلاد تبلغ استثماراتها الاجمالية خمسة مليارات ريال. وقال حمد عبد الله الزامل رئيس غرف التجارة والصناعة في المنطقة الشرقية في المؤتمر ان السعودية انفقت 30 مليار ريال على مشروعات الكهرباء. وأضاف متقدو تكاليف خطة الكهرباء طويلة الاجل للاعوام الخمسة والعشرين المقبلة بنحو 438 مليار ريال».

وقال فهيد فهد الشريف رئيس الشركة السعودية الموحدة للكهرباء للمنطقة الشرقية ان السعودية تدرس خطة لاعادة هيكلة قطاع الكهرباء تشمل السماح للقطاع الخاص ببناء محطات الكهرباء وتشغيلها.

وكان يماني قال ان بلاده تعتزم تقسيم قطاع الكهرباء الى قطاعات للتوليد والنقل والتوزيع. وسيبدأ القطاع الخاص يتولى عمليات توليد الكهرباء أما قطاعا النقل التوزيع فسيظلان تحت سيطرة الحكومة.

واضطرت الرياض بسبب انخفاض أسعار النفط وعجز الميزانية الى الاتجاه للقطاع الخاص لتمويل مشروعات البنية الاساسية.

على صعيد آخر تتوقع الشركة السعودية الموحدة للكهرباء للمنطقة الشرقية عائدات تشغيل قيمتها 2.66 مليار ريال (709 ملايين دولار) في السنة الهجرية الجديدة التي بدأت الشهر الماضي.

وقالت النشرة الشهرية للشركة التي حصلت رويترز على نسخة منها امس الاربعاء ان العائدات المتوقعة ستزيد عن السنة السابقة بمقدار 94 مليون ريال.

وذكرت الشركة وهي احدى اربع شركات رئيسية للكهرباء في السعودية ان عائدات التشغيل في الاشهر التسعة حتى نهاية كانون الثاني (يناير) 1998 بلغت 2.22 مليار ريال مقارنة مع 2.16 مليار ريال في الفترة نفسها قبل عام.

وافادت ايضا بانها منيت بخسائر صافية في فترة الاشهر التسعة بلغت 190.6 مليون ريال مقارنة مع خسائر قيمتها 145.9 مليون ريال قبل عام.

وقالت الشركة ان الحد الاقصى للطلب على الكهرباء اثناء الصيف من المتوقع ان يزيد الى 6735 ميغاوات في عام 1998 بزيادة اربعة في المئة عن المستوى المسجل في عام 1997 والبالغ 6498 ميغاوات.

ومن المتوقع ان تصل طاقة الشركة لتوليد الكهرباء الى 8799 ميغاوات. ولم تذكر ارقاما للمقارنة.

الدولار يساوي 3.75 ريال سعودي.

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الأمير سعود الفيصل يزور طهران 26 مايو ويوقع اتفاقية للتعاون المشترك

الرياض: من حاسن البنيان

يبدأ الأمير سعود الفيصل وزير الخارجية السعودي زيارة رسمية لإيران، يومي 26 و27 مايو (ايار) الحالي تلبية لدعوة وزير الخارجية الإيراني الدكتور كمال خرازي، الذي زار الرياض يوم 14 مارس (اذار) الماضي.

وأفادت المصادر ان الأمير سعود الفيصل وخرازي سيوقعان خلال الزيارة اتفاقية للتعاون المشترك بين البلدين، تشمل الجوانب الاقتصادية والتجارية والاستثمارية، والعلمية والفنية والثقافية، وكذلك مجال الرياضة والشباب.

كما سيتفق الوزيران على تسمية اعضاء ومواعيد اجتماعات اول لجنة مشتركة للتعاون السياسي والاقتصادي والتجاري بين البلدين.

وقال السفير الإيراني في الرياض محمد رضا نوري لـ«الشرق الأوسط» امس، ان «الأوساط السياسية والشعبية الإيرانية تبدي ترحيبها بزيارة الأمير سعود الفيصل، الذي سيلتقي كبار المسؤولين الإيرانيين ويعقد جولة مباحثات مهمة مع الوزير الإيراني الدكتور كمال خرازي، تستهدف الخير، وتعمل على تقوية الثقة المتبادلة، وتوسيع آفاق مستقبل التعاون، الذي سيسهل مد جسور الثقة بين البلدين، وخدمة المصالح المشتركة».

واشار الى ان «هذه الزيارة ستنعكس آثارها الايجابية، ليس على البلدين فحسب، وانما على مستقبل الحفاظ على امن واستقرار المنطقة، وتمكين العالم الاسلامي من مواجهة التحديات والمخاطر التي تمر به».

وقال نوري ان «توقيع اتفاقية للتعاون المشترك بين الجانبين، سيسهم في تعزيز وتعميق اواصر المودة والاخاء بين البلدين المسلمين الجارين».

واضاف قوله ان «العلاقات السعودية - الايرانية من حسن الحظ اصبحت تمضي قدما من الحسن الى الاحسن، وهي دخلت مرحلة تاريخية جديدة، تبعث على الأمل وتبشر بالخير للجميع». واستطرد قائلا ان «القيادتين في البلدين لديهما رغبة جادة وحرص اكيد على توطيد وتوثيق اواصر المودة، لتطوير التعاون المستمر، مما سيرسخ اجواء النوايا الطيبة والثقة المتبادلة بين الجانبين».

واوضح انه في ضوء هذه الاجواء، جاء تأكيد قائد الثورة الإيرانية باننا شهدنا العام الحالي حجا جيدا ومرضيا، بفضل العلاقات الطيبة السائدة بين البلدين، فمنذ ان قرر البلدان تطوير وتحسين علاقاتهما، ونحن نشهد اجواء من الهدوء والاستقرار تسود منطقتنا الحساسة والاستراتيجية، مما يثلج قلوب جميع شعوب المنطقة، والكل يشعر بالارتياح والاطمئنان، لأن ذلك يعمق الشعور بالأخوة الاسلامية، ويبرز الاحترام المتبادل والوعي بالمصالح المشتركة».

واضاف السفير نوري قوله ان «تبادل مثل هذه الزيارات بين كبار المسؤولين في البلدين، وعلى مستوى الوفود، سيعمل على مزيد من التقارب في المواقف ووجهات النظر تجاه القضايا الاسلامية والاقليمية والدولية».

واشار الى ان «اللقاءات المهمة التي ستشهدها هذه الزيارة، ستساهم في تقريب القلوب وتوحيد مواقف بلدين لهما وزنهما ومكانتهما واهميتهما وثقلهما في العالم الاسلامي. ومن المقرر ان يرافق الأمير سعود الفيصل في هذه الزيارة وفد رفيع المستوى يضم السفير عبد اللطيف ميمني السفير السعودي في طهران، والسفير حمد الفارس مدير عام مكتب الوزير، والسفير هشام مرزوقي السكرتير الخاص، والسفير الدكتور يوسف السعدون وكيل الوزارة المساعد للشؤون الاقتصادية.

يماني: رفع طاقة التوليد الكهربائي في السعودية يحتاج الى استثمار 16 مليار ريال سنويا

الدمام: من وليد بوعلي

اكد الدكتور هاشم عبدالله يماني وزير الصناعة والكهرباء بالسعودية ان الطلب على الطاقة الكهربائية في نمو مستمر، وبالتالي فان متطلبات قطاع الكهرباء من مرافق ومعدات التوليد والنقل والتحويل وشبكات التوزيع والتحكم في ازدياد، ففي السعودية وحدها يتوقع زيادة قدرة التوليد بمعدل 2000 ميجاواط سنويا للخمس وعشرين سنة القادمة وهذا يتطلب استثمارات كبيرة في تطور النظام الكهربائي بمعدل 17 مليار ريال سنويا منها حوالي 9 مليارات في مجال التوليد و5 مليارات في مجال النقل و3 مليارات في مجال التوزيع.

واضاف وزير الصناعة في كلمته التي القاها في ندوة «توطين الصناعات الكهربائية» بغرفة الشرقية يوم امس بانه في حالة استثمار دول مجلس التعاون لتلك المبالغ الكبيرة في تلك الفترة فانه يجب اتخاذ القرار التنموي الصائب للدخول بقوة في الصناعات الكهربائية والتعاون مع الشركات التي تملك التقنية لتوطينها في دول المجلس. واشار الى ان هناك وسائل تمكن دول المجلس من توطين الصناعة الكهربائية منها دعم البحوث العلمية بالجامعات ومؤسسات البحث المساندة لهذه الصناعة في المجالات المتجددة بجانب تدريب الكوادر الوطنية في هذا المجال حيث ان الاقتناع بأهمية هذه الصناعة والبحوث والتدريب في هذا المجال مع الدعم الفعلي والمعنوي على المدى الرسمي الطويل لهما سيجعل الصناعات الكهربائية صناعات قوية تنافسيا على المستوى العالمي.

ونوه الدكتور يماني بالنقلة النوعية التي تمت في قمة الكويت حين اتخذ القرار باعتماد الخطوات التنفيذية للربط الكهربائي بين دول مجلس التعاون. واكد ان للمشروع تاثيره الايجابي على الصناعات الكهربائية في دول المجلس بل لعله يتواءم ويتناغم مع حالة الصناعة في الوقت الراهن. ويمكن فهم مشروع الربط الكهربائي كمشروع بحجم الحاجة لمرافق التوليد وبعظم الحاجة لمرافق النقل، ودول المجلس اقدر على التصنيع في الوقت الراهن في مجال النقل عنه في مجال التوليد.

واكد على اهمية عقد الندوة خاصة ان الصناعات الكهربائية صناعة مفصلية بمعنى ان الدول التي تنقلها وتدرب كوادرها فيها تكون قد هيأت الكوادر لاحتياجات الصناعات الاخرى فالصناعات الكهربائية تكاد تعطي جزءا كبيرا من التقنيات المستخدمة في صناعات اخرى، لذلك فالصناعات الكهربائية مرشحة لتكون احدى الصناعات الاساسية لتقدم دول المجلس نفسها.

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الأمير سلمان بن عبد العزيز في لقائه برجال الأعمال في الرياض:

السعودية التزمت حرية حركة المال والتجارة

إبان حرب الخليج رغم ما حدث من سحوبات

الرياض من عدنان جابر

وضح الأمير سلمان بن عبد العزيز أمير منطقة الرياض ثوابت العمل الاقتصادي أمس بقوله ان السعودية التزمت مبادئ حرية حركة الأموال إبان حرب الخليج رغم الارتباك الذي عاشه السوق في بادئ الأمر من جراء التحويلات والسحب من البنوك في إشارة قوية الى ان سياسة حرية التجارة والاقتصاد في السعودية لا يمكن التنازل عنها. وقال الأمير أمام حشد ضم أكثر من [illegible] رجل أعمال واقتصادي ان مسؤولية تسيير دفة العمل الحر تقع على رجال الأعمال وان مواصلة هذه الأسس تقع على عاتقهم.

وأثنى الأمير سلمان على تواصل الأجيال السعودية في تأسيس الغرف التجارية مستشهدا بتجربة غرفة الرياض التي عايشها منذ انشائها على أيدي رجال وطنيين قاموا بجهد كبير قبل ان يكمل اخوانهم وابناؤهم المهمة وهم في غالبيتهم من الرجال المثقفين العارفين في كل المجالات وفي كل أصناف العمل والموجودين أمامي الآن».

وانتقل الأمير سلمان للحديث عن أهم استثمارات بلاده بالقول «ان المملكة كما تعلمون استثمرت استثمارات كبيرة وعظيمة في كل المجالات، ولكن أعود وأقول دائما ان أهم استثمار عندما هو الاستثمار في التعليم وفي الرجال. وهذا ما نراه والحمد لله، إذ نرى في الدولة، وفي كل مرافقها، وأعمالها رجالاً أكفاء أخذوا النصيب الأوفى من العلم في بلدهم أو خارج بلدهم».

وأضاف «كذلك نرى من رجال الأعمال نفس المستوى وهو ما يؤكد ان هناك تكاملاً تاماً بين الدولة وبين العمل الحر، معتبراً ان استخدام كلمة القطاع الخاص ليست محددة لديه دائماً، لأن مجتمع المملكة متماسك، كما ان النظام لا يتغير، لأنه أساسي، حيث ان النظام الحر الموجود في البلاد مقرر في كتاب الله وسنة رسوله، وهو ما يعني - طبقاً لما ذكره الأمير سلمان «نظاماً لا تبديل فيه مثل بعض التنظيمات الأخرى».

وأكد أمير الرياض أمس على مسؤولية الدولة في المحافظة على رأس المال وصيانته، والمحافظة عليه وتوفير فرص العمل، اضافة الى توفير الأمن والطمأنينة لرأس المال الوطني قبل كل شيء آخر، واستشهد في ذلك بما حدث إبان حرب الخليج عندما تقرر عقد اجتماع رسمي في جدة برئاسة الأمير سلطان بن عبد العزيز للنظر في الموضوعات الخاصة بالتحويلات النقدية الخارجية، والتصدير، وغيرها من الأمور الاقتصادية التي صاحبت هذه الأزمة، وأدت الى ارباك السوق في بداية الأمر عندما ارتفعت سحوبات الودائع من البنوك والتحويل للخارج.

وقال الأمير سلمان: «كنت ضمن المجموعة المكلفة بدراسة هذا الموضوع والمشكلة من بعض الأمراء والوزراء والمسؤولين، وكان توجه خادم الحرمين الشريفين الملك فهد بن عبد العزيز حينها يؤكد على عدم الرغبة في أي تدخل حكومي في العمل الحر، ودار النقاش، وتقرر في ذلك الوقت عدم تدخل الدولة وترك الوضع الاقتصادي والمالي، والتجارة حرة كما كانت، واعتمد القرار من قبل خادم الحرمين الشريفين، رغم ان بعض رؤوس الأموال بدأت تتسلل، وحدث نوع من ارتباك السوق في أول الأمر من التحويلات والسحب من البنوك والتحويل للخارج، إلا ان بعضهم أخذ نقوده، ثم أعادها مرة أخرى، وبعضهم أعادها بعد أيام، وبعضهم أعادها بعدما شاهد الوضع والحمد لله طبيعياً، وكما تذكرون فان الأسعار أيضاً لم يحدث عليها ارتفاع وأصبح السوق يحكم نفسه، والدولة لم تتدخل، وهنا أقول ان الأوضاع ما زالت طبيعية».

وانتقل الأمير سلمان للحديث عن فرص الاستثمار الواسعة في السعودية، مشيراً الى ان المجال مفتوح لتعديل الكثير من الأنظمة التي يمكن ان ترفع حجم الاستثمار في البلاد، وداعياً في الوقت نفسه رجال الأعمال الى طرح جميع الآراء التي يمكن ان تخدم المصلحة العامة، ورفعها الى الجهات المسؤولة.

ولفت الأمير سلمان النظر الى رغبة الكثير من رجال الأعمال في الدول الأخرى للتعامل مع المملكة لأسباب عدة من أبرزها توفير فرص الأمن والاستقرار، وفرص الاستثمار الكبيرة والمتاحة، ووجود رجال أعمال سعوديين يمكن التعاون معهم على أسس ثابتة.

وشرح أمير الرياض ما دار خلال لقاءاته الأخيرة مع رجال الأعمال اليابانيين حول الاستثمار في المملكة، بقوله: «قلت لهم بكل صراحة نحن لا نطلب مساعدات من أحد، بل ندعوكم لتستفيدوا ونستفيد... عليكم بالرجال الأكفاء من رجال الأعمال السعوديين اتركوا تجار الصدفة، استثمروا مع الرجال الذين يفيدونكم ويفيدون وطنكم».

وتابع قوله: «كل انسان لديه طموح، وكل انسان يرغب ان يتقدم في مجال العمل، ولكن يجب ان يكون ذلك على أسس ثابتة حتى لا يضر نفسه، ويضر اقتصاد وطنه، ويضر مواطنيه، ان الشيء المبني على أسس سليمة هو ما نريده».

وعبر الأمير سلمان عن اعتزازه بوجود رجال أعمال سعوديين يتمتعون بمستوى مرتفع من التفكير والعمل والخبرة، مما يعزز من جاذبية الاستثمار المحلي خاصة وانه لا يوجد أي تقييد للاستثمارات، وعوائدها التي لا يمكن ان تتدخل الدولة فيها أو تمنعها عن المستثمر كما يحدث في بعض الدول التي قيدت الاستثمار والتنمية، وكانت النتيجة عكسية.

وضرب الأمير سلمان مثلاً على ذلك بالأحداث التي جرت في العام الهجري 1377 عندما فرضت القيود على التحويل، وعلى أسعار صرف الدولار الأميركي، وهو ما نتج عنه ظهور السوق السوداء التي وضعت أسعاراً مضاعفة للسعر الرسمي، وتطور الأمر كما يقول الأمير سلمان الى درجة أصبحت العملة تؤخذ من الدولة بالسعر الرسمي، ثم تباع في السوق السوداء.

وتابع أمير الرياض «نحن في دولتنا نريد ان يكون الناس أحراراً في أموالهم وأعمالهم، اعمل واستفد وافد وطنك، هذا هو المبدأ الحقيقي الذي تسير عليه الدولة، وهذا هو الجاري الآن، واذا كان هناك قصور في بعض الأنظمة أو الترتيبات سواء من الدولة أو القطاع الخاص فالمجالس مفتوحة للبحث»، معتبراً ان وجود الوزراء المسؤولين في مثل هذا اللقاء دليل على تجاوب الدولة مع مواطنيها.

وعبر الأمير سلمان عن فخره بروح الأخوة بين المسؤول والمواطن، مشيراً الى انعدام الفوارق، والحساسية في هذا الأمر، إذ لا يوجد شخص يعلو بمنصبه على انسان آخر، لأن المنصب أو المال أو الجاه يعتبر من الأشياء البراقة، ويبقى الانسان كانسان».

وتسلم الأمير سلمان أمس ملفاً كاملاً يتضمن مقترحات القطاع الخاص في الرياض، وأوضح عبد الرحمن الجريسي ان الملف يحوي بعض الدراسات التي يود رجال الأعمال تقديمها للأمير الذي اعتاد ان يتبناها، ويطرحها على جميع الجهات المسؤولة، للحصول على الدعم والمساندة في الأمور التي تؤدي الى تفعيل دور رجال الأعمال والاقتصاديين في المملكة.

وعبر الجريسي في كلمة

القاها خلال اللقاء عن اعتزاز رجال الأعمال بالخطوات التي اتخذتها الحكومة السعودية من اجل تفعيل اعمال القطاع الخاص، ومن ابرزها التخصيص، الذي تم تنفيذه في الموانئ السعودية عبر اسناد جميع اعمال التشغيل والصيانة وادارة الأرصفة ومعدات الموانئ على القطاع الخاص لادارتها باسلوب تجاري، اضافة الى تحويل مرفق الاتصالات بمختلف مكوناته وتجهيزاته الى شركة سعودية تدار على أسس تجارية سليمة.

من جهته اعتبر أسامة جعفر فقيه وزير التجارة السعودي ان اللقاء حمل دلالات كبيرة، وأكد على التواصل والتلاحم بين القيادة ومختلف المواطنين ومختلف انشطتهم ومساهماتهم لدفع عجلة التنمية في المملكة.

وقال فقيه في تصريحات ادلى بها عقب اللقاء، ان حديث الأمير سلمان لرجال الأعمال هذا المساء كان حديثاً من القلب ويعبر عن الثوابت التي تقوم عليها ركائز هذا الكيان الكبير في السعودية، وتاكيد على الحرية المطلقة لرجال الأعمال في ممارسة انشطتهم، وهي امور ليست مصطنعة، بل أسس ثابتة في الشريعة السمحاء التي كفلت حرية التملك، والتصرف، وحرية العمل.

واشار فقيه الى ان هذه الأمور مقبولة ومصونة بحكم قواعد الشريعة الاسلامية، إذ تعطي مزيداً من الاطمئنان لرجل الأعمال السعودي، وللمستثمر الأجنبي، لأن التعامل في السعودية يقوم على اسس راسخة دون قلق، خاصة وان التاريخ الطويل للمملكة يثبت ويؤكد ذلك، إذ في احلك الظروف لم تلجأ الدولة الى تبديل نهجها، بل تمسكت بالأسس الراسخة لسياستها الاقتصادية وسياستها التجارية، وكفلت لكل مواطن مخلص وصالح وينتمي الى هذا البلد ان يقوم بمبادراته ويصرف شؤونه وماله بكل حرية، وبكل ما تمليه عليه متطلبات العمل الحر.

الحياة
العربية
الخميس ١٤ ايار (مايو) ١٩٩٨ الموافق ١٨ محرم ١٤١٩هـ/ العدد ١٢٨٥٤
AL HAYAT THURSDAY 14, MAY, 1998 ISSUE NO 12854

تعيين الأمير عبدالعزيز بن فهد وزير دولة

● جدة - «الحياة» - عيّن خادم الحرمين الشريفين الملك فهد بن عبدالعزيز، بأمر ملكي، الأمير عبدالعزيز بن فهد بن عبدالعزيز، وزيراً للدولة عضواً في مجلس الوزراء. وجاء التعيين بناء على ترشيح ولي العهد السعودي نائب رئيس مجلس الوزراء رئيس الحرس الوطني الأمير عبدالله بن عبدالعزيز، الأمير عبدالعزيز للمنصب الجديد.

والأمير عبدالعزيز هو أصغر أبناء الملك فهد، وكان يشغل منصب مستشار في الديوان الملكي برتبة وزير منذ ٢٧ كانون الأول (ديسمبر) ١٩٩٤.

السعودية: الديوان الملكي ينعى الأميرة العنود بنت عبدالعزيز

● جدة - واس - نعى الديوان الملكي السعودي أمس الأميرة العنود بنت عبدالعزيز، احدى اخوات خادم الحرمين الشريفين الملك فهد بن عبدالعزيز التي توفيت اول من أمس عن عمر يناهز ٨١ سنة بعد معاناة مع المرض. ودفن جثمانها أمس في مقبرة العود في الرياض.

رسالة من بلير للأمير عبدالله

● جدة - واس - تسلم ولي العهد السعودي نائب رئيس مجلس الوزراء رئيس الحرس الوطني الأمير عبدالله بن عبدالعزيز رسالة من رئيس الوزراء البريطاني توني بلير سلمها سفير بريطانيا لدى المملكة اندرو غرين الذي استقبله الأمير عبدالله امس.

وزير الصناعة والكهرباء في ندوة "توطين الصناعات الكهربائية"

السعودية: الزيادة المتوقعة في توليد الكهرباء تتطلب استثمار ١٧ بليون ريال سنوياً

□ الرياض - سعد الاسمري

■ قال وزير الصناعة والكهرباء السعودي الدكتور هاشم بن عبدالله يماني ان الزيادة المتوقعة في قدرة توليد الطاقة الكهربائية في السعودية، بمعدل ٢٠٠٠ ميغاواط سنويا خلال الـ ٢٥ سنة المقبلة، ستتطلب استثمارات كبيرة في تطوير النظام الكهربائي تبلغ نحو ١٧ بليون ريال سنويا منها تسعة بلايين ريال في مجال التوليد وخمسة بلايين في مجال النقل وثلاثة بلايين في مجال التوزيع.

وكان يماني يتحدث في افتتاح ندوة «توطين الصناعات الكهربائية» التي نظمتها اللجنة الاقليمية لنظم الطاقة الكهربائية لدول الخليج العربية (سيجري الخليج) بالتعاون مع شركة «كهرباء الشرقية» السعودية والغرفة التجارية الصناعية في المنطقة الشرقية.

واضاف يماني ان عدد المصانع المتخصصة في قطاع الكهرباء في السعودية يبلغ ١٥٠ مصنعاً تقدر استثماراتها بنحو خمسة بلايين ريال (١.٣٣ بليون دولار).

وتناقش الندوة مجموعة من اوراق العمل منها «دور كهرباء الشرقية في توطين الصناعات الكهربائية» و«دور ارامكو السعودية في توطين الصناعات الكهربائية» إضافة إلى خمس وراق أخرى سيقدمها عدد من الشركات الوطنية المتخصصة في مجال الكهرباء. وسيقام على هامش الندوة معرض متخصص في الكهرباء.

من ناحية ثانية، توقع مجلس إدارة شركة «كهرباء الشرقية» في السعودية ان تبلغ ايرادات بيع الطاقة هذه السنة نحو ٢.٧ بليون ريال (٧٠٩.٣ مليون دولار) بزيادة قدرها ٩٤ مليون ريال (٢٥ مليون دولار) على العام الماضي. وتوقع ان تصل مبيعات الطاقة إلى ٤٥.٤ الف جيغاواط/ ساعة بزيادة نسبة ٣.٧ في المئة على العام الماضي. واشارت الخطة التشغيلية للشركة ان انتاج الطاقة الكهربائية من محطات كهرباء الشرقية والمؤسسة العامة لتحلية المياه المالحة في السنة الجارية ستبلغ نحو ٤٩.١ الف جيغاواط/ ساعة لتلبية حاجات المشتركين في المنطقتين الوسطى والشرقية من السعودية.

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ABC NEWS Interview of Usama Bin Laden
Tape date: May 28, 1998
Air date: June 10, 1998

QUESTION: Mr. Bin Laden, to Americans you are an interesting figure. A man who comes from a background of wealth and comfort who ended up fighting on the front lines. Many Americans would think that's unusual.

BIN LADEN: Thanks be to Allah. It is hard for one to understand if the person does not understand Islam. In our religion we believe that Allah created us to worship Him. Allah is the one who created us and blessed us with this religion, orders us to carry out the holy struggle "jihad" to raise the word of Allah above the words of the unbelievers. We believe this a form of worship we must follow despite our financial ability. This is a response to Westerner and secularists in the Arab world that claim the reason for the awakening and the return to Islam is economic difficulties. This is untrue, in fact the return of the people to Islam is a blessing from Allah, and their return is a need for Allah.

This is not a strange issue, during the days of "Jihad" thousands of young men who were well off financially left the Arabian Peninsula and other areas and joined the fighting, hundreds of them were killed in Afghanistan, Bosnia and Chechnya. We pray Allah grant them martyr's status.

QUESTION: You have been described as the "world's most wanted man." There is word that the American government intends to put a price on your head in the millions for your capture. Do you think that they will do that? Does it worry you?

BIN LADEN: Praise be to Allah. It does not worry us what the Americans think. What worries us is pleasing Allah. The Americans impose themselves on he who believes in his religion, and his rights, or his wealth. They accuse our children in Palestine of being terrorists. Those children that have no weapon and have not even reached maturity. At the same time they defend a country with its airplanes and tanks, the state of the Jews, that has a policy to destroy the future of these children. Clinton stands after Qana and defends the horrible massacre that severed the heads of children and killed about 100 persons. Clinton stands and claims Israel has a justification which is to defend itself. We do not worry about America's opinion, and we are not scared of them or the fact that they place prices on our heads. We as Muslims, believe in that our fate is set, if the whole world decided to get together and kill us before our time has come we will not die, also livelihood is set, no matter how much pressure America places on the regime in Riyadh to freeze our assets and to prevent people from contributing to this great cause we rely on Allah and He will be the one to judge us.

QUESTION: You have said if the Americans are so brave they will come and arrest me. Do you think that is something my country will try?

BIN LADEN: Despite if they try or not, we have seen particularly during the last decade the decline of the American government and the weakness of the American soldier who is ready to wage cold wars and unprepared to fight long wars. This was proven in Beirut when the Marines

fled after two explosions, and also after the two explosions in Aden they ran in less than 24 hours, this was also repeated in Somalia. So in any given situation we are prepared and we rely on Allah and He will be the one to judge us.

QUESTION: Mr. Bin Laden, you have issued a fatwah calling on Muslims to kill Americans where they can when they can. Is that directed at all Americans, just American military, just Americans in Saudi Arabia?

BIN LADEN: Praise be to Allah. As we mentioned before, Allah ordered us in this religion to uphold the truth to purify Muslim land of all non-believers, and especially the Arabian Peninsula where the Ka'ba is. After World War II the Americans became more aggressive and oppressive, forcing itself on others, especially in the Muslim world.

We are surprised this question is coming from Americans. Each action will solicit a similar reaction. Reciprocal punishment is required to keep your evil away from Muslims, Muslim children and women. American history does not distinguish between civilians and military, and not even women and children. They are the ones who used the bombs against Nagasaki and Hiroshima. Can these bombs distinguish between infants, children, women and military? American does not have a religion that will prevent it from destroying all people.

Your situation with Muslims in Palestine is shameful and disgraceful. If there is any shame left in America. Sabra and Shatilla massacre, was a symbol of cooperation between Zionist and Christian forces against Muslims. Houses were demolished over the heads of children also by testimony of relief workers in Iraq, the Americans led sanctions that resulted in the death of over one million Iraqi children for no reason. All of this is done in the name of American interests. The only reason is your intransigence and your desire to take other people's money and to steal Muslims' oil under misguided terms, saying that it is part of America's vital interests. We believe that the biggest thieves in the world today is America, and the biggest terrorists are the Americans. The only way for us to fend off these assaults is use similar means.

We do not differentiate between those dressed in military uniforms and civilians; they are all targets in this fatwah. Especially since American officials have stated after the Khobar bombing that there was a lack of information and all American civilians were asked to gather information on Muslims and observant Muslim youth and to convey to the security section in the embassy. The fatwah is general and includes all that share or take part in killing of Muslims, assaulting holy places, or those who help the Jews occupy Muslim land.

QUESTION: Ramzi Yousef was a follower, a follower of yours. Do you remember him? Did you know him?

Ramzi Yousef, after the World Trade Center bombing became a well known Muslim personality,

and all Muslims know him. Unfortunately, I did not know him before the incident.

I remember him as a Muslim who defended Islam from American aggression on Muslim lands. He took this effort to let the Americans know that their government assaults Muslims to insure Israeli interests, to insure Jews.

America will see many youths that will follow Ramzi Yousef.

QUESTION: Is it true that when Ramzi Yousef was captured he was in a guesthouse that you were paying for?

BIN LADEN: What was broadcasted in the news and what we learned is that he was captured through American intervention in Pakistan, a big misfortune, from one of the hotels.

QUESTION: Wali Khan Amin Shah, he was captured in Manila. American authorities believed he was working for you, funded by you, setting up training camps there and that part of his plan was to plan out the assassination or attempted assassination of President Clinton during his trip to Manila.

BIN LADEN: Praise be to Allah. Wali Khan is a Muslim youth, in Afghanistan he is nicknamed the Lion. Azmarai in Afghani. He was one of our best Muslim youths in Afghanistan. We were good friends. We fought together in the same trench against the Russians until Allah sent them away in humiliating defeat. You mentioned that he works for me, we do not have what it is called working for someone. We all work for Allah and await his reward. And regarding your mention of his attempt to assassinate President Clinton, it is not surprising. I did not know about it, but it is not surprising.

As I said, every action solicits a similar reaction. What do you expect from those whom Clinton killed and assaulted and attacked their children and mothers to do? What does he expect but equal treatment which is killing? This is not a surprising matter.

QUESTION: Federal authorities in the United States are still investigating their suspicion that you ordered and funded the attacks on the United States military in el Khobar and Riyadh.

BIN LADEN: We roused the people, the Muslims, and carried fatwahs from our Ulima after the Saudi government imprisoned them to placate the American government, and the most prominent are Sheikh Salman ben Fahd al-Odeh, Safad ben Abdel Rahman el Hawali, Sheikh Ibrahim al-Dubayyan, Sheikh Yehya Yehya and Sheikh Said ben Sair. They are all our brothers and we pray for them.

So we carried out these fatwahs and incited the people to eject this enemy from the Holy Land,

some of the people listened, from among them, Khaled el-Sa'eed, Abdel Azziz el Me'them, Hamood al Hajery and Misleh el Samray. We pray Allah grant them martyr's status. They have raised the head of the Muslim nation high, and washed away some of the dishonor we had to bear by the Saudi government's collaboration with the American government in the land of Allah and in the land of the two holy mosques.

We look at these young men as great heroes and Mujahedeen who followed the steps of the prophet peace be upon Him. We called and they answered, we pray to Allah to accept them and bless their parents with patience.

QUESTION: You have been painted in America as a terrorist leader, to your followers you are a hero, how do you see yourself?

BIN LADEN: As I said before, we do not worry about what America says. We look at ourselves and our brethren as worshipers of Allah who created us to worship Him and follow His books and prophets, peace be upon Him, I am one of Allah's worshipers, I worship Allah, as he ordered which includes carrying out the Jihad to raise Allah's word and evict the Americans from all Muslim lands all over.

QUESTION: No one expected the Mujahedeen to beat the Russians in Afghanistan. That came as a surprise to everyone. What do you see as the future for American involvement in the Mid-East and taking on groups like yours?

BIN LADEN: NATO that America created, we know it spent $455 billion American dollars in improving weaponry to protect Europe and America from Russia. And they did not fire a single shot. Allah stood with the Muslims, the Afghani Mujahedeen and those who fought with them from other Muslim countries. We fought against the Russians and the Soviet Union, until, not to say we defeated them, but Allah defeated them and then became non existent. There is a lesson to learn from this for he who wishes to learn. The Soviet Union entered in the last week of 1979, in December, and with Allah's help their flag was folded December 25 a few years later and thrown in the trash, and there was nothing left to call Soviet Union. We are sure of Allah's victory and our victory against the Americans and the Jews as promised by the prophet peace be upon Him "Judgement day shall not come until the Muslims fight the Jews, where the Jew will hide behind trees and stones, and the tree and the stone will speak and say, Muslim, Allah's worshiper, behind me a Jew come and kill him," except for al-Gharaad tree, which is a Jewish plant."

We are sure of our victory. Our battle with the Americans is larger than our battle with the Russians. The Americans made a very stupid mistake that no one has made before. They attacked the greatest Muslim symbol the Kibla of 1,200 Million people. The reaction was very encouraging by all classes especially the Muslim scholars and the youth.

We predict a black day for America and the end of the United States as united states, and will be separate states, and they will retreat from our land and collect the bodies of its sons back to America. Allah willing.

QUESTION: What so you see as the future of the Saudi Royal family and their involvement with America and the U.S. military?

BIN LADEN: History has an answer to your question. Any government that sells its people's interests and betrays its people and takes actions that remove it from the Muslim nation will not succeed.

We predict that the Riyadh leader and those with him that stood with the Jews and Christians and violated Al-Haramain (the holy shrines), by Jews and Christians with American identities or otherwise. This is a grave contradiction to Islam which eventually removes from the Islamic nation.

We predict that like the Iranian Royal family, the Shah, they will disperse and disappear. After Allah gave them property on the most sacred land and gave them wealth that is unheard of before from oil, and still they sinned and did not value Allah's gift. We predict destruction and dispersal. They will not find shelter on earth after being oppressive and despotic and taking part in the disasters brought against the Muslim nation, especially what happens to the Muslim people of Iraq.

The prophet, peace be upon Him, in his Hadith said, "A woman entered hell because of a cat. She did not feed it and trapped it from finding food on its own." She is going to hell for trapping a cat to death, what to say to those who agreed and gave reason for the hundreds of thousands of troops to blockade millions of Muslims in Iraq.

QUESTION: Do you think the Saudi government wants the American military to stay?

BIN LADEN: This does not make a difference, since American repression, boastfulness and greed still exist. They came by the approval of government. It does not make a difference if the government wants you to stay or leave because you will not leave by their words. You will leave when the youth send you the wooden boxes and the coffins and you will carry in it the corpses of American troops and the American civilians. This is when you will leave. The decision makers beyond taking you out are the Muslim masses in the Muslim world who defending the Muslim lands. Allah willing we will win.

QUESTION: Describe the situation when your men took on the American forces in Somalia? Were you there?

BIN LADEN: After Allah honored us with victory in Afghanistan and justice prevailed and the killings of those who slaughtered millions of Muslims in the Muslim republics. It cleared from Muslim minds the myth of superpowers. The youth ceased from seeing America as a superpower. After leaving Afghanistan they headed for Somalia and prepared for a long battle, thinking that the Americans are like the Russians, but they were surprised when the Americans entered with thirty thousand troops and collected more troops from the world, five thousand from Pakistan, five thousand from India, five thousand from Bangladesh, and also from Egypt, Senegal and others like Saudi.

The youth were surprised at the low morale of the American soldiers and realized more than before that the American soldier is a paper tiger. And after a few blows he ran in defeat, and America forgot about all the hoopla and media propaganda after leaving the gulf war and destroying infrastructure and destroying baby formula factories, all civilian factories, bridges and dams that help planting food. America presented itself as the world leader, and the leader of the new world order, and after a few blows they forgot about this title and left dragging their corpses and their shameful defeat and stopped using such titles. And the politicians in America learned that this name is larger than them and that they are not fit for it.

When this took place I was in Sudan, and this great defeat against America pleased me very much, the way it pleased all Muslims. Allah willing, the next victory will be in Hijaz and Najd, Saudi Arabia will make the Americans forget the horrors of Vietnam and Beirut.

QUESTION: Many Americans believe that fighting army to army like what happened in Afghanistan is heroic for either army, but setting off bombs killing civilians and incidents like the World Trade Center is terrorism.

BIN LADEN: They don't act accordingly to the standards he is making. After our victory in Afghanistan and defeating the Russians, the world media, lead by the American media, started a campaign against us that is still going on until today despite the fact that the Russians left in 1989, almost ten years ago, they have been carrying out this campaign accusing us of being terrorist without any action being taken by the mujahedeen against the real terrorists, the Americans. This is on one hand.

On the other hand, American policy does not admit to differentiate between civilians, military, and child, human or animal. Examples I mentioned before in Nagasaki and Hiroshima where they eliminated entire populations.

As for Muslims, the testimony of Westerners and Crusaders who have testified to the death of hundreds of thousands of our children in Iraq. And there are Qana, Sabra and Shatila, Dir Yasin and Bosnia.

The crusaders continued their slaughter of our mothers, siblings and children and America every time takes a decision to support them and prevent weapons from reaching the Muslims, leaving the Serbian butcher to slaughter Muslims.

You do not have a religion that prevents you from carrying out these actions and therefore you do not have the right to object to like treatment. Every action solicits a reaction. It is a punishment that is equally inflicted. At the same time our primary target are military and those in its employment.

Our religion forbids us to kill innocent children, women who are not combatants. However, women soldiers who place themselves in the battle trenches receive the same treatment as fighting men.

QUESTION: Is there a high council of the leaders of the different groups like yours that decide on ways and means to attack America?

BIN LADEN: After the Americans entered the Holy Land sympathy and emotions were roused in the Muslim world, more than we have seen before. A great meeting took place a few days ago in Pakistan, it was attended by 150 scholars in Pakistan the goal of the meeting is to work towards liberating the land of Al-Haramain and to coordinate efforts between Muslim masses in the area.

Also, with Allah's blessings, scholars from Afghanistan, India, and other Muslim nations, individual fatwahs were passed, but here great joint fatwahs were passed. The coordination has been expanding between general supported of this religion. From this effort, the International Islamic Front for the Jihad Against Jews and Crusaders was formed which we are members of, with other groups. It has a higher council to coordinate rousing the Nation to carry Jihad against the Jews and the crusaders and in this, matters are promising due to God's grace.

QUESTION: The American people by in large do not know the name Bin Laden, but they soon likely will. Do you have a message for the American people?

BIN LADEN: I say that the American people gave leadership to a traitorous leadership. This became very clear and especially in Clinton's government. The American government is called the American government, but we think it is an agent that represents the Israel inside America. If we look at sensitive departments in the present government like the Defense Department or the State Department, or sensitive security departments like the CIA and others we find that Jews have the first word in the American government, which is how they exploit America to carry out their plans in the world and especially the Muslim world.

The presence of Americans in the land of Al-Haramain (Saudi Arabia) supports the Jews in the prophet's Holy Land, peace be upon Him, and gives them a safe back. The American

government at the time there are millions of Americans living on the street and those living below the standard of living, and in stricken poverty, we find the American government turning towards helping Israel in occupying our land and building settlements in the prophet's Holy Land peace be upon Him.

The American government is throwing away the lives of Americans in the land of Al-Haramain (Saudi Arabia) and other places for the interests of the Jews. The Jews are a people that Allah cited in his holy book the Qura'an as those who attacked their prophets with lies and killings and attacked Mary, may peace be upon her, and accusing her of being a whore. They are a people who didn't abstain from killing God's prophets. How would they refrain from killing, raping and stealing from humans.

They believe that all humans are animals to be exploited by them, and found that the Americans are the best created beings for that use. The American government is driving America to destruction and rational people have no doubt that America will not be a superpower at the turn of the next century.

So, we tell the American people, and we tell the mothers of soldiers, and American mothers in general, if they value their lives and those of their children to find a nationalistic government that would look after their interests and not the interests of Jews.

The continuation of the repression will bring the fighting to America, like Ramzi Yousef and others. This is my message to the American people to look for a serious government that looks out for their interests and does not attack others, their lands or their money.

QUESTION: Mr. Bin Laden these are most of the questions we came with. Is there anything that I did not ask that you would like to add?

BIN LADEN: I would like to stress that we are at a close contact with Muslim masses, praise be to Allah, and the issue of liberating Holy Lands is not my personal cause, but I am just a worshiper of Allah and one of Allah's soldiers in the Muslim nation.

The reaction is increasing fast. And I am sure of our victory with Allah's help against Americans and the Jews. We see this then in the strength of the reaction, that every day the Americans delay their departure for every day they delay they will receive a new corpse from Muslim countries to America

The Saudi Arabian government captured a few months ago in Ramadan a number of missiles, which they didn't report. The missiles included anti-aircraft missiles, SAM and Stinger missiles.

Can the Saudi government explain to its people when a SAM missile is launched against a

passenger airplane with 250 soldiers abroad? Can they justify to the American public about the death of these soldiers? What the Saudi Arabian government had captured was definitely much less than what was not captured. The American government if it has anything left to hold on to it has no choice but to pull its sons from the land of Al-Haramain in particular, especially the Muslims land in general, and to refrain from supporting in any way the Israeli government and Jews who occupy our land.

We place total responsibility on the American government for any attack against Muslims and its support of regimes in our countries against the best interest of the people. We also hold them responsible for its attack on Islamic symbols, Sheikh Omar Abdel Rahman, who is considered one of the most prominent Islamic scholars who Allah gave the courage to speak the truth.

We hear that he is in a bad health condition, and he is a man beyond 60 years of age and is blind, and America treats him badly. The imprisonment of Sheikh Omar is an attack on the Islamic religion in general and the Muslim countries. We hold it completely responsible for the imprisonment of Sheikh Omar and the imprisonment of other Muslims in America.

My words are to the American journalists not to ask why we did that, but ask what had their government done that forced us to defend ourselves. They should ask why are we defending ourselves.

This is all I have to say.

QUESTION: What are you going to do - just picking up a word or two - did he mention by any chance the new fatwah that Rahman issued from jail like last week? No. Okay. I heard the name come up so it just reminded me. I was wondering if you could tell me the story of the gun behind you and how you got it. It is a kind of legend in many ways, that during the Afghan war you got it in hand to hand combat with Russians who were on a three day assault of a camp.

BIN LADEN: Praise be to Allah. We went through vicious battles with the Russians. It is enough to just say with Russians, they are known in the West for their brutality and viciousness. They used poisonous gas against us. I was personally injured by this. They used airplanes against our position, we lost many fighters, and we consider them martyrs but we were able to deter many commando attacks, unlike anything before.

QUESTION: From history: 1897, a man named Teddy Roosevelt who was a wealthy man who grew up in a privileged situation who fought on the front lines put together his own team not from the army, hand picked his own men and went into battles. You are like, the Middle East version of Teddy Roosevelt.

BIN LADEN: We are worshipers of Allah and we carry out our duties. Our duty is to call on all

nations to join the light of Islam. Our first duty is not only to preach for this religion, but also to defend those who embraced this religion.

Since we grew up, American weapons were on our heads and the heads of our children and mothers, like in Qana and others.

The Westerners have been under the impression that Muslims are butchers. They just only need to look at your brothers in Eastern Europe, Turkey and Albania to see those who embraced Islam and lived happily with it for centuries. The Western masses have fallen under the effect of Jewish media who do not broadcast on Muslims except that we are butchers, and without showing that the number of those of us who were butchered are many times.

CNN Interview of Usama Bin Laden
Tape date: March 20, 1997
Air date: May 10, 1997

QUESTION: Mr. Bin Laden, could you give us your main criticism of the Saudi royal family that is ruling Saudi Arabia today?

MR. BIN LADEN: Regarding the criticisms of the ruling regime in Saudi Arabia and the Arabian peninsula, the first one is their subordination to the US. So, our main problem is the US government while the Saudi regime is but a branch or an agent of the US. By being loyal to the US regime, the Saudi regime has committed an act against Islam. And this, based on the ruling of Shari'a (Islamic jurisprudence), casts the regime outside the religious community. Subsequently, the regime has stopped ruling people according to what God revealed, praise and glory be to Him, not to mention many other contradictory acts. When this main foundation was violated, other corrupt acts followed in every aspect of the country, the economic, the social, government services and so on.

QUESTION: Mr. Bin Laden, if the Islamic movement takes over Arabia, what kind of society will be created and will Saudi Arabia, for example, return to the laws of the Qur'an at the time of the Prophet?

BIN LADEN: We are confident, with the permission of God, Praise and Glory be to Him, that Muslims will be victorious in the Arabian peninsula and that God's religion, praise and glory be to Him, will prevail in this peninsula. It is a great pride and a big hope that the revelation unto Muhammad, Peace be upon him, will be resorted to for ruling. When we used to follow Muhammad's revelation, Peace be upon him, we were in great happiness and in great dignity, to God belong credit and praise.

QUESTION: Mr. Bin Laden, if the Islamic movement takes over Saudi Arabia, what would your attitude to the West be and will the price of oil be higher?

BIN LADEN: We are a nation and have a long history, with the grace of God, Praise and Glory be to Him. We are now in the 15th century in this great religion, the complete and comprehensive course, has clarified the dealings between one individual and another, the duties of the believer towards God, Praise and Glory be to Him, and the relationship between the Muslim country and other countries in time of peace and in time of war. If we look back at our history, we will find that there were many types of dealings between the Muslim nation and the other nations in time of peace and in time of war, including treaties and matters to do with commerce. So it is not a new thing that we need to come up with. Rather, it already, by the grace of God, exists. As for oil, it is a commodity that will be subject to the price of the market according to supply and demand. We believe that the current prices are not realistic due to the Saudi regime's association with the American Government to increase production and flooding the market that caused a sharp decrease in oil prices.

QUESTION: Mr. Bin Laden, you've declared a jihad against the United States. Can you tell us why? And is the jihad directed against the US government or the United States' troops in Arabia? What about US civilians in Arabia or the people of the United States?

BIN LADEN: We declared jihad against the US government, because the US government is unjust, criminal and tyrannical. It has committed acts that are extremely unjust, hideous and criminal whether directly or through its support of the Israeli occupation of the Prophet's Night Travel Land (Palestine). And we believe the US is directly responsible for those who were killed in Palestine, Lebanon and Iraq. The mention of the US reminds us before everything else of those innocent children who were dismembered, their heads and arms cut off in the recent explosion that took place in Qana (in Lebanon). This US government abandoned even humanitarian feelings by these hideous crimes. It transgressed all bounds and behaved in a way not witnessed before by any power or any imperialist power in the world. They should have been considerate that the qibla (Mecca) of the Muslims upheaves the emotion of the entire Muslim World. Due to its subordination to the Jews the arrogance and haughtiness of the US regime has reached, to the extent that they occupied the qibla of the Muslims (Arabia) who are more than a 1,250 million in the world today. For this and other acts of aggression and injustice, we have declared jihad against the US, because in our religion it is our duty to make jihad so that God's word is the one exalted to the heights so that we drive the Americans away from all Muslim countries. As for what you asked whether jihad is directed against US soldiers, the civilians in the land of the Two Holy Places (Saudi Arabia, Mecca and Medina) or against the civilians in America, we have focused in our declaration on striking at the soldiers in the country of The Two Holy Places. The country of the Two Holy Places has in our religion a peculiarity of its own over the other Muslim countries. In our religion, it is not permissible for any non-Muslim to stay in our country. Therefore, even though American civilians are not targeted in our plan, they must leave. We do not guarantee their safety, because we are in a society of more than a billion Muslims. A reaction might take place as a result of US government's hitting Muslim civilians and executing more than 600 thousand Muslim children in Iraq by preventing food and medicine from reaching them. So, the US is responsible for any reaction, because it has transgressed through war from military personnel to civilians. This is what we say. As for what you asked regarding the American people, they are not exonerated from responsibility, because they chose this government and voted for it despite their knowledge of its crimes in Palestine, Lebanon, Iraq and in other places and its support of its collaborating regime who filled our prisons with our best children and scholars. We ask that may God release them.

QUESTION: Mr. Bin Laden, will the end of the United States' presence in Saudi Arabia, their withdrawal, will that end your call for jihad against the United States and against the US?

BIN LADEN: The cause of the reaction must be sought and the act that has triggered this reaction must be eliminated. The reaction came as a result of the US aggressive policy towards the entire Muslim world and not just towards the Arabian peninsula. So if the cause that has

called for this act comes to an end, this act, in turn, will come to an end. So, the driving-away had against the US does not stop with its withdrawal from the Arabian peninsula, but rather it must desist from aggressive intervention against Muslims in the whole world.

QUESTION: Mr. Bin Laden, tell us about your experience during the Afghan war and what did you do during that jihad?

BIN LADEN: Praise be to God, the Cherisher and Sustainer of the worlds, that He made it possible for us to aid the Mujahidin in Afghanistan without any declaration for jihad. It was rather the news that was broadcast by radio stations that the Soviet Union invaded a Muslim country. This was a sufficient motivation for me to start to aid our brothers in Afghanistan. I have benefitted so greatly from the jihad in Afghanistan that it would have been impossible for me to gain such a benefit from any other chance and this cannot be measured by tens of years but more than that, Praise and Gratitude be to God. In spite of the Soviet power, we used to move with confidence and God conferred favors on us so that we transported heavy equipment from the country of the Two Holy Places (Arabia) estimated at hundreds of tons altogether that included bulldozers, loaders, dump trucks and equipment for digging trenches. When we saw the brutality of the Russians bombing Mujahidins' positions, by the grace of God, we dug a good number of huge tunnels and built in them some storage places and in some others we built a hospital. We also dug some roads, by the grace of God, Praise and glory be to Him, one of which you came by to us tonight. So our experience in this jihad was great, by the grace of God, praise and glory be to Him, and the most of what we benefitted from was that the myth of the super power was destroyed not only in my mind but also in the minds of all Muslims. Slumber and fatigue vanished and so was the terror which the US would use in its media by attributing itself super power status or which the Soviet Union used by attributing itself as a superpower. Today, the entire Muslim world, by the grace of God, has imbibed the faithful spirit of strength and started to interact in a good manner in order to bring an end to occupation and the Western and American influence on our countries.

QUESTION: Mr. Bin Laden, what was the significance of the Afghan war for the Islamic movement? Veterans of that war are fighting for Islamic movements and conflict from the former Soviet republics such as Chechnya to Bosnia to Algeria. Can you explain that phenomenon to us?

BIN LADEN: As I mentioned in my answer to the previous question, the effect of jihad has been great not only at the level of the Islamic movement but rather at the level of the Muslim nation in the whole world. The spirit of power, dignity and confidence has grown in our sons and brothers for this religion and the power of God, Praise and Glory be to Him. And it has become apparent even to the Islamic movement that there is no choice but return to the original spring, to this religion, to God's Book, Praise and Glory be to Him, and to the sunna of His Prophet, Peace be upon him, as understood by our predecessors, may God be pleased with them. Of this, the acme

of this religion is jihad. The nation has had a strong conviction that there is no way to obtain faithful strength but by returning to this jihad. The influence of the Afghan jihad on the Islamic world was so great and it necessitates that people should rise above many of their differences and unite their efforts against their enemy. Today, the nation is interacting well by uniting its efforts through jihad against the US which has in collaboration with the Israeli government led the ferocious campaign against the Islamic World in occupying the holy sites of the Muslims. As for the young men who participated in jihad here, their number, by the grace of God, was quite big, Praise and Gratitude be to Him, and they spread in every place in which non-believers' injustice is perpetuated against Muslims. Their going to Bosnia, Chechnya, Tajikistan and other countries is bit a fulfillment of a duty, because we believe that these states are part of the Islamic World. Therefore, any act of aggression against any of this land of a span of hand measure makes it a duty for Muslims to send a sufficient number of their sons to fight off that aggression.

QUESTION: Can you tell us now about your expulsion from Saudi Arabia and your time you spent in Sudan and your arrival here in Afghanistan?

BIN LADEN: I was, by the grace of God, Praise and Glory be to Him, in the great spot that is dear to God, Praise and Glory be to Him, al-hijaz, especially Venerable Mecca, where is God's Ancient House. However, the Saudi regime imposed on the people a life that does not appeal to the free believer. They wanted the people to eat and drink and celebrate the praise of God, but if the people wanted to encourage what is right and forbid what is wrong, they can't. Rather, the regime dismisses them from their jobs and in the event they continued to do so, they are detained in prisons. As for myself, I have rejected to live this submissive life, by God's favor, Praise and Gratitude be to Him, that is not benefitting of man let alone a believer. So, I waited for the chance until, God, Praise and Glory be to Him, has made it possible for me to leave the country of the Two Holy Places. I hope God, Praise and Glory be to Him, would confer upon me His favor to return one day when God's law rules in that country. I went to the Sudan and stayed there for about five years during which I visited Afghanistan and Pakistan to work against the Communist government in Kabul. When the Saudi government transgressed in oppressing all voices of the scholars and the voices of those who call for Islam, I found myself forced, especially after the government prevented Sheik Salman al-Awdah and Sheik Safar al-Hawali and some other scholars, to carry out a small part of my duty of enjoining what is right and forbidding what is wrong. So, I collaborated with some brothers and established a committee for offering advice and we started to publish some declarations. (The Advice and Reformation Committee). However, the Saudi regime did not like this and started to exercise pressure on the Sudanese regime. The US government, the Egyptian government and the Yemeni government also helped in doing so. They requested me explicitly from the Sudanese regime and the pressure continued. Saudi Arabia dropped all of its conditions put to the Sudanese regime in return that I be driven out of the Sudan. The US government had already taken the same stance and pulled out its diplomatic mission from Khartoum to Nairobi and put forth their condition to return only after I have left. Unfortunately, the Sudanese government was in some difficult circumstances

and there was a tendency inside the government that was inclined to reconciliation or surrender. hen, when they insisted that I should keep my mouth shut, I decided to look for a land in which I could breathe a pure, free air to perform my duty in enjoining what is right and forbidding what is wrong. I ask God, Praise and Glory be to Him, for increase in prosperity for this great land, the Land of Khurasan (Afghanistan) in order to carry on this duty. So, we implore God, Praise and Glory be to Him, that He accept (our deeds) from us and the Muslims.

QUESTION: Now, the United States government says that you are still funding military training camps here in Afghanistan for militant, Islamic fighters and that you are a sponsor of international terrorism; but others describe you as the new hero of the Arab-Islamic world. Are these accusations true? And, how do you describe yourself?

BIN LADEN: After the collapse of the Soviet Union in which the US has no mentionable role, but rather the credit goes to God, Praise and Glory be to Him, and the Mujahidin in Afghanistan, this collapse made the US more haughty and arrogant and it has started to look at itself as a Master of this world and established what it calls the new world order. It wanted to delude people that it can do whatever it wants, but it can't do this. It leveled against me and others as many accusations as it desired and wished. What you have mentioned were some of them (accusations). The US today as a result of the arrogant atmosphere has set a double standard, calling whoever goes against its injustice a terrorist. It wants to occupy our countries, steal our resources, impose on us agents to rule us based not on what God has revealed and wants us to agree on all these. If we refuse to do so, they will say you are terrorists. With a simple look at e US behaviors, we find that it judges the behavior of the poor (Palestinian) children whose country was occupied and their fathers were murdered; if they throw stones against the Jewish occupation, it says they are terrorists whereas when the Israeli pilots bombed the United Nations building in Qana, Lebanon while was full of children and women, the U.S. was not ashamed to veto any plan or project to condemn the Jews. At the time that they condemn any Muslim who calls for his right, they receive the highest top official from the Irish Republican Army (Gerry Adams) at the White House as a political leader, while woe, all woe is the Muslims if they cry out for their rights. Whenever we look, we find the US as the leader of terrorism and crime in the world. The US does not consider it a terrorist act to throw atomic bombs at nations thousands of miles away, when it would not be possible for those bombs to hit military troops only. These bombs were rather thrown at entire nations, including women, children and elderly people and up to this day the traces of those bombs remain in Japan. The US does not consider it terrorism when hundreds of thousands of our sons and brothers in Iraq died for lack of food or medicine. So, there is no base for what the US says and this saying does not affect us, because we, by the grace of God, are dependent on Him, Praise and Glory be to Him, getting help from Him against the US. As for the last part of your question, we are fulfilling a duty which God, Praise and Glory be to Him, decreed for us. We look upon those heroes, those men who undertook to kill the American occupiers in Riyadh and Khobar (Dhahran). We described those as heroes and describe them as men. They have pulled down the disgrace and submissiveness off

the forehead of their nation. We ask Allah, Praise and Glory be to Him, to accept them as artyrs.

QUESTION: Let's go to the bombings of United States troops in Riyadh and Dhahran. Why did they happen and were you and your supporters involved in these attacks?

BIN LADEN: We ask about the main reason that called for this explosion. This explosion was a reaction to a US provocation of the Muslim peoples, in which the US transgressed in its aggression until it reached the qibla of the Muslims in the whole world. So, the purpose of the two explosions is to get the American occupation out (of Arabia). So if the U.S. does not want to have its sons who are in the army being killed, then it has to get out.

QUESTION: On the same issue of the American troops in Saudi Arabia, do you think there will be more bombing attacks on them? Or attacks on U.S. civilians in Arabia? Or assassination attempts for example, on the Saudi royal families?

BIN LADEN: As for the previous question, the explosion of Riyadh and the one in Al-Khobar (Dhahran). It is no secret that during the two explosions, I was not in Saudi Arabia, but I have great respect for the people who did this action. I say, as I said before, they are heroes. We look upon them as men who wanted to raise the flag of "There is no God but Allah," and to bring the flag of non believers and of injustice that the U.S. brought. I also say that what they did is a great job and a big honor that I missed participating in.

QUESTION: Do you think there will be more bombing attacks on American troops in Saudi Arabia? Or attacks on American civilians in Saudi Arabia? Or will there be assassination attempts on the Saudi Arabian ruling family?

BIN LADEN: It is known that ever action has its reaction. If the American presence continues, and that is an action, then it is natural for reactions to continue against this presence. In other words, explosions and killings of the American soldiers would continue. These are the troops who left their country and their families and came here with all arrogance to steal our oil and disgrace us, and attack our religion. As for what was mentioned about the ruling (Saudi) family those in charge, do bear the full responsibility of everything that may happen. They are the shadow of the American presence. The mujahideen, the people and the young men are concentrating their efforts on the sponsor and not on the sponsored. The concentration of Jihad at this point is against the American occupiers.

QUESTION: What are your views about Sheik Omar Abdel Rahman and have you ever met him? Do you know him?

BIN LADEN: Sheik Omar Abdel Rahman is a Muslim scholar well-known all over the Muslim

world. He represents the kind of injustice and false accusations that is adopted by the U.S. gainst the symbols of the Islamic World. A baseless case was fabricated against him even though he is blind old man. We ask Allah, The Almighty, to relieve him. The U.S. sentenced him to hundreds of years just to please it caprice and the whims of the Egyptian regime. He is now very badly treated and in no way fit for an old man like him or any Muslim scholar.

QUESTION: The U.S. State Department quoting a Pakistani official says that Ramzi Yousef, a convicted bomber in the World Trade Center in New York City stayed in the house you funded in Peshawar, Pakistan for those receiving training during the Afghan conflict after the Trade Center bombing, is that true? Did Ramzi Yousef stay in your house in Peshawar?

BIN LADEN: I do not know Ramzi Yousef. What the American government based on the Pakistani intelligence has been reporting is not true at all. But I say if the American government is serious about avoiding the explosions inside the U.S., then let it stop provoking the feelings of 1,250 million Muslims. Those hundreds of thousands who have been killed or oppressed in Iraq, Palestine, Lebanon, do have brothers and relatives. The conduct of America and the conduct of the American government will drive thousands of young people to follow the footsteps of Ramzi Yousef and they will transfer the battle into the United States. Everything is made possible to protect the blood of the American citizen while the bloodshed of Muslims is allowed in every place. With this kind of behavior, the U.S. government is hurting itself, hurting Muslims and hurting the American people.

UESTION: Mr. Bin Laden, were you involved in financing the bombing of the World Trade enter in New York City?

BIN LADEN: I have no connection or relation with this explosion.

QUESTION: Mr. Bin Laden, in a recent interview with an Arabic newspaper, you said that Arabs who fought in the Afghan war killed U.S. troops in Mogadishu, Somalia. Can you tell us about that?

BIN LADEN: The US government went there with great jubilation and stayed there for some time with a strong media presence wanting to frighten people that it is the greatest power on earth. It went there with vanity and with over 28,000 soldiers, to a poor unarmed people in Somalia. The goal of this was to scare the Muslim world and the whole world saying that it is able to do whatever it desires. As soon as the American troops reached the Mogadishu beaches, they found no one but children. The CNN and other media cameras started photographing them (the soldiers) with their facial camouflage and heavy arms, marching and showing themselves to the world as the "greatest power in earth." Resistance started against the American invasion, because Muslims do not believe the U.S. allegations that they came to save the Somalis. A man with human feelings in his heart does not distinguish between a child killed in Palestine or in

Lebanon, in Iraq or in Bosnia. So how can we believe your claims that you came to save our hildren in Somalia while you kill our children in all of those places?

With Allah's grace, Muslims over there. There was a faction from the Islamic alliance that emerged and, cooperated with some Arab "Mujahideen" who were in Afghanistan. They participated with their brothers in Somalia against the American occupation troops killed large numbers of them. The American administration was aware of that. After a little resistance, the American troops left after achieving nothing. The rulers of the White House have forgotten their assertions that they were the largest power on earth. They left after some resistance from powerless, poor, unarmed people whose only weapon is the belief in Allah The Almighty, and who do not fear the fabricated American media lies. We learned from those who fought there, that they were surprised to see the low spiritual morale of the American fighters in comparison with the experience they had with the Russian fighters. The Americans ran away from those fighters who fought and killed them, while the latter were still there. If the U.S. still thinks and brags that it still has this kind of power even after all these successive defeats in Vietnam, Beirut, Aden, and Somalia, then let them go back to those who are awaiting its return.

QUESTION: Mr. Bin Laden, your family is a rich powerful family in Saudi Arabia. Have they, or the Saudi Arabian government asked you to stop your activities?

BIN LADEN: They have done that a lot. The Saudi Government have pressured my family a lot, especially since a lot of our money is still in the hands of the Saudi ruling family due to activities the our family and company. They sent me my mother, my uncle, and my brothers in almost nine visits to Khartoum asking me to stop and return to Arabia to apologize to King Fahd. I apologized to my family kindly because I know they were driven by force to come to talk to me. This regime wants to create a problem between me and my siblings and in order to take some measures against them. But with Allah's grace, this regime did not get its wish fulfilled. I refused to go back. They (my family) conveyed the Saudi government's message that if I did not go back, they'll freeze all my assets, deprive me of my citizenship, my passport, and my Saudi ID and distort my image in the Saudi and foreign media. They think that a Muslim may bargain on his religion. I said to them do whatever you may wish. It is with Allah's bounty, I refused to go back. I am living in dignity and honor for whom we thank Allah. It is much better for us to live under a tree here on these mountains than to live in palaces in the most sacred land to Allah, while being subjected to disgrace not worshiping Allah even in the most sacred land on earth, where injustice is so widespread. There is no strength except with Allah.

QUESTION: Mr. Bin Laden, have Saudi agents attempted to assassinate you? Are you targeted by the U.S. government? Are you in fact in fear of your life?

BIN LADEN: The U.S. pressures are no secret to you. The Saudi pressures are also in response to American pressures. There were several attempts to arrest me or to assassinate me. This has

been going on for more than seven years. With Allah's grace, none of these attempts succeeded. This is a proof in itself to Muslims and to the world that the U.S. is incapable and weaker that the picture it wants to draw in people's mind. A believer must rest assured that life is only in the hands of Allah, and sustenance is also in the hands of Allah, the Almighty. As for fearing for one's life, it is difficult to explain to you how we think of ourselves, unless you have full belief. We believe that no one could take out one breath of our written life as ordained by Allah. We see that we see that getting killed in the cause of Allah is a great honor wished for by our Prophet (May Allah be pleased with him). He said in his Hadith: "I swear to whom Mohammed's (pbuh) soul is in his hand, I wish to fight for Allah's cause and be killed, I'll do it again and be killed, and I'll do it again and be killed." Being killed for Allah's cause is a great honor achieved by only those who are the elite of the nation. We love this kind of death for Allah's cause more than you like to live. We have nothing to fear for. It is something we wish for."

QUESTION: What are your future plans?

BIN LADEN: You'll see them and hear about them in the media, God willing.

QUESTION: If you had an opportunity to give a message to President Clinton, what would that message be?

BIN LADEN: Mentioning the name of Clinton or that of the American government provokes disgust and revulsion. This is because the name of the American government and the name of Clinton and Bush directly reflect in our minds the picture of children with their heads cut off before even reaching one year of age. It reflects the picture of the children with their hand cut off, the picture of children who died in Iraq, the picture of the hands of our sons smashed by the Jews. The hearts of Muslims are filled with hatred towards the United States of America and the American president. The President has a heart that knows no words. Because whoever kills hundreds of children definitely knows no words. Our people in the Arabian Peninsula will send him messages with no words because he does not know any words. If there is a message that I may send through you, then it is a message I address to the mothers of the American troops who came here with their military uniform walking proudly up and down our land while the scholars of our country are thrown in prisons. I say that this represents a blatant provocation to 1,250 million Muslims. To these mothers I say if they are concerned for their sons, then they should object to the American government's policy and the to the American president. Do not let themselves be cheated by his fake standing when the bodies of the killed soldiers in coffins describing the freedom fighters in Saudi Arabia as terrorist. It is he who is a terrorist who pushed their sons into this for the interest of the Jews. We believe that the American army of Saudi Arabia came to prevent the Muslims and the people from ruling in accordance with Allah's wish. They came to be in support of the Israeli forces in the occupied Palestine, the land of the "Israa" of our Prophet, may peace and God's prayers be upon him.

Thank You.

Bin Ladin's Former 'Bodyguard' Interviewed on Al-Qa'ida Strategies
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Al-Quds Al-Arabi headline: "Abu-Jandal, Former Personal Bodyguard of Usama Bin Ladin and Leading Al-Qa'ida Element in Yemen Reveals to Al-Quds Al-Arabi his Intercession in Bin Ladin's Marriage to a Yemeni Girl. He Used to Meet With Al-Zarqawi, but Says he is not a Leader. The United States Moves Toward its Demise. Saudi Bombings Are the Natural Outcome of the Regim's Policy and They Will Continue"

(FBIS Translated Text)

After a long period of refusal to talk with any of the local and international news media, he was finally persuaded to give a chance to Al-Quds al-Arabi to conduct a detailed interview with him on Al-Qa'ida Organization activities in Yemen and the world. He is the former bodyguard of Al-Qa'ida leader Usama Bin Ladin. He is known by the nickname "Abu-Jandal" but his real name is Nasir Ahmad Nasir al-Bahri.

He said that he was born in Jedda, Saudi Arabia, in 1973. He completed his secondary school education in Saudi Arabia and he then specialized in business administration. He is currently engaged in import-export trade in Yemen. His brother-in-law, Salim Hamdan, is imprisoned at the US Guantanamo Base in Cuba.

Abu-Jandal is educated and open-minded. He has the power of persuasion. The security and military sense that he trained on while in Al-Qa'ida in Afghanistan still dominates him. He had a key role in the organization and was trusted by Usama Bin Ladin. However, he only revealed a little of the information that he has in this interview, in which we tried to literally drag him to a number of issues and managed to come out with a great deal of information. The following is text of the interview with Abu-Jandal:

(Al-Hammadi) When were you imprisoned in Yemen and how long did you stay in prison?

(Abu-Jandal) I was imprisoned in Yemen on 2 Dhu-al-Hijjah 1423 Hegira (2001) in Sanaa. I stayed in prison for one year and 10 months, of which 13 months were spent in solitary confinement.

(Al-Hammadi) What was the charge brought against you when arrested?

(Abu-Jandal) The charge was suspected complicity in the operation to destroy the US destroyer "Cole" in the Port of Aden.

(Al-Hammadi) Was this charge the main reason for your arrest and focus of the investigations in prison?

(Abu-Jandal) It was the maim reason for my arrest, but not the focus of the investigations in prison.

(Al-Hammadi) Were you tortured in prison to obtain confessions?

(Abu-Jandal) No I was not exposed to any torture in prison. And, this is a testimony I make in favor of the Yemeni Government.

(Al-Hammadi) Was it the Americans who carried out the investigation with you in prison, and what was the nature of their investigations?

(Abu-Jandal) Yes, it was the Americans who carried out the investigation with me, but this was a week after the 11 September 2001 incidents. It was a very calm investigation under the supervision of the Yemeni Government. The issue was not left to the Americans.

(Al-Hammadi) How many Americans carried out the investigation with you?

(Abu-Jandal) There were three, and all of them were FBI officers.

(Al-Hammadi) Did they speak in English or Arabic?

(Abu-Jandal) Two of them spoke in Arabic being of Lebanese origin. The third was an American who spoke in English.

(Al-Hammadi) What was your reply to the FBI officers who investigated with you?

(Abu-Jandal) I believe that our reply was very credible. It did not show appeasement to or fear of anyone. There was also truth in it.

(Al-Hammadi) What were the main questions addressed to you and what were your answers?

(Abu-Jandal) The questions by the Americans had nothing to do with the Cole or 11 September incidents but revolved around Al-Qa'ida structure, ideology, entity, and composition. Most of the questions revolved around Al-Qa'ida.

(Al-Hammadi) Didn't they investigate with you in an attempt to obtain confessions on any role you had in the Cole or 11 September incidents?

(Abu-Jandal) Yes there were attempts to do that by beating round the bush (using twisted methods). But, the truth is I did not have any role in any of these incidents. So they could not obtain anything.

(Al-Hammadi) What were your main answers to them?

(Abu-Jandal) Most of my answers were on Al-Qa'ida ideology and structure and why it deals in this way. The answers were to the point. They used to put forth rather strange questions. One question said: As far as we are concerned, 80 percent of what you said is true, but does Al-Qa'ida have chemical plants and nuclear weapons? I recall that my answer to them was that Usama Bin Ladin has a weapon that is far superior to all the US weapons. What is this weapon, the asked? I told them: "Among the believers are men, who have been true to their covenant to God: of them some have completed their vow (to the extreme), and some (still) wait: But they have never changed (their determination) in the least." (Koranic verse) The US arsenal is full of weapons, but it does not have the men.

(Al-Hammadi) How were you released from prison?

(Abu-Jandal) I was released from prison through a presidential pardon by President Ali Abdallah Salih. I thank him for pardoning me and the group of youths, although there were no charges against us for participating in any activity in the country. It was a kind presidential gesture that had a very good effect on us and our families and people.

(Al-Hammadi) Was it a general amnesty, or was it because they could not find anything against you?

(Abu-Jandal) It was essentially because they could not find anything against us. Most of the youths belonging to Al-Qa'ida and other organizations in Yemen had no activity inside the country. Many of them did not like to operate in Yemen, being their country that must be protected. They did not think of carrying out operations in Yemen. So they youths were released.

(Al-Hammadi) When did you join Al-Qa'ida?

(Abu-Jandal) I joined it in 1996. After my return from Tajikistan we went on what we called the journey to the north. After our return from Bosnia and Somalia, we moved to Tajikistan, but we could not withstand the conditions; the snow, rough terrain, and bad roads. So we returned. I met with Shaykh Usama Bin Ladin on 27 Sha'ban 1417 (end of 1996), and I joined Al-Qa'ida immediately after this meeting.

(Al-Hammadi) When did you visit Afghanistan the first time and when did you return from it the last time?

(Abu-Jandal) My first visit to Afghanistan was in the middle of 1996. I left Afghanistan three times. I left it the first time to get married. I left it the second time to finalize the arrangements for Shaykh Usama Bin Ladin's marriage in Yemen. My third and last departure from Afghanistan was before the Cole operation by about two and a half months (the middle of year 2000).

(Al-Hammadi) You said that your second departure was in order to arrange Usama Bin Ladin's marriage in Yemen. Could you tell us more about that?

(Abu-Jandal) The departure was for the purpose of delivering the dowry, the cost of the wedding, and the price of tickets for Bin Ladin's fourth wife to Afghanistan. The plans were for the bride to travel to Afghanistan accompanied by her immediate relatives. But, due to some delay in the arrangements I had to return to Afghanistan before them. They then followed after one and a half months.

(Al-Hammadi) How much was the dowry and what was the cost. Do you recall such things?

(Abu-Jandal) I recall that the full sum that I delivered personally was $5,000.

(Al-Hammadi) What were your role and the duties you undertook in Al-Qa'ida?

(Abu-Jandal) Abu-Abdallah (Usama Bin Ladin) used to call me and the youths from the northern group the founders, because since he announced the jihad on the United States he only had a few Egyptians and Algerians left. He did not have any people from Yemen and the Arabian Peninsula. Our group of 17 persons was the first batch to come from the Arabian Peninsula; that is from the people concerned with this cause. This was why they called us founders of the organization. Our duties included preaching for the ideology and the cause, rousing the people, and getting prepared to carry out martyrdom operations.

(Al-Hammadi) Was the preaching and rousing process inside Afghanistan or also outside it?

(Abu-Jandal) Both inside and outside Afghanistan, as it became our cause, which we carried in our hearts wherever we went. Regarding my duties in the organization, I had two duties. I was responsible for guarding Shaykh Usama Bin Ladin. I was his personal bodyguard for a period of time. I then moved to the duty of being in charge of the guesthouse or guesthouses in Kabul and

Kandahar.

(Al-Hammadi) Where do Usama Bin Ladin's last wife of Yemeni origin and the other three wives live?

(Abu-Jandal) From what I know and what is often being said, and also as confirmed by some acquaintances, she is still with her husband Shaykh Usama in Afghanistan, and so are his other three wives, except for his first wife, Umm-Abdallah, who left long before the incidents and did not return.

(Al-Hammadi) The trial of those accused in the bombing of US Destroyer "Cole" is now in progress in Yemen. What do you know about the bombing of this destroyer, and how was it arranged?

(Abu-Jandal) Like all people, I learned about it from what was published in the newspapers, although I was close to many of the youths. This operation was preceded by another one that was supposed to have taken place a year earlier but it failed due to certain natural factors. But, they succeeded in this operation, although not completely. From what I heard, the plan was to attack it in international waters so that no state in the region would assume the consequences of this operation. But, it was God's wish to happen this way and so it was attacked in Yemeni territorial waters. Thank God, the destroyer did not blow up completely. The destroyer was being watched for some time. The information on it was collected by committees, and the implementers of this operation were two persons only. As to the reports that say that it was carried out by the Mosad, this is a myth and a means to frustrate Muslims by saying that they are incapable of anything. Those who carried out the operation, may God rest their souls in peace, are well known among our brother mujahidin.

(Al-Hammadi) Who were the two persons that carried out the Cole operation?

(Abu-Jandal) The first is our brother Hassan al-Khamiri originally from Shabwah Governorate, but was born at Al-Ta'if in Saudi Arabia. The second is our brother Ibrahim al-Thawr from Sanaa who was also born at Al-Ta'if.

(Al-Hammadi) Was the operation to bomb the US destroyer Cole planned by these two persons only, or by many others inside and outside Yemen?

(Abu-Jandal) Al-Qa'ida pursues a method or principle that calls for "centralization of decision and decentralization of execution." The decision was made centrally, but the method of attack and execution was the duty of field commanders. For example, the persons who were in Yemen like Abd-al-Rahim al-Nashiri and others took part in this operation. They planned for it and God granted them success in its fulfillment after a long watch. As I said, it was preceded by another operation a year earlier, which was

called Cole operation one, but it did not succeed due to natural elements. As for this one, it was Cole operation two. The planning for Cole operation was carried out by the people themselves. The idea was formed and the target was set and then it was referred to a higher military control committee in Al-Qa'ida called Military Affairs Committee, which does not plan, but gives the green light, the support, and the funds for these operations. But, the planning, execution, and method of attack were all undertaken by field commanders in the operations field.

(Al-Hammadi) Do you believe that the detainees or those who are now on trial have nothing to do with the subject?

(Abu-Jandal) Yes I firmly believe that they have nothing to do with the case. They are, so to say, scapegoats, because they really didn't know anything. They may have known about the existence of an operation, but they did not know its details, type, method, or hour of execution.

(Al-Hammadi) Why exactly was the US destroyer Cole chosen as the target?

(Abu-Jandal) Actually, there are several reasons. The first is to break US prestige in the sea and raise the morale of the Islamic nation by saying that its sons can deal blows to the enemies of the nation wherever they may be on the land, in the sea, or in the air. It is to say that we can face the enemies even with individual capabilities. Take the Islamic World, which consists of about 71 states. It cannot say no to the United States, but we individuals can do so. They proved to the Islamic World Muslim ability to break US prestige and hegemony over Muslim shores and sea. This was the main reason for choosing the US destroyer Cole for bombing in the sea. Otherwise, there were many ocean liners. But, the choice of the best destroyer in the US Navy and the best produced by the US Army was intended to be a slap in the face for the United States. It was to tell the United States that we can deal it a blow whenever and wherever we want.

(Al-Hammadi) If the arch enemy and big target for Al-Qa'ida is the United States, why was the French oil tanker Limbourg targeted off the coast of Al-Mukalla?

(Abu-Jandal) Actually, the attack on the French oil tanker Limbourg was a reaction to a mistake that was committed by both sides in the case of Yahya Mujalli, who was killed by government forces in Sanaa. It was a rash, unstudied, and uncalculated reaction to that incident, and thus it had very bad consequences for both the Yemeni Government and the people.

(Al-Hammadi) Was the execution of the Cole and Limbourg operations according to instructions by Al-Qa'ida central leadership, or was the decision from the field leaderships?

(Abu-Jandal) As far as Cole is concerned, I believe that the decision was central, as the destroyer was under observation for some time. As to the Limbourg incident that took place a year after the 11 September incident when contact with the central leadership was very difficult then, it was a reaction. The decision was made by the field leadership in Yemen.

(Al-Hammadi) It is said that the bombings have calmed down in Yemen and moved to Saudi Arabia. Why have they calmed down in Yemen since the Limbourg incident, and is this an indication of a truce between the government and Al-Qa'ida?

(Abu-Jandal) Actually, one can say that there is no Al-Qa'ida presence in Yemen now, but individuals who carry its ideology. The presence ended with the martyrdom of Shaykh Abu-Ali al-Harithi, the commander of the organization in Yemen. Still, I believe the organization is not small in Yemen, as there are large numbers who sympathize with it, although not ideologically, organizationally and administratively, or by recruitment. Many youths in Yemen admire Usama Bin Ladin. They also admire Al-Qa'ida and hate what Bin Ladin hates. It has become a second nature to them. There is no peace with the state. There were attempts by the state to contain and absorb these youths, but God willed something else; for the Limbourg tanker to be attacked and Abu-Ali al-Harithi to be killed afterward. These operations have created a big reshuffle of cards in the interest of both the Yemeni Government and the youths. Thus matters calmed down in the country. The killing of Al-Harithi created a crisis and the youths became individuals without a leadership, and so they weakened very much.

(Al-Hammadi) Was Abu-Ali al-Harithi indeed Al-Qa'ida commander in Yemen?

(Abu-Jandal) I knew Abu-Ali al-Harithi as a tribal leader more than Al-Qa'ida commander. But, he was indeed the first Al-Qa'ida official in Yemen.

(Al-Hammadi) Do you think that the suffering of the detainees in Yemeni prison, as well as the suffering of their families, would reflect on their activities once they are out of prison?

(Abu-Jandal) Certainly, and I speak for myself. When I left prison I did not have a source of livelihood. I lacked many things. There were promises by the Yemeni Government to improve conditions for these youths and absorb them into the society once again. But it seems that the government will take some time before doing anything. I advise the Yemeni Government to take immediate steps to sponsor these youths, ensure their needs, and reorganize their affairs so that they would not take a different direction by carrying out acts harmful to the country. Poverty is akin to non-belief.

[Al-Hammadi) How big is Al-Qa'ida in Yemen, in your opinion?

(Abu-Jandal) I can tell you in figures. Some 95 percent of Al-Qa'ida members are Yemenis. The remaining five percent are Yemeni expatriates. It can be said that the majority members of Al-Qa'ida are Yemenis. This is a fact that no one can deny. The leader of Al-Qa'ida is of Yemeni origin. His bodyguards are Yemenis. The trainers in the camps are Yemenis. The commanders are the fronts are Yemenis. All the operations that were directed against the United States were coordinated with Yemeni members. Yemenis are spread all over Al-Qa'ida.

(Al-Hammadi) Yes, but how big is it in Yemen?

(Abu-Jandal) Let us consider this matter numerically, both in the world and in Yemen. If, for example, there is one Al-Qa'ida member in Yemen, those influenced by his ideas are six to seven at least, although they do not carry his ideology. They love Al-Qa'ida but they do not carry its ideology. Many people think that Al-Qa'ida's size is gauged by the number of individuals. Al-Qa'ida's cause is to convey its ideology to the world. And I can assure you that they have managed to a large extent in spreading this ideology. What is taking place in Afghanistan and Iraq, and the activities in Saudi Arabia and many Arab states, show that they have succeeded very much in their strategy.

(Al-Hammadi) Do you believe that what is taking place in Iraq now is planned by Al-Qa'ida and carried out by its members and followers?

(Abu-Jandal) Al-Qa'ida elements had expected this thing. Al-Qa'ida had expected the fall of the Iraqi regime and that the United States could only control the region through Iraq. As the Americans said, the Saudis are an inhospitable people. Many Americans were killed in Saudi Arabia and the recent incidents confirmed that. Therefore, the Americans had no choice but direct occupation. This thing was expected. Indeed what is taking place inside Iraq now confirms that. Many Al-Qa'ida elements entered Iraq and are now fighting with the Iraqi resistance.

(Al-Hammadi) Do you believe that Abu-Mis'ab al-Zarqawi is indeed the Al-Qa'ida representative in Iraq?

(Abu-Jandal) The problem is Al-Qa'ida itself is now longer an entity but an ideology. It has become an ideology now. Many youths now carry Al-Qa'ida ideology against United States. Abu-Mus'ab al-Zarqawi was in Afghanistan. He was also in Kabul and he used to often meet with Shaykh Usama Bin Ladin. But I don't think that he is Al-Qa'ida's number one man, because Al-Qa'ida has Iraqi cadres that exist in Iraq. So it can dispense with Abu-Mus'ab

al-Zarqawi.

(Al-Hammadi) Since the Cole incident, the names of Abu-Ali al-Harithi and Abu-Asim al-Ahdal had been heading Al-Qa'ida leadership in Yemen. Then Washington assassinated the former in the Ma'rib desert and arrested the latter in Sanaa. What is the truth about their leadership of Al-Qa'ida in Yemen, especially since the arrest of Abu-Asim al-Ahdal we have not heard anything about him or his trial, and he was not include among those on trial in the Cole case?

(Abu-Jandal) Actually, the talk about the two men's leadership of Al-Qa'ida is not correct. What is more correct is Abu-Ali Al-Harithi's leadership. As I said, Abu-Ali al-Harithi was considered a tribal leader more than an organizational or military leader. As far as Abu-Asim al-Ahdal is concerned, he has nothing to do with Al-Qa'ida. This is a fact. But, the problem with the US media is that if they want to arrest someone they begin by charging him with membership in Al-Qa'ida. The media say the man is an Al-Qa'ida leader and the charge sticks. Al-Qa'ida has become a boogeyman. But, this is not true at all.

(Al-Hammadi) Are all Al-Qa'ida leaders in Yemen still active and ready to carry out missions against US and Yemeni interests?

(Abu-Jandal) Matters have changed much, especially since there is no leadership leading these youths, or to be more precise there are any influential personalities that can influence these elements as individuals. There is another problem. The issue now is such that it is not essential for Al-Qa'ida member to execute the job. Persons outside Al-Qa'ida could carry out operations, as happened in the killing of US missionaries in Jablah and Jarallah Umar in the Reform Conference. The executors of these two operations had nothing to do with Al-Qa'ida and did not leave Yemen in the first place. No one can control these matters, as they have become rather loose. They are no longer under Al-Qa'ida control. It is now feelings that motivate people everywhere. As to whether they are active, Al-Qa'ida elements are very well trained. However, their comprehension of information differs from one person to another. As to whether they are active, I say yes they are active, but in the interest of their country, especially after the recent statements by Democratic candidate Kerry, who announced that Yemen is one of the sources of terrorism, and that it must be attacked. I believe that many youths would begin to prepare themselves for this new confrontation, as it is very likely for the United States to come to the whole region -- and it is coming -- in order to control the entire Middle East. I don't expect Yemeni youths, especially those who trained in Al-Qa'ida and carried al-Qa'ida ideology to stands with their hands tied before US moves in the region.

(Al-Hammadi) US demands recently included Shaykh Abd-al-Majid al-Zandani. They also hinted at Shaykh Abdallah Sa'tar. And before that the United States kidnapped Shaykh Muhammad al-Mu'ayyad. Do you think that these people have any link to Al-Qa'ida extensions to be considered subject to US demands?

(Abu-Jandal) Frankly, we cannot but speak well of these people, especially about these three personalities. But, the truth of the matter is, as I said before, when the United States wants to fabricate a problem with a state, a group, or an organization in the Islamic World it links it to Al-Qa'ida, such as when it shut down the Saudi Al-Haramayn Foundation, although it is a welfare institution that has nothing to do with armed organizations. The same can also be said about many other welfare and relief organizations. Shaykh Mu'ayyad, Shaykh Al-Zandani, Shaykh Al-Sa'tar, and others will remain a target for the United States. God says in the Koran: "Never will the Jews or the Christians be satisfied with thee." No matter how we tried to improve our image, hold dialogue of civilizations, or call for the unity of religions, Jews and Christians will not be pleased with us. As far as Shaykh Al-Zandani and Shaykh Sa'tar are concerned, it is well known that Shaykh Sa'tar in particular is against Al-Qa'ida and armed action in general. So how can he be a supporter of Al-Qa'ida? Even we the former Al-Qa'ida members had engaged in heated arguments with him on several occasions. The man is completely against us. So how can he be a supporter of Al-Qa'ida?

(Al-Hammadi) And what about the continuous incidents and bombings in Saudi Arabia, do you think that they have been planned and implemented by Al-Qa'ida?

(Abu-Jandal) According to my knowledge of some of the leaderships and the individuals that carried out the martyrdom operations in Saudi Arabia, I assure you that they are elements of Al-Qa'ida. But, there remains the question: Why did they do that? This is the question that we must address to the Kingdom of Saudi Arabia, which is dear to my heart. It is my birthplace. I was raised in it and I studied in it. I am one of those who like to breathe the air of the Hejaz. So my question is very normal. I, as one of the Yemenis who were raised in Hejaz and who know it very well, ask: What made the youths take up arms and carry out bombings in the Saudi territories? I believe that it is the Saudi Government's stupid policy toward these people. Those who bombed Al-Muhayya complex spoke frankly in their audiotapes over the Internet that they went to jihad with the permission of the state and the instigation of Shaykh Sa'd al-Burayk, Shaykh A'id al-Qarni, Shaykh Sulayman al-Awdah, and many others who instigated these youths. But when the confrontation began between the government and these youths, the youths were surprised to find that these shaykhs had abandoned them. In fact, Shaykh Sa'd al-Burayk and Shaykh A'id al-Qarni began attacking these youths, who were the product of their lectures,

sermons, lessons, and religious circles. They did not come from vacuum. The operations here are a reaction. For example, Abdallah al-Mu'abbidi, a man well known to me, was against the idea of armed operations in Saudi Arabia and anything harmful to his country. Why did he carry out the bombing in Saudi Arabia? We used to sit down together, eat and drink together with the one who made him think about these things; namely, Abd-al-Aziz al-Muqrin. He was completely against this idea. What made him do such things? What happened to him was the motivation. Saudi criminal intelligence men stormed his house, beat up his mother, broke his brother's arm, and entered his sister's bedroom. What do you expect from this person, who was thrown in solitary confinement for one year and five months without any reason, but to go to jihad? Did he do anything as an individual? No, on the contrary, these youths were "against" and have now become "for." They were against operations inside Saudi Arabia, and now they themselves carry them out in Saudi Arabia. Why did many of them join Al-Qa'ida? This is because they now find in Al-Qa'ida a means through which to avenge for what happened to them. All this must be taken into consideration.

(Al-Hammadi) Do you think that the Saudi authorities have erred in their calculations in dealings with Al-Qa'ida elements on their territory?

(Abu-Jandal) The Saudi authorities do not deal with these persons as Al-Qa'ida elements. They deal with them as jihadist elements, as directed and instigated by the advisers of Interior Minister Nayif Bin-Abd-al-Aziz, and others from the neighboring Arab states, who give advice. The youths reacted on the basis that they were members of the organization, while they were not to begin with. Neither Abdallah al-Mu'abbidi, nor Abd-al-Aziz al-Muqrin or many of the youths who were killed were members of the organization. Neither also was Khalid al-Hajj, Khalid al-Jihni, or others in the list of those killed in Saudi Arabia were members. They had no link whatsoever with Al-Qa'ida. But the Saudi Government's policy made them join Al-Qa'ida. The Saudi Government knows that they were not members in Al-Qa'ida in the first place. But, later on and as a reaction to what happened to them they became members in Al-Qa'ida. This is the truth of the matter on this subject.

(Al-Hammadi) How long would the armed operations continue in Saudi Arabia?

(Abu-Jandal) They will continue as long as this reckless policy of the sword and bullets continued, as stated by Interior Minister Nayif, who said, we have no dialogue with these people except with the sword and bullets. These operations will continue as long this Saudi Government policy, which is essentially to please the United States, continues.

(Al-Hammadi) Some people say that Al-Qa'ida has been penetrated by US intelligence and is now being used to serve US aims, as is happening in

Saudi Arabia. What is your opinion on that?

(Abu-Jandal) This information is not correct, but it is disseminated by Arab intelligence services more than US services. The question of intelligence penetration of Al-Qa'ida does not take place by planting an agent or recruiting another. The question is merely the return of some persons to their country. A well-known figure had returned to Egypt and it was said that he was an intelligence man for 17 years within Al-Qa'ida. They said they penetrated jihadist organizations to the marrow! Now, let me ask them: How could you have penetrated jihadist organizations to the marrow when you could not stop the military operations? Your penetration of these organizations would have meant that you were informed of their operations and where there would take place so that you could stop them. What you say is not true. Still, there were attempts by US, Jordanian, and Saudi intelligence services to penetrate Al-Qa'ida, but they failed for one reason; namely, Usama Bin Ladin chooses his elements from the steel and fire. They are not political elements with official jobs and university diplomas. It is from within the battles that elements are chosen, and hypocrites and agents cannot join battlefronts. It is difficult for them. What they say is not true.

(Al-Hammadi) It is believed that those charged with the 11 September incidents visited Afghanistan in the period you were there. Who do you know among them?

(Abu-Jandal) Actually, among the elements that carried out the September incidents I knew Muhammad Ata, Awad Abd-al-Rahman al-Masri. I knew personally in Afghanistan. But, the period of his stay in Afghanistan was very short. He stayed only for the month of Sha'ban and Ramadan and left in Id Al-Fitr. Among the persons I knew also were Ramzi al-Shaybah, Zakariya al-Musawi, and Khalid al-Muhdar. I fought together with the latter in some battlefronts. I knew these men personally, but I have nothing to do with what they did.

(Al-Hammadi) When you met with them, did you know that they were preparing for the execution of this operation?

(Abu-Jandal) I didn't know that they were preparing for this operation. But, what I know is that all Al-Qa'ida members are fully qualified and equipped to carry out any operation at any time. Al-Qa'ida elements are qualified, but the assignment of persons depends on capabilities. For example, those who carried out the 11 September were a Lebanese, an Egyptian, one from the UAE, two Saudis, and some who held Yemeni documents. They were a mixture. And whoever enters the United States has entered.

(Al-Hammadi) Was the 11 September incident as planned, or was it smaller or

bigger than what was expected?

(Abu-Jandal) Actually, the operation results were not expected to lead to such great damage and collapse. But, God says in His book: "When thou threwest (a handful of dust), it was not thy act, but God's." That was a mere cause, and so God supported the Muslims in the United States.

(Al-Hammadi) But, was the plan to carry out the operation in these areas or was it bigger than that?

(Abu-Jandal) From the information that we had and what I knew from personal sources, which was then confirmed by the news media and US intelligence via the investigation committee into the 9/11 incidents, the operation was to use 12 planes. If four planes caused all this uproar, what if 12 planes were used?

(Al-Hammadi) Do you believe that those who carried out the 9/11 incidents came to Afghanistan to receive the final signals to carry out the operation?

(Abu-Jandal) I don't think so because the youths were prepared and trained and most of them were in the battlefronts. But the selection process was haphazard.

(Al-Hammadi) How about the execution, was it personal or coordinated with the central leadership?

(Abu-Jandal) It was certainly coordinated but it was the field command in the United States that planned the operation. But, the central leadership had a role. It played an important role in preparing and selecting the good elements for it.

(Al-Hammadi) In your opinion, what is the reason for the United States' inability to capture Usama Bin Ladin, although it captured Saddan Husayn a short period after the war on Iraq?(Abu-Jandal) Many persons claim that Usama Bin Ladin's agentry delayed his capture up to now. But, we say that the comparison between Usama Bin Ladin and Saddam Husayn is unfair because Saddam was a black past for his people. There was the massacre of Kurds in Halabjah, the killing of Shiites in the south, and the domination and enslavement of the Iraqi people. All those have caused hatred against him, which facilitated his capture even if after a while. But, wherever he went, from the ocean to the ocean and not just from the Gulf to the ocean Usama Bin Ladin is popular. We strongly believe that Usama Bin Ladin would only face what God had ordained for him. But, we are also certain that this man upheld God and that God would preserve him.

(Al-Hammadi) A final question, what is the future of Al-Qa'ida on the Arab

and international levels in light of these universal wars against it?

(Abu-Jandal) Al-Qa'ida had sought right from the start to foster confrontation between the United States and the Islamic World. I recall Shaykh Usama Bin Ladin telling us: We as an organization cannot continue with the qualitative operations. So we have to draw the United States into a confrontation with all the Islamic peoples. This was the plan in the Somalia days. Bin Ladin had wished the capture of a single US soldier alive to make the United States withdraw and for the fighting to continue everywhere. Shaykh Usama Bin Ladin and the Al-Qa'ida have pursued this endeavor and succeeded in drawing the United States into an unequal confrontation, not from the military technology aspect, but from the ideology aspect. Muslims have now reached the point where they are fed up with the United States, which lives in prosperity off our nation's resources. I believe that the United States is heading for its demise. As to the future of Al-Qa'ida, I believe that it has found what it wanted. It can now melt into a new caldron, and a new giant would be reborn, of which Al-Qa'ida would be a part. Many of the Islamic World leaders would join it and the confrontation with the United States would be inevitable. And, Al-Qa'ida would not be the leader but a vanguard army.

(Description of Source: London Al-Quds al-Arabi in Arabic -- London-based independent Arab nationalist daily with an anti-US and anti-Saudi editorial line; generally pro-Palestinian, tends to be sympathetic to Bin Ladin)

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Bin Ladin's Former 'Bodyguard' Interviewed on Al-Qa'ida Strategies
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Al-Quds Al-Arabi headline: "Abu-Jandal, Former Personal Bodyguard of Usama Bin Ladin and Leading Al-Qa'ida Element in Yemen Reveals to Al-Quds Al-Arabi his Intercession in Bin Ladin's Marriage to a Yemeni Girl. He Used to Meet With Al-Zarqawi, but Says he is not a Leader. The United States Moves Toward its Demise. Saudi Bombings Are the Natural Outcome of the Regim's Policy and They Will Continue"

(FBIS Translated Text)

After a long period of refusal to talk with any of the local and international news media, he was finally persuaded to give a chance to Al-Quds al-Arabi to conduct a detailed interview with him on Al-Qa'ida Organization activities in Yemen and the world. He is the former bodyguard of Al-Qa'ida leader Usama Bin Ladin. He is known by the nickname "Abu-Jandal" but his real name is Nasir Ahmad Nasir al-Bahri.

He said that he was born in Jedda, Saudi Arabia, in 1973. He completed his secondary school education in Saudi Arabia and he then specialized in business administration. He is currently engaged in import-export trade in Yemen. His brother-in-law, Salim Hamdan, is imprisoned at the US Guantanamo Base in Cuba.

Abu-Jandal is educated and open-minded. He has the power of persuasion. The security and military sense that he trained on while in Al-Qa'ida in Afghanistan still dominates him. He had a key role in the organization and was trusted by Usama Bin Ladin. However, he only revealed a little of the information that he has in this interview, in which we tried to literally drag him to a number of issues and managed to come out with a great deal of information. The following is text of the interview with Abu-Jandal:

(Al-Hammadi) When were you imprisoned in Yemen and how long did you stay in prison?

(Abu-Jandal) I was imprisoned in Yemen on 2 Dhu-al-Hijjah 1423 Hegira (2001) in Sanaa. I stayed in prison for one year and 10 months, of which 13 months were spent in solitary confinement.

(Al-Hammadi) What was the charge brought against you when arrested?

(Abu-Jandal) The charge was suspected complicity in the operation to destroy the US destroyer "Cole" in the Port of Aden.

(Al-Hammadi) Was this charge the main reason for your arrest and focus of the investigations in prison?

(Abu-Jandal) It was the maim reason for my arrest, but not the focus of the investigations in prison.

(Al-Hammadi) Were you tortured in prison to obtain confessions?

(Abu-Jandal) No I was not exposed to any torture in prison. And, this is a testimony I make in favor of the Yemeni Government.

(Al-Hammadi) Was it the Americans who carried out the investigation with you in prison, and what was the nature of their investigations?

(Abu-Jandal) Yes, it was the Americans who carried out the investigation with me, but this was a week after the 11 September 2001 incidents. It was a very calm investigation under the supervision of the Yemeni Government. The issue was not left to the Americans.

(Al-Hammadi) How many Americans carried out the investigation with you?

(Abu-Jandal) There were three, and all of them were FBI officers.

(Al-Hammadi) Did they speak in English or Arabic?

(Abu-Jandal) Two of them spoke in Arabic being of Lebanese origin. The third was an American who spoke in English.

(Al-Hammadi) What was your reply to the FBI officers who investigated with you?

(Abu-Jandal) I believe that our reply was very credible. It did not show appeasement to or fear of anyone. There was also truth in it.

(Al-Hammadi) What were the main questions addressed to you and what were your answers?

(Abu-Jandal) The questions by the Americans had nothing to do with the Cole or 11 September incidents but revolved around Al-Qa'ida structure, ideology, entity, and composition. Most of the questions revolved around Al-Qa'ida.

(Al-Hammadi) Didn't they investigate with you in an attempt to obtain confessions on any role you had in the Cole or 11 September incidents?

(Abu-Jandal) Yes there were attempts to do that by beating round the bush (using twisted methods). But, the truth is I did not have any role in any of these incidents. So they could not obtain anything.

(Al-Hammadi) What were your main answers to them?

(Abu-Jandal) Most of my answers were on Al-Qa'ida ideology and structure and why it deals in this way. The answers were to the point. They used to put forth rather strange questions. One question said: As far as we are concerned, 80 percent of what you said is true, but does Al-Qa'ida have chemical plants and nuclear weapons? I recall that my answer to them was that Usama Bin Ladin has a weapon that is far superior to all the US weapons. What is this weapon, the asked? I told them: "Among the believers are men, who have been true to their covenant to God: of them some have completed their vow (to the extreme), and some (still) wait: But they have never changed (their determination) in the least." (Koranic verse) The US arsenal is full of weapons, but it does not have the men.

(Al-Hammadi) How were you released from prison?

(Abu-Jandal) I was released from prison through a presidential pardon by President Ali Abdallah Salih. I thank him for pardoning me and the group of youths, although there were no charges against us for participating in any activity in the country. It was a kind presidential gesture that had a very good effect on us and our families and people.

(Al-Hammadi) Was it a general amnesty, or was it because they could not find anything against you?

(Abu-Jandal) It was essentially because they could not find anything against us. Most of the youths belonging to Al-Qa'ida and other organizations in Yemen had no activity inside the country. Many of them did not like to operate in Yemen, being their country that must be protected. They did not think of carrying out operations in Yemen. So they youths were released.

(Al-Hammadi) When did you join Al-Qa'ida?

(Abu-Jandal) I joined it in 1996. After my return from Tajikistan we went on what we called the journey to the north. After our return from Bosnia and Somalia, we moved to Tajikistan, but we could not withstand the conditions; the snow, rough terrain, and bad roads. So we returned. I met with Shaykh Usama Bin Ladin on 27 Sha'ban 1417 (end of 1996), and I joined Al-Qa'ida immediately after this meeting.

(Al-Hammadi) When did you visit Afghanistan the first time and when did you return from it the last time?

(Abu-Jandal) My first visit to Afghanistan was in the middle of 1996. I left Afghanistan three times. I left it the first time to get married. I left it the second time to finalize the arrangements for Shaykh Usama Bin Ladin's marriage in Yemen. My third and last departure from Afghanistan was before the Cole operation by about two and a half months (the middle of year 2000).

(Al-Hammadi) You said that your second departure was in order to arrange Usama Bin Ladin's marriage in Yemen. Could you tell us more about that?

(Abu-Jandal) The departure was for the purpose of delivering the dowry, the cost of the wedding, and the price of tickets for Bin Ladin's fourth wife to Afghanistan. The plans were for the bride to travel to Afghanistan accompanied by her immediate relatives. But, due to some delay in the arrangements I had to return to Afghanistan before them. They then followed after one and a half months.

(Al-Hammadi) How much was the dowry and what was the cost. Do you recall such things?

(Abu-Jandal) I recall that the full sum that I delivered personally was $5,000.

(Al-Hammadi) What were your role and the duties you undertook in Al-Qa'ida?

(Abu-Jandal) Abu-Abdallah (Usama Bin Ladin) used to call me and the youths from the northern group the founders, because since he announced the jihad on the United States he only had a few Egyptians and Algerians left. He did not have any people from Yemen and the Arabian Peninsula. Our group of 17 persons was the first batch to come from the Arabian Peninsula; that is from the people concerned with this cause. This was why they called us founders of the organization. Our duties included preaching for the ideology and the cause, rousing the people, and getting prepared to carry out martyrdom operations.

(Al-Hammadi) Was the preaching and rousing process inside Afghanistan or also outside it?

(Abu-Jandal) Both inside and outside Afghanistan, as it became our cause, which we carried in our hearts wherever we went. Regarding my duties in the organization, I had two duties. I was responsible for guarding Shaykh Usama Bin Ladin. I was his personal bodyguard for a period of time. I then moved to the duty of being in charge of the guesthouse or guesthouses in Kabul and

Kandahar.

(Al-Hammadi) Where do Usama Bin Ladin's last wife of Yemeni origin and the other three wives live?

(Abu-Jandal) From what I know and what is often being said, and also as confirmed by some acquaintances, she is still with her husband Shaykh Usama in Afghanistan, and so are his other three wives, except for his first wife, Umm-Abdallah, who left long before the incidents and did not return.

(Al-Hammadi) The trial of those accused in the bombing of US Destroyer "Cole" is now in progress in Yemen. What do you know about the bombing of this destroyer, and how was it arranged?

(Abu-Jandal) Like all people, I learned about it from what was published in the newspapers, although I was close to many of the youths. This operation was preceded by another one that was supposed to have taken place a year earlier but it failed due to certain natural factors. But, they succeeded in this operation, although not completely. From what I heard, the plan was to attack it in international waters so that no state in the region would assume the consequences of this operation. But, it was God's wish to happen this way and so it was attacked in Yemeni territorial waters. Thank God, the destroyer did not blow up completely. The destroyer was being watched for some time. The information on it was collected by committees, and the implementers of this operation were two persons only. As to the reports that say that it was carried out by the Mosad, this is a myth and a means to frustrate Muslims by saying that they are incapable of anything. Those who carried out the operation, may God rest their souls in peace, are well known among our brother mujahidin.

(Al-Hammadi) Who were the two persons that carried out the Cole operation?

(Abu-Jandal) The first is our brother Hassan al-Khamiri originally from Shabwah Governorate, but was born at Al-Ta'if in Saudi Arabia. The second is our brother Ibrahim al-Thawr from Sanaa who was also born at Al-Ta'if.

(Al-Hammadi) Was the operation to bomb the US destroyer Cole planned by these two persons only, or by many others inside and outside Yemen?

(Abu-Jandal) Al-Qa'ida pursues a method or principle that calls for "centralization of decision and decentralization of execution." The decision was made centrally, but the method of attack and execution was the duty of field commanders. For example, the persons who were in Yemen like Abd-al-Rahim al-Nashiri and others took part in this operation. They planned for it and God granted them success in its fulfillment after a long watch. As I said, it was preceded by another operation a year earlier, which was

called Cole operation one, but it did not succeed due to natural elements. As for this one, it was Cole operation two. The planning for Cole operation was carried out by the people themselves. The idea was formed and the target was set and then it was referred to a higher military control committee in Al-Qa'ida called Military Affairs Committee, which does not plan, but gives the green light, the support, and the funds for these operations. But, the planning, execution, and method of attack were all undertaken by field commanders in the operations field.

(Al-Hammadi) Do you believe that the detainees or those who are now on trial have nothing to do with the subject?

(Abu-Jandal) Yes I firmly believe that they have nothing to do with the case. They are, so to say, scapegoats, because they really didn't know anything. They may have known about the existence of an operation, but they did not know its details, type, method, or hour of execution.

(Al-Hammadi) Why exactly was the US destroyer Cole chosen as the target?

(Abu-Jandal) Actually, there are several reasons. The first is to break US prestige in the sea and raise the morale of the Islamic nation by saying that its sons can deal blows to the enemies of the nation wherever they may be on the land, in the sea, or in the air. It is to say that we can face the enemies even with individual capabilities. Take the Islamic World, which consists of about 71 states. It cannot say no to the United States, but we individuals can do so. They proved to the Islamic World Muslim ability to break US prestige and hegemony over Muslim shores and sea. This was the main reason for choosing the US destroyer Cole for bombing in the sea. Otherwise, there were many ocean liners. But, the choice of the best destroyer in the US Navy and the best produced by the US Army was intended to be a slap in the face for the United States. It was to tell the United States that we can deal it a blow whenever and wherever we want.

(Al-Hammadi) If the arch enemy and big target for Al-Qa'ida is the United States, why was the French oil tanker Limbourg targeted off the coast of Al-Mukalla?

(Abu-Jandal) Actually, the attack on the French oil tanker Limbourg was a reaction to a mistake that was committed by both sides in the case of Yahya Mujalli, who was killed by government forces in Sanaa. It was a rash, unstudied, and uncalculated reaction to that incident, and thus it had very bad consequences for both the Yemeni Government and the people.

(Al-Hammadi) Was the execution of the Cole and Limbourg operations according to instructions by Al-Qa'ida central leadership, or was the decision from the field leaderships?

(Abu-Jandal) As far as Cole is concerned, I believe that the decision was central, as the destroyer was under observation for some time. As to the Limbourg incident that took place a year after the 11 September incident when contact with the central leadership was very difficult then, it was a reaction. The decision was made by the field leadership in Yemen.

(Al-Hammadi) It is said that the bombings have calmed down in Yemen and moved to Saudi Arabia. Why have they calmed down in Yemen since the Limbourg incident, and is this an indication of a truce between the government and Al-Qa'ida?

(Abu-Jandal) Actually, one can say that there is no Al-Qa'ida presence in Yemen now, but individuals who carry its ideology. The presence ended with the martyrdom of Shaykh Abu-Ali al-Harithi, the commander of the organization in Yemen. Still, I believe the organization is not small in Yemen, as there are large numbers who sympathize with it, although not ideologically, organizationally and administratively, or by recruitment. Many youths in Yemen admire Usama Bin Ladin. They also admire Al-Qa'ida and hate what Bin Ladin hates. It has become a second nature to them. There is no peace with the state. There were attempts by the state to contain and absorb these youths, but God willed something else; for the Limbourg tanker to be attacked and Abu-Ali al-Harithi to be killed afterward. These operations have created a big reshuffle of cards in the interest of both the Yemeni Government and the youths. Thus matters calmed down in the country. The killing of Al-Harithi created a crisis and the youths became individuals without a leadership, and so they weakened very much.

(Al-Hammadi) Was Abu-Ali al-Harithi indeed Al-Qa'ida commander in Yemen?

(Abu-Jandal) I knew Abu-Ali al-Harithi as a tribal leader more than Al-Qa'ida commander. But, he was indeed the first Al-Qa'ida official in Yemen.

(Al-Hammadi) Do you think that the suffering of the detainees in Yemeni prison, as well as the suffering of their families, would reflect on their activities once they are out of prison?

(Abu-Jandal) Certainly, and I speak for myself. When I left prison I did not have a source of livelihood. I lacked many things. There were promises by the Yemeni Government to improve conditions for these youths and absorb them into the society once again. But it seems that the government will take some time before doing anything. I advise the Yemeni Government to take immediate steps to sponsor these youths, ensure their needs, and reorganize their affairs so that they would not take a different direction by carrying out acts harmful to the country. Poverty is akin to non-belief.

[Al-Hammadi) How big is Al-Qa'ida in Yemen, in your opinion?

(Abu-Jandal) I can tell you in figures. Some 95 percent of Al-Qa'ida members are Yemenis. The remaining five percent are Yemeni expatriates. It can be said that the majority members of Al-Qa'ida are Yemenis. This is a fact that no one can deny. The leader of Al-Qa'ida is of Yemeni origin. His bodyguards are Yemenis. The trainers in the camps are Yemenis. The commanders are the fronts are Yemenis. All the operations that were directed against the United States were coordinated with Yemeni members. Yemenis are spread all over Al-Qa'ida.

(Al-Hammadi) Yes, but how big is it in Yemen?

(Abu-Jandal) Let us consider this matter numerically, both in the world and in Yemen. If, for example, there is one Al-Qa'ida member in Yemen, those influenced by his ideas are six to seven at least, although they do not carry his ideology. They love Al-Qa'ida but they do not carry its ideology. Many people think that Al-Qa'ida's size is gauged by the number of individuals. Al-Qa'ida's cause is to convey its ideology to the world. And I can assure you that they have managed to a large extent in spreading this ideology. What is taking place in Afghanistan and Iraq, and the activities in Saudi Arabia and many Arab states, show that they have succeeded very much in their strategy.

(Al-Hammadi) Do you believe that what is taking place in Iraq now is planned by Al-Qa'ida and carried out by its members and followers?

(Abu-Jandal) Al-Qa'ida elements had expected this thing. Al-Qa'ida had expected the fall of the Iraqi regime and that the United States could only control the region through Iraq. As the Americans said, the Saudis are an inhospitable people. Many Americans were killed in Saudi Arabia and the recent incidents confirmed that. Therefore, the Americans had no choice but direct occupation. This thing was expected. Indeed what is taking place inside Iraq now confirms that. Many Al-Qa'ida elements entered Iraq and are now fighting with the Iraqi resistance.

(Al-Hammadi) Do you believe that Abu-Mis'ab al-Zarqawi is indeed the Al-Qa'ida representative in Iraq?

(Abu-Jandal) The problem is Al-Qa'ida itself is now longer an entity but an ideology. It has become an ideology now. Many youths now carry Al-Qa'ida ideology against United States. Abu-Mus'ab al-Zarqawi was in Afghanistan. He was also in Kabul and he used to often meet with Shaykh Usama Bin Ladin. But I don't think that he is Al-Qa'ida's number one man, because Al-Qa'ida has Iraqi cadres that exist in Iraq. So it can dispense with Abu-Mus'ab

al-Zarqawi.

(Al-Hammadi) Since the Cole incident, the names of Abu-Ali al-Harithi and Abu-Asim al-Ahdal had been heading Al-Qa'ida leadership in Yemen. Then Washington assassinated the former in the Ma'rib desert and arrested the latter in Sanaa. What is the truth about their leadership of Al-Qa'ida in Yemen, especially since the arrest of Abu-Asim al-Ahdal we have not heard anything about him or his trial, and he was not include among those on trial in the Cole case?

(Abu-Jandal) Actually, the talk about the two men's leadership of Al-Qa'ida is not correct. What is more correct is Abu-Ali Al-Harithi's leadership. As I said, Abu-Ali al-Harithi was considered a tribal leader more than an organizational or military leader. As far as Abu-Asim al-Ahdal is concerned, he has nothing to do with Al-Qa'ida. This is a fact. But, the problem with the US media is that if they want to arrest someone they begin by charging him with membership in Al-Qa'ida. The media say the man is an Al-Qa'ida leader and the charge sticks. Al-Qa'ida has become a boogeyman. But, this is not true at all.

(Al-Hammadi) Are all Al-Qa'ida leaders in Yemen still active and ready to carry out missions against US and Yemeni interests?

(Abu-Jandal) Matters have changed much, especially since there is no leadership leading these youths, or to be more precise there are any influential personalities that can influence these elements as individuals. There is another problem. The issue now is such that it is not essential for Al-Qa'ida member to execute the job. Persons outside Al-Qa'ida could carry out operations, as happened in the killing of US missionaries in Jablah and Jarallah Umar in the Reform Conference. The executors of these two operations had nothing to do with Al-Qa'ida and did not leave Yemen in the first place. No one can control these matters, as they have become rather loose. They are no longer under Al-Qa'ida control. It is now feelings that motivate people everywhere. As to whether they are active, Al-Qa'ida elements are very well trained. However, their comprehension of information differs from one person to another. As to whether they are active, I say yes they are active, but in the interest of their country, especially after the recent statements by Democratic candidate Kerry, who announced that Yemen is one of the sources of terrorism, and that it must be attacked. I believe that many youths would begin to prepare themselves for this new confrontation, as it is very likely for the United States to come to the whole region -- and it is coming -- in order to control the entire Middle East. I don't expect Yemeni youths, especially those who trained in Al-Qa'ida and carried al-Qa'ida ideology to stands with their hands tied before US moves in the region.

(Al-Hammadi) US demands recently included Shaykh Abd-al-Majid al-Zandani. They also hinted at Shaykh Abdallah Sa'tar. And before that the United States kidnapped Shaykh Muhammad al-Mu'ayyad. Do you think that these people have any link to Al-Qa'ida extensions to be considered subject to US demands?

(Abu-Jandal) Frankly, we cannot but speak well of these people, especially about these three personalities. But, the truth of the matter is, as I said before, when the United States wants to fabricate a problem with a state, a group, or an organization in the Islamic World it links it to Al-Qa'ida, such as when it shut down the Saudi Al-Haramayn Foundation, although it is a welfare institution that has nothing to do with armed organizations. The same can also be said about many other welfare and relief organizations. Shaykh Mu'ayyad, Shaykh Al-Zandani, Shaykh Al-Sa'tar, and others will remain a target for the United States. God says in the Koran: "Never will the Jews or the Christians be satisfied with thee." No matter how we tried to improve our image, hold dialogue of civilizations, or call for the unity of religions, Jews and Christians will not be pleased with us. As far as Shaykh Al-Zandani and Shaykh Sa'tar are concerned, it is well known that Shaykh Sa'tar in particular is against Al-Qa'ida and armed action in general. So how can he be a supporter of Al-Qa'ida? Even we the former Al-Qa'ida members had engaged in heated arguments with him on several occasions. The man is completely against us. So how can he be a supporter of Al-Qa'ida?

(Al-Hammadi) And what about the continuous incidents and bombings in Saudi Arabia, do you think that they have been planned and implemented by Al-Qa'ida?

(Abu-Jandal) According to my knowledge of some of the leaderships and the individuals that carried out the martyrdom operations in Saudi Arabia, I assure you that they are elements of Al-Qa'ida. But, there remains the question: Why did they do that? This is the question that we must address to the Kingdom of Saudi Arabia, which is dear to my heart. It is my birthplace. I was raised in it and I studied in it. I am one of those who like to breathe the air of the Hejaz. So my question is very normal. I, as one of the Yemenis who were raised in Hejaz and who know it very well, ask: What made the youths take up arms and carry out bombings in the Saudi territories? I believe that it is the Saudi Government's stupid policy toward these people. Those who bombed Al-Muhayya complex spoke frankly in their audiotapes over the Internet that they went to jihad with the permission of the state and the instigation of Shaykh Sa'd al-Burayk, Shaykh A'id al-Qarni, Shaykh Sulayman al-Awdah, and many others who instigated these youths. But when the confrontation began between the government and these youths, the youths were surprised to find that these shaykhs had abandoned them. In fact, Shaykh Sa'd al-Burayk and Shaykh A'id al-Qarni began attacking these youths, who were the product of their lectures,

sermons, lessons, and religious circles. They did not come from vacuum. The operations here are a reaction. For example, Abdallah al-Mu'abbidi, a man well known to me, was against the idea of armed operations in Saudi Arabia and anything harmful to his country. Why did he carry out the bombing in Saudi Arabia? We used to sit down together, eat and drink together with the one who made him think about these things; namely, Abd-al-Aziz al-Muqrin. He was completely against this idea. What made him do such things? What happened to him was the motivation. Saudi criminal intelligence men stormed his house, beat up his mother, broke his brother's arm, and entered his sister's bedroom. What do you expect from this person, who was thrown in solitary confinement for one year and five months without any reason, but to go to jihad? Did he do anything as an individual? No, on the contrary, these youths were "against" and have now become "for." They were against operations inside Saudi Arabia, and now they themselves carry them out in Saudi Arabia. Why did many of them join Al-Qa'ida? This is because they now find in Al-Qa'ida a means through which to avenge for what happened to them. All this must be taken into consideration.

(Al-Hammadi) Do you think that the Saudi authorities have erred in their calculations in dealings with Al-Qa'ida elements on their territory?

(Abu-Jandal) The Saudi authorities do not deal with these persons as Al-Qa'ida elements. They deal with them as jihadist elements, as directed and instigated by the advisers of Interior Minister Nayif Bin-Abd-al-Aziz, and others from the neighboring Arab states, who give advice. The youths reacted on the basis that they were members of the organization, while they were not to begin with. Neither Abdallah al-Mu'abbidi, nor Abd-al-Aziz al-Muqrin or many of the youths who were killed were members of the organization. Neither also was Khalid al-Hajj, Khalid al-Jihni, or others in the list of those killed in Saudi Arabia were members. They had no link whatsoever with Al-Qa'ida. But the Saudi Government's policy made them join Al-Qa'ida. The Saudi Government knows that they were not members in Al-Qa'ida in the first place. But, later on and as a reaction to what happened to them they became members in Al-Qa'ida. This is the truth of the matter on this subject.

(Al-Hammadi) How long would the armed operations continue in Saudi Arabia?

(Abu-Jandal) They will continue as long as this reckless policy of the sword and bullets continued, as stated by Interior Minister Nayif, who said, we have no dialogue with these people except with the sword and bullets. These operations will continue as long this Saudi Government policy, which is essentially to please the United States, continues.

(Al-Hammadi) Some people say that Al-Qa'ida has been penetrated by US intelligence and is now being used to serve US aims, as is happening in

Saudi Arabia. What is your opinion on that?

(Abu-Jandal) This information is not correct, but it is disseminated by Arab intelligence services more than US services. The question of intelligence penetration of Al-Qa'ida does not take place by planting an agent or recruiting another. The question is merely the return of some persons to their country. A well-known figure had returned to Egypt and it was said that he was an intelligence man for 17 years within Al-Qa'ida. They said they penetrated jihadist organizations to the marrow! Now, let me ask them: How could you have penetrated jihadist organizations to the marrow when you could not stop the military operations? Your penetration of these organizations would have meant that you were informed of their operations and where there would take place so that you could stop them. What you say is not true. Still, there were attempts by US, Jordanian, and Saudi intelligence services to penetrate Al-Qa'ida, but they failed for one reason; namely, Usama Bin Ladin chooses his elements from the steel and fire. They are not political elements with official jobs and university diplomas. It is from within the battles that elements are chosen, and hypocrites and agents cannot join battlefronts. It is difficult for them. What they say is not true.

(Al-Hammadi) It is believed that those charged with the 11 September incidents visited Afghanistan in the period you were there. Who do you know among them?

(Abu-Jandal) Actually, among the elements that carried out the September incidents I knew Muhammad Ata, Awad Abd-al-Rahman al-Masri. I knew personally in Afghanistan. But, the period of his stay in Afghanistan was very short. He stayed only for the month of Sha'ban and Ramadan and left in Id Al-Fitr. Among the persons I knew also were Ramzi al-Shaybah, Zakariya al-Musawi, and Khalid al-Muhdar. I fought together with the latter in some battlefronts. I knew these men personally, but I have nothing to do with what they did.

(Al-Hammadi) When you met with them, did you know that they were preparing for the execution of this operation?

(Abu-Jandal) I didn't know that they were preparing for this operation. But, what I know is that all Al-Qa'ida members are fully qualified and equipped to carry out any operation at any time. Al-Qa'ida elements are qualified, but the assignment of persons depends on capabilities. For example, those who carried out the 11 September were a Lebanese, an Egyptian, one from the UAE, two Saudis, and some who held Yemeni documents. They were a mixture. And whoever enters the United States has entered.

(Al-Hammadi) Was the 11 September incident as planned, or was it smaller or

bigger than what was expected?

(Abu-Jandal) Actually, the operation results were not expected to lead to such great damage and collapse. But, God says in His book: "When thou threwest (a handful of dust), it was not thy act, but God's." That was a mere cause, and so God supported the Muslims in the United States.

(Al-Hammadi) But, was the plan to carry out the operation in these areas or was it bigger than that?

(Abu-Jandal) From the information that we had and what I knew from personal sources, which was then confirmed by the news media and US intelligence via the investigation committee into the 9/11 incidents, the operation was to use 12 planes. If four planes caused all this uproar, what if 12 planes were used?

(Al-Hammadi) Do you believe that those who carried out the 9/11 incidents came to Afghanistan to receive the final signals to carry out the operation?

(Abu-Jandal) I don't think so because the youths were prepared and trained and most of them were in the battlefronts. But the selection process was haphazard.

(Al-Hammadi) How about the execution, was it personal or coordinated with the central leadership?

(Abu-Jandal) It was certainly coordinated but it was the field command in the United States that planned the operation. But, the central leadership had a role. It played an important role in preparing and selecting the good elements for it.

(Al-Hammadi) In your opinion, what is the reason for the United States' inability to capture Usama Bin Ladin, although it captured Saddan Husayn a short period after the war on Iraq?(Abu-Jandal) Many persons claim that Usama Bin Ladin's agentry delayed his capture up to now. But, we say that the comparison between Usama Bin Ladin and Saddam Husayn is unfair because Saddam was a black past for his people. There was the massacre of Kurds in Halabjah, the killing of Shiites in the south, and the domination and enslavement of the Iraqi people. All those have caused hatred against him, which facilitated his capture even if after a while. But, wherever he went, from the ocean to the ocean and not just from the Gulf to the ocean Usama Bin Ladin is popular. We strongly believe that Usama Bin Ladin would only face what God had ordained for him. But, we are also certain that this man upheld God and that God would preserve him.

(Al-Hammadi) A final question, what is the future of Al-Qa'ida on the Arab

and international levels in light of these universal wars against it?

(Abu-Jandal) Al-Qa'ida had sought right from the start to foster confrontation between the United States and the Islamic World. I recall Shaykh Usama Bin Ladin telling us: We as an organization cannot continue with the qualitative operations. So we have to draw the United States into a confrontation with all the Islamic peoples. This was the plan in the Somalia days. Bin Ladin had wished the capture of a single US soldier alive to make the United States withdraw and for the fighting to continue everywhere. Shaykh Usama Bin Ladin and the Al-Qa'ida have pursued this endeavor and succeeded in drawing the United States into an unequal confrontation, not from the military technology aspect, but from the ideology aspect. Muslims have now reached the point where they are fed up with the United States, which lives in prosperity off our nation's resources. I believe that the United States is heading for its demise. As to the future of Al-Qa'ida, I believe that it has found what it wanted. It can now melt into a new caldron, and a new giant would be reborn, of which Al-Qa'ida would be a part. Many of the Islamic World leaders would join it and the confrontation with the United States would be inevitable. And, Al-Qa'ida would not be the leader but a vanguard army.

(Description of Source: London Al-Quds al-Arabi in Arabic -- London-based independent Arab nationalist daily with an anti-US and anti-Saudi editorial line; generally pro-Palestinian, tends to be sympathetic to Bin Ladin)

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UNITED STATES OF AMERICA	)	
	)	
v.	)	PROSECUTION REPLY TO DEFENSE
	)	RESPONSE ON MOTION TO PRE-ADMIT
SALIM AHMED HAMDAN	)	EVIDENCE
	)	
	)	October 20, 2004

1. Timeliness. This reply is being filed in a timely manner within the parameters established by the Presiding Officer.

2. Relief Requested. The Prosecution renews its request to pre-admit evidence. Despite Defense assertions to the contrary, this motion is not being utilized to circumvent witness testimony, but rather will contribute to the full, fair and efficient trial of this case

3. Defense Factual Assertions (responses correlate with Defense lettered factual assertions).

a. The Prosecution concurs with Defense fact (a).

b. The Prosecution contests Defense fact (b) that translators were used during all of these interviews. Several interviews were conducted directly by the questioner in the Accused's native language.

c. Subpoenas have been issued to attempt to obtain contact information for these individuals. No responses have been received to date.

d. If the Defense is aware of transcripts or audio/visual recordings of these interviews, they should specifically identify. We disagree with this factual assertion.

e. We agree that the Defense has not been given the opportunity to cross-examine either the detainees or the agents who took the statements. The trial has not started yet so it would be difficult for cross-examination to have been conducted. We are aware that detainees are being made available for interviews by the Defense and that the Defense has taken advantage of this opportunity.

f. This factual assertion has no probative value as it fails to address any matters pertaining to the Accused or other specific persons who provided statements that the Prosecution intends to use.

g. The Prosecution is unaware of any audio or video recordings of these interviews and requests the Defense to elaborate if they have any information on this issue.

h. This factual assertion has no probative value as it fails to address any matters pertaining to the Accused or other specific persons who provided statements that the Prosecution intends to use.

i. This factual assertion has no probative value as it fails to address any matters pertaining to the Accused or other specific persons who provided statements that the Prosecution intends to use. It is noteworthy that the Defense places reliance on a newspaper article (the very type of evidence the Defense chastises the Prosecution for desiring to admit into evidence).

j. The Prosecution concurs with this factual assertion

4. Additional Facts.

a. The Defense deadline for filing motions was 1 October 2004. (Presiding Officer Order from August 2004).

b. Despite having been provided all of the law enforcements statements related to interviews of the Accused, the Defense did not file any motions to suppress any of these statements. (Assistant to the Presiding Officer List of Currently Pending Motions).

c. The Prosecution has never stated or implied that the agents who took the statements from the Accused or other detainees would not be available to testify. In fact, quite the contrary, when the names and contact information of the agents was provided to the Defense, it was with the additional statement that " you should not assume that because a name appears on the list that the individual will in fact be produced by the Prosecution to testify before this Commission. If you desire any of these witnesses independently for the Defense, you should so state in writing." (Prosecution Discovery Response of 24 September 2004).

d. To date, the Defense has not requested that any law enforcement agents be produced as witnesses at this trial.

e. The Prosecution does intend, and has always intended, to produce between 10-20 agents to testify and be subjected to cross-examination concerning the statements they took from the Accused as well as others.

5. Legal Authority Cited.

a. Military Rule of Evidence 801

b. Federal Rule of Evidence 801

c. Military Commission Order No. 1

d. Nuremburg Charter, Article 19

e. International Criminal Tribunal for Yugoslavia, Rule 89

f. International Criminal Tribunal for Rwanda, Rule 89

g. Rome Statute for the International Criminal Court, Rule 69(4)

h. Prosecutor v. Blaskic, ICTY Trial Chamber Judgment (3 March 2000)

i. Judge Richard May and Marieke Wierda, International Criminal Evidence (2002)

6. Legal Analysis.

a. The Witnesses who took Statements will be Testifying and Available for Defense Cross-Examination.

The Defense claims we are going to circumvent the right to cross-examination by admitting the official law enforcement documentation of what the Accused stated to investigators during interviews. I state in no uncertain terms that every statement of the Accused given to law enforcement officials that the Prosecution will seek to admit into evidence will have a sponsoring agent witness who was present during the interview. The names of these agents and contact information for these witnesses have been previously disclosed to the Defense.

The Defense is confused in the difference between pre-admitting evidence and having the ability to challenge the credibility of the evidence admitted. The Prosecution asserts in complete good faith that for every law enforcement document it intends to introduce, a sponsoring agent will testify that it accurately reflects what they were told by the Accused (many times directly and sometimes through the use of a translator). Absent some concrete and specific assertion particularized to a specific piece of evidence that the Prosecution seeks to introduce, this evidence should be admitted for efficiency while still being subjected to the rigors of aggressive cross-examination.

The Defense asserts that these reports are "riddled with errors" but provides no examples to back up this bald assertion. At this point in time the Defense has not cogently identified what their theory is concerning these statements. Are they saying that the statements attributed to the Accused were never said or are they saying that they were said but were the result of coercion? As the Defense has not filed any motions challenging the admissibility of this previously identified and provided evidence, we do not have a basis to litigate the issue.

Even in a traditional court-martial or federal court setting, the testifying agent would be able to repeat in court the statements the Accused made to him or her. These would qualify as admissions under Military Rule or Federal Rule of Evidence 801(d) (2) (statement is not hearsay if it is offered against a party and is the party's own statement).

b. The Defense Assertion that there is no showing of Relevance is Disingenuous.

In response to the Defense motion to dismiss for failure to state an offense, the Prosecution attached three investigative reports documenting the prior admissions of the Accused. Within these statements, the Accused admits to attending terror training camps,

pledging conditional bayat to bin Laden and that he transported weapons and ammunition provided by the Taliban to al Qaida compounds in Qandahar. We could go on. Regardless of their position on the credibility of this evidence, is the Defense honestly asserting that they do not see the relevance of this evidence? These statements provide evidence that correlates exactly with the overt acts contained on the Accused's charge sheet. On its face, this evidence is relevant and has probative value to a reasonable person. Similarly the other evidence the Prosecution seeks to admit is equally relevant on its face and this should be readily discernible to attorneys with the breadth of experience of the Defense counsel in this case.

c. The Defense Assertions on What they Have Been Provided in Discovery Are not Accurate.

On page 5 of the Defense Motion Response, they allege that the Prosecution has "to this day, not provided the circumstances under which each 302 was made, including the time, location, and coercive techniques used, if any to elicit the information. The devil is in the details and the discovery documents do not lie. Attached to the Reply is the initial discovery memorandum provided by the Prosecution to the Defense on 18 December 2003. When listing the investigative reports, the Prosecution identified the date of the report as well as the location of the interview. Furthermore, if one were to read the actual investigative reports, they clearly delineate the date and location of the corresponding interview and the date of transcription of the corresponding 302's. This information has consistently been provided in relation to investigative reports throughout the discovery process.

As for the disclosure of the coercive techniques used during interrogations, the Prosecution has met its obligation to disclose exculpatory information and has disclosed any and all evidence concerning coercion of which we are aware. The Prosecution is unaware of any physical coercion or threats of any kind being made in conjunction with these law enforcement interviews.

Furthermore, with the issuance of a Protective Order requiring the Defense to protect the identities of law enforcement agents, the Prosecution provided the Defense with the names of the law enforcement agents who conducted the interviews. We specifically correlated the agent names with the name of the subject interviewed and the date of the interview. See Bates Stamp 1616-1621. We are perplexed as to why the Defense would assert that they do not have this information.

d. Defense Counsel with this Level of Skill, Knowledge and Experience Can Clearly Recognize the Probative Value of the Other Evidence the Prosecution Seeks to Admit.

The Defense claims the Prosecution should not be able to use "the proverbial kitchen sink . . . to demonstrate that Mr. Hamdan conspired to commit the crimes alleged." They state that they are unable to determine how this evidence is relevant or how it has probative value to a fact finder. (Defense Motion at 5.) An example of a sampling of the evidence the Prosecution is seeking to pre-admit shows the Defense is not being sincere in the protestation:

(1) 1996 Declaration of Jihad – The offenses the Accused is alleged to have conspired to commit have as an element that they occurred during a period of armed conflict. Is the Defense

opining that they do not see the relevance of a document where bin Laden declares war on the United States?

(2) 1998 Fatwa – The Accused is charged with conspiring to attack civilians. Is the Defense opining that they do not see the relevance of a document where bin Laden tells his followers that they must kill Americans - whether military or civilian - anywhere they can be found?

(3) Interviews of bin Laden by ABC and CNN. The very same evidence we seek to admit was found relevant by the United States District Court for the Southern District of New York and was admitted during the prosecution of those associated with the United States Embassy Bombings in Kenya and Tanzania.

While the Defense may argue that this type of evidence is not relevant in relation to the Accused, the three investigative reports documenting interviews of the Accused previously submitted by the Prosecution clearly show that this evidence is relevant.

e. The Evidence the Prosecution seeks to Pre Admit meets the Standard for Admissibility and the Defense is not Precluded in Any Way from Attacking the Credibility of this Evidence.

The starting point for determining the admissibility of evidence is Military Commission Order (MCO) No. 1 that states that evidence shall be admitted if "the evidence would have probative value to a reasonable person." MCO No.1, Section 6(D) (1).

This standard for admissibility is consistent with the standard for:

(1) Nuremburg (Article 19 – adopt expeditious and nontechnical procedures and admit any evidence that has probative value);

(2) The International Criminal Tribunal for Rwanda (Rule 89 – chamber may admit relevant evidence which it deems to have probative value);

(3) The International Criminal Tribunal for Yugoslavia (Rule 89 – admit relevant evidence that has probative value and only exclude if probative value is substantially outweighed by the need to ensure a fair trial); and

(4) The International Criminal Court (Rule 69(4) – Court rules on admissibility of evidence taking into account probative value and prejudice evidence may cause to a fair trial)

In the International realm, the rules favor admissibility allowing questions of credibility or authenticity to be determined according to the *weight given* to each of the materials at the appropriate time. Prosecutor v. Blaskic, ICTY Trial Chamber Judgment (3 March 2000) at para 34-35. In Blaskic, the Trial Chamber authorized the presentation of evidence without it being submitted by a witness. Id. The same arguments that are being made by the Defense in this case were made in the Blaskic case. The Trial Chamber found that admitting evidence up front while later allowing inquiry into the credibility of the evidence to determine the weight to give the

evidence "allowed the proceedings to be expedited whilst respecting the fairness of the trial and contributing to the ascertainment of the truth. Id. at 35. Like the Defense in our case, the Defense counsel in Blaskic also asserted that this was hearsay and that there was no inquiry as to its reliability. Id. at 36. The Trial Chamber rejected this objection stating that they could receive any evidence that had probative value and that the other arguments go to weight and not its admissibility. Id. Similar to the arguments presented by this Accused, the Trial Chamber stated that documentary evidence produced by a party and identified by a witness was admissible, and that any dispute over authenticity goes only to weight and not admissibility. . . Id.

On the Hearsay issue, we again reiterate that admissions by the Accused are not hearsay. Furthermore, in international trials, hearsay documents are "frequently admitted and there are few formal rules regarding admissibility." Judge Richard May and Marieke Wierda, International Criminal Evidence, para 4.02. Rigid and technical hearsay and admissibility rules will preclude much potentially probative evidence to go unheard in jurisdictions (war crime tribunals) where any evidence is scarce and difficult to obtain. Id at para 4.11.

With respect to the reliability of the evidence the Prosecution seeks to admit, the Defense can hardly contest the reliability of things such as the 1998 Fatwa, 1996 Declaration of Jihad or documented interviews of bin Laden by ABC and CNN. These items are readily available on the Internet or have been run on national or international television networks and have been previously admitted as evidence in various federal courts.

A distinguished ICTY judge and his co-author cited by the Defense for having written an authoritative treatise on International Criminal Evidence opines Trial Chambers should admit evidence without first making a formal determination of reliability as the Trial Chamber is in a better position to make such a determination after "it has received **all** the evidence." Id. at para 4.42.

f. Conclusion.

The Prosecution is not in any way hindering the Defense's ability to cross-examine witnesses and delve into the credibility of the evidence. The evidence the Prosecution seeks to admit has probative value to a reasonable person on its face and the Defense has not offered any concrete evidence to detract from this probative value. The Defense objected vehemently based on their misapprehension that sponsoring witnesses would not be produced and subject to cross-examination. However they have not advanced any arguments contesting that the sponsoring witness could lay the appropriate foundation for the evidence. Furthermore, even if they did contest this issue, consistent with the practice of the ICTY, this is a question that should go to weight and not admissibility.

If the Defense has specific issues with respect to specific evidence that they feel was obtained by inappropriate means of such magnitude that the evidence no longer has probative value, they should bring the issue to the forefront by filing an appropriate motion. This will promote trial efficiency. The motion filing deadline date has passed and no such motions were brought.

Pre-admitting evidence promotes trial efficiency while preserving both parties' right to a full and fair trial. With logistics issues, difficulties in the transport of individuals to Guantanamo, and a voluminous amount of evidence, it only makes sense to pre-admit evidence to promote efficiency. We invite the Defense to do the same with the evidence they intend to introduce.

7. Attachments.

Prosecution Discovery Memorandum of 18 December 2003

8. Witnesses. None.

9. Oral Argument. Oral argument will be provided if desired.

[redacted]
Commander, JAGC, U.S. Navy
Prosecutor
Office of Military Commissions

Review Exhibit 22-C

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTION, DC 20301-1600

December 18, 2003

From: Trial Counsel, Military Commissions
To: Detailed Defense Counsel ICO Salem Ahmed Salem Hamdan

Subj: DISCOVERY ICO SALEM AHMED SALEM HAMDAN (A/K/A SAQR AL JADDAWI)

Ref: (a) Military Commission Order No. 1 of March 21, 2002
(b) Target Letter ICO Hamdan dated December 15, 2003

1. To assist you in the performance of your duties under reference (a), the following documents are provided. Please note that these documents and the information contained therein are subject to the attached protective order issued by the Appointing Authority.

[redacted]

(10 pages).

ATTACHMENT TO
Review Exhibit 22-C

Page 1 Of 3

ATTACHMENT
Review Exhibit 22-C

Page 2 Of 3

[redacted]

2. If you did not receive any of the listed enclosures, please notify me immediately so that the situation can be rectified. If I do not receive such notice within three days of providing this discovery, I will proceed with the understanding that you received all of the items listed.

3. Although many of the enclosed are unclassified, they are marked as FOUO/Law Enforcement Sensitive. As such, the information in these documents should be safeguarded from the general public and only be shared with members of the defense team and others with an appropriate need to know. Additionally, all CITF Form 40 documents should be treated as SECRET until an ongoing review of these documents is completed.

[redacted]

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the above described documents were provided to the detailed defense counsel on the 18th day of December 2003.

[redacted]

ATTACHMENT 70

Review Exhibit 22-C

Page 3 Of 3

UNITED STATES	)	
	)	Prosecution Motion to Preclude
v.	)	Attorney and Legal Commentator
	)	Opinion Testimony Concerning
	)	Their Views of the Law
SALIM AHMED HAMDAN	)	
	)	
	)	October 8, 2004

1. Timeliness. This Motion is submitted within the time frame established by Presiding Officer Memorandum 4-2. The Prosecution requests that this motion be decided at the Commission's first opportunity.

2. Relief Sought. That the Military Commission deny the Accused's request to call attorneys and legal commentators as expert witnesses for the following reasons: 1) the personal viewpoints of legal commentators is not the type of evidence that falls within the parameters of "expert testimony" recognized by military, federal or international courts. 2) the Defense fails to meet a threshold showing that the offered testimony by the "expert witnesses" is relevant. The Prosecution submits that if Defense Counsel believe that the opinions of international law commentators would be beneficial to the process, they can incorporate the comments into the Defense submissions. The Prosecution does not oppose the reasonable appointment of expert consultants to the Defense to assist in such matters.

3. Overview. The Defense has listed 21 attorneys, legal commentators and law professors that it would seek to call as expert witnesses to voice their opinions regarding various legal issues. These include: opinions on U.S. law, including the applicability of the Equal Protection Clause of the U.S. Constitution and the Right to Speedy Trial under Article 10 of the Uniform Code of Military Justice (UCMJ); and aspects of international law, such as the applicability of the Geneva Conventions. In both U.S. and international courts, expert witnesses are generally permitted where they possess scientific, technical or other specialized knowledge that would assist the trier of fact in understanding the evidence or determining a fact in issue, *if* the testimony is based on the application of reliable principles and methods to sufficient relevant facts to allow the witness to form a reliable opinion. As a rule, legal commentators are not permitted to testify as experts, because the inherent subjective nature of their opinions do not meet the standards necessary to be admissible as expert testimony (e.g., see indefinite and qualified statements of proposed experts in para. 4). The Prosecution opposes a departure from this norm; a procession of opposing legal academics would not provide relevant evidence to the Commission and is contrary to the Military Commission Orders, international legal practice, and the law of the United States. The Defense has the ability to adequately present their positions on the law by engaging the assistance of these individuals and incorporating their thoughts into the submitted briefs and arguments.

The Prosecution is only aware of these proposed 21 experts on the law based upon the Defense motions filed on 1 October 2004. The Defense has not yet made any formal witness requests that meet the requirements of Presiding Officer Memorandum No. 10. Regardless, the Prosecution files this motion to ensure timely resolution of this issue based on logistical concerns and to avoid the monetary waste of transporting 21 individuals to Guantanamo who the Prosecution asserts should not be permitted to provide testimony.

4. Facts.

a. The Accused, through counsel, has filed eleven motions in this matter. Seven of these motions cite the need for expert witness testimony on the law and name the witnesses whom the Defense intends to call to testify before the Commission.

b. The Prosecution has contacted several of these proposed witnesses to ascertain their availability to testify and whether they can provide the testimony alleged by the Defense in their inadequate synopsis and proffer. The contacting of these witnesses resulted in the following:

(1) Dean Anne Marie Slaughter. Dean Slaughter of Princeton University's Woodrow Wilson School of Public and International Affairs is listed among the witnesses in support of the Defense motion to dismiss the charge for violation of Common Article 3 of the Geneva Conventions and motion to dismiss the charge for violation of Art. 103 of the Third Geneva Convention of 1949. Dean Slaughter's expert opinion, consistent with the Prosecution's position, is that members and associates of al Qaida, such as the Accused, are ***not*** protected by the Geneva Conventions.

(2) Professor Derek Jinks. Professor Jinks of the Arizona State School of Law, cited as a witness regarding the applicability of Article 3 of the Geneva Conventions, believes that "both sides would have an equally strong argument" on whether or not the Geneva Conventions would apply to the Accused.

(3) Rear Admiral (RADM) John Hutson, U.S. Navy (retired). RADM Hutson, Dean of the Franklin Pierce Law School, is listed as another Defense witness on international law and the Geneva Conventions. He does not consider himself to be an expert on the Law of War or the Geneva Conventions.

(4) Professor Ryan Goodman. Professor Goodman of Harvard Law School, a purported Defense witness on the Geneva Conventions, has not been contacted by the Defense and has not formed an opinion on the applicable law in this matter.

(5) Professor Jordan Paust. In support of their motion to dismiss under Article 10, UCMJ, the Defense states that they "intend to call Professor Paust as an expert in the area of constitutional and statutory law, specifically discussing the speedy trial doctrine, in support of this motion." (Hamden -- Motion to Dismiss Under Article 10 UCMJ, p. 5.)

When asked his opinion as to whether there were any speedy trial violations in Mr. Hamden's case, he responded: "Haven't entertained the thought."

5. The law supports the relief sought.

a. The President's Military Order of November 13, 2001 (PMO) Sec. 4(c) (2) mandates that all commissions be "full and fair." A full and fair trial requires that only witnesses who may present evidence that would assist the Commission in determining the relevant facts and issues should be permitted to testify. A parade of lawyers or legal commentators appearing before the Commission as "expert witnesses" to express their opinion on what the law is, or should be, is not consistent with recognized standards for expert witnesses or the notion of "full and fair" trials.

b. U.S. Law. Both federal and state law generally prohibit the testimony of lawyers regarding the law. In Sprecht v. Jensen, 853 F.2d 805 (10th Cir. 1988), *cert. denied,* 488 US 1008 (1989), the Court reversed the trial court's decision to allow a lawyer to testify in a civil rights action because the lawyer's testimony consisted only of legal conclusions which supplanted the trial roles of both the court and jury. The Court in Sprecht, citing the law in the Second, Fourth, Fifth and Sixth Circuits, held that "an expert witness may not give an opinion on ultimate issues of law" for at least two reasons. *Id.* at 808. Primarily, an "expert" on the law supplants the judge's role as the source of the law and creates confusion. *Id.* at 807. Secondarily, the trial process is such that if one side calls an expert on the law, the other will do so as well. The result is an inefficient process with lengthy testimony of multiple contradictory experts. *Id.* at 809. Similarly, the states have followed the federal courts in barring attorney experts on the law. See, e.g., Summers v. A.L. Gilbert Co., 69 Cal.App.4th 1155; 82 Cal.Rptr. 2d 162 (1999) ("California is not alone in excluding expert opinions on issues of law. ... At least seven circuit courts have held that the Federal Rules of Evidence prohibit such testimony.") *Id.* at 1179.

c. International Law. Consistent with U.S. holdings, the International Criminal Tribunal – Yugoslavia (ICTY) has disallowed expert testimony that interferes with the very role of the court. In Kordic and Cerkez (a matter involving Law of War violations before the ICTY) the Trial Chamber would not permit an expert to offer testimony that included legal conclusions. Persuaded by defense counsel that such testimony elevated the witness to the status of a "fourth judge" the Chamber denied the request, concluding that such testimony would impermissibly provide an opinion "on the very matters upon which this Trial Chamber is going to have to rule" and that doing so "invades the right, power and duty of the Trial Chamber to rule upon the issue." Furthermore, the Chamber concluded, "it's dealing with the matters which we have to deal with ultimately, drawing the conclusions and inferences which we have to draw, we think that it does not assist and is, therefore, not of probative value." Kordic and Cerkez, IT 95-14/2-T, Transcript (January 28, 2000) at 13289-13290, 13306-13307.)

On the other hand, when unique or significant issues of law are before a court, both U.S. and International Courts have recognized the benefit of receiving written material from legal scholars and commentators. As indicated above, the permitted mechanism,

however, is not to vest these scholars or commentators with the mantle of "expert witness." Instead, it is the obligation of the parties to develop the assistance of these scholars and incorporate their opinions into the parties submissions to the Court.

6. Analysis.

a. Offering attorneys as "expert witnesses" to testify on ultimate issues of law before the Commission runs afoul of the standards for expert witnesses recognized by both U.S. and International courts. Defense, in its pre-trial motions, all but states that the Military Commission lacks the ability to reach legal conclusions – something "beyond the training and expertise of lay persons" – without expert testimony, but offers no explanation as to why briefs, arguments of counsel and legal research are insufficient to state the Accused's position on the law. The Prosecution strongly disagrees with the Defense position. The Prosecution submits that the Commission, like other courts and tribunals, is squarely suited to receive the submissions of counsel regarding the interpretation of applicable law and render an informed decision. Moreover, a U.S. Appellate Court explicitly warns that such over-reliance on opinions of academics can lead to incorrect conclusions about the actual content of customary law. Yousef, 327 F.3d 56 at 69-70. It stated, "scholars do not *make* law, and that it would be profoundly inconsistent with the law-making process within and between States for courts to permit scholars to do so by relying upon their statements, standing alone, as sources of international law." Id. Standing for the same proposition, *see also* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)

b. Evidence of Probative Value. Prior to the admission of any expert testimony, the Defense must make a showing that the proffered witness is qualified and has evidence of probative value to offer. The motions filed to date have made no such showing. Indeed, a survey of the proposed witnesses indicates that the Defense has not and cannot meet their burden of demonstrating probative value. Military Commission Order (MCO) No.1 (6)(D)(2)(a). Testimony which is not probative as to the facts at issue is not admissible. The Defense falls woefully short of meeting the burden of demonstrating why the requested testimony would be relevant. In fact, and ironically, many of the witnesses described have either not been contacted by the Defense, or offer potentially helpful information to the Prosecution. See paragraph 4 above.

7. Oral Argument. The Prosecution asserts that this motion can be resolved without the necessity of oral argument.

8. Legal Authority.

a. United States v. Ramzi Ahmed Yousef, 327 F.3d 56 (2d Cir 2003)

b. Sprecht v. Jensen, 853 F.2d 805 (10th Cir. 1988), *cert. denied,* 488 US 1008 (1989)

c. Summers v. A.L. Gilbert Co., 69 Cal.App.4th1155; 82 Cal.Rptr. 2d 162 (1999)

d. Kordic and Cerkez, IT 95-14/2-T, Transcript (January 28, 2000)

e. Military Commission Order No. 1

f. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)

g. In re Yamashita, 327 U.S. 1, 18 (1946)

Commander, USN
Prosecutor
Office of Military Commissions

UNITED STATES OF AMERICA	)	
	)	**DEFENSE RESPONSE TO PROSECUTION MOTION BARRING EXPERT WITNESSES**
v.	)	
SALIM AHMED HAMDAN	)	14 October 2004

1. Timeliness. This motion response is being filed in a timely manner.

2. Defense Position on Prosecution Motion. The Defense Opposes the Prosecution's motion to hide the law and history from the commission's members by barring relevant evidence from the leading law professors in the world on the meaning of the Geneva Conventions, United States military law, the Uniform Code of Military Justice, and the United States Constitution. These are not "legal commentators" seeking to direct the Commission to a certain result, but rather the nation's most serious scholars of what the law *is*. In an attempt to invent a categorical ban on such evidence which does not exist, the Prosecution bends legal authority and cites irrelevancies. This inapposite case law must rely on a mischaracterization of the Defense's proposal, because in actuality there is absolutely no legal reason – nor a prudential one – to deny the Defense's proposal.

Each of the six identified witnesses is a leading expert in his or her field. By calling them, the Defense seeks to provide the commission with the most objective, scholarly views on what the law actually is, and what the history behind the law reveals. None are "defense witnesses" in that they will not testify as to the particular facts at issue in this case or apply the law to Mr. Hamdan's facts – a distinction the Prosecution has ignored. They are men and women of the highest integrity and professionalism, and can be expected to take positions that are sometimes contrary to those of the defense. They developed their expertise in the law over years of careful study and experience, all undertaken independently from this case and from the defense's position in particular.

The Defense firmly believes that without the testimony of the six witnesses it wishes to call, the military commissions will be fundamentally flawed from the outset. By illuminating the meaning of the various laws and provisions at issue, the six experts will render the Presiding Officer more capable of evaluating Mr. Hamdan's case, while simultaneously ensuring that he, as the Commission's only lawyer, does not exercise undue influence over the non-lawyers who make up the rest of the Commission.

The Defense understands why the Prosecution fears this expert testimony – the Prosecution would prefer that the Commission not understand the legal restraints on the President's convening of military commissions. But that is not a reason to bar this testimony. Moreover, the prosecution's motion poses numerous logistical problems. As a legal motion, it can only be decided by the commission itself, and since the commission itself can only meet in Guantanamo, the expert witnesses would have to be transported to

Guantanamo – to their great inconvenience and at huge expense to the American Government – at which point they may be barred from testifying altogether.

At bottom, this is a motion to hide relevant evidence from the commission. Unlike the evidence the Prosecution seeks to introduce, which is often prejudicial and uncorroborated, the testimony at issue is the product of neutral, objective scholarship of the highest level. There is absolutely no reason why such evidence would unfairly hurt one party. The motion should be denied.

3. Facts.

a. On October 1, 2004, the Defense gave notice of a range of 21 witnesses as experts in the fields of law at issue in this case. As the motions themselves made clear, the defense never intended to call 21 witnesses. Rather, they gave the prosecution notice of the law professors around the country who have expertise in these highly specialized issues, and began checking on their availability for participation at Guantanamo.
b. On October 11, 2004, as per the Order of the Presiding Officer, the Defense submitted a list of six names as expert witnesses to be called for the Defense next month. Five of the six are the leading law professors in the country on the particular history and issue involved in the specified motions; the sixth witness is a former General with significant experience in the area of the implementation of the Geneva Conventions
    a. Bruce Ackerman is Sterling Professor of Law, Yale Law School.
    b. Anne-Marie Slaughter is the Dean of the Woodrow Wilson School of Public and International Affairs, Princeton University.
    c. George Fletcher is the Cardozo Professor of Jurisprudence, Columbia University Law School.
    d. Allison Danner is Associate Professor of Law, Vanderbilt University
    e. Jordan Paust is Law Foundation Professor, University of Houston Law Center.
    f. General David Brahms was responsible for POW matters with respect to Vietnam.
c. The Prosecution misrepresents the positions of various witnesses that they contacted. For example, Professor Slaughter did *not* say that her "expert opinion, consistent with the Prosecution's position, is that members and associates of al Qaida, such as the Accused, are ***not*** protected by the Geneva Conventions." Pros. Motion at 2. Instead, Professor Slaughter told the Prosecution in that phone conversation that her view was that the Geneva Conventions were not written with Al Qaeda in mind, but that this did not create a legal black hole where no international law protected them. She explained to the prosecution that when gaps arise in the coverage of the Geneva Conventions, that the starting point for analysis must be the animating purpose behind the Conventions.
d. The Prosecution similarly ignores the position of Professor Paust. Professor Paust is the leading American authority on the relationship between the Uniform Code of Military Justice (UCMJ) and military commissions. He is being called to explain why the UCMJ, including its speedy trial provision,

binds the military commission. Notably, the views of Professor Paust directly contradict the stated position of the Presiding Officer on this legal issue.

e. Neither Professor Paust nor Dean Slaughter are being called to testify as to whether a specific violation, either of international law or the UCMJ, exists in the specific Hamdan case. Rather, they will explicate to the commission what the relevant law and history behind the law *is*.

f. In any event, the fact that there is disagreement as to what a particular witness believes is not a reason to bar their testimony, but precisely the reason why it must be introduced.

g. On 13 October, 2004, the Prosecution issued six formal denials of the witness requests, adding a new reason: that the Defense has not provided a full statement of what the witness is likely to say. The Defense has already set forth the relevance of each expert, as well as their personal knowledge of the specific issue of concern in the Motions, in its 11 October witness requests and their accompanying C.V.'s, which detail their published work on the issues facing the commission.

    a. Because they are not factual experts, it would be highly inappropriate to submit a detailed account, first person or otherwise, of what precisely each of them would say when called before the commission. The Defense has briefly summarized the scholarly positions that each witness has taken in their published and otherwise available works, and has explained why their views bear on the work of the commission. But it has not sought out to have a transcript or testimony in advance precisely because the testimony is independent of the Defense. The Defense would be willing, should the Presiding Officer or the Commission so authorize, to obtain such statements from each of the witnesses.

    b. As the leading treatise on rules of evidence in international military tribunals has said, "[t]he modern tribunals have relied extensively on live evidence" and "[r]eliance on expert testimony has also been significant." Judge Richard May & Marieke Wierda, International Criminal Evidence 208 (2002). At the same time, experts must be independent. Id., at 199. The Defense has sought to bring the leading minds in the nation today to the commissions, and has not previewed their testimony for precisely this reason.

4. <u>The Law Requires Rejecting This Motion to Hide Relevant and Nonprejudicial Evidence.</u>

    a. The prosecution has not a single case to support their motion. Not one case they cite addresses the barring of law professors' testimony from a body composed of lawyers and nonlawyers. In fact, the cases they cite – as well as many they ignore - suggest the contrary.

    b. Courts of all types – U.S. federal civilian courts, military courts, and international courts – *routinely* admit the testimony of experts in both domestic and international law. "Merely being a lawyer does not disqualify one as an expert witness." Askanase v. Fatjo, 130 F.3d 657, 672 (5th Cir. 1997).

c. In U.S. courts, admitting expert legal testimony is a longstanding tradition – particularly in the field of international law. In *The Paquete Habana*, decided over one hundred years ago, the Supreme Court of the United States declared: for the purpose of ascertaining and administering international law, "resort must be had to the customs and usages of civilized nations; and, as evidence of these, *to the works of jurists and commentators*, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. *Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is*." 175 U.S. 677, 700 (1900) (emphasis added). This language was affirmed by the Supreme Court just a few months ago. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739 , 2766-67 (2004) (citing above quotation).

d. Under the Supreme Court's guidance in *The Paquette Habana*, so many federal courts have heard and relied upon experts in international law that it would be impossible to list them all here. *See, e.g.*, Fernandez-Roque v. Smith, 622 F. Supp. 887, 901-02 (N.D. Ga. 1985) (explaining that the Court had conducted an evidentiary hearing to hear testimony of international law professors "because expert testimony is an acceptable method of determining international law"); *see also* Grupo Protexa, S.A. v. All Am. Marine Slip, 20 F.3d 1224, 1241 (3d Cir. 1994) ("In reaching its conclusions, the district court considered testimony regarding the validity of the order under Mexican and international law from witnesses produced by both sides, and we consider such testimony integral to our present decision.");United States v. Royal Caribbean Cruises, 11 F. Supp. 2d 1358, 1372 (S.D. Fla. 1998) (relying upon expert testimony in ascertaining customary international law); Navios Corp. v. The Ulysses II, 161 F. Supp. 932 (D. Md. 1958) (comparing the testimony of both parties' experts in international law).

e. The practice of receiving testimony from international law experts is also common in military courts. *See*, e.g., United States v. New, 50 M.J. 729 (C.C.A. 1999); United States v. Rockwood, 48 M.J. 501, 505 n.6 (C.C.A. 1998).

f. The Statute of the International Court of Justice goes even further, recognizing that besides conventions, international custom, and general principles of international law, the Court may look to "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the *determination* of rules of law." Article 38(1) (emphasis added).

    a. In fact, in *Kunarac, Kovac and Vukovic* (IT-96-23) & (IT-96-23/1), 11 Sept. 2000, at 5364-93, available at http://www.un.org/icty/transe23/000911it.htm, the Tribunal heard the expert testimony of Professor Stanko Bejatovic from Belgrade Law School, as to the elements of rape.

g. Federal courts also regularly hear experts on complex matters of domestic law. *E.g.*, Huddleston v. Herman & MacLean, 640 F.2d 534, 552 (5th Cir. 1981) (permitting expert testimony as to "boilerplate" language in securities industry); Sharp v. Coopers & Lybrand, 457 F. Supp. 879, 883 (E.D. Pa. 1978) (accepting testimony of law professor expert in federal income taxation). In *United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979), a federal court of appeals actually overturned the lower court for *failing* to admit defendant's proffered legal expert testimony on income tax law: "We hold that the combined effect of the trial court's evidentiary rulings excluding defendant's proffered expert testimony and its requested jury charge prejudicially deprived the defendant of a valid theory of her defense . . . [B]ecause the district court refused to permit . . . the expert for the government, and . . . the expert for the defense, to testify and because it reserved to itself the job of unriddling the tax law, thus completely obscuring from the jury the most important theory of Garber's defense that she could not have willfully evaded a tax if there existed a reasonable doubt in the law that a tax was due her trial was rendered fundamentally unfair." In other words, to refuse to admit this evidence creates the possibility that the final decision of this commission will be overturned on appeal.
    a. Similarly, in *In re Madeline Marie Nursing Homes*, 694 F.2d 433 (6th Cir. 1982), the Court found that the bankruptcy court's failure to avail himself of expert legal testimony on Ohio's Medicaid scheme "rendered it impossible for the court to reach an appropriate decision." *Id.* at 440. It stated, "We believe that when the legal inquiry extends to a complex scheme . . . a court should not hesitate to seek out all of the practical assistance it can obtain in its function as ultimate determiner of the law. Id. at 445. When legal matters are as complicated as they were in *Garber* and *Madeline Marie Nursing Homes* and not written down in a federal statute, admitting expert legal testimony may be imperative.
h. Contrary to the Prosecution's claims, the standard for admitting experts – legal or otherwise – is a flexible one characterized by pragmatism. Rule 702 of the Federal Rules of Evidence reads, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The essential inquiry in a decision to admit expert testimony (in addition to reliability, which is not at issue in this matter) is helpfulness to the trier of fact. *See, e.g.*, *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 591 (1993); *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988), *cert. denied*, 488 US 1008 (1989); Fed. R. Evid. 702 advisory committee note.
i. A trial judge has broad power to admit an expert's testimony. *Haarhuis v. Kunnan Enters., Ltd.*, 177 F.3d 1007 (D.C. Cir. 1999)

(finding proper the qualification of an expert in Chinese and international law, stating that "the decision whether to qualify an expert witness is within the broad latitude of the trial court . . . ."); *Hayter v. City of Mt. Vernon*, 154 F.3d 269 (5th Cir. 1998) ("Trial courts have broad discretion in rulings on the admissibility of expert opinion evidence . . . .").

j. Because the Commission will be ruling on matters of great complexity in many fields of law, the testimony of renowned experts in those fields will certainly be helpful – if not invaluable – in reaching legally sound conclusions. And because the rules of evidence in a commission are even more permissive than in federal court (so long as no prejudice results to one side), the evidence *must* be admitted.

5. Analysis

a. The statement of probative value for each of the six experts is explicitly made in each of the witness requests of 11 October 2004. Each meets the standard criteria to qualify someone as an expert.

b. The Prosecution's legal authority is inapposite – going either to legal "experts" who apply the law to facts and thus dictate a particular result, or to experts who claim that their testimony is binding law. The Defense's position poses neither of these scenarios. Rather, the Defense seeks to introduce objective and relevant expertise (apart from the facts) as to what the law actually is. Of course, the Commission will ultimately decide for themselves how that law applies to the facts of Mr. Hamdan's case. Once the Defense's position on the use of expert law professors is understood, even the Prosecution's meager precedent falls away.

c. The Prosecution misstates the law for the International Tribunal for the Former Yugoslavia. The rule for admission of expert testimony explicitly permits the testimony of the witnesses identified here. *See Kunarac, Kovac and Vukovic* (IT-96-23) & (IT-96-23/1), 11 Sept. 2000, at 5364-93 (discussed above, where a law professor's testimony as to the elements of the offense of rape were admitted). Rule 94 permits the admission of such testimony provided that it is from "a person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute." Indeed, not only does ICTY refrain from barring the testimony of lawyers, *it has even permitted ICTY's own prosecutors' staff to serve as expert witnesses in cases before the tribunal.* See DECISION CONCERNING THE EXPERT WITNESSES EWA TABEAU AND RICHARD PHILIPPS, 3 July 2002, IT-98-29-T. (The Defense is attaching a copy of that opinion because it is not easily available.)

   i. ICTY has a permissive standard for the testimony of expert witnesses. See Prosecutor v. Brjdanin, decision of June 3, 2003 (http://www.un.org/icty/brdjanin/trialc/decision-e/030603.htm);

see also http://www.un.org/icty/strugar/trialc1/decision-e/040401.htm.

ii. In the case cited by the prosecution, Kordic and Cerkez, IT 95-14/2-T, Transcript (January 28, 2000), the witness was opining as to *facts* showing whether the defendant was guilty. That case did not categorically bar the testimony of law professors, lawyers, or any other legal experts. To do so would violate the longstanding published Rule 94 and decisions such as *Kunarac, Kovac and Vukovic*, and *Tabeu and Phillips*, cited above. In fact, the leading academic analysis of the Prosecution's Kordic case finds that it is distinguishable on precisely this ground. See May & Weirda, supra, at 200-201.

d. The Prosecution misrepresents each of the two main American cases upon which it bases its motion, neither of which is actually relevant to whether the Defense may call its expert witnesses. In *Specht v. Jensen*, 853 F.2d 805, the Court made the narrow finding that an ordinary attorney may not be called as an expert witness in a jury trial to "state his views of the law which governs the verdict and opine whether defendants' conduct violated that law." *Id.* at 806.

e. *Specht* is inapplicable to the present question for three reasons.

i. First, the case concerns an ordinary attorney and not an academic expert in a highly specialized field.

ii. Second, *Specht* and the authority it cites speak to *jury trials*, in which the Court believed an expert testifying as to matters of law might usurp the trial judge's role in instructing the jury. 853 F.2d at 808 ("These courts have decried the latter kind of testimony as directing a verdict, rather than assisting the jury's understanding and weighing of the evidence."). In the Prosecution's misleadingly abbreviated discussion of *Specht*, it tries to obscure the centrality of the jury in that opinion – saying that it decries legal expert testimony because it "creates confusion," Prosec. Motion 5(b), while failing to mention that the body in which it creates confusion is the *jury*, not the judge. The Prosecution also claims that *Specht* rejected expert legal testimony because it could lead to "an inefficient process," though this rationale appears nowhere in the *Specht* decision. Rather, *Specht* objected that competing legal testimony would *confuse a jury*. 853 F.2d at 809. The Defense is calling these witnesses to clarify matters for the Commission, not confuse it. The Defense certainly believes that the Commission will determine ultimate matters of law for itself.

iii. Third, *Specht only* applies when an expert legal witness attempts to apply the law *to the facts of the case*. *Id.*; *see also* United States v. Arutunoff, 1 F.3d 1112, 1118 (10th Cir. 1993) (stating that the case is distinguishable from *Specht* because the expert "did not attempt to apply the law to the facts of the case or otherwise tell the jury how the case should be decided"). To emphasize its limited holding, the *Specht* court declared: "The line we draw here is narrow. We do not exclude all testimony regarding legal issues."

Id. at 809. The Defense does not seek to call witnesses who will draw ultimate conclusions on the facts of the case, but rather will explicate legal principles so that the Commission itself may apply those principles to the facts. The Prosecution's motion, which attempts to obscure the limits of *Specht*, is misleading.

f. *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003), is even less applicable to Defense's proposal to *call legal experts*. In *Yousef*, the Court merely rejected the proposition that international law scholars *make* international law – a claim completely unrelated to the Defense's proposal. The Defense does not contend that its proposed experts should go before the Commission to *make* law, but rather to elucidate the law as it currently exists in authoritative documents. *Yousef* itself recognizes the utility of legal experts in this endeavor, stating that scholars "may be useful in explicating or clarifying an established legal principle or body of law." *Id.* at 101. Neither *Specht* nor *Yousef* even remotely supports the categorical ban on legal experts the Prosecution asserts.

g. Expert legal testimony is particularly important given both the structure of the military commission and the claims it will be considering. Structurally, expert witnesses will be crucial in countering the influence of the Presiding Officer over the lay commissioners. The Presiding Officer is the commission's only lawyer; as a result, the lay members of the commission will have a natural tendency to defer to him. Introducing the legal analysis of these scholars by way of expert testimony is an especially helpful way of instructing commission members – a result presumably important for *both* the Prosecution and the Defense; the Defense does not in any way mean to suggest that the Presiding Officer's determinations would be categorically biased against one Party in the upcoming proceedings.

   i. Resisting undue influence on the part of the Presiding Officer is particularly important given that he has already expressed predeterminations of matters of fact and law. For example, the Presiding Officer has stated that the Uniform Code of Military Justice's speedy trial provision does not apply to Mr. Hamdan. That view contradicts over a century of military commission practice, as well as the views of the Pentagon when the issue was last studied, during the Nixon Administration. Professor Paust was one of the individuals who studied that issue for the Nixon Administration, and his testimony is highly relevant in countering the stated views of the Presiding Officer.

h. The Commission here can be analogized to the United States Congress' calling of expert witnesses who are law professors during impeachment trials to help them understand what the law is. See testimony of 19 bipartisan law professors in the United States House of Representatives Impeachment of President Clinton, available at http://jurist.law.pitt.edu/hearing.htm (Nov. 9, 1998).

i. The defense believes that this motion to sequester the commission from the leading experts in the field has no legal merit. Furthermore,

denying the commission access to these witnesses creates a tremendous risk that the commission will not reach a full and fair judgment of law. If the Prosecution wants to challenge a particular witness as unqualified, they are free to do so. But to bar wholesale all experts from testifying on a matter as complicated as this does no service to the cause of justice, and violates longstanding principles of Anglo-American jurisprudence.

6. Oral Argument. The Defense believes that this motion, which seeks to bar reams of evidence whose relevance is obvious and provided to the commission, cannot be resolved without oral argument.

7. Legal Authority.

a. Askanase v. Fatjo, 130 F.3d 657 (5th Cir. 1997)
b. The Paquete Habana, 175 U.S. 677 (1900)
c. Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004)
d. Judge Richard May & Marieke Wierda, International Criminal Evidence 208 (2002)
e. Fernandez-Roque v. Smith, 622 F. Supp. 887 (N.D. Ga. 1985)
f. Grupo Protexa, S.A. v. All Am. Marine Slip, 20 F.3d 1224 (3d Cir. 1994)
g. United States v. Royal Caribbean Cruises, 11 F. Supp. 2d 1358 (S.D. Fla. 1998)
h. Navios Corp. v. The Ulysses II, 161 F. Supp. 932 (D. Md. 1958)
i. United States v. New, 50 M.J. 729 (C.C.A. 1999)
j. United States v. Rockwood, 48 M.J. 501 (C.C.A. 1998)
k. Statute of the International Court of Justice, Article 38(1).
l. Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981)
m. Sharp v. Coopers & Lybrand, 457 F. Supp. 879 (E.D. Pa. 1978)
n. United States v. Garber, 607 F.2d 92 (5th Cir. 1979)
o. In re Madeline Marie Nursing Homes, 694 F.2d 433 (6th Cir. 1982)
p. Fed. Rules of Evidence 702.
q. Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993).
r. Specht v. Jensen, 853 F.2d 805 (10th Cir. 1988), *cert. denied*, 488 US 1008 (1989)
s. Fed. R. Evid. 702 advisory committee note
t. Haarhuis v. Kunnan Enters., Ltd., 177 F.3d 1007 (D.C. Cir. 1999)
u. Hayter v. City of Mt. Vernon, 154 F.3d 269 (5th Cir. 1998)
v. *Kunarac, Kovac and Vukovic* (IT-96-23) & (IT-96-23/1), 11 Sept. 2000, at 5364-93, available at http://www.un.org/icty/transe23/000911it.htm.
w. DECISION CONCERNING THE EXPERT WITNESSES EWA TABEAU AND RICHARD PHILIPPS, 3 July 2002, ICTY
x. Prosecutor v. Brjdanin, decision of June 3, 2003 (http://www.un.org/icty/brdjanin/trialc/decision-e/030603.htm)
y. http://www.un.org/icty/strugar/trialc1/decision-e/040401.htm.
z. Kordic and Cerkez, IT 95-14/2-T, Transcript (January 28, 2000)
aa. United States v. Arutunoff, 1 F.3d 1112, 1118 (10th Cir. 1993)
bb. United States v. Ramzi Ahmed Yousef, 327 F.3d 56 (2d Cir 2003)

cc. United States House of Representatives Impeachment of President Clinton, available at http://jurist.law.pitt.edu/hearing.htm (Nov. 9, 1998).

8. Conclusion.

The Defense believes that the Prosecution's motion is precipitous. Barring the testimony of the leading experts in the world as to the law which governs the military commissions risks destroying the credibility of the commission itself, and denying Mr. Hamdan a full and fair trial. Furthermore, the Prosecution's motion risks an enormous expense and inconvenience to the expert witnesses by forcing them to come to Guantanamo and then barring their testimony once they are there.

There is no support in any body of law, either American or foreign, for the categorical exclusion of expert law professors and experts on the Geneva Conventions. On the contrary, the practice of calling legal experts on complicated international and domestic legal matters is widespread in U.S., military, and international courts. The need for such evidence is all the greater in the Guantanamo commissions, for these are bodies that have been set up by the unilateral action of a single individual, and not the Congress of the United States or the international nations at large, where experts and a wide cross-section of accountable decisionmakers have set up architectures to dispense justice. In this case, the unilateral action contravenes longstanding American history, the view of the Founders of our nation, the laws enacted by Congress (including military law), and solemn treaties as to which the United States is a ratified party. The motion should be denied.

Neal Katyal
Civilian Defense Counsel

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UNITED
NATIONS

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

Case: IT-98-29-T

Date: 3 July 2002

Original: English

IN THE TRIAL CHAMBER

Before: Judge Alphons Orie, Presiding
Judge Amin El Mahdi
Judge Rafael Nieto-Navia

Registrar: Mr Hans Holthuis

Decision of: 3 July 2002

PROSECUTOR

v.

STANISLAV GALIĆ

DECISION CONCERNING THE EXPERT WITNESSES EWA TABEAU AND RICHARD PHILIPPS

Office of the Prosecutor:

Counsel for the Defence:

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Mr. Mark Ierace

Ms. Mara Pilipovi}
Mr. Stéphane Piletta-Zanin

TRIAL CHAMBER I, Section B 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 ("International Tribunal");

NOTING that the Prosecution submitted as statements pursuant to Rule 94 *bis*, a research report called "Population losses in the 'Siege' of Sarajevo 10 September 1992 to 10 August 1994" prepared by Ewa Tabeau, Marcin Zoltkowski and Jakub Bijak filed on 13 May 2002, complemented by two addenda filed on 14 May 2002 and 6 June 2002 and a research report called "Sarajevo Romanija Corps Structure" prepared by Richard Philipps and filed on 17 May 2002; and that the Prosecution expressed its intention to call Ewa Tabeau and Richard Philipps as expert witnesses;

NOTING the Motion of the Defence filed on 7 June 2002 ("the Motion"), in which the Defence, having noted that the Rules of Procedure and Evidence of the Tribunal do not define what an expert witness is, argues that Richard Philipps and Ewa Tabeau are not impartial because they are staff members of the Office of the Prosecutor, that the role of expert testimony in criminal proceedings may be crucial to the determinations to be made by a Trial Chamber and that therefore Richard Philipps and Ewa Tabeau disqualify as experts;

NOTING the "Prosecution's Response to the Request by the Defence for a Decision Concerning two Expert Witnesses' Reports Submitted under Rule 94 *bis*" dated 17 June 2002 in which the Prosecution responds that (i) the "grounds of objection raised by the

Defence deal with matters relevant to the evaluation of evidence and not admissibility of evidence", (ii) the reports of the witnesses have been prepared on the basis of their expertise and qualifications, not disputed by the Defence, in their respective fields, and (iii) the "contractual relationship that exists between the two Experts Witnesses and the OTP does not render them unreliable";

CONSIDERING that, under Rule 94 *bis* (A), "[t]he full statement of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge"; that this Trial Chamber accepts, in accordance with the commonly accepted meaning of this word, an "expert (witness)" to be a person whom by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute (and to that end testifies);

CONSIDERING that an expert witness is expected to give his or her expert opinion in full transparency of the established or assumed facts he or she relies upon and of the methods used when applying his or her knowledge, experience or skills to form his or her expert opinion; and that the mere fact that the expert witness is employed by or paid by a party or a party related agency does not disqualify him or her to be called and testify as an expert witness;

CONSIDERING that it is to the Trial Chamber to assess the evidentiary value of reports and testimony of expert witnesses taking into account all relevant factors;

CONSIDERING that the party calling the expert witness should satisfy the Trial Chamber that the expert witness has at his or her disposal the special knowledge, experience, or skills needed to potentially assist the Trial Chamber in its understanding or determination of issues in dispute;

CONSIDERING that the Prosecution has fulfilled this obligation given that Richard Philipps and Ewa Tabeau are well-credentialed; that, in addition, the qualifications of Richard Philipps and Ewa Tabeau in respect of their knowledge, experience or skills are not challenged by the Defence;

CONSIDERING that the Defence will have the opportunity to cross-examine the expert witnesses Richard Philipps and Ewa Tabeau; that the Defence is allowed to have its experts present in the courtroom to assist it in understanding the testimony of any expert witness and to prepare for cross-examination in respect of, for instance, the methodology, theory or technique used by the expert to form his or her opinion;

CONSIDERING further that the Defence is entitled to submit counter-expertise and to call its own expert witnesses during the presentation of its case;

FINDING therefore that the fairness of the trial would not be affected if Ewa Tabeau and Richard Philipps were called as expert witnesses;

PURSUANT TO Article 21 of the Statute, and Rules 89 and 94 *bis* of the Rules of Procedure and Evidence;

FOR THE FOREGOING REASONS,

REJECTS the Motion and **ALLOWS** the Prosecution to call Ewa Tabeau and Richard Philipps as expert witnesses.

Done in English and French, the English version being authoritative.

Alphons Orie
Presiding Judge

Done this 3rd Day of July 2002
At The Hague,
The Netherlands.

FSeal of the Tribunalğ

Review Exhibit 23-B

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UNITED STATES	)	
	)	Prosecution Reply to Defense
	)	Response to Motion to Preclude
v.	)	Attorney and Legal Commentator
	)	Opinion Testimony Concerning
	)	Their Views of the Law
SALIM AHMED HAMDAN	)	
	)	
	)	19 October 2004

1. Timeliness. This Reply to the Defense's Response is submitted within the time frame established by Presiding Officer Memorandum 4-2. The Prosecution requests that this motion be decided at the Commission's first opportunity.

2. Relief Sought. That the Military Commission deny the Accused's request to call attorneys and legal commentators as expert witnesses for the following reasons: 1) the personal viewpoints of legal commentators are not the type of evidence that falls within the parameters of "expert testimony" recognized by military, federal or international courts; and 2) the Defense fails to meet a threshold showing that the offered testimony by the "expert witnesses" is relevant. The Prosecution submits that if Defense Counsel believe that the opinions of international law commentators would be beneficial to the process, they can incorporate the comments into the Defense submissions. The Prosecution does not oppose the reasonable appointment of expert consultants to the Defense to assist in such matters.

3. Facts.

a. On 1 October 2004, the Accused, through counsel, filed eleven motions in this matter; seven of which cited the need for expert witness testimony on the law.

b. On 11 October 2004, following the Prosecution's original motion to preclude the testimony of legal experts, the Defense requested six witnesses it actually intended to call from among the list of 21 specified in its earlier motions, but failed to provide a synopsis of expected testimony for any of their six witnesses.

c. On 13 October 2004, the Prosecution delivered its denial of the Defense witness requests, citing numerous deficiencies. Among them, was defense's noncompliance with Presiding Officer Memorandum (POM) 10 by failing to provide a synopsis of expected witness testimony.

d. On 14 October 2004, the Defense filed its Defense Response to Prosecution Motion Barring Expert Witnesses ("Response") to the instant motion. The defense stated that it "would be willing" to obtain statements from each witness, but, again, failed to provide such statements.

4. Legal Authority.

a. Sprecht v. Jensen, 853 F.2d 805 (10th Cir. 1988), *cert. denied,* 488 US 1008 (1989)

b. Military Commission Order No. 1

c. In re Yamashita, 327 U.S. 1, 18 (1946)

d. ICTY Rules of Procedure and Evidence, 94 bis

e. Federal Rules of Evidence 702

5. Analysis.

The Defense Has Made No Showing as to Why the Commission Should Forego Briefs and Instead Receive the Testimony of Academics and Lawyers.

a. The Defense essentially offers three reasons for the Commission to depart from the traditional practice of reaching conclusions of law through briefs and arguments of counsel and for the Defense's failure to comply with POM 10:

(1) the witnesses sought by the Defense are not "'defense witnesses' in that they will not testify as to the particular facts at issue in this case or apply the law to Mr. Hamden's facts;"

(2) the testimony of legal experts "is an especially helpful way of instructing commission members;" and

(3) a synopsis of expected testimony is not required because reportedly – "... it would be highly inappropriate to submit a detailed account, first person or otherwise, of what precisely each of them would say when called before the commission." The Defense provides no rationale as to why a procession of lawyers on the witness stand is superior to expressing their point of view through briefs or through Defense counsel; or why they have altogether failed to comply with POM 10.

b. The Defense specifically maintains that its witnesses are not "defense witnesses" and are not expected to "testify as to the particular facts at issue in this case or apply the law to Mr. Hamden's facts . . . " However, what Defense conveniently overlooks is that testimony which is not probative as to the facts at issue is not admissible. The standard for admissibility of evidence is set out in Military Commission Order (MCO) No.1 (6)(D)(1). MCO No.1 (6)(D)(1) provides that "[e]vidence shall be admitted if, ..., the evidence would have probative value to a reasonable person." The United States Supreme Court noted and affirmed similar language in addressing the issue of admissibility and probativeness in considering an earlier military commission: "The regulations prescribed by General MacArthur governing the procedure for the trial of [Yamashita] by the commission directed that the commission should admit such evidence

'as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man.'" In re Yamashita, 327 U.S. 1, 18 (1946). Opinion testimony on the law has no bearing on the acts or intentions of the Accused. It does not prove or disprove the charge and should not be admitted.

c. Recognizing that the evidence offered by these witnesses does not meet the criteria set out in MCO No. 1, the Defense attempts to offer their witnesses as "experts." This approach is equally unavailing. While the Defense correctly cites the Federal Rule for admissibility of expert testimony, it is nonetheless inapplicable to the instant case because it applies only, and specifically, to aid the trier of fact, not the trier of law. The rule states as follows: "If scientific, technical, or other specialized knowledge will assist the trier of *fact* to understand the evidence or to determine a *fact* in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of opinion or otherwise." (emphasis added.) Fed. R. Evid. 702. (See also Military Rule of Evidence 702 which is identical.) Federal Rule of Evidence 702 is not relevant or applicable to the instant case because the experts are being offered to assist the trier regarding matters of law, not matters of fact.

d. The Defense offers numerous cases from multiple jurisdictions to support its position. However, a careful look at these cases reveals that Defense's legal analysis is broad to a degree of irrelevancy; and the cases they cite categorically are not on point. For instance, the defense points to Askanase v. Fatjo, 130 F.3d 657 (5th Cir. 1997) for the proposition that courts "*routinely*" admit the testimony of experts in both domestic and international law: "merely being a lawyer does not disqualify one as an expert witness." *Id.* at 672, (Response p. 3). However, the Defense fails to put the quotation in context and provide the language which follows: "We agree that merely being a lawyer does not disqualify one as an expert witness. Lawyers may testify as to legal matters when those involve questions of fact. [citations omitted] However, 'it must be posited as an *a priori* assumption [that] there is one, but only one, legal answer for every cognizable dispute. There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge." Id. at 672-73. As the complete quote demonstrates, the Askanase Court was not endorsing the Defense position that the testimony of a lawyer on questions of law is routine.

e. The Defense further cites, Paquette v. Habana, 175 U.S. 677 (1900) and Sosa v. Alvarez-Machain, 124 S. Ct 2739 (2004) to support its position that expert witnesses should be allowed to testify concerning the law. However, a careful look at these cases reveals that both support the Prosecution position that the law should be determined by an examination of the actual sources of the law, not legal expert testimony. In both cases the court looked to written works of recognized experts. In Paquette, the Court examined whether professional fishing vessels could be captured as prizes of war. The Court reviewed "works" that included French treatises, French writers and jurists, German books on international law, English text-writers, and so forth. Paquette at 702-706. Similarly, in Sosa the Court also looked to written works such as International Agreements, International Law Journals surveying various constitutions, Restatements, legal briefs from similar cases, and the like. Sosa v. Alvarez-Machain, 124 S. Ct 2739,

2767-2769 (2004). Importantly -- neither case involved expert witness testimony. At best, they stand for the basic proposition that jurists may rely on written works to help gain an understanding of the issue at bar.

f. Similarly, the military cases cited by the Defense do not hold that that the testimony of international law experts is common in military courts. In neither United States v. New, 50 M.J. 729 (C.C.A. 1999) nor United States v. Rockwood, 48 M.J. 501, 505 n.6 (C.C.A. 1998) does the court permit testimony before the fact finder. Likewise, none of the other U.S. cases cited by Defense holds that a legal expert may testify on the law before the "triers of both fact and law."

g. Just as the defense misstates federal and military holdings, the same is true of the International Cases cited in defense's motion. The Defense assertion that the international cases it cites support its view that international tribunals also routinely admit attorney testimony on the law is just plain wrong. The cases cited by the Defense do not stand for this proposition. Prosecutor v. Stanislav Galic (IT-98-29-T) [cited by Defense as DECISION CONCERNING THE EXPERT WITNESSES EWA TABEAU AND RICHARD PHILIPS, 3 July 2002, ICTY and attached to its Response] does not hold that attorneys can testify as expert witnesses. That case concerned two non-lawyer, staff members from the prosecutor's office that were offered to testify about research reports they had previously prepared discussing two topics: population losses in a particular siege, and the Sarajevo corps structure. The cases examined whether these witnesses could remain impartial despite their employment with the prosecutor's office – not whether they could offer opinion on the law. Again the Stanislav Galic case, offered by the Defense as their primary supporting case, is not on point. There are no relevant similarities between that case and the instant case.

h. Defense also cites Kunarac, Kovac and Vukovic to advance their position that expert witnesses have been permitted to testify concerning the law. What they fail to reveal, however, is that the expert in that case was admonished by the Court on three distinct occasions concerning the scope of his testimony. Importantly, the Court states "We are not going to deal with definitions, how the Yugoslav law views rape, because we have our own statute which we are following here . . . " (p. 5368). The court continues "[s]urely, though we do not need a ten-minute lecture on what the law of rape is in Yugoslavia." (p. 5368). Later in the testimony while the expert was offering an opinion about the elements of rape, the Judge again interrupted the witness and stated "the case of the Prosecution before this trial Chamber is, as seen, far removed from what the witness is describing." (p. 5272) The court further directs, "can you please lead him to what is relevant in the case before the Trial Chamber." (p. 5273) Finally, in a third and final admonishment the Court tersely states "Mr. Prodanovic, this is not helping us at all. It's not helpful to the case before the Trial Chamber at all." (p. 5374-5375).

i. Just as Stanislav Galic fails to support defense's position, so do the other International cases offered by defense. For instance in both Prosecutor v. Radoslav Brdanin and Prosecutor v. Pavle Strugar, the offering party submitted written statements summarizing the expected testimony of the non-lawyer experts; and the experts testified about factual issues in both instances. In Brdanin, witnesses testified on the basis of their

"expert reports" concerning command and control doctrine, and artillery and weapon use. (Prosecutor v. Radoslav Brdanin Case No. IT-99-36-T (2003). Similarly, in Pavle Strugar, the witnesses testified concerning military affairs and developments. (Prosecutor v. Pavle Strugar, Case No. IT-01-42-PT (2004)). Theses cases did not discuss or even involve attorneys testifying as expert witnesses; nor was any other testimony offered concerning matters of law

j. The Defense argues throughout its Response that the legal experts will tell the Commission "what the law actually is." (Response pp. 1, 3, 6 and 8.) In fact, the Defense goes so far as to state that their testimony is "an especially helpful way of instructing commission members" as a counter balance to the potential influence of the Presiding Officer. (Response p. 8.) A witness, expert or otherwise, may not instruct the finders of fact on the law in any system of justice. Black's Law Dictionary defines "jury instruction" as follows:

> An instruction given by the judge to the jury concerning the law of the case; a statement made by the judge to the jury informing them of the law applicable to the case in general or some aspect of it; an exposition or the rules or principles of law applicable to the case or some branch or phase of it, which the jury are bound to accept and apply.

k. Curiously, the Defense also argues that while the witnesses will *instruct* the members on the law, the witnesses will not claim that this law is "binding law." (Response p.6.) These inconsistent positions are, at best, confusing and contradictory. Clearly the Defense will advocate that the Commission adopt its view of the law and that -- if adopted -- it is binding upon them. This is exactly the type of confusion the court in Sprecht v. Jensen, 853 F.2d 805 (10th Cir. 1988), *cert. denied*, 488 US 1008 (1989) warned of when it held that "an expert witness may not give an opinion on ultimate issues of law" for two reasons. Id. at 808. Primarily, an "expert" on the law supplants the judge's role as the source of the law and creates confusion. Id. at 807. Secondarily, the trial process is such that if one side calls an expert on the law, the other will do so as well. Id. at 809. The result is an inefficient process with lengthy testimony of multiple contradictory experts.

l. The Defense takes the position that the witnesses he has requested are prominent legal scholars who can be expected to take positions that may even support the prosecution. According to Defense Counsel they will espouse "neutral, objective scholarship of the highest level" to members of the Commission. It is perfectly acceptable, even desirable, to invite colleagues to an academic symposium to offer differing views. But Mr. Hamdan's lawyer is expected to actually know what his witnesses will say and how they support his defense theory before presenting them to the Commission. Compliance with POM 10 enables the opposing party to assess the probative value before filing a motion to exclude their testimony and saves the time and expense of hearing legally irrelevant testimony. There is no exception for attorney experts.

m. POM 10 is also consistent with the procedure in international tribunals. To support its position that it not comply with POM 10, the Defense cites an obviously out-dated ICTY rule regarding expert witnesses, while conveniently overlooking the current rule that was amended nearly two years ago. Under the current rule, 94 *bis*, expert testimony is offered in the form of a statement and, when accepted by opposing party, the statement is then admitted into evidence without calling the witness to testify at all. (ICTY, Rules of Procedure and Evidence, 94 *bis*). In fact, the academics cited in defense's own motion suggest that current narrowed provisions regarding expert testimony are "aimed at expediting the trial and avoiding the unnecessary calling of experts." (Judge Richard May and Marieke Wieirda, International Criminal Evidence (2002) (p. 203) (See also, May and Wierda pp. 204-208 for a complete discussion regarding: "Expert Evidence Before the Modern Tribunals" which lists the various experts who may properly provide evidence to international courts. Notably absent from their litany of experts are lawyers.) Not only does POM 10, and ICTY Rule 94 bis direct that witness testimony be summarized, ironically, so does the very case that defense cites and appends (Prosecutor v. Stanislav Galic). Stanislav Galic demonstrates that attorneys are required to offer expected testimony of offered witnesses under ICTY Rule 94 *bis*. In that case, the Prosecution submitted statements, research reports, and addenda to articulate the expected witness testimony. Ironically, and contrary to defense's cited authority, Defense Counsel refuses to comply with POM 10 (which is similar to ICTY Rules of Evidence 94 *bis*), which also requires a separate written proffer of expected testimony for each witness requested. (POM 10, ¶ 4(a-j).

6. Files Attached. None.

7. Oral Argument. This motion can be resolved without the necessity of oral argument.

[redacted]
Commander, U.S. Navy
Prosecutor
Office of Military Commissions

Review Exhibit 23-C
Page 6 Of 6

UNITED STATES OF AMERICA	)	
	)	
	)	
	)	**MOTION FOR HEARING**
v.	)	**BEFORE APPOINTING**
	)	**AUTHORITY**
	)	
SALIM AHMED HAMDAN	)	
	)	2 August 2004

Request for Hearing before Appointing Authority

1. Based on the attached email from the Presiding Officer, the Defense in the above captioned case understands that the Presiding Officer expects the government to clarify his role by issuing "guidance". The Defense understands "guidance" in the context of the attached email to mean a revised or new instruction/order clarifying the powers and role of the Presiding Officer. If this is in fact what Presiding Officer is seeking from the government, either in the form of a new or revised Military Commission Instruction/Order or in the form of other guidance issued by the Appointing Authorities office, Defense Counsel request an opportunity to be brief this issue and be heard by the Appointing Authority or any other authority who will be promulgating this "guidance.".

2. As Commission proceedings have commenced in Mr. Hamdan's case, further instructions at the Prosecutor's request that substantially alter the prescribed power of personnel within the Commission are substantive procedural changes made unilaterally and at least partially informed on the basis of ex-parte communications. Such procedure during course of litigation raises on the part of the Defense in the above captioned case, concerns of the perception and actual fairness of Mr. Hamdan's hearing

3. The Defense is specifically concerned that the Presiding Officer's approach complies neither with existing Military Instructions/Orders for Commissions, historical president, and fails to promote a atmosphere of full and equal discourse between members of the Commission concerning issues of law and fact necessary for a just finding. The Presiding Officer currently proposes to sit as a de facto Military Judge throughout the course of the proceedings and then deliberate with the other members. Such a proposition is not in keeping with Anglo/American notions of justice and the deliberative process and will almost certainly give the Presiding Offer a disproportionate voice in the deliberative process.

4. The Defense requests that the Appointing Authority consider this motion to be a formal request for hearing and that this motion be made part of the record of trial in Mr. Hamdan's case and that in keeping with a public trial that this motion be published to the public. A written response to this request is requested.

CHARLES SWIFT
Lieutenant Commander, JAGC, U.S. Navy
Detailed Defense Counsel

Attachment: Email of 31 July 04 from COL Brownback, Presiding Officer to LCDR Charles Swift, Detailed Defense Counsel, *US v. Hamdan*

Review Exhibit 24A

Page 2 **Of** 2

UNITED STATES OF AMERICA	)
	)
	) DEFENSE MOTION TO
v.	) DISMISS FOR VIOLATION OF
	) ART. 103 OF THE THIRD
	) GENEVA CONVENTION OF
	) 1949
	)
SALIM AHMED HAMDAN	) 1 October 2004

1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004.

2. Relief Sought. The Military Commission find that the protections granted under Article 103 of the Third Geneva Convention apply to Mr. Hamdan and that the Government's delay of more than 8 months in charging and bring Mr. Hamdan to trial after placing him in conditions amounting to pre-trial confinement violates Article 103's requirement that under no circumstance shall pre-trial confinement exceed 3 months and dismiss the charge against Mr. Hamdan.

3. Overview. The government held Mr. Hamdan in pre-trial segregation for 8 months without informing him of the charge against him. Article 103 of the Third Geneva Convention provides that "judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible." In the event that a prisoner of war is placed in confinement that, Article 103 further provides that "in no circumstances shall this confinement exceed three months". Mr. Hamdan is entitled to protections of Article 103 as he is presumed to be a prisoner of war under Article 5 of the Third Geneva Convention and U.S. Army Regulation 190-8, until such time as his status has been determined by competent tribunal. To date, Mr. Hamdan has not received such a tribunal and must accordingly be presumed to be a POW for the purposes of protection under Article 103.

4. Facts.

a. On 13 November 2001, President Bush issued a military order pursuant to the authority vested in him as President of the United States and Commander in Chief of the Armed Forces of the United States by the Constitution and laws of the United States vesting in the Secretary of Defense the authority to try by military commission those persons that President determined were subject to the order.

b. Subsequent to the President's Military Order of 13 November 2001, Mr. Hamdan was taken prisoner by indigenous Afghanistan forces in late November 2001, where upon he was subsequently turned over to U.S. personnel for a bounty and has been detained by the United States government ever since.

c. On or about July 2002, Mr. Hamdan was transferred from Afghanistan to Guantanamo Bay where he was initially held in Camp Delta.

d. Camp Delta consists of cell block units holding 20 detainees in individual cells, is open to the air, and permits conversations between detainees.

e. On 3 July 2003, the President of the United States determined that Mr. Hamdan was subject to his military order of 13 November 2001.

f. On or about 14 December 2003, Mr. Hamdan was transferred on order of Commander, JTF Guantanamo to Camp Echo into pre-trial segregation, pursuant to preparation for trial by Military Commission.

g. On 15 December 2003, The Chief Prosecutor for Military Commissions requested that the Chief Defense Counsel detail counsel to Mr. Hamdan for the limited purpose of negotiating a pre-trial agreement.

h. On 18 December 2003, the Chief Defense Counsel detailed LCDR Charles D. Swift, JAGC, USN, as Mr. Hamdan's military Defense Counsel.

i. On 31 January 2004, Detailed Defense Counsel met with Mr. Hamdan and explained his rights in conjunction with Military Commission and the governments stipulation that detailed defense counsel's access was conditioned on Mr. Hamdan's willingness to enter into pre-trial negotiations.

j. On 12 February 2004, Detailed Defense Counsel on behalf of Mr. Hamdan submitted a demand for charges and for a speedy trial.

k. On 23 February 2004, the Legal Advisor to the Appointing Authority denied the applicability of Article 10 of the UCMJ, without further explanation or charges.

l. Following Defense demand for speedy trial, CDR [redacted] JAGC, USN, Detailed Prosecutor in the subject case, orally stated to Detailed Defense Counsel that Mr. Hamdan's case was going to be "moved to the back of the stack."

m. 13 July 2004, a charge of conspiracy to commit terrorism against Mr. Hamdan was referred to this Military Commission.

n. The first session of Mr. Hamdan's Military Commission was held on 24 August 2004.

5. Law.

a. The Geneva Conventions Bar This Trial

1. Article 103 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), provides in pertinent part that

> Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. *In no circumstances* shall this confinement exceed three months. *Id.* art. 103, 6 U.S.T. at 3394 (emphasis added).

2. This speedy trial provision is mandatory: "in no circumstances" may the detaining power decide midstream whether to charge an enemy combatant with a crime—such decisions must be made within three months of the prisoner's initial confinement or the trial is explicitly barred by the Geneva Conventions. In this case, Mr. Hamdan has been held in pre-commission solitary confinement for over nine months prior to being brought to trial. This conduct violates Article 103 of the Geneva Convention (GPW).

b. Article 103 Applies to Mr. Hamdan

1. Regardless of whether Mr. Hamdan is ultimately determined to be a prisoner of war or not, he is currently entitled to the protections of Article 103. The 1949 Geneva Convention mandates, in Article 5, that, "[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories [entitled to POW protections], such persons shall enjoy the protection of the present convention *until such time* as their status has been determined by a competent tribunal." GPW art. 5, 6 U.S.T. at 3324 (emphasis added). The United States signed the GPW in 1949 and the United States Senate ratified it in 1955.

2. Moreover, Articles 5 and 103 ***have been implemented*** in the domestic law of the United States through binding regulations promulgated by every department of the U.S. Military:

> *All persons* taken into custody by U.S. forces will be provided with the protections of the GPW *until* some other legal status is determined by competent legal authority. Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) (1997), available at http://www.apd.army.mil/pdffiles/r190_8.pdf [hereinafter AR 190-8] (emphasis added).[1]

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[1] This regulation was jointly promulgated by the Headquarters of the departments of the Army, Navy, Air Force, and Marine Corps in Washington, D.C. on October 1, 1997. The regulation itself explicitly states that its purpose is to implement international law as set forth in the GPW: "This regulation implements international law, both customary and codified, relating to EPW [enemy prisoners of war], RP [retained personnel], CI [civilian internees], and ODs [other detainees], which includes those persons held during military operations other than war.

In addition to this general statement implementing the GPW, both Article 5 and Article 103 is the subject of specific, detailed sections of AR 190-8, which closely track the language of the GPW. For example, AR 190-8 § 1-6 provides:

> 1-6. Tribunals
>
> *a.* In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.
>
> *b.* A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

3. Thus, the mere assertion by the detainee of protected status is sufficient to require military authorities to afford the detainee the protections of the GPW pending a determination by a competent tribunal. The provisions that immediately follow, § 1-6 (c)-(g), describe in detail the procedures that should be followed in implementing GPW Article 5. In his concurring opinion in *Hamdi v. Rumsfeld*, Justice Souter, joined by Justice Ginsburg, correctly noted that these regulations were "***adopted to implement the Geneva Convention***." 124 S.Ct. 2633, 2658 (June 28, 2004) (emphasis added).

4. Likewise, AR 190-8 § 3-7(h) tracks almost exactly the language of Article 103:

> *h.* Confinement. A pretrial investigation of an offense alleged to have been committed by a detainee will be conducted as soon as circumstances permit so that trial, if warranted, will take place as soon as possible. A detainee will not be confined while awaiting trial unless a member of U.S. Armed Forces would be so confined if accused of a similar offense, or unless national security would be served. ***In no case will this confinement exceed 3 months.***
>
> *i.* Retention of Geneva Benefits. Persons prosecuted for an act committed before capture will retain, even if convicted, the protections of the Geneva Convention. Id. (emphasis added).

5. The phrase "Retention of Geneva Benefits" in § 3-7(i) is also highly significant, indicating that detainees are afforded the protections of the GPW at the

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The principal treaties relevant to this regulation are:...(3) The 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW)." AR 190-8 § 1-1(b).

beginning of their detention, and do not lose them subsequently.[2] These regulations and their predecessors have long been included in U.S. Military training manuals, which provide further evidence of implementation.[3]

6. The legislative history of the GPW also establishes that the provisions at issue here have been implemented. In its Report recommending that the Senate give its advice and consent to ratification of the 1949 Geneva Conventions, the Senate Committee on Foreign Relations stated: "[I]t appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions." S. Exec. Rep. No. 84-9 (1955) [hereinafter "Ratifying Report"] at 30. The Committee identified only four areas where additional implementing legislation would be required, none of which are relevant here.[4] With respect to the GPW Articles relating to "grave breaches," the Committee noted:

> The committee is satisfied that the obligations imposed upon the United States by the "grave breaches" provisions are such as can be met by existing legislation enacted by the Federal Government within its constitutional powers. A review of that legislation reveals that no further measures are needed to provide effective penal sanctions or procedure for those violations of the conventions which have been considered in this portion of the report. Ratifying Report at 27.

7. Furthermore, "[t]here can, of course, be instances in which the United States Constitution, or previously enacted legislation, will be fully adequate to give effect to an apparently non-self-executing international agreement, thus obviating the need of adopting new legislation to implement it." Id. As noted above, the Ratifying Report expressly stated that this

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[2] AR 190-8 § 3-7(i) tracks the language of GPW Article 85.

[3] See, e.g., Dep't of the Army, Field Manual no. 27-10, *The Law of Land Warfare*, ch. 3 § I ¶ 71 (1956) ([Article 5] applies to any person not appearing to be entitled to prisoner-of-war status...who asserts that he is entitled to treatment as a prisoner of war or concerning whom any other doubt of a like nature exists") (unchanged by 1976 revision), available at www.adtdl.army.mil/cgi-bin/adtl.dll/fm/27-10/Ch.3.htm; Dep't of the Navy, *The Commander's Handbook on the Law of Naval Operations* § 11.7 (1995) ("Individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and have the question adjudicated"); The Judge Advocate General's School, *Operational Law Handbook* 22 (William O'Brien, ed., 2003) (instructing judge advocates to "advise commanders that, *regardless of the nature of the conflict*, all enemy personnel should initially be accorded the protections of the GPW Convention (GPW), at least until their status has been determined") (emphasis added).

[4] The implementing legislation deemed necessary was as follows: (1) modification of 18 U.S.C. § 706 relating to the commercial use of the Red Cross emblem, (2) legislation to provide workmen's compensation for civilian internees, (3) legislation to exempt relief shipments from import, customs, and other duties, and (4) appropriate penal measures to enforce provisions that only POW or internment camps be identified by the letters PW, PG, or IC. Ratifying Report at 30-31.

is precisely the situation in this case, as very little new legislation was deemed necessary to implement the GPW in its entirety.[5]

8. Because it is undisputed that (1) there has been no determination by an Article 5 tribunal that Hamdan is not entitled to the protection of the GPW, and (2) he has been held in pre-trial solitary confinement for over 8 months (without charges having been preferred against him for 7 months), this commission should find as a matter of law that the Government has violated the GPW.

c. The Provisions of the GPW at Issue in this Action are Self Executing

1. Self-execution is not even important to this challenge, since the government is relying on international law as the source of authority for these commissions. Having designed a procedure to enforce international law, they are bound by its procedures and limitations.

2. In any event, even if one were to disregard that, and to disregard also the fact that the military's own regulations implement Article 5 and Article 103 of the Geneva Convention, it would still not help the Government because those provisions of the Geneva Convention are self-executing. The Supremacy Clause of the United States Constitution declares that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and *all treaties made*, or which shall be made, under the authority of the United States, shall be the *supreme* law of the land." Art. VI.

3. A self-executing treaty is one that operates as law without requiring implementing legislation or Executive action.

> Courts in the United States are bound to give effect to...international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation.
>
> An international agreement of the United States is 'non-self-executing' (a) if the agreement manifests an intention that it shall not become effective as domestic law without enactment of implementing legislation, (b) if the Senate in giving advice and consent to a treaty, or Congress by resolution requires implementing legislation, or (c) if implementing legislation is constitutionally required. Restatement § 111 ¶¶ 3-4 (1987).

"Whether an international agreement is self-executing is a matter of interpretation to be determined by the courts," *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (citing Restatement (Second) of Foreign Relations § 154 (1965)). "If a treaty contains language clearly indicating its status as self-executing, courts regard that language as conclusive." *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1107

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[5] "In fact, Congress has rarely refused to implement an admittedly valid international agreement." Restatement § 111, Rpt.'s Note 7.

(D.C. Cir. 2001). It is well established that some provisions of a treaty may be self-executing, and others not. *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001) (citing cases and quoting Restatement § 111); *United States v. Postal*, 589 F.2d 862, 884 (5th Cir. 1979) ("A treaty need not be wholly self-executory or wholly executory").

4. "A treaty may create judicially enforceable rights if the signing parties so desire." *Cardenas v. Smith*, 733 F.2d 909, 918, (D.C. Cir. 1984). "When no right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-809 (D.C. Cir. 1984) (Bork, J., concurring) (suggesting that treaties that "speak in terms of individual rights" may be regarded as self-executing).

> Since generally the United States is obligated to comply with a treaty as soon as it comes into force for the United States, compliance is facilitated and expedited if the treaty is self-executing. Moreover, when Congressional action is required but delayed, the United States may be in default on its international obligation. Therefore, if the Executive Branch has not requested implementing legislation and Congress has not enacted such legislation, there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts. (This is especially so if some time has elapsed since the treaty has come into force.) In that even, a finding that the treaty is not self-executing is a finding that the United States has been and continues to be in default, and should be avoided.
>
> In general, agreements that can readily be given effect by executive or judicial bodies, federal or State, without further legislation, are deemed self-executing, unless a contrary intention is manifest. ***Obligations not to act, or to act only subject to limitations, are generally self-executing***. Restatement §111, Rpt.'s Note 5 (emphasis added).

5. In an opinion characterized by the Supreme Court as "very able" (see *United States v. Rauscher*, 119 U.S. 407, 427-28 (1886)), the Kentucky Court of Appeals stated:

> When it is provided by treaty that certain acts shall ***not*** be done, or that certain limitations or restrictions shall ***not*** be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land." *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1978) (emphasis added).

6. The Supreme Court has long recognized that individual rights established by treaty are directly enforceable in federal courts, even in the absence of implementing legislation:

> [A] treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.... ***A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.*** *The Head Money Cases*, 112 U.S. 580, 598 (1884) (emphasis added)[6]; *see also Kolovrat v. Oregon*, 366 U.S. 187 (1961) (recognizing claim under a treaty as a defense against state action in taking of property); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928) (relying on treaty provisions to uphold issuance of a writ of mandamus against state official); *Asakura v. City of Seattle*, 265 U.S. 332, 339-41 (1924) (recognizing private right of action for injunctive relief against enforcement of municipal ordinance in violation of treaty with Japan); *Chew Hong v. United States*, 112 U.S. 536 (1884) (holding that habeas petitioner could properly claim rights to leave the country and return as established by treaty with China); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (holding that private rights established by treaty are enforceable).

7. In this case, both the plain language and the history of the GPW demonstrate that the Convention (1) was intended to confer rights on private individuals, and (2) is self-executing in many of its provisions, including those at issue here. First, the language of the GPW clearly creates judicially enforceable rights held by individual detainees. For example, GPW Article 5 expressly secures rights to "persons...having fallen into the hands of the enemy" and provides that "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." 6 U.S.T. at 3324. Article 6 states that no agreement between or among nations "shall adversely affect the situation of prisoners of war, as defined by the present Convention, ***nor restrict the rights that it confers upon them.***" Id. (emphasis added). Article 7 provides that POWs "may in no circumstances renounce in part or in entirety ***the rights secured to them*** by the present Convention." Id. (emphasis added). Article 78 provides that prisoners "shall have the right to make known to the military authorities" their requests and complaints regarding the conditions of their captivity. Id. at 3566. This article authorizes prisoners acting directly, not through their nation's diplomats, to bring their claims to the attention of the detaining power. Thus, there can be no serious doubt that the GPW confers rights on private individuals, and not just on nations.

8. In revising the Geneva Conventions of 1929, which had failed to provide adequate protection during World War II, the United States sought "to ensure humane treatment of POWs – not to create some amorphous, unenforceable code of honor among the signatory nations." *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992) ("[I]t is inconsistent with both the language and spirit of [the GPW] and with our professed support of its purpose to find that the rights established therein cannot be enforced by individual POWs in a court of

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[6] In The Head Money Cases, the Supreme Court analyzed different provisions of a treaty separately to determine whether they were self-executing.

law...."). The legislative history of the GPW also bears this out. The authors of the Ratifying Report noted that "[e]xperience acquired during 1939-45 amply demonstrated the necessity of bringing [earlier treaties] up to date, making them susceptible of more uniform application and more definite in interpretation, and further improving them so as to provide greater and more effective protection for the persons whom they were intended to benefit.... The function of the new texts [including the GPW] is to provide better protection...." Ratifying Report at 2. The 1929 Geneva Convention failed because of its reliance on reciprocity and diplomatic protest, principles that the GPW replaced with legally binding injunctions. As the Committee noted, "[t]he practices which [the present Conventions] ***bind*** nations to follow impose no burden upon us that we would not voluntarily assume in a future conflict without the ***injunctions*** of a formal treaty obligations." Ratifying Report at 32 (emphasis added). The Committee recommended that consent to ratification be given, despite "the possibility that at some later date a contracting party may invoke specious reasons to evade compliance with the ***obligations*** of decent treatment which it has freely assumed in these instruments. Id. (emphasis added).

9. Thus, the intent and the acknowledgement of the United States in ratifying the GPW was that it was a binding obligation. This is also apparent from new language in the GPW requiring the contracting parties "to ensure respect for the present Convention in all circumstances." This language, absent from the 1929 Convention, was placed in the very first Article of the GPW. As the official ICRC commentary to the Convention explains:

> By undertaking this obligation at the very outset, the Contracting Parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity.... It is rather a series of ***unilateral engagements*** solemnly contracted before the world as represented by the other Contracting Parties. *Official ICRC Commentary* at 17-18 (emphasis added).

10. This result is further confirmed by analyzing the criteria for self-execution set forth in Restatement § 111. None of the conditions recognized as characteristic of a non-self-executing provision exists with respect to Article 103 or Article 5. That is, (1) the GPW does not "manifest an intention that it shall not become effective as domestic law without the enactment of implementing legislation," (2) the Senate, in giving consent to the treaty, did not "require implementing legislation" for those Articles, and (3) implementing legislation is not "constitutionally required." Restatement § 111 ¶ 4.

11. Moreover, the right secured to Hamdan by Article 103 is the right ***not*** to be held in pretrial incarceration for more than 3 months. As such, it falls squarely within that category of treaty provisions described in *Hawes* that "certain acts shall not be done, or certain limitations or restrictions shall not be disregarded or exceeded." *Hawes*, 76 Ky. (13 Bush) at 702-03. Such provisions do not need addition legislative or executive implementation, and are readily enforceable in the federal courts. Accordingly, Article 103 should be deemed self-executing. Article 5 is likewise a provision that a certain act ***not*** be done, specifically, a detainee shall not be stripped of the protections of the GPW unless a competent tribunal determines that the detainee is not a protected person under the terms of the Convention.

12. Here again, no implementing legislation is required to give effect to this provision. Rather, because GPW Articles 5 and 103 "prescribe a rule by which the rights of the

private citizen or subject may be determined," federal courts can and must enforce these treaty obligations, even without implementing legislation. *The Head Money Cases*, 112 U.S. at 598; see also *Asakura*, 265 U.S. at 341 ("The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinance or state laws.... It operates itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.").

13. In sum, the Geneva Conventions require that, "*In no circumstances* shall this confinement exceed three months." But Mr. Hamdan has been held for far, far, longer, and in solitary confinement to boot. This Commission, which is evidently constituted to enforce international law, is bound by it as well. And the Geneva Conventions require that this prosecution be dismissed for this flagrant violation of the law.

6. Files Attached. None.

7. Oral Argument. Is required. The Presiding Officer has instructed the Commission members that he will provide the Commission members with his interpretation of the law as he sees it, but that the Commission members are free to arrive at their own conclusions. The Defense asserts its right to be heard following the Presiding Officer's pronouncement via oral argument in order for the remainder of the Commission members to be informed as to the reasons for the Defense's support or opposition to the Presiding Officer's position. Additionally, the Defense intends to call expert witnesses and to incorporate their testimony into this motion via oral argument.

8. List of Legal Authority Cited.

a. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135

b. Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-5(a)(2) (1997), available at http://www.apd.army.mil/pdffiles/r190_8.pdf

c. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2658 (June 28, 2004)

d. Art VI, United States Constitution

e. *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976)

f. *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1107 (D.C. Cir. 2001)

g. *Lidas, Inc. v. United States*, 238 F.3d 1076,1080 (9th Cir. 2001)

h. *United States v. Postal*, 589 F.2d 862, 884 (5th Cir. 1979)

i. *Cardenas v. Smith*, 733 F.2d 909, 918, (D.C. Cir. 1984)

j. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-809 (D.C. Cir. 1984)

k. *United States v. Rauscher*, 119 U.S. 407, 427-28 (1886)

l. *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1978)

m. *The Head Money Cases*, 112 U.S. 580, 598 (1884)

n. *Kolovrat v. Oregon*, 366 U.S. 187 (1961)

o. *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928)

p. *Asakura v. City of Seattle*, 265 U.S. 332, 339-41 (1924)

q. *Chew Hong v. United States*, 112 U.S. 536 (1884)

r. *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833)

s. *United States v. Noriega*, 808 F. Supp. 791, 799 (S.D. Fla. 1992)

t. *Official ICRC Commentary*

9. Witnesses and/or Evidence Required. The Defense may call one or more of the following witnesses in support of this motion: David Brahms, Anne Slaughter, Lee Gunn, John Hutson, Richard O'Meara, Linda Malone, David Vladeck, Derek Jinks, Ryan Goodman, Carlos Vasquez, Doug Cassell, and/or Bridget Arimond (all Curriculum Vitae's are attached as available). All of these individuals are experts in the area of international human rights law including the Geneva Conventions. The expert testimony is probative to a reasonable person under the circumstances presented, specifically based on the individual's skill, knowledge, training, and education. They each possess specialized knowledge of the laws of international human rights and as they are applied in the United States. The application and substance of such laws is a legal finding to be made by members of the Military Commission beyond the training and expertise of lay persons. As such, the expert testimony provided by one or more of the above named individuals will assist the Commission members in understanding and determining whether the President's Military Order of 13 November 2001 violates the Geneva Conventions.

10. Additional Information. The Defense is in the process of identifying which of the above experts are available for a 8 November hearing date and will identify from the above list the expert(s) intended to be called by the Defense at the earliest opportunity.

CHARLES D. SWIFT
Lieutenant Commander, JAGC, US Navy
Detailed Military Defense Counsel
Office of Military Commissions

Review Exhi 25B

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UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	)	PROSECUTION RESPONSE TO DEFENSE MOTION TO DISMISS (VIOLATION OF ARTICLE 103 OF THE THIRD GENEVA CONVENTION AND UNITED STATES GOVERNMENT REGULATIONS) 15 October 2004

1. Timeliness: This Motion is filed in a timely manner as per the Presiding Officer's Order.

2. Position on Motion: The Defense's Motion to dismiss should be denied.

3. Facts Agreed upon by the Prosecution: The Prosecution admits the facts alleged by the Defense in subparagraphs 4(j) and 4(n) for the purposes of this motion.

4. Facts:

a. The Chief Prosecutor did not ask that counsel be appointed to the Accused for the limited purpose of negotiating a pre-trial agreement, but ". . . to advise Mr. Hamdan on how he might engage in pretrial discussions with a view towards resolving the allegations against him." See Memorandum dated 15 December 2003, Subject: Target Letter Re: Military Commission of Mr. Salem Ahmed Salem Hamdan, attached.

b. On 23 February, the Legal Advisor to the Appointing Authority did send a reply to the Defense but, contrary to the Defense's misrepresentation, it did contain an explanation. See Memorandum date 23 February 2003, Subject: In the Case of Salem Hamdan: Questions Regarding Application of Article 10, UCMJ, attached. It explained that the Accused was being held based on his status as an unlawful combatant (a basis unrelated to military commissions).

c. The "back of the stack" allegation is an absolute misrepresentation. CDR [redacted] never said what LCDR Swift has quoted him as saying. CDR [redacted] merely told LCDR Swift that he did not control the order of cases and that he did not know when he would be tried if a plea agreement were not reached.

d. On 13 July 2004, a charge of conspiracy to commit the following offenses was referred to this Military Commission: attacking civilians; attacking civilian objects;

murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

5. Legal Authority Cited:

a. The Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1955).

b. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003)

c. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003)

d. Rasul v. Bush, 124 S.Ct. 2686 (2004)

e. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984)

f. Handel v. Artukovic, 601 F.Supp. 1421 (C.D. Cal. 1985)

g. War Crimes Act of 1996, 18 U.S.C. § 2441

h. Johnson v. Eisentrager, 339 U.S. 763 (1950)

i. United States v. Noriega, 808 F.Supp. 791 (S.D. Fla. 1992)

j. United States v. Lindh, 212 F.Supp.2d 541 (E.D. Va. 2002)

k. Memorandum for the Vice President, et al. From President, Re: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002)

l. Dep't of the Navy v. Egan, 484 U.S. 518 (1988)

m. Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948)

n. Kolovrat v. Oregon, 366 U.S. 187 (1961)

6. Discussion:

The Defense moves this commission to dismiss the charges against the Accused on speedy trial grounds pursuant to Article 103 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), 6 U.S.T. 3315 (1955). The Defense's motion should be dismissed because the GPW are not self-executing and do not apply to al Qaida.

Article 103 of the GPW is not self-executing.

Federal law distinguishes "self-executing" international agreements from "non-self-executing" international agreements. An international agreement is "non-self-executing" in any of the following circumstances:

a. if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, or

b. if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or

c. if implementing legislation is constitutionally required.

Restatement (Third) of Foreign Relations Law § 111(4) (1987). If a treaty is "non-self-executing" then it does not give individuals rights that they may enforce in a judicial proceeding. "Courts in the United States are bound to give effect to . . . international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation." Id. § 111 (3).

That the GPW is not self-executing is demonstrated in the text of the GPW, its legislative history, and case law. Indeed the GPW contains many provisions that, when considered together, demonstrate that the contracting parties understood that violations of the treaty would be enforced through diplomatic means. As the Fourth Circuit recently explained:

> What discussion there is [in the text of the GPW] of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inherent in sovereign nations. If two warring parties disagree about what the Convention requires of them, Article 11 instructs them to arrange a "meeting of their representatives" with the aid of diplomats from other countries, "with a view to settling the disagreement." Geneva Convention, at Article 11. Similarly, Article 132 states that "any alleged violation of the Convention" is to be resolved by a joint transnational effort "in a manner to be decided between the interested Parties." Id. at art. 132; cf. id. at arts. 129-30 (instructing signatories to enact legislation providing for criminal sanction for "persons committing . . . grave breaches of the present Convention"). We therefore agree with other courts of appeals that the language in the Geneva Convention is not "self-executing" and does not "create private rights of action in the domestic courts of the signatory countries."

Hamdi v. Rumsfeld, 316 F.3d 450, 468-469 (4th cir. 2003), vacated on other grounds, 124 S.Ct. 2686 (2004). See also Al Odeh v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring), overruled on other grounds, Rasul v. Bush, 124 S.Ct.

2686 (2004); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork J., concurring); Handel v. Artukovic, 601 F.Supp. 1421, 1424-1426 (C.D. Cal. 1985). The Fourth Circuit alluded to the fact that there was one area in which the contracting parties sought to go beyond diplomacy to enforce violations of the treaty: "grave breaches," which the parties pledged to punish themselves by enacting domestic criminal legislation. GPW Article 129. Congress responded by enacting the War Crimes Act of 1996, 18 U.S.C. § 2441. That Act provides a means for remedying grave breaches, and other war crimes, but does not create any privately enforceable rights. The Executive Branch, through its ability to bring prosecutions, remains responsible for ensuring adherence to the treaty. In light of this clear textual framework for enforcing the treaty, there is no sound basis on which to conclude that the treaty provided individuals with private rights of action.

The legislative history of the GPW does not suggest otherwise. In fact, the Senate Report makes clear that the GPW is not self-executing. In the section titled "Provisions Relating To Execution Of The Conventions," the Report states that "the parties agree, moreover, to enact legislation necessary to provide effective penal sanctions for persons committing violations of the contentions enumerated as grave breaches." S. Exec. Rep. No. 84-9 (1955), at 7. The Report celebrates this provision as "an advance over the 1929 instruments which contained no corresponding provisions." Id.

Significantly, the Supreme Court interpreted the 1929 Geneva Convention in Johnson v. Eisentrager, 339 U.S. 763 (1950), and held that it was not self-executing. The Court ruled there that the German prisoners of war who were challenging the jurisdiction of the military commission which convicted them could not invoke the Geneva Convention because:

> It is . . . the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.

Id. at 789. It should be noted that the Senate that ratified the 1949 GPW was operating post-Eisentrager, yet no mention was made of the new GPW or its implementing legislation creating an individually actionable right. Moreover, in addressing how future compliance with the treaty would be achieved, the Senate Report did not mention legal claims or judicial machinery, but instead observed that "the weight of world opinion," would "exercise a salutary restraint on otherwise unbridled actions." S. Exec. Rep. at 32.

Given that it is apparent on the face of the treaty and from the legislative history that the parties contemplated the need for enacting legislation, the Fourth Circuit's

conclusion in Hamdi that the GPW is not self-executing is undoubtedly correct. As such, the Accused's claim motion should be denied on those grounds.[1] [2]

The GPW does not apply to al Qaida.

Even if the GPW were self-executing, the Accused's motion should be denied because the President has declared that the GPW does not apply to al Qaida. See Memorandum for the Vice President, et al. From President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 1 (Feb. 7, 2002), available at www.library.law.pace.edu/government/detainee_memos.html. This determination is not reviewable, given the foreign policy and national security concerns implicated in the present context and the Presidential prerogatives in those domains. See, e.g., Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."). But even if it were, it would at least be entitled to substantial deference, see Kolovrat v. Oregon, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."). The President's memorandum should be given deference by the Commission and the Accused's request to dismiss should be denied.

Conclusion.

The GPW is non-self-executing and provides no private exercisable right to the Accused. Similarly, 18 U.S.C. § 2441 provides no private right to the Accused. Therefore, the Defense's motion must be denied. However, even if the GPW did give an individual a right in a criminal trial, the Accused could not claim that right because the President has found that the GPW do not apply to him.

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[1] United States v. Lindh, 212 F.Supp.2d 541 (E.D. Va. 2002), although permitting the assertion of the GPW "as a defense to criminal prosecution," is not controlling in this instance because the Fourth Circuit, a superior court, in Hamdi subsequently held the GPW to be non-self-executing. Hamdi at 468. Moreover, the case of United States v. Noriega, 808 F.Supp. 791 (S.D. Fla. 1992), also offers nothing of substance to the issue. First, Noriega was an advisory opinion by a district court. Id. at 799. Second, Noreiga's reasoning was that the non-grave-breach articles of the GPW were self-executing specifically because the GPW did not call for implementing legislation. Id. at 797. Thus, by the very reasoning in Noreiga, Article 103 of the GPW, violation of which would be a grave breach, would not be self-executing as they require implementing legislation pursuant to the plain language of the treaty.

[2] Additionally, the argument that the United States has already implemented the GPW by way of AR 190-8 is spurious. First, the War Crimes Act of 1996, 18 U.S.C. § 2441, is Congress' implementation of the GPW and its legislative history says that. AR 190-8, on the other hand, was enacted to implement DoD Directive 2310.1. DoD Directive 2310.1 merely establishes the Department of Defense's policy with regard to observing the international law of war, including the GPW. The policy of an agency subordinate to the Chief Executive cannot seriously be posited to be the United State's implementing legislation to an international treaty when Congress, the United State's legislative body, was specifically charged with enabling legislation and actually did enact enabling legislation.

7. Attachments:

a. Memorandum dated 15 December 2003, Subject: Target Letter Re: Military Commission of Mr. Salem Ahmed Salem Hamdan

b. Memorandum date 23 February 2003, Subject: In the Case of Salem Hamdan: Questions Regarding Application of Article 10, UCMJ

8. Oral Argument: Although the Prosecution does not specifically request oral argument, we are prepared to engage in oral argument if so required.

9. Witnesses:

a. Major [redacted]
b. Captain [redacted]
c. Special Agent [redacted] (already Protected Information pursuant to Presiding Officer Order of August 27 2004).

We ask that the names contained in (a) and (b) above also be considered Protected Information. A proposed Protective Order has been provided in separate correspondence.

[redacted]
Prosecutor

Review Exhibit 25-B

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

December 15, 2003

MEMORANDUM FOR ACTING CHIEF DEFENSE COUNSEL

SUBJECT: Target Letter re Military Commission Investigation of Mr. Salem Ahmed Salem Hamdan

On July 3, 2003, the President determined that Mr. Salem Ahmed Salem Hamdan is subject to the Military Order of November 13, 2001. As a result, pursuant to Section 4(a) of the President's Military Order, Mr. Hamdan "shall, when tried, be tried by military commission for any and all offenses triable by military commission that [he] is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."

The Office of the Chief Prosecutor is considering whether to prepare charges against Mr. Hamdan and present them to the Appointing Authority for approval and referral in accordance with Section 4(B)(2) of Military Commission Order No. 1, dated March 21, 2002. The charges currently under consideration include, but are not limited to: attacking civilians and civilian objects; terrorism; and conspiracy to commit the above mentioned offenses. Theories of liability in proving these offenses may include conspirator liability for the substantive offense, liability based upon being a member of an enterprise of persons who shared a common criminal purpose, aider and abettor liability, or some combination thereof.

Under my interpretation of Section 3(B)(8) of Military Commission Instruction No. 4, you are authorized to detail a military defense counsel to advise Mr. Hamdan on how he might engage in pretrial discussions with a view toward resolving the allegations against him. My office will make the arrangements with the Commander, Joint Task Force Guantanamo, for such detailed military defense counsel to have access to Mr. Hamdan. Such access shall continue so long as we are engaged in pretrial negotiations. Please advise me as soon as possible what arrangements, if any, you desire to facilitate this representation.

Attachment 1 to this memorandum is provided: 1) to assist Mr. Hamdan's detailed defense counsel in evaluating the potential charges against him; and 2) to advise Mr. Hamdan regarding his options. Additional discovery will be provided to detailed defense counsel when identified.

The final decisions regarding charges against Mr. Hamdan and the terms of any plea agreement that might be entered are within the sole discretion of the Appointing Authority. Nothing in this memorandum, or in any subsequent discussions between the

Office of the Chief Prosecutor and the defense counsel detailed to represent Mr. Hamdan pursuant to this memorandum, should be considered as binding on the Appointing Authority.

Please advise the Office of the Chief Prosecutor no later than January 9, 2004 whether or not Mr. Hamdan is interested in discussing a plea agreement.

Commander [redacted] is my point of contact for matters related to this memorandum.

Disclosure or other public release of the contents of this memorandum is prohibited by Military Commission Instruction No. 4, Section 3(B)(4) and Military Commission Instruction No. 5, Annex B, Section II(E)(1).

[redacted]
Colonel, U.S. Army
Chief Prosecutor (Acting)
Office of Military Commissions

Attachment:
1. Salem Ahmed Salem Hamdan FBI 302, dated July 10, 2002

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

February 23, 2004

MEMORANDUM FOR Lieutenant Commander C.D. Swift, USN, Detailed Defense Counsel for Salem Ahmed Hamdan

SUBJECT: In the Case of Salem Ahmed Hamdan: Question Regarding the Application of Article 10, UCMJ

I am in receipt of your February 12, 2004 memorandum requesting a determination that Article 10, UCMJ, applies to the Department of Defense detention of Salem Ahmed Hamdan. The Department of Defense is detaining Mr. Hamdan as an unlawful enemy combatant. Article 10, UCMJ, does not apply to Mr. Hamdan's detention.

Thomas L. Hemingway
Brig Gen, USAF
Legal Advisor to the Appointing Authority
Office of Military Commissions

cc: Chief Defense Counsel

UNITED STATES OF AMERICA	)	DEFENSE REPLY TO PROSECUTION RESPONSE TO **D15** (ARTICLE 103 OF THE THIRD GENEVA CONVENTION AND UNITED STATES GOVERNMENT REGULATIONS)
v.	)	
SALIM AHMED HAMDAN	)	27 October 2004

1. Timeliness. This reply is filed within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004, and the grant of relief by the Presiding Officer on 22 October 2004 to submit on 27 October 2004.

2. Relief Sought. That the original Defense Motion, D15, be granted.

3. Facts:

a. The Chief Prosecutor in his Memorandum dated 15 December 2003, Subject: Target Letter Re: Military Commission of Mr. Salem Ahmed Salem Hamdan, (attached) and cited by the Prosecution conditioned Defense Counsel access to Mr. Hamdan to "so long as we are engaged in pretrial negations. By so limiting Defense Counsel's access to Mr. Hamdan the Chief Prosecutor clearly envisioned representation for the limited purpose of negotiating a pre-trial agreement

b. The Prosecution states in b) that the February Legal Advisor Letter denying the applicability of Article 10 of the UCMJ gave a reason: Mr. Hamdan is being held as "an unlawful combatant (a basis unrelated to military commissions)". The claim that Mr. Hamdan's status is "unrelated" to commissions is flat out wrong, as the prosecutor's own memoranda make clear. See, e.g., Prosecution's Response to D20, Lack of Legislative Authority, at 4 (stating that commissions may punish "unlawful belligerents"); id. (quoting *Hamdi*'s language that punishment of "unlawful combatants" is appropriate); id. At 7 (discussing the "power to bring unlawful enemy combatants to justice"); and numerous other places in its Prosecution motions.

c. The Defense does not disagree that CDR[redacted] indicated that the order of cases was not up to him. The Defense however, clearly remembers CDR[redacted] stating that Mr. Hamdan was going to go to the back of the pack. CDR[redacted] words proved prophetic, as although Mr. Hamdan received the second Target letter and was the only detainee to demand a speedy trial, he was in fact the last detainee charged.

d. Please refer to the initial motion for additional facts.

4. Law and Discussion.

Review Exhibit 25-C

Page 1 **Of** 9

The prosecution's response fails to refute the law as set forth in the Defendant's Motion To Dismiss for Violation of GPW Article 103 of the Geneva Conventions. Contrary to the prosecution's assertions, Article 103 binds the Commission and protects detained individuals from government overreaching. It is, moreover, clearly applicable to an individual confined in the circumstances Mr. Hamdan has suffered. Despite the Government's violation of Article 103 – a violation that notably the Prosecutor does not even deny – Mr. Hamdan is being brought before this commission ostensibly to vindicate the laws of war when the Prosecution itself has flouted them in a fundamental sense.

a. Article 103 of the GPW Binds this Commission

Contrary to the prosecution's assertions, Article 103 of the GPW binds this commission and provides a minimum level of protections to defendant, which cannot be abrogated by this commission. To deny this proposition, the prosecution must undermine the plain text of the United States Constitution. To deny this proposition, the prosecution must mischaracterize the overwhelming weight of centuries of learned precedent interpreting that plain text. To deny this proposition, the prosecution must rewrite the history of the United States Congress, the Geneva Convention, and the dominant interpretations of the Geneva Convention created by the Department of Defense. And finally, to deny this proposition, the prosecution discards invaluable protections for American soldiers in favor of abstract and ill-founded concerns over the prerogatives of the political branches of American government.

In any event, the entire presupposition of "self-execution" is irrelevant before this commission. It turns out that the Geneva Conventions are self-executing, as it happens, but that is not at all necessary to decide this motion. Self-execution has to do with whether an individual, if a treaty has been violated, can walk into a *federal civil* court and sue for money damages and the like. That has absolutely nothing to do with whether it may be asserted as a *defense* in a commission – particularly a commission that is evaluating whether he can be jailed for years on end. As to that question, the Prosecution offers absolutely no precedent, or even logic, whatsoever. And they cannot, for the entire premise of a military commission is that it is to vindicate the laws of war. One cannot vindicate those rules by conducting a commission that is at odds with the charter document of the laws of war – the Geneva Convention. If there is any doubt about this at all, the text of the Constitution makes it obvious. The Supremacy Clause of the United States Constitution is clear: "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const., Art. VI, cl. 2.

While self-execution is therefore not at all relevant in this proceeding, it is worth pointing out that, for the record, the Prosecution's claims about the Geneva Convention are wrong. For centuries, the interpretation of such treaties has been recognized to be the "peculiar province of the judiciary." *Jones v. Meehan*, 175 U.S. 1, 3 (1899). The primacy of judicial interpretations of federal treaties under the Supremacy Clause, even against clearly contrary interpretations provided by Congress or the Executive Branch, has long been upheld. *See, e.g.*, *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *Perkins v. Elg*, 307 U.S. 325 (1939); *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809). A clearly contrary construction of a treaty provided by the Executive Branch may be given some weight, but it is "not conclusive" in the face of consistent judicial interpretation. *See Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933).

The prosecution's response to the defense motion to dismiss entirely avoids the necessary dominance of judicial interpretation of federal treaties under the plain text of the Supremacy Clause and centuries of Supreme Court opinion.

The U.S. judiciary has provided a clear interpretation of the scope of the Geneva Conventions. That interpretation commits the United States and this tribunal to recognize that the Geneva Conventions represent "a self-executing treaty to which the United States is a signatory . . . . [They] are a part of American law. . . ." *United States v. Lindh*, 212 F. Supp.2d 541, 553-54 (E.D. Va. 2002) (footnotes omitted); *see also United States v. Noriega*, 808 F. Supp. 791, 797 (S.D. Fla. 1992); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002), *remanded on other grounds*, 356 F.3d 695 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711 (2004). The interpretation of the Geneva Conventions advanced by these courts is completely in keeping with longstanding Supreme Court precedent in interpreting and enforcing the rights guaranteed to individuals by federal treaties. Federal treaties "may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other . . . . A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." *The Head Money Cases*, 112 U.S. 580, 598 (1884); *Jordan v. Tashiro*, 278 U.S. 123, 130 (1928); *Asakura v. City of Seattle*, 265 U.S. 332, 339-41 (1924); *Chew Hong v. United States*, 112 U.S. 536 (1884); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833). Such a rule is provided by Article 103.

In contrast, the judicial interpretation of the Geneva Conventions advanced by the prosecution relies solely upon discredited, reversed, inapplicable, distorted, or minority judicial positions which lack the governing force of law.[1] They cannot justify the prosecution's strained

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[1] The prosecution relies exclusively on the following cases in its response to the Defense Motion to Dismiss on Article 103 grounds. Prosecution Response at 3-4, *citing Hamdi v. Rumsfeld*, 316 F.3d 450, 468-69 (4th Cir. 2003), *rev'd* 124 S.Ct. 2686 (2004); *Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring), *rev'd Rasul v. Bush*, 124 S.Ct. 2686 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring); *Handel v. Artukovic*, 601 F. Supp. 1421, 1424-26 (C.D. Cal. 1985).

The prosecution's main support is provided by a lengthy excerpt from the Fourth Circuit's ruling in *Hamdi*. This opinion was vacated by the Supreme Court, 124 S. Ct. 2686 (2004), in a plurality opinion written by Justice O'Connor. Justice O'Connor specifically avoided "address[ing] at this time whether any treaty guarantees [detainees] . . . access to a tribunal for a determination [of status]." However, Justice O'Connor is on record elsewhere expressing support for the preeminence of the Supremacy Clause in determining the legal force of foreign treaties, and for claiming further that "our status as a free nation demands faithful compliance with the law of free nations." Sandra Day O'Connor, "Federalism of Free Nations," in *International Law Decisions in National Courts* 13, 18 (Thomas M. Franck & Gregory H. Fox, eds., 1996). Whatever precedential value *Hamdi* may provide to this commission, it surely cuts against the prosecution's interpretation of Article 103 and in favor of dismissal.

The prosecution also cites Judge Randolph's concurrence in *Al Odah*. However, this citation is not representative of the D.C. Circuit's ruling in *Al Odah*; in any case, *Al Odah* was overruled by *Rasul*.

The prosecution also cites Judge Bork's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring). Again, this is not representative of the D.C. Circuit's ruling in *Tel-Oren*; in any case, Judge Bork's concurrence, considered in full, is best understood as ***actually undermining*** the prosecution's argument. *See Tel-Oren*, 726 F.2d at 808-09 (suggesting that treaties which "speak in terms of individual rights," as do the Geneva Conventions generally and Article 103 particularly, may be regarded as self-executing).

Finally, the prosecution cites *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985). The prosecution's reliance on this case is completely misplaced, as it involves the predecessor to the 1949 GPW, the 1929 Geneva convention.

In short, the prosecution's claim that the Geneva Conventions are not self-executing is, if anything, undercut by the judicial opinions cited as support.

judicial interpretation of the Geneva Conventions, which runs counter to specific recent precedent and the overwhelming weight of Supreme Court authority. The correct judicial interpretation of the Geneva Conventions requires dismissal, even against a clearly contrary construction of the Geneva Conventions by the executive branch, which in any event is lacking in this case.[2] The plain text of the Constitution and the plain weight of U.S. judicial precedent are at stake before this commission. These authorities alone are sufficient and necessary for dismissal.

It is equally evident that the correct interpretation of the Geneva Conventions generally and Article 103 specifically provide privately enforceable rights. As was shown in the original Motion to Dismiss, American courts have historically understood treaty rights to be directly enforceable by private individuals. *See* Defendant's Motion To Dismiss at 7-8. In response, the prosecution ignores this overwhelming weight of judicial interpretation. Instead, the prosecution alludes to the 1929 Geneva Convention and *Johnson v. Eisentrager*, 339 U.S. 763 (1950). *See* Prosecution Response at 4. The 1929 Geneva Convention is simply not at issue, and *Eisentrager* is irrelevant. However, it is relevant that the legislative history of the 1949 Geneva Conventions clearly demonstrates their intention to protect, "first and foremost . . . individuals, and not to serve state interests." Oscar M. Uhler et al., *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 20 (Jean S. Pictet ed., 1958). It is also relevant that American courts have consistently held that the ultimate goal of the applicable Geneva Conventions "is to ensure humane treatment" for individuals, "not to create some amorphous, unenforceable code of honor among the signatory nations." *Noriega*, 808 F. Supp. at 799; *see also Lindh,* 212 F. Supp.2d at 553-54. The weight of relevant authority requires the rights guaranteed by Article 103 to be directly enforceable by private individuals such as Defendant.

As has been repeatedly demonstrated, the judicial interpretation of federal treaties, including the Geneva Conventions, must be paramount. The interpretation of the Geneva Conventions urged by the prosecution would require this court to ignore and reverse the settled and supreme judicial understanding of this treaty in favor of a radical vision justified by limited and controversial executive authority alone. Worse still, the prosecution's interpretation would require this commission to sacrifice invaluable protections afforded to American soldiers by the Geneva Conventions in favor of fictitious concerns for the power of the executive branch. The United States' commitment to broad adherence to the Geneva Conventions has created reciprocal protection for United States military personnel in conflicts across the world for over half a century. *See* Amicus Brief of General David M. Brahms, et al. at 2-7. These safeguards should

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[2] The prosecution's response implies that the recent presidential memorandum expresses a consistent executive branch interpretation of the GPW. *See* Prosecution Response at 5, *citing Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al Qaeda and Taliban Detainees*, at 1 (Feb. 7, 2002). This implication is incorrect: the recent presidential memorandum is inconsistent with the previous weight of executive interpretation. *See* notes 46-47, *supra*. Even if the executive branch interpretation cited by the prosecution were a consistent and compelling alternative, the judicial interpretation of the GPW must be given ultimate precedence. *See Factor v. Laubenheimer*, 290 U.S. 276, 293-94, 295 (1933) (holding that "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred," and ruling that although the construction of a treaty by the Executive Branch is "of weight," it is "not conclusive upon courts called upon to construe" the treaty). Moreover, American courts have specifically overturned the interpretations of treaties advanced by the executive branch in situations where individual rights are at stake, even in areas where deference is traditionally due. *See, e.g., Perkins v. Elg*, 307 U.S. 325; *United States v. Decker*, 600 F.2d 733, 738 (9th Cir. 1979). In this case, where the executive interpretation provided by the prosecution is inconsistent even with past executive interpretations, the deference due to the correct judicial interpretation of the treaty must be even greater.

not be discarded on the basis of the prosecution's ill-founded structural concerns for the prerogatives of the political branches.

b. Article 103 is Applicable to Mr. Hamdan.

1) No Court Has Determined that Mr. Hamdan was Ever a Member of Al Qaeda.

The government cannot circumvent the protections of the Geneva Convention simply by assigning Mr. Hamdan membership in some "terrorist organization," particularly when, first, Mr. Hamdan was captured by Afghan paramilitary forces allied with the United States and fighting the Taliban, and, second, when evidence in the record includes Mr. Hamdan's adamant denial that he was ever a member of al Qaeda or engaged in any type of terrorist activity. The presumption of POW status under Geneva Convention Article 5 illuminates this issue; at a minimum, a "competent tribunal" must determine Mr. Hamdan to have been a member of al Qaeda before the government can dispute the applicability of the Article 103 of the Conventions on that same ground.[3]

2) The President's Opinion on the Applicability of the Geneva Convention to Al Qaeda Members Is Entitled to No Deference and Is, In Any Case, Wrong as a Matter of Law.

The prosecutor attempts to deprive this court of its constitutional mandate of judicial review by claiming that the legal conclusion set forth in a two-year-old memorandum from the President to the Vice President is "not reviewable."[4] The very cases the prosecution cites reveal the fallacy behind this assertion, which seeks to conflate, on one hand, the individualized determinations a President will make on the explicit authority of law, with, on the other, a President's unsolicited opinion about a general legal matter.

In Chicago & S. Air Lines v. Waterman S.S. Corp.,[5] cited by the prosecutor, the Supreme Court determined whether the courts could review a President's grant or denial of an application by a citizen carrier to engage in overseas and foreign air transportation.[6] The relevant statute explicitly required Presidential approval before an application could be granted, and it was exceptionally expansive: "Presidential control is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies."[7] The Court understood the statute as "invert[ing] the usual administrative process" in this manner as a consequence of the foreign policy decisions implicit in the determination to grant these applications.[8] Likewise, in Dep't of the Navy v. Egan,[9] the

[3] *See* Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, U.S.T. 3316, 3394, 75 U.N.T.S. 135 (GPW) ("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.").

[4] Prosecution's Response to the Defendant's Motion To Dismiss for Violation of GPW Article 103 of the Geneva Conventions at 5.

[5] 333 U.S. 103 (1948).

[6] *Id.* at 104.

[7] *Id.* at 109.

[8] *Id.* at 109.

[9] 484 U.S. 518 (1988).

Court found the decision by an executive agency to revoke a given Navy employee's security clearance to be unreviewable where "the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is *committed by law* to the appropriate agency of the Executive Branch."[10]

The decisions are, in short, wholly inapposite in the present context. No statute—and certainly, no provision of the Constitution—requires the President's approval before the Geneva Conventions, signed by the United States over 50 years ago, will apply to a given group of people. It is, of course, the treaty itself that makes this determination. Indeed, any "executive decisions as to foreign policy" implicated by the *applicability* of these Conventions came in the former president's decision to sign the Convention and in subsequent presidents' decisions to approve or veto legislation expanding its scope. The current President is free to advocate for his interpretation of the Conventions, but that advocacy is by no means binding on the courts or this body.

In any case, the President's interpretation of the applicability of the Conventions to members of al Qaeda is wrong as a matter of law. The amicus brief submitted in conjunction with the Defendant's Motion To Dismiss for Violation of Common Article 3 explains the proper interpretation:

> Secretary of State Powell was . . . correct when he stated, soon after the United States invaded Afghanistan, that the Geneva Conventions apply to both al Qaeda and Taliban fighters. Rowan Scarborough, *Powell Wants Detainees to the Declared POWs*, WASH. TIMES, Jan. 26, 2002. As his Legal Adviser stated (Taft Mem. at ¶ 3):
>
> > [The suggestion that there is a] . . . distinction between our conflict and al Qaeda and our conflict with the Taliban does not conform to the structure of the Conventions. The Conventions call for a decision whether they apply to the conflict in Afghanistan. If they do, their provisions are applicable to all persons involved in the conflict—al Qaeda, Taliban, Northern Alliance, U.S. troops, civilians, etc. If the Conventions do not apply to the conflict, no one involved in it will enjoy the benefit of their protections as a matter of law.[11]

Respondents' interpretation of Common Article 2 bears a disturbing resemblance to the interpretation of predecessor conventions adopted by Nazi Germany in World War II. Exploiting "technicalities" and "ambiguities" in the 1929 Conventions, the Nazis refused to afford POW status to members of the armed forces of countries the Nazis occupied because those prisoners were no longer soldiers of any government or state in existence. *See* [Howard S.] Levie, *Prisoners of War in International Armed Conflict*, at 12 [(1977)]. Responding to this brazen evasion of the conventions, Common Article 2 was written as a catchall, in include every type of

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[10] *Id.* at 527.

[11] *See also* Lawrence Azubuike, *Status of Taliban and Al Qaeda Soliders: Another Viewpoint*, 19 Conn. J. Int'l L. 127, 153-54 (2003) (arguing that the Third Convention should be applied to the conflict with al Qaeda because al Qaeda was an "enemy" of the U.S. in an armed conflict and its forces were so intertwined with the Taliban as to make them indistinguishable); Joan Fitzpatrick, *Agora: Military Commissions: Jurisdictions of Military Commissions and the Ambiguous War on Terrorism*, 96 Am. J. Int'l L. 345, 349 (2002) (noting that the conflict in Afghanistan was an international armed conflict in which the Taliban and Al Qaeda joined forces against the U.S. and its Afghan allies).

hostility which might occur without being 'declared war,'" [Oscar M. Uhler et al,] *Commentary IV[: Geneva Conventions Relative to the Protection of Civilian Persons in Time of War* (Jean S. Pictet ed., 1958)], at 14-15, thus ensuring that "nobody in enemy hands can be outside the law," *id.* at 51.[12]

As one scholar has commented, [the government's] position "repudiates the very concept of a 'law' of war," substituting "a new form of international armed conflict that is subject to no identifiable norms of international humanitarian law" and "An international armed conflict in which all the 'combatants' as defined by the Third Geneva Convention are on one side—that of the United States and its allies." Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 Hastings Int'l & Comp. L. Rev. 303, 317-18 (2002).[13]

It is, finally, critical for the court to recognize that any deference accorded to the President's 2002 interpretation of the Conventions must be judged in the context of the last fifty years of executive interpretation of the Convention's applicability. Again, the very same case that the prosecutor cites confirms the point, as the Court in *Kolovrat v. Oregon* found it determinative that there were before it "statements, in the form of diplomatic notes exchanged between the responsible agencies of the United States and of Yugoslavia, to the effect that the 1881 Treaty, *now and always*, has been construed as providing for inheritance by both countries' nationals without regard to the location of the property to be passed or the domiciles of the nationals."[14] The *Kolovrat* Court also, tellingly, revealed that looking into the "*purpose* in entering into that series of treaties" is helpful when courts fulfill their constitutional duty of "interpreting treaties for themselves."[15] The purpose and history of the Convention both confirm that its provisions must be interpreted to encompass a broad scope. As its Commentary explicitly states: "Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention. . . . There is no intermediate status; nobody in enemy hands can be outside the law."[16]

In sum, the prosecution's response fails to refute the law as set forth in the Defendant's Motion To Dismiss for Violation. As the Defendant has contained throughout the process, Article 103 binds this commission. It is clearly applicable to an individual confined in the circumstances Mr. Hamdan has suffered. Due to the violations of the Conventions—which, tellingly, the Prosecution does not deny in its Response—the court should grant the Defendant's Motion To Dismiss.

5. Files Attached. None.

6. Oral Argument. See D15, the Defense position remains the same.

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[12] *See also* Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. Int'l L. & For. Aff. 331, 371 (2003) (arguing that "the U.S. treatment of individual al-Qaeda members must comport with the strictures of the conventions because the conventions apply in all instance of international conflict.").

[13] Amicus Brief of General David M. Brahms, et al. at 17-18 (footnote numbering altered).

[14] 366 U.S. 187, 194-195 (1961) (emphasis added).

[15] *Id.* at 195, 194.

[16] *See* Int'l Comm. of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (Jean S. Pictet ed., 1958); *see also* Fourth Geneva Convention arts. 4(1) & 4(3); Additional Protocol I art. 50; Dep't of the Army, Field Manual no. 27-10, *Law of Land Warfare*, para. 73 (1956).

7. Legal Authority Cited.

a. Article 103 of the GPW

b. U.S. Const., Art. VI, cl. 2.

c. *Jones v. Meehan*, 175 U.S. 1 (1899)

d. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986)

e. *Perkins v. Elg*, 307 U.S. 325 (1939)

f. *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809)

g. *Factor v. Laubenheimer*, 290 U.S. 276 (1933)

h. *United States v. Lindh*, 212 F. Supp.2d 541 (E.D. Va. 2002)

i. *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992)

j. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002)

k. *The Head Money Cases*, 112 U.S. 580 (1884)

l. *Jordan v. Tashiro*, 278 U.S. 123 (1928)

m. *Asakura v. City of Seattle*, 265 U.S. 332 (1924)

n. *Chew Hong v. United States*, 112 U.S. 536 (1884)

o. *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833)

p. *Johnson v. Eisentrager*, 339 U.S. 763 (1950)

q. Oscar M. Uhler et al., *Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 20 (Jean S. Pictet ed., 1958)

r. Levie, *Prisoners of War in International Armed Conflict* (1977)

s. Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 Hastings Int'l & Comp. L. Rev. 303, 317-18 (2002)

t. *Kolovrat v. Oregon* 366 U.S. 187 (1961)

8. Witnesses/Evidence Required. See D15, the Defense position remains the same. However, the Defense notes that the Prosecution's answer of 15 October 2004, indicates that the Prosecution intends to call three witnesses but that the Prosecution has not filed a Notice of Witness in accordance with POM 10. The Defense does not read POM 10 to apply exclusively to the Defense. Accordingly, the Defense objects to the calling of any witness for which a notice has not been filed. The Defense understands that because of the novel issues presented that the failure to file may simply be an oversight on the Prosecutions part and the Defense is willing to withdraw its objection upon The Prosecution's submission of a Witness Notice on or before 1 November 2004 (5 working days before the hearing)

9. Additional Information. None.

NEAL KATYAL
Civilian Defense Counsel

LCDR CHARLES SWIFT
Detailed Defense Counsel

Review Exhibit 25e

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	)	**DEFENSE MOTION TO DISMISS** **(FOR FAILURE TO STATE AN OFFENSE WITHIN THE SUBJECT-MATTER JURISDICTION OF A MILITARY COMMISSION AND CONTRARY TO THE RECOGNIZED LAWS OF WAR)** 1 October 2004

1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004.

2. Relief Sought. That the Military Commission find that the sole charge against Mr. Hamdan is not within its subject matter jurisdiction as established by the Constitution of the United States, Federal Statutes, and international law and dismiss the charge against Mr. Hamdan.

3. Overview. Mr. Hamdan has been charged with a single count of conspiracy. This charge is clearly authorized. As the Supreme Court of the United States has said, only offenses against the laws of war can be tried by a military commission. When it examined the case of the Nazi Saboteurs, the Supreme Court said that the very first inquiry a court must ask is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial." *Ex Parte Quirin,* 317 U.S 1, 29 (1942). Here, the only charge against Mr. Hamdan is one unrecognized by the United States Congress and unknown to the laws of war.

4. Facts.

a. On September 11, 2001, Mohammed Atta, Abdul Alomari, Wail al-Shehri, Waleed al-Shehri, and Satam al-Suqami hijacked American Airlines Flight 11, bound from Boston to Los Angeles, and crashed it into the North Tower of the World Trade Center in New York. Mohammed Atta piloted the plane after it was hijacked. Near-simultaneously, Marwan al-Shehhi, Fayez Ahmed, a/k/a Banihammad Fayez, Ahmed al-Ghamdi, Hamza al-Ghamdi, and Mohald al-Shehri hijacked United Airlines Flight 175, bound from Boston to Los Angeles, and crashed it into the South Tower of the World Trade Center in New York. Marwan al-Shehhi piloted the plane after it was hijacked. As a result of the crashes, the towers of the World Trade Center collapsed. Approximately 2,752 people, almost all of them civilians, were killed. At the time of the hijackings and

attacks, the tenants of the World Trade Center were civilian in nature. The occupants consisted of approximately 430 tenants for business and commerce purposes only. Each of the named individuals are alleged to be members of Al Qaeda.

b. On September 11, 2001, Khalid al-Midhar, Nawaf al-Hazmi, Hani Hanjour, Salem al-Hamzi, and Majed Moqed hijacked American Airlines Flight 77, bound from Washington D.C. to Los Angeles, and crashed it into the Pentagon in Arlington, Virginia. Hani Hanjour piloted the plane after it was hijacked. As a result of the crash, approximately 184 people including many civilians were killed in and around the Pentagon. Each of the named individuals are alleged to be members of Al Qaeda.

c. On September 11, 2002, Ziad Jarrah, Ahmed al-Haznawi, Saaed al-Ghamdi, and Ahmed al-Nami hijacked United Airlines Flight 93, bound from Newark to San Francisco, and crashed it into a field near Shanksville, Pennsylvania. Ziad Jarrah piloted the plane after it was hijacked. 44 civilians died in the crash. Each of the named individuals are alleged to be members of Al Qaeda.

d. The organization known as al Qaida, or "The Base," was founded in or around 1989 by Usama bin Laden, and others. Al Qaida is composed of private individuals and did not constitute the armed force of any recognized state.

e. In response to the events of September 11, 2001, on September 18, 2001, Congress passed a joint resolution authorizing the President to use all necessary and appropriate force . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Sept. 18, 2001 Joint Res.

f. On 7 October 2001, pursuant to Presidential Order the United States commenced armed hostilities in Afghanistan in support of the Northern Alliance.

g. At the time that the United States commenced armed hostilities the Northern Alliance consisted of ethnic Tajiks that opposed the Taliban regime by military force. The Northern Alliance controlled approximately 10% of Afghanistan. The remainder of Afghanistan was controlled by military force/government, commonly referred to as the Taliban.

h. The Taliban exercised political and military control over that portion of Afghanistan that it controlled. The Taliban had been recognized as the government of Afghanistan by Pakistan and Saudi Arabia. The United States, however, did not recognize the Taliban as government of Afghanistan.

i. The United States, however, prior to the commencement of the use of military force negotiated with the Taliban seeking that they capture and turn over Usama Bin Laden and other members of al Qaeda to the United States.

j. On 13 November 2001, President Bush issued a military order pursuant to the authority vested in him as President of the United States and Commander in Chief of the Armed Forces of the United States by the Constitution and laws of the United States vesting in the Secretary of Defense the authority to try by military commission those persons that the President determined were subject to the order.

k. Subsequent to the President's Military Order of 13 November 2001, Mr. Hamdan was taken prisoner by indigenous Afghanistan forces in late November 2001, where upon he was subsequently turned over to U.S. personnel for a bounty and has been detained by the United States government ever since.

l. On 3 July 2003, the President of the United States determined that Mr. Hamdan was subject to his military order of 13 November 2001.

m. 13 July 2004, a charge of conspiracy to commit terrorism against Mr. Hamdan was referred to this Military Commission.

5. Law.

a. This Commission must First Satisfy Itself That Jurisdiction Exists Before Proceeding

The Supreme Court of the United States has explained what jurisdiction is and what this body's duties are: "The requirement that jurisdiction be established as a **threshold** matter ... is **inflexible** and without exception . . . for [j]urisdiction is **power** to declare the law,, and **[w]ithout jurisdiction the court cannot proceed at all** in any cause." *Ruhrgas AG v. Marathon Oil Co.*, 119 S. Ct. 1563, 1567 (1999) (internal punctuation and citations omitted).

"Jurisdiction" refers to the power of a legal body to try an offense. If that body lacks jurisdiction, everything it does in proceeding with a trial is illegal and unlawful. That is why judges across our land, in both the military and civil systems, have said that before proceeding with trial, they must first satisfy themselves that jurisdiction exists. *See In re Grimley,* 137 U.S. 147, 150 (1890); *Carter v. McClaughry*, 183 U.S. 365, 401 (1902); *Hiatt v. Brown,* 339 U.S. 103, 111 (1950). Jurisdiction, in turn, has always been broken down into two separate concepts. *First*, is the offense something that can be tried by the legal body? This inquiry turns on the history and language of authorizing legislation for that legal body. *Second*, is the person being tried someone that is properly before the reach of the legal body? That question asks whether the Government has alleged facts sufficient to place the specified individual before the military commission. This motion concerns the first of these inquiries. Because conspiracy is not an offense against the laws of war, this commission should declare the prosecution of Mr. Hamdan null and void.

b. Commissions Can Currently Try Only Spying and Enemy Assistance

Congress has provided only two offenses explicitly triable by commission. *See* 10 U.S.C. § 904 (aiding the enemy); 10 U.S.C. § 906 (spying). Yet rather than charge Mr. Hamdan with these carefully crafted statutes, the Government has invented a definition of an offense that is unknown to the laws of war and untethered to anything in the U.S. Code. Amending the definition of offenses is a job belonging to Congress – one it has proven capable of executing – as the events after *Quirin* demonstrated.[1]

c. Even in Declared War, Commissions May Only Try Offenses Specified By Congress

With respect to what constitutes a violation of the law of war, "Congress ha[s] the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts." *Quirin*, 317 U.S., at 30. At the time of *Quirin*, Congress chose not to define offenses against the law of war. But since those events, the Congress of the United States has done exactly that in the War Crimes Act of 1996, 18 U.S.C. § 2441, and the Expanded War Crimes Act of 1997. These Acts established that a "war crime" consists of "any conduct" that, *inter alia*, is a "grave breach" of international law. Congress provided a huge list of crimes in referencing so many treaties, but conspiracy is not on it.[2] A lawful commission may hear cases involving poison, killing soldiers who have laid down their arms, and like offenses specified in The Hague Convention and elsewhere, but not conspiracy.

d. The Conspiracy Charge Does Not State a Violation of the Laws of War

1. The laws of war do not recognize a conspiracy offense.

Neither Article 23 of The Hague Convention IV nor the Geneva Conventions make any mention whatsoever of a conspiracy charge.[3] While a conspiracy charge was used at

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[1] Following *Quirin*, Congress expanded the reach of Section 906 to make clear that it covered precisely the offenses of the Nazi saboteurs. 10 U.S.C: § 906 (1951) added to the definition of spying not only military installations but also spying over "any manufacturing or industrial plant." *See* Charge 1, Specification 1, in *Quirin* Tr., at 36 (charging them with intent "'to destroy certain war industries, war utilities and war materials within the United States.'"). This was intentional. *See* Hearings on HR 2498 of the 81st Cong. at 1229 (1949) (stating that Article 106 was intentionally expanded "in view of the importance of industrial plants, and other manufacturing units engaged in the war effort"). The UCMJ drafters also enlarged the definition of Article 81 to encompass more tangential connections through punishing anyone who "holds any intercourse with the enemy." This, too, was intentional. *See id.*

[2] Indeed, the House Report for that legislation referred explicitly to Congress' Art. I, Section 8 power to "define and punish . . . Offenses against the law of Nations" and stated that "The constitutional authority to enact federal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions to prosecute perpetrators of these crimes." H.R. Rep. No. 105-204.

[3] Indeed, they *bar* collective punishment like that sought by the Government here. *See* Art. 87 of GPW III; *see also* Art. 33, GPW IV.

Nuremberg, that offense is unavailable today.[4] The Nuremburg judges ruled that there was no offense of conspiracy to commit war crimes or crimes against humanity.[5] Instead, they confined conspiracy to very limited acts, and only against very high-level German officials who were directly involved in specific acts of aggression that took place.[6] Indeed, the Department of Defense has essentially admitted that conspiracy is not a violation of the laws of war. Its own Instruction defining the offense divides all offenses into three distinct groups: War Crimes; Other Offenses Triable by Military Commission; and Other Forms of Liability and related Offenses.[7] Conspiracy falls within not "War Crimes," and not even "Other Offenses Triable by Military Commission," but rather in the "Other Forms Of Liability" section.

When leaders act through followers, the leaders may be liable under complicity principles for limited offenses that have actually taken place. But there is literally no support in the law of war for the idea that a low-level individual may be liable simply because he "agrees" to commit some act in the future. The weight of law throughout the world emphatically rejects such a notion. Conspiracy has *never* been used to prosecute an inchoate offense of the law of war. *See* Cassesse, International Criminal Law 197 (Oxford 2003).
"The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.). And the Department of Defense admits that "No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question." Military Commission Instruction ("MCI") No. 2, Section 3(A).

2. Conspiracy doctrine cannot be used against low-level individuals.

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[4] Assistant Attorney General Herbert Wechsler, head of the Criminal Division, criticized the War Department's proposal to use a conspiracy charge, stating that "it is an error to designate as conspiracy the crime itself, the more so since the common-law conception of the criminality of an unexecuted plan is not universally accepted in civilized law." *See* Memorandum for the Attorney General, in The American Road to Nuremburg, 84, 87, Dec. 29, 1944 (Smith ed. 1982).

[5] Many read Nuremburg to say that there is no separate offense of conspiracy at all. *See* Major Edward J. O'Brien, The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood, 149 Mil. L. Rev. 275, 281 (1995).

[6] "The International Military Tribunal ultimately "interpreted the [conspiracy] concept very narrowly, and adopted a construction of the Charter under which conspiracies to commit 'war crimes' or 'crimes against humanity' were ruled entirely outside the jurisdiction of the Tribunal." Telford Taylor, Brigadier General, USA, Chief of Counsel for War Crimes, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10., 70 (U.S.G.P.O. 15 Aug. 1949). In fact, all four of the cases brought against defendants for conspiracy to commit crimes against the peace resulted in acquittals. *Id.* at 31.

[7] *See* MCI No. 2; *see also* 1998 Rome Statute of the International Criminal Court, art. 8(a)(2), UN Doc. A/CONF. 183/9 (1998), reprinted in 37 ILM 999 1998) (defining "War Crimes" as grave breaches of the 1949 Geneva Conventions and "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law. . . "), *Id.*

The Government's charging Hamdan, a mere underling, with conspiracy is in complete contrast to international law, which has emphasized that any conspiracy charges must be against leaders.[8] The charges against Mr. Hamdan are unprecedented and could potentially destabilize the development of international criminal law. See Neal Katyal, Gitmo Better Blues, Slate Magazine, Mar. 19, 2004, available at http://slate.msn.com/id/2097397.

3. Conspiracy charges cannot incorporate pre-war conduct.

The conspiracy charge is based largely on conduct that occurred before 9/11, yet commissions can only adjudicate violations after a war begins.[9] It is a tremendous stretch to argue that the war began in 1989 or 1995 or 1999. Such a claim would have surprised former President Clinton; indeed, it apparently would even have surprised President Bush, who stated at a March 6, 2004 press conference, "The terrorists declared war on us that day [September 11, 2001]."

4. The Pentagon definition empties conspiracy of its meaning.

The Government's "definition" of conspiracy (a questionable term to apply to a Pentagon civilian's laundry list of offenses when the Government simultaneously says that it is a "common law" offense) is woefully lacking. For example, it eliminates the most important element of conspiracy: agreement. *See, Prosecutor v. Juvenal Kajelijeli* (Case No. ICTR-98-44A) Judgment 787 (1 Dec. 2003) ("the evidence must show that an

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[8] *See* Nuremberg Trial Proceedings, *reprinted in* The Avalon Project at Yale Law School, vol. 22, 467: Judgment, http://www.yale.edu/lawweb/avalon/imt/proc/09-30-46.htm; *Charter of the International Military Tribunal for the Far East*, art. 1 (January 19, 1946), http://www.yale.edu/lawweb/avalon/imtfech.htm (limiting conspiracy charge to leaders); S.C. Res. 1329 (Nov. 30, 2000) (detailing the Security Counsel's endorsement of an official prosecutorial policy for the ICTY and ICTR that "civilian, military and paramilitary leaders should be tried before them in preference to minor actors."); Statute of the Special Court for Sierra Leone, art. 1(limiting the court's jurisdiction to those "who bear the *greatest responsibility* for serious violations of international humanitarian law."); Wechsler Memorandum, *supra*, at 89 (criticizing conspiracy charges against Germans who were not "prime leaders," because the charge "may be seriously weakened in the eyes of the world if too many individuals are included in it.").

[9] GPW Art. 99 (explicitly barring such ex post facto charges); *see also*, International Covenant on Civil and Political Rights (ICCPR), Article 15 (made non-derogable by Article 4); Wechsler Memo., *supra*, at 86 ("atrocities committed prior to a state of war" "are not embraced within the ordinary concept of crimes punishable as violations of the laws of war."); *Prosecutor v. Multinovic*, Decision on Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, ICTY Appeals Chamber, Case No. IT-99-37-AR72, ¶ 17 (May 21, 2003) ("it is every Chamber's duty to ascertain that a crime or a form of liability charged in the indictment is both provided for under the statute and existed at the relevant time under customary international law."); Winthrop, Military Law and Precedents 837 (2d ed. 1920) ("An offence, to be brought within the cognizance of a military commission, must have been committed within the period of the war"); *id.* n.95 (quoting source that "martial law is not retrospective. An offender cannot be tried for a crime committed before martial law was proclaimed.").

agreement had indeed been reached. The mere showing of a negotiation in process will not do."). Under MCI No. 2, § 6(a)(1), a defendant need only "join[] an enterprise of persons who shared a common criminal purpose" to establish a conspiracy. While those who actively plot specific terrorist activities would fall within the domestic civilian conspiracy offense,[10] the MCI's use of "enterprise" is impermissibly vague.

Second, even under broad domestic standards, conspiracy is a specific intent crime. *State v. Bond*, 49 Conn. App. 183, 196, 713 A.2d 906, 913 (Conn. App. Ct. 1998). As such, the intent of one person to commit a crime cannot simply be imputed to another. *See Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir. 1982), *rehearing denied with opinion*, 697 F.2d 699 (5th Cir. 1983). Yet the prosecution does not allege such specific intent.

e) Summary

Given the above deficiencies, a conspiracy charge cannot be based upon the MCI's invented definition of the offense. "Common law" does not mean "made-up law," especially when someone's liberty is at stake.

No one understands better the need for clearly defined offenses that let the world know that the United States is serious about prosecuting terrorism than undersigned counsel. Fortunately, the United States Congress has proven itself willing to do exactly that, listing dozens of crimes that can be used to prosecute terrorists, both in civilian courts as well as courts martial. This prosecution is an unbridled attempt to circumvent a carefully calibrated plan for dealing with threats to the nation. Even if it might be wise to have military commissions for certain offenses, it is manifestly unwise to do so here, for a crime that has *never* been accepted in a military commission before. Military commissions can only try violations of the laws of war. The charge against Mr. Hamdan, however, states something unknown to those very laws.

6. Files Attached. None.

7. Oral Argument. Is required. The Presiding Officer has instructed the Commission members that he will provide the Commission members with his interpretation of the law as he sees it, but that the Commission members are free to arrive at their own conclusions. The Defense asserts its right to be heard following the Presiding Officer's pronouncement via oral argument in order for the remainder of the Commission members to be informed as to the reasons for the Defense's support or opposition to the Presiding

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[10] Domestic criminal law is, of course, not a powerful source of support for the Government. American civilian criminal law has been able to develop a vibrant offense of conspiracy because of its strong commitment to criminal procedural guarantees. While charges can be more vague in a civilian conspiracy trial and hearsay evidence may be admitted, the standard checks on prosecutorial and judicial abuse exist – an indictment by a grand jury, the right to a jury trial, the right to confront witnesses, the right to obtain exculpatory evidence, and so on. These procedural rights are preconditions before conspiracy doctrines become available.

Officer's position. Additionally, the Defense intends to call expert witnesses and to incorporate their testimony into this motion via oral argument.

8. List of Legal Authority Cited.

a. *Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir. 1982)

b. *Ex Parte Quirin,* 317 U.S 1, 29 (1942)

c. *In re Grimley,* 137 U.S. 147, 150 (1890)

d. *Carter v. McClaughry*, 183 U.S. 365, 401 (1902)

e. *Hiatt v. Brown,* 339 U.S. 103, 111 (1950)

f. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)

g. *Ruhrgas AG v. Marathon Oil Co.*, 119 S. Ct. 1563, 1567 (1999)

h. 10 U.S.C. § 904

i. 10 U.S.C. § 906

j. 18 U.S.C. § 2441

k. H.R. Rep. No. 105-204

l. Hearings on HR 2498 of the 81st Cong. at 1229 (1949)

m. *Charter of the International Military Tribunal for the Far East*, art. 1 (January 19, 1946), http://www.yale.edu/lawweb/avalon/imtfech.htm

n. Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1955) ("GPW")

o. The Hague Convention IV (1907)

p. 1998 Rome Statute of the International Criminal Court, art. 8(a)(2), UN Doc. A/CONF. 183/9 (1998), reprinted in 37 ILM 999 1998)

q. Cassesse, International Criminal Law 197 (Oxford 2003).

r. Neal Katyal, Gitmo Better Blues, Slate Magazine, Mar. 19, 2004, available at http://slate.msn.com/id/2097397.

s. Memorandum for the Attorney General, in The American Road to Nuremburg, 84, 87, Dec. 29, 1944 (Smith ed. 1982)

t. Military Commission Instruction ("MCI") No. 2

u. Nuremberg Trial Proceedings, *reprinted in* The Avalon Project at Yale Law School, vol. 22, 467: Judgment, http://www.yale.edu/lawweb/avalon/imt/proc/09-30-46.htm

v. Edward J. O'Brien, The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood, 149 Mil. L. Rev. 275, 281 (1995)

w. *Prosecutor v. Multinovic*, Decision on Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, ICTY Appeals Chamber, Case No. IT-99-37-AR72, ¶ 17 (May 21, 2003)

x. *Prosecutor v. Juvenal Kajelijeli* (Case No. ICTR-98-44A) Judgment 787 (1 Dec. 2003)

y. *State v. Bond*, 49 Conn. App. 183, 196, 713 A.2d 906, 913 (Conn. App. Ct. 1998)

z. S.C. Res. 1329 (Nov. 30, 2000)

aa. Statute of the Special Court for Sierra Leone, art. 1

bb. Telford Taylor, Brigadier General, USA, Chief of Counsel for War Crimes, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10., 70 (U.S.G.P.O. 15 Aug. 1949)

cc. Winthrop, Military Law and Precedents (2d ed. 1920)

9. Witnesses and/or Evidence Required. The Defense intends to call Professor Allison Danner or Professor George Fletcher (Curriculum Vitae attached) as an expert witness in the area of International Criminal Law including crimes against the laws of war. Professors Danner's and Fletcher's expert testimony is probative to a reasonable person under the circumstances presented specifically, based on the Professors' skill knowledge, training and education. They possess specialized knowledge of International Criminal Law including crimes against the laws of war. The application and substance of such laws is a legal finding to be made by members of the Military Commission beyond the training and expertise of lay persons. As such, Professors Danner and Fletcher's specialized knowledge will assist the Commission members in understanding and determining whether the crime charged was a recognized violation of the laws of war during the relevant period.

10. Additional Information. Professors Danner and Fletcher are both nominated as experts as the Defense is yet to determine the availability of Professor Fletcher. The Defense will not present cumulative testimony.

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UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	) PROSECUTION RESPONSE TO DEFENSE) MOTION TO DISMISS (FOR FAILURE TO) STATE AN OFFENSE WITHIN THE) SUBJECT MATTER JURISDICTION OF A) MILITARY COMMISSION AND CONTRARY) TO THE RECOGNIZED LAWS OF WAR)))) October 15, 2004

1. Timeliness. This motion is being filed in a timely manner within the parameters established by the Presiding Officer.

2. Relief Sought. The Prosecution requests that the Defense Motion to Dismiss based on the failure to allege an offense be denied.

3. Overview. Military Commission Law, specifically Military Commission Instruction No.2, is declarative of existing law which recognizes the crime of conspiracy and criminal accountability pursuant to joining an enterprise of persons who shared a common criminal purpose.

There have been prior convictions of the offense of conspiracy to commit war crimes before United States Military Commissions. Conspiracy is recognized under international law as well as liability based upon joining an enterprise of persons who shared a common criminal purpose.

4. Facts. The Defense cites no sources for the facts asserted in their motion (sources required to be identified in accordance with Presiding Officer Memorandum 4-2). The Prosecution does not specifically agree with or stipulate to the facts contained in Defense Motion paragraph 4. We will work with the Defense and attempt to work out acceptable stipulations.

The Prosecution asserts the following facts:

a. As the United States Supreme Court succinctly stated in Hamdi v. Rumsfeld:

> On September 11, 2001, the al Qaida terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these 'acts of treacherous violence,' Congress passed a resolution authorizing the President to 'use all necessary and appropriate force against those nations, organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.' Authorization for Use of Military Force ('the AUMF'), 115 Stat 224. Soon thereafter, the President ordered United Stated Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

124 S. Ct. 2633 (2004) (plurality opinion)

b. Subsequent to the AUMF, the President issued his Military Order of November 13, 2001 ("Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism"). 66 Fed. Reg. 222 (November 16, 2001) In doing so, the President expressly relied on "the authority vested in me . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and sections 821 and 836 of title 10, United States Code."[1]

c. In his Order, the President found, *inter alia*, "To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." Id. at Section 1(e). The President ordered, "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed . . . ." Id. at Section 2(a). He directed the Secretary of Defense to "issue such orders and regulations . . . as may be necessary to carry out" this Order. Id.

d. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President's Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority) and over offenses (violations of the laws of war and all other offenses triable by military commission). *Id.*, at para 3(A), 3(B). The Secretary directed the Department of Defense General Counsel to "issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions . . . ." Id., at para 8(A).

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[1] Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice ("UCMJ"). These sections provide, in relevant part:

Art. 21. Jurisdiction of courts-martial not exclusive

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

Art. 36. President may prescribe rules

a. Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

b. All rules and regulations made under this article shall be uniform insofar as practicable.

e. The General Counsel did so, issuing a series of Military Commission Instructions (MCIs), including MCI No. 2: Crimes and Elements for Trial by Military Commission.

f. On July 13, 2004, the Appointing Authority approved and referred a charge of conspiracy against the Accused.

g. The Accused was born in Yemen. In 1996 he left Yemen utilizing a fraudulent passport and attempted to travel to Tajikistan to engage in *jihad*. (Accused's FBI 302 from July 2002 (Attached)).

h. Unable to join up with the Tajikistan *jihad*, the Accused eventually went to a Jalalabad guesthouse where he agreed to have a personal meeting with Usama bin Laden. His goal in meeting with bin Laden was to join in *jihad* with bin Laden (Accused's FBI 302 and CITF Form 40 from July 2002 and May 2003 (Attached)).

i. Prior to meeting with Usama bin Laden, the Accused was aware of bin Laden's goal to "expel the infidels from the Arabian Peninsula." (Accused's CITF Form 40 from May 2003).

j. After brief stops at the Jihad Wal and Khaldan terrorist training camps, the Accused met personally with Usama bin Laden at bin Laden's compound in Qandahar, Afghanistan (AF). (Accused's FBI 302 from July 2002).

k. The Acccused agreed to live at the bin Laden compound and serve as a driver. (Accused's FBI 302 from July 2002).

l. After an eight-month observation period conducted by Saif al Adel, the head of al Qaida security, the Accused was picked to serve as bin Laden's personal driver and bodyguard. (Accused's CITF Form 40 from May 2003). The Accused continued to serve in this capacity (absent a few leaves of absence) until his capture in November of 2001. (Accused's CITF Form 40 from May 2003).

m. While serving as bin Laden's personal driver and bodyguard, the Accused pledged "conditional bayat" to bin Laden agreeing to provide full support of the "*jihad* against the Crusaders and Jews." (Accused's CITF Form 40 from May 2003).

n. While serving the al Qaida organization, the Accused transported weapons and ammunition provided by the Taliban to al Qaida compounds in Qandahar. (Accused's CITF Form 40 from May 2003).

o. While serving as Usama bin Laden's driver and bodyguard, the Accused trained on several occasions at the al Farouq terrorist training camp on the use of various weapons. (Accused's CITF Form 40 from May 2003).

p. The Accused was with Usama bin Laden and was one of the people responsible for his safe transport and overall safety during the time periods of the U.S. Embassy bombings in 1998 and the attacks of September 11th. (Accused's statements of July 2002 and May 2003).

q. The Accused attended many speeches and press conferences given by Usama bin Laden where bin Laden described the "war against America" and the duty of Muslims to fight Americans. (Accused's statement of May 2003).

r. The Accused had knowledge of Usama bin Laden's 1996 Declaration of War and the 1998 fatwa against America. With this knowledge, he continued to serve as Usama bin Laden's driver and bodyguard. (Accused's CITF Form 40 from May 2003).

s. The accused observed Mullah Bilal experimenting with explosives in Qandahar, AF in the months prior to the USS COLE attack. Bilal was an al Qaida member who worked for bin Laden. Bilal admitted to Hamdan that he was directly involved in the USS COLE attack. (Accused's FBI 302 of 6 August 2002 (Attached)).

t. The Accused viewed portions of the USS COLE al Qaida recruiting video and believed this video was produced by al Qaida to spread enthusiasm for the cause throughout the world. (Accused's Form 40 of May 2003).

u. The Accused was an al Qaida member and he experienced "uncontrollable enthusiasm" as a result of being with bin Laden. (Accused's statement of May 2003).

v. The Accused was present shortly after the attacks of September 11th when Usama bin Laden discussed these attacks with Khalid Sheikh Muhammad (Mukhtar). Bin Laden thanked God for the success of the operation and asked God to reward Mukhtar for his work and role in the September 11th operation. (Accused's Form 40 of May 2003).

5. Authorities

a. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (plurality opinion)
b. President's Military Order of November 13, 2001 ("Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism")
c. Military Commission Order No. 1
d. Military Commission Instruction No. 2
e. Ex parte Quirin, 317 U.S. 1
f. Johnson v. Eisentrager, 339 U.S. 763 (1950)
g. Colepaugh v. Looney, 235 F.2d 429 (10th Cir 1956)
h. Thomas Michael McDonnell, The Death Penalty—An Obstacle to the "War Against Terrorism"?, 37 Vand. J. Transnat'l L. 353 (2004)
i. Neal Kumar Katyal, Why it Makes Sense to Have Harsh Punishments for Conspiracy, Legal Aff., Apr. 2003
j. United States v. Townsend, 924 F.2d 1385, 1394 (7th Cir. 1991)
k. Iannelli v. United States, 420 U.S. 770 (1975)
l. Direct Sales Co. v. United States, 319 U.S. 703 (1943)
m. Manual for Courts-Martial
n. United States v. Recio, 537 U.S. 270 (2003)
o. Callahan v. United States, 364 U.S. 587 (1961)

p. Pinkerton v. United States, 328 U.S. 640 (1946)
q. United States v. Rivera-Santiago, 872 F.2d 1073 (1st Cir. 1989)
r. Carlson v. United States, 187 F.2d 366, 370 (10th Cir. 1951)
s. United States v. Hersh, 297 F.3d 1233 (11th Cir. 2002)
t. WAYNE R. LAFAVE, CRIMINAL LAW (4TH ED. West Group 2000)
u. Major Michael A. Newton, Continuum Crimes: Military Jurisdiction over Foreign Nationals who Commit International Crimes, 153 Mil. L. Rev. 1, 14-21 (1996)
v. U.S Army's Field Manual 27-10, The Law of Land Warfare, (18 July 1956)
w. H.R. Rep No. 104-698
x. 18 U.S.C. section 2411
y. H.R. Rep. No. 105-204
z. Prosecutor v. Tadic, Case no. IT-94-1-A (Appeals Chamber, July 15, 1999)
aa. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279
bb. Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30 (2003)
cc. International Military Tribunal for the Far East, Apr. 26, 1946
dd. Jordan J. Paust, Addendum: Prosecution of Mr. Bin Laden et. al for Violations of International Law and Civil Lawsuits by Various Victims, ASIL Insights (Sept. 21, 2001)
ee. Statute of the International Tribunal for Yugoslavia
ff. Statute for the International Tribunal of Rwanda
gg. Convention on the Prevention and Punishment of the Crime of Genocide, Dec 9, 1948
hh. Prosecutor v. Musema, Case no. ICTR-96-13-T, January 27, 2000
ii. Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289 (S.D.N.Y. 2003)
jj. Prosecutor v. Mulitinovic et al., Case No. IT 99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003
kk. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Appeals Chamber, July 21, 2000
ll. Prosecutor v. Kovocka et al., Case No: IT-98-30/1, Judgment 2 November 2001
mm. Carol Rosenberg, Driver for bin Laden in Guantanamo Cell, Miami Herald, February 11, 2004
nn. Mudd v. Caldera, 134 F. Supp.2d 138 (D.D.C. 2001)

6. Law Supporting the Request for Relief Sought.

a. Military Commission Instruction No. 2 is a Valid, Binding Instruction.

Execution of the war against al Qaida and the Taliban is within the exclusive province of the President of the United States pursuant to his powers as Executive and Commander in Chief under Article II of the United States Constitution. Ex Parte Quirin, 317 U.S. 1, 26 (1942). "The Constitution confers on the President the 'executive Power', Art II, cl. 1, and imposes on him the duty to 'take Care that the Law be faithfully executed.' Art. II, 3. It makes him the Commander in Chief of the Army and Navy, Art. II, 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, 3, cl. 1.

The Congress, in passing the AUMF of 2001, expressly authorized the President to use "all necessary and appropriate force" against "nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001," and it is the President's duty to carry out this war. Public L. No. 107-40, 115 Stat. 224 (2001).

As a plurality of the Supreme Court just months ago held, "The capture and detention of lawful combatants and the capture, detention, *and trial* of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (plurality opinion), citing Ex parte Quirin, 317 U.S., at 28 (emphasis added). See also, Johnson v. Eisentrager, 339 U.S. 763, 771 (1950). Furthermore, Congress, in enacting Articles 21 and 36 of the Uniform Code of Military Justice, expressly recognized the President's authority to use and to prescribe rules regarding military commissions. Thus, the President's Military Order is a legitimate, recognized exercise of his Constitutional authority as Commander in Chief.

As commissions are recognized to be the Executive Branch's prerogative, it has been left to the Executive to determine appropriate guidelines for the conduct of military commissions. "[S]urely since Ex parte Quirin,. . . there can be no doubt of the constitutional and legislative power of the president, as Commander in Chief of the armed forces, to invoke the law of war by appropriate proclamation; to define within constitutional limitations the various offenses against the law of war; and to establish military commissions with jurisdiction to try all persons charged with defined violations." Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956), cert. denied 352 U.S. 1014 (1957).

The Executive has issued his guidance with respect to the present military commissions in his Military Order. The Order directs that individuals subject to trial under the Order shall receive a "full and fair trial" and delegates the authority to promulgate further orders or regulations necessary to implement military commissions to the Secretary of Defense. PMO, Section 4(c)(2). The Secretary of Defense further delegated the authority to issue regulations and instructions to the Department of Defense General Counsel. Pursuant to DoD MCO No. 1, Section 7, The Appointing Authority shall, subject to approval of the General Counsel of the

Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President's Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's military order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships. It is pursuant to this authority that the Department of Defense General Counsel issued, among other instructions, MCI No. 2. This instruction is "declarative of existing law" Para. 3(A), MCI No. 2. and details a number of offenses that "derive from the law of armed conflict." Id.

The charge before this Commission involves a conspiracy or joining an enterprise of persons who shared a criminal purpose to commit several of the offenses delineated in MCI No. 2. The elements of this offense are delineated in Section 6(C)(6) of MCI No.2 and as discussed, such elements are declarative of existing law.

These elements include:

(1) Entering into an agreement with one or more persons to commit a substantive offense triable by Military Commission or otherwise joining an enterprise of persons who share 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) That the Accused knew of the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined it willfully; and

(3) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

The al Qaida organization is an elaborate organization with a worldwide reach. The organization, led by Usama bin Laden, actively recruited individuals to come to Afghanistan to attend terrorist training camps. Those who excelled at these training camps were chosen to conduct martyr and other operations that actively targeted United States military personnel and civilians as well as military and civilian property. The organization relied upon a compartmented cell structure such that only those with a true need to know were privy to the exact details of these destructive missions. Regardless of the clandestine and secret details of the missions, the goals and desires of the organization were very public and well known. See Generally, Thomas Michael McDonnell, The Death Penalty—An Obstacle to the "War against Terrorism"?, 37 Vand. J. Transnat'l L. 353 (2004). Usama bin Laden's 1996 Declaration of War against the United States as well as the 1998 fatwa he joined in on calling for the killing of American military and civilians wherever found were well publicized (See Attached). Most importantly the Accused was familiar with these proclamations when he took a role in the al Qaida organization and agreed to be bin Laden's personal driver and bodyguard. He was, in fact, present when Usama bin Laden announced the 1998 fatwa.

Based on the Accused's agreement to assist the al Qaida organization and his knowledge of one of the organization's purposes – to kill Americans, he can be found guilty of the crime of conspiracy if the prosecution can prove that one of the alleged overt acts was committed in furtherance of this conspiracy.

Use of conspiracy law is extremely appropriate in the prosecution of the Accused because, "in a world full of crime committed by groups, from terrorists to bank robbers, to drug gangs to mafia families, traditional conspiracy doctrine plays a vital role in making our society and communities safer." Neal Kumar Katyal, Why it Makes Sense to Have Harsh Punishments for Conspiracy, Legal Aff., Apr. 2003, at 44 (advocating use of conspiracy prosecutions as necessary weapon against group activity and as a means to compel cooperation of minor actors); Thomas Michael McDonnell, The Death Penalty—An Obstacle to the "War against Terrorism"?, 37 Vand. J. Transnat'l L. 353, 364-65 (2004) (use of conspiracy law by federal and military tribunal prosecutors essential to combating sophisticated terrorist groups like al Qaida); United States v. Townsend, 924 F.2d 1385, 1394 (7th Cir. 1991) (joint action of group more threatening than individual actions and collaboration allows for division of labor and psychological support).

b. The Basics of Conspiracy Law and the "Agreement".

Conspiracy is an inchoate offense, the essence of which is the agreement to commit an unlawful act. Iannelli v. United States, 420 U.S. 770, 777 (1975). The agreement need not be explicit and can be inferred from the facts and circumstances of the case. Direct Sales Co. v. United States, 319 U.S. 703, 711-713 (1943). "The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words." MCI No. 2 Section (6)(C)(6)(b)(1); Manual for Courts-Martial (MCM), United States (2002 Edition), Section 5(c)(2) (sufficient if minds of parties arrive at a common understanding and this may be shown by conduct of the parties). The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play. MCM, Section 5(c)(2). A conspiracy conviction will be upheld even if the substantive offense that the conspirators agreed to commit is never completed or attempted. United States v. Recio, 537 U.S. 270-275 (2003) (agreeing to commit crime is sufficient evil warranting punishment whether or not substantive crime ever ensues); Iannelli 420 U.S. at 778. It is well established that when groups or partnerships are formed to commit criminal acts, the dangers are far greater.

> [C]ollective criminal agreement – partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not

confined to the substantive offense which is the immediate aim of the enterprise.

Callahan v. United States, 364 U.S. 587, 593-94 (1961).

Thus, paragraph 6(C) of MCI No. 2 is consistent with United States' domestic jurisprudence when it states "regardless of whether the substantive offense was completed, a person may be criminally liable of the separate offense of conspiracy." Furthermore Comment C(6)(b)(8) of MCI No. 2 is firmly established in the law when it states that "conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy." See Pinkerton v. United States, 328 U.S. 640 (1946).

Relationship with Your Co-Conspirators.

While a conspiracy does require two or more persons to enter into an agreement, the Prosecution is not required to establish that the Accused knew the identity of his co-conspirators and their particular connection with the criminal purpose. MCI No. 2 para 6(C)(6)(b)(1); MCM , Section 5(c)(1).

A conspiracy is a continuum. Once a participant knowingly helps initiate the agreement and set it in motion, he assumes conspirator's responsibility for the foreseeable actions of his confederates within the scope of the conspiratorial agreement, whether or not he is aware of precisely what steps they plan to take to accomplish the agreed goals." United States v Rivera-Santiago 872 F.2d 1073, 1079 (1st Cir.1989). Absent some type of withdrawal defense by the accused, all of the overt acts taken by the accused or another co-conspirator, regardless of the date they were undertaken, and regardless of exactly when it may be that jurisdiction attached for the President to *charge* this conspiracy as a crime under the Laws of War, are relevant to show the accused's participation in the conspiracy. After all, "the overt acts merely manifest that the conspiracy is at work." Carlson v United States 187 F.2d 366, 370 (10th Cir. 1951).

Overt Acts.

There are several overt acts alleged on the Accused's charge sheet. While not required, all of these alleged overt acts are arguably tied to the actions of the Accused. See MCI No. 2, Section 6(C)(6)(b)(3) (overt act must be done by one or more of the conspirators, but not necessarily the accused); MCM, Section 5(c)(4)(a) (overt act must be done by one or more of the conspirators, but not necessarily the accused).

The Defense contends that the conspiracy charge against the Accused is insufficient because many of the overt acts pled occurred prior to September 11, 2001. Defense Motion at para 5(d)(3). The Defense appears to assert that an armed conflict had commenced as of September 11, 2001, a matter vigorously disputed by the Prosecution. Id. (Defense raising issue based on minimizing conduct occurring prior to 9-11 and quoting President Bush with respect to terrorists declaring war on September 11th).

For the purposes of litigating this motion, these Defense concessions alone make the litigation of this point moot. See United States v. Hersh, 297 F.3d 1233, 1244-46 (11th Cir. 2002) (requiring only a showing that **one** overt act occurred after the effective date of the criminal statute). The Defense motion is asking for the conspiracy charge to be dismissed. The overt acts on the charge sheet on their face are alleged to have occurred through the year 2001 (Prosecution concedes that they concluded with the Accused's capture in late November 2001). The Prosecution intends to prove that most, if not all, of these alleged overt acts occurred both before and after the terrorist attacks of September 11th. This factual issue as well as the factual issue related to the commencement date of the armed conflict will appropriately be resolved during the trial on the merits.

While not required for the resolution of this issue, it is the Prosecution's position that the crux of a conspiracy offense is the agreement. After the agreement, the offense is complete once an overt act is committed that will "effectuate the object of the conspiracy or in furtherance of the common criminal enterprise. MCI No. 2 para 6(C)(6)(b)(3). It is not essential that any substantive offense be committed. Id. at para 6(C)(6)(b)(4). Therefore it is irrelevant whether the ultimate crime is committed or whether a state of armed conflict existed at the time of the overt act. The purpose behind criminalizing conspiracies it to prevent crimes before they occur, while attacking against the dangers of group criminality. See WAYNE R. LAFAVE, CRIMINAL LAW (4th ed. West Group 2000) at 620.

c. U.S. Military Commissions have Previously Convicted of Conspiracy in Relation to Law of War Violations.

The Defense assertion that a charge of conspiracy is "unknown to the laws of war" is erroneous. Defense Motion at 1. The Defense relies on the Quirin case for the assertion that offenses against the laws of war can be tried before military commissions. See Defense Motion para 3; Ex parte Quirin, 317 U.S. 1 (1942). In Ex parte Quirin, several Nazi saboteurs were charged and tried before a military commission created by President Roosevelt in his capacity as President and Commander in Chief. Included in these charges was **conspiracy to commit the offenses of violation of the law of war**, violation of Article 81 of the Articles of War (giving intelligence to the enemy) and Article 82 of the Articles of War (spying). 317 U.S. 1 (1942). The exact wording of the conspiracy specification was:

> Specification: In that, during the year 1942, the prisoners, Ernest Peter Burger, George John Dasch, Herbert Haupt, Heinrich Harm Heinck, Edward John Kerling, Hermann Neubauer, Richard Quirin, and Werner Thiel, being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, did plot, plan, and conspire with each other, with the German Reich, and with other enemies of the United States, to commit each and every one of the above-enumerated charges and specifications."
>
> Quirin Trial Transcript at 43, 44.

Similarly, in Colepaugh v. Looney, the accused was tried before a military commission and convicted of conspiracy to commit law of war violations. 235 F.2d 429 (10th Cir. 1956). Relying on the Quirin decision, the court stated that there can be no doubt that the President, as Commander in Chief of the armed forces can invoke the law of war by appropriate proclamation and can define the various offenses against the law of war. Id. at 431-432. It is noteworthy that this opinion was issued in 1956 and there was no mention that the enactment of the UCMJ in 1950 would in any way curtail the President's powers in this regard.

While Quirin is one of the most well known military commission cases, war crime conspiracy convictions at military commissions did not commence with the Quirin decision. See Mudd v. Caldera, 134 F. Supp.2d 138 (D.D.C. 2001) (military commission had jurisdiction to try conspirator in the assassination of President Lincoln); Major Michael A. Newton, Continuum Crimes: Military Jurisdiction over Foreign Nationals who Commit International Crimes, 153 Mil. L. Rev. 1, 14-21 (1996) (providing historical context for military commissions and identifying other commission war crime conspiracy convictions from 1865 and 1942).

The Department of the Army formally recognized the offense of conspiracy to commit war crimes in 1956. U.S. Army's Field Manual 27-10, The Law of Land Warfare, Chapter 8, para. 500 (18 July 1956). It clearly and succinctly states that "Conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable." Id. Based on this language alone, the *ex post facto* argument the Defense attempted to convey during *voir dire* is nullified.

The Defense has forcefully asserted that "conspiracy has never been used to prosecute an inchoate offense of the law of war. Defense Motion at 5(d) (1). There source for this proclamation is the book International Criminal Law by Cassesse. This source simply does not support this argument. Cassesse notes that Nuremburg had a restrictive view of conspiracy, but he does not assert that prosecutors have never charged anyone with conspiracy to commit an inchoate offense against the law of war. Id. at 197. In fact, this page in the textbook is part of a section discussing conspiracy to commit genocide. Id. In this realm, Cassesse acknowledges that the ICTR Trial Chamber has concluded that this prohibition applies to inchoate offenses and that in the Musema case, a conspiracy conviction was determined valid regardless of whether the ultimate substantive offense was ever committed. Id. at 198.

d. The Accused can be Tried for Any Act that Constitutes a Crime Under the Law of War or that by Statute can be Tried Before a Military Commission.

Article 21 of the Uniform Code of Military Justice (UCMJ) states that military commissions have jurisdiction to try "offenses that by statute or by the law of war may be tried by military commissions." A literal reading of this statute defeats the Defense argument that Commissions can only try the offenses of spying (UCMJ Article 106) and aiding the enemy (UCMJ Article 104). The word "or" clearly shows that this statute permits the prosecution of violations of the law of war **in addition** to the offenses that can be tried based upon offenses defined by statutes elsewhere. Therefore neither of these crimes specifically defined under the UCMJ nor the crimes defined in 18 U.S.C. 2411 preclude the prosecution of other violations of the law of war.

The UCMJ was enacted in 1950 and replaced its predecessor, the Articles of War. The Defense contends that because the offenses of aiding the enemy (Article 104) and spying (Article 106) were changed slightly when the UCMJ was enacted, Congress somehow was taking away the ability to prosecute other violations of the law of war. This assertion is incorrect. It is more important to examine Article 21 of the UCMJ when it was enacted in 1950. UCMJ Article 21 was not altered in any way from its predecessor, Article 15 of the Articles of War. In fact, this statutory language was left unchanged because this language had already been construed and interpreted favorably in Quirin. H.R. Rep No. 81-491 (specifically stating it was left unchanged because of Quirin); S. Rep. No. 81-486 (also confirming left intact because of Quirin). Clearly Congress did not intend to limit the prosecution of war crimes that were the subject of prosecution in Quirin.

The War Crimes Act was enacted for a specific purpose. When originally enacted in 1996, it was for the express purpose of satisfying the 1949 Geneva Conventions requirement of providing criminal penalties in a country's domestic courts for grave breaches of the Geneva Conventions. H.R. Rep. No. 104-698 (July 24, 1996). In the "Purpose and Summary" section of the House Report, it states that this legislation was to provide criminal penalties "for **certain** war crimes." Id. at 1. Congress clearly understood that there were **other** war crimes in existence that this legislation was not intended to address. This legislation was enacted because then current federal and state law was inadequate to support prosecutions of all grave breaches of the Geneva Conventions. Id. at 4.

It was understood when the War Crimes Act legislation was passed that the statute was inadequate to address many war crime situations. Id. at 8. Aware of these limitations, representatives from both the Department of State and Department of Defense submitted letters recommending that the statute be written more broadly. Id. at 8 n.27. Congress did not make the statute broader as requested but also expressed that these war criminals could be punished by **more appropriate alternative venues**. Id.

The War Crimes Act was amended in 1997. Included in the amendments was the extension of the statute to punish war crimes other than just grave breaches of the Geneva Conventions. 18 U.S.C. 2441(a). However the limitations concerning the "circumstances" when this statute could be utilized remained subject to the previous restrictions. 18 U.S.C. section 2441(b) (prosecution only available when person committing the crime or victim of crime is a member of U.S. armed forces or a national of the United States). Therefore, even with the amendments, many war crimes remained beyond the reach of this statute. The statute went on to define in more detail what constituted a "war crime" but with the qualifier "as used in this section." 18 U.S.C. section 2441(c) (defining war crime but only when prosecuted using this statute that only permits prosecution when perpetrator or victim is U.S. national or servicemember). If this legislation is deemed to preclude military commission and other prosecutions, a multitude of victims will be left unprotected and a multitude of war crimes will be left unprosecutable. Under the Defense reasoning, a perpetrator of the September 11th attacks could not be prosecuted for the deaths of those who were not U.S. nationals or servicemembers.

The testimony of Michael J. Matheson, Principal Deputy Legal Advisor to the Department of State, was examined by the House Committee on the Judiciary in determining whether

amendments to War Crimes Act were necessary. H.R. Rep. No. 105-204 at 3 (July 25, 1997). Mr. Matheson asked for expansion of the statute to cover **certain** violations of the laws of war in addition to grave breaches. Id. The use of the qualifier "certain" clearly demonstrates that there are other acts that would violate the laws of war that this statute was not meant to address. Furthermore, this statute was obviously not meant to be exhaustive and the only avenue available to prosecute war crimes. It is certainly not what was contemplated in the Defense cited language for Quirin of "crystallizing in permanent form and in **minute detail every offense** against the law of war" (emphasis added).

There is some overlap between the crimes that could be prosecuted at a military commission and those that could be prosecuted in a federal district court. However Congress clearly realized that military commissions might overlap with other judicial systems. While not specifically mentioning federal district courts, Congress made it very clear that the availability of other forums was not to preclude Commission jurisdiction. See UCMJ Article 21 (delineating that courts-martial jurisdiction does not deprive a commission of concurrent jurisdiction).

e. Although Inapplicable – Conspiracy Prosecutions Are Acceptable Under the War Crimes Act.

The War Crimes Act lists a variety of offenses that constitute violations of 18 U.S.C. section 2441. While not conceding that this statute has any applicability with respect to Commission prosecutions, the Defense assertion that conspiracies related to the war crimes listed in 18 U.S.C. section 2441 are precluded from prosecution is incorrect. Defense Motion para 5(c). A conspiracy prosecution is available for any offense under Title 18 of the United States Code (that like 18 U.S.C. section 2441 does not have its own independent conspiracy language) under 18 U.S.C. section 371 (making punishable any offense where two or more persons conspire to commit an offense against the United States).

f. The Defense Argument that MCI No. 2 Does not Require an Agreement.

The Defense asserts that MCI No. 2 does not require the element of an "agreement." In defining the elements of conspiracy MCI No. 2 specifically states: "Entering into an agreement with one or more persons to commit a substantive offense triable by Military Commission or otherwise joining an enterprise of persons who share 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" MCI No. 2 para 6(C)(6)(a). The term "agree" is alleged on the charge sheet as the Prosecution contends the evidence will show both an agreement by the Accused as well as his joinder in an enterprise of persons who shared a common criminal purpose (although not required to prove both). The Defense may dispute that the Accused ever entered into an agreement. This is a question of fact to be determined during the trial on the merits. It is not an appropriate matter for a pretrial motion where the charge as drafted clearly states an offense under MCI No. 2.

As will be discussed below, criminal liability based on joinder in an enterprise of persons who shared a common criminal purpose is clearly established under customary international law. See Prosecutor v. Tadic, Case No. IT-94-1-A paras. 180-209 (ICTY Appeals Chamber, July 15,

1999) (J. Cassesse, Presiding). In analyzing this offense or form of liability, the Tadic Appeals Chamber found this doctrine rooted in the laws of the United States as well as the laws of other both common and civil law countries. Id. at para. 224. The Appeals Chamber found such principles to exist under the United States Supreme Court precedent citing to Pinkerton v. United States, 328 U.S. 640 (1946) (a conspiracy case where accused convicted of both conspiracy and the other foreseeable crimes committed that were likely to result from the common criminal purpose).

g. Conspiracy under International Law.

The crime of conspiracy was clearly established in the Nuremburg Charter. It defined crimes against peace to include "the planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participations in a **common plan or conspiracy** for the accomplishment of the foregoing" (emphasis added). Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 2, art. 6(a), 82 U.N.T.S. 279, 288, 59 Stat. 1544, 1547; Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30, 56 (2003) (citing Nuremburg and Tokyo trials as examples where conspiracy to commit crimes against peace were recognized in the charters as separate crimes); The Nuremburg Tribunal stated that Hitler had to have the cooperation of others in carrying out his plan. When these others, with knowledge of his [Hitler's] aims, gave him their cooperation, they made themselves parties to the plan he had initiated. See Nazi Conspiracy and Aggression, Opinion and Judgment Vol. 1, Office of the United States Chief of Counsel for Prosecution of Axis Criminality at 45. Similarly, Usama bin Laden relies on others to carry out his plan to attack and kill Americans whether military or civilian. Persons like the Accused, who provide cooperation and assistance to bin Laden with knowledge of bin Laden's plan, are exactly the criminals that conspiracy law is designed to reach.

Conspiracy law was solidified in Articles 5(a) and 5(b) of the International Military Tribunal for the Far East, Apr 26, 1946, 2, 4 Bevan 20, 28 punished "the planning, preparation, initiation or waging of a . . . war of aggression, or a war in violation of international law, treaties or agreements or assurances, or participation in a **common plan or conspiracy** for the accomplishment of any of the foregoing" and also directly assigned criminal responsibility to conspirators "for all acts performed by any person in the execution of such plan."

Seven individuals were in fact convicted of conspiracy offenses at Nuremburg. The Defense's assertion that a charge of conspiracy lacks validity based on a memo from an Assistant Attorney General that merely criticized the use of conspiracy charges is unwarranted and unjustified as these seven individuals at Nuremburg were in fact convicted and sentenced based upon their role in the conspiracy. This holding of the Nuremburg International Tribunal is reflective of customary international law. See also, Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30 n. 53 (examining International Tribunal at Nuremburg holding that person can be convicted of war crimes and crimes against humanity they are "connected with" even if not involved in or part of a prearrangement with the person who actually commits the crime).

Military tribunals in France and Great Britain continued to broaden conspiracy law as they conducted several military commissions where conspiracy or joint enterprise to commit war crimes was prosecuted. See Tadic, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999) (discussing the war crimes conspiracy convictions in France, Great Britain, United States and other countries). Admittedly many of these cases discussed in Tadic rested their convictions on a joint enterprise theory of liability for the ultimate substantive offense. Based on the arguments presented, it is clear that theory of prosecution is directly akin to conspiracy and joint enterprise liability as defined under MCI No. 2. Tadic at paras. 206-213 citing The Essen Lynching Case *The Trial of Erich Heyer and Six Others*, British Military Court for the Trial of War Criminals Volume I, 88 (United Nations War Crimes Commission, 1947) and drawing the inference that all concerned in the killing" were guilty and citing the United States military court case of Kurt Goebel et al. placing great emphasis on the "common purpose" argument of the prosecutor who stated all the accused were "cogs in the wheel of common design, all equally important, each cog doing the part assigned to it."

Conspiracy law continued to develop and expand in International Law. Its existence is most prevalent in the Genocide Convention of 1948. In addition to establishing the crime of conspiring to commit genocide, it also mandated that members of the United Nations would ensure that conspiracy to commit genocide was a punishable offense in their domestic criminal codes. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 3(b), 78 U.N.T.S. 277, 280. The conspiracy crime is proscribed in various other international conventions. See Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, art 2(c) (as amended) (requiring signatory states to make legislation providing for the severe punishment of conspiracy to traffic drugs); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted Dec. 19, 1988, art. 3(1)(c)(iv), 29 I.L.M. 493; International Convention on the Suppression and Punishment of the Crime of Apartheid, U.N. Gaor, 28th Sess., 2185th plen. Mtg., Annex, Supp. No. 30 at 76, art III(a), U.N. Doc. A/9030 (1973) (providing for international criminal responsibility for those who "commit, participate in, directly incite or conspire in the commission of the acts [of apartheid]"); Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30 n.126 (2003) (extensive discussion of conspiracy recognized in various international conventions). Based upon this established history of conspiracy law in the international arena, *ex post facto* concerns are alleviated and do not stand as an obstacle to prosecution under international criminal law. Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30, 60-61 (2003); Jordan J. Paust, Addendum: Prosecution of Mr. Bin Laden et al. for Violations of International Law and Civil Lawsuits by Various Victims, ASIL Insights (Sept. 21, 2001) (identifying examples where *ex post facto* problems avoided because crimes already recognized under customary international law).

Conspiracy law has been recognized in the International Tribunals of Yugoslavia(ICTY) and Rwanda (ICTR). See Statute of the International Tribunal for Yugoslavia, art. 4(3)(b) (declaring that conspiracy to commit genocide is a punishable act); Statue for the International Tribunal for Rwanda, art. 2(3)(b); Amnesty International, The International Criminal Court: Making the Right Choices, pt. 1, VI(D) (1997) (stating that concept of "conspiracy" is recognized in the ICTY and ICTR statutes).

In Prosecutor v. Alfred Musema, the ICTR defined the crime of conspiracy to commit genocide established in the ICTR statute. Case No. ICTR-96-13-T, Trial Chamber, January 27, 2000 at para 185-198. Choosing a common law approach over a civil law approach, the Trial Chamber held that conspiracy is "an agreement between two or more persons." Id. This is consistent with the language of MCI No. 2. Most importantly, the Trial Chamber recognized conspiracy as a crime in and of itself and not just a theory of liability. Id.

In Presbyterian Church of Sudan v. Talisman Energy, there is a comprehensive discussion of the sources of customary international law and whether conspiracy to commit a war crime is an offense under these laws. 244 F. Supp. 2d 289 (S.D.N.Y 2003). This case arose under the Alien Tort Claims Act (ATCA) where the Talisman Corporation was sued for conspiring to commit war crimes and other offenses. Id. at 296. Based on the wording of the ATCA statute, the court had to analyze the validity of the allegations by applying customary international law. Id. at 304. The court held that "an examination of international law reveals that the concepts of **conspiracy** and aiding and abetting are commonplace with respect to the types of allegations contained in the Amended Complaint, such as genocide and **war crimes**" (emphasis added). Id. at 321. In making this determination, the court examined the precedent from the various international criminal tribunals. Id. at 322-324.

MCI No. 2 establishes criminal liability through either entering into an agreement with one or more persons to commit a substantive offense triable by Military Commission or *otherwise joining an enterprise of persons who share a common criminal purpose*. MCI No. 2 para 6(C)(6). This liability based upon "joining an enterprise" was established solidly in an in-depth opinion in the seminal case of Prosecutor v. Tadic, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999). Tadic was convicted of murdering five people because he "took part in the common criminal purpose to rid [the Prijedor region] of the non-Serb population, by committing inhumane acts," and because the killing of non-Serbs in furtherance of this plan was a foreseeable outcome of which he was aware. Prosecutor v. Tadic, Case No. IT-94-1-T, paras 371-73 (ICTY Trial Chamber II, May 7, 1997), aff'd, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999). There is a distinction between the Tadic decision and Section (6)(C)(6) of MCI No. 2. The Tadic court found liability for the ultimate substantive offenses because of sharing a common criminal purpose with others in the enterprise. Id. MCI No. 2 permits conviction of the enterprise offense in and of itself.

From a practical perspective this is a matter of little import. It appears that MCI No. 2 merely reflects the more traditional approach which practitioners before Military Commissions are accustomed to(as well as others in common law jurisdictions). Even under a traditional court-martial approach, a conspirator can be convicted of the underlying substantive offense solely because of his role in the analogous conspiracy. There is no prejudice to the Accused. See MCM, Section 5(c)(8); Pinkerton, 328 U.S. at 646.

The impact of the distinction is even more remote in the prosecution of this Accused as factually, the ultimate substantive offenses were carried out to completion. Prosecutor v. Mulitinovic et al., Case No. IT 99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, para. 23, 21 May 2003 (identifying

difference in that conspiracy only requires an agreement whereas joint criminal enterprise requires some criminal act in furtherance of the agreement). While there may be some differences, the underlying goal that is common to these offenses is the punishment of criminal thoughts when coupled with some action that advances the thought.

The Tadic Appeals Chamber delineated three categories of joint activity that could result in criminal liability for a person who joins a criminal enterprise. They are:

(1) where all co-defendants, acting pursuant to a common design possess the same criminal intention;

(2) where members of a unit act pursuant to a concerted plan, each with the requisite mental element deriving from "knowledge of the nature of the system . . . and intent to further the common design" (based on World War II concentration camp prosecutions of administrative and support staff);

(3) where the accused possesses "the intention to take part in a joint criminal enterprise and to further . . . the criminal purposes of that enterprise" and the offenses committed by members of the group are foreseeable.

Tadic, Appeals Chamber, July 15, 1999, paras. 196-220.

The scope of this third theory of liability under Tadic is far reaching. Under this approach, a participant in the enterprise who does not commit the ultimate substantive offense is still subject to prosecution if they have the requisite intent to further the enterprise's purposes and if he could have predicted or foreseen this ultimate result. Id. at para. 220.

Mr. Hamdan was aware of the Declaration of War against America in 1996 and the 1998 fatwa calling for the killing of Americans whether military or civilian. He knew that training camps were established in Afghanistan which at least in part trained individuals to conduct martyr missions in furtherance of these goals. He knew that all operational planning had to be approved by Usama bin Laden and that those carrying out these missions were accountable to bin Laden. The Accused was with bin Laden at the time of the American Embassy Bombings in 1998 and the attacks of September 11th. He knew that the United States would react to these attacks by seeking out Usama bin Laden and his dedicated followers. The Accused took direct action to ensure the safety of bin Laden, a person he had previously pledged conditional bayat to.

The ICTY continued to expand the enterprise liability case law established in Tadic in Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Appeals Chamber, July 21, 2000. The Furundzija Appeals Chamber stated that a preexisting plan or purpose is not required for criminal liability to attach. Id. at para. 119. The "common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise." Id.

Some have suggested that the ICTY's required proof of a "common plan" for criminal enterprise convictions is strikingly similar to the proof required for the "agreement" element in

establishing a conspiracy. Richard P. Barrett and Laura E. Little, Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. at 42.

While not specifically mentioning the word "conspiracy", in the newly established International Criminal Court (ICC), a person can be held criminally responsible if they contribute to the "commission or attempted commission of . . . a crime by a group of persons acting with a common criminal purpose." Section 3(d) of Article 25 Rome Statute of the International Criminal Court, July 17, 1998. For liability to attach, such contribution must be intentional and shall either: (1) Be made with the aim of furthering the criminal activity or criminal purpose of the group . . .; or (2) Be made in the **knowledge of the intention of the group** to commit the crime (emphasis added).

h. Hamdan is Not a Minor Actor and Even if He is, He can still be Convicted of Conspiracy.

Examining MCI No. 2, there is no distinction between minor and major actors with respect to the charge of conspiracy. The Accused's status is irrelevant and the Prosecution is only required to prove the elements listed.

Even if relevant, it is premature to litigate the magnitude of the Accused's role in the conspiracy or criminal enterprise. The Defense is essentially asking for a trial within a trial. The Prosecution has the burden to prove that the Accused is a conspirator or he joined an enterprise of persons who shared a common criminal purpose. MCI No. 2 para 6(C)(6). The factual evidence concerning the Accused will be presented on the merits of the case. The appropriate time to raise this issue is after the Prosecution has been given the opportunity to factually present evidence concerning the Accused's role. This issue should be raised after the presentation of the Prosecution's case when the Commission Members have already seen the evidence necessary to decide this motion.

Analysis of whether a minor actor can be prosecuted for conspiracy is unnecessary in this case as this Defense assertion fails both on factual and legal grounds. The Prosecution will present evidence that the Accused is not a minor actor, but rather is one of a handful of Usama bin Laden's most trusted confidants. He is trusted to know the travel plans of the leader of the al Qaida organization and bin Laden puts his life in the Accused's hands every time he gets into the car driven by the Accused. The Accused has the ultimate responsibility of protecting this terrorist organization's leader at all costs. Putting this in perspective, this leader the Accused is tasked to protect is the ultimate authority whose approval is required before any of these horrendous terrorist acts are commenced.

The Defense is patently aware that in order to nullify the actions of those involved in a global conspiracy or criminal enterprise, certain non leaders need to be prosecuted to bring the power brokers of the organization to justice. Civilian Defense Counsel in this case acknowledges this fact. Neal Kumar Katyal, Why it Makes Sense to Have Harsh Punishments for Conspiracy, Legal Aff., Apr. 2003, at 44 (advocating use of conspiracy prosecutions as necessary weapon against group activity and as a means to compel cooperation of minor actors). It is commonplace in mafia and drug ring prosecutions to prosecute those at a lower level in an organization and work your way up. See Richard P. Barrett and Laura E. Little, Lessons of Yugoslav Rape Trials:

A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. at 66. (conspiracy prosecutions are necessary and useful to combat those "small fish" on the periphery of the conspiracy but who are nonetheless essential to the conspiracy's object).

In the case of Prosecutor v. Kvocka et al., the Trial Chamber examined the criminal liability under a joint criminal enterprise theory of various individuals who either worked or visited the Omarska prison camp where acts of murder, torture and rape were being committed. Case No: IT-98-30/1, Judgment 2 November 2001. Because none of the accused in the case were organizers of the camp or in a high level position within the military, the Trial Chamber focused its attention on the participation of lower-level actors in a criminal enterprise. Id. at 289. The Trial Chamber distinguished between those who are co-perpetrators of the criminal enterprise and those who aid or abet the criminal enterprise. Id. at 282-284. One guilty as a co-perpetrator of the enterprise shares the intent to carry out the enterprise and performs an act or omission in furtherance of the enterprise, while an aider and abettor of a joint criminal enterprise need only be aware that his contribution is assisting or facilitating a crime committed by the enterprise. Id. Criminal liability exists when the "evidence indicates that a person who substantially assists the enterprise shares the goals of the enterprise." Id.

The significance of these low threshold standards that allow for the conviction of crimes such as murder and torture is that finding Mr. Hamdan guilty for his participation in this worldwide criminal enterprise where thousands have been killed will not "destabilize the development of international criminal law" as the Defense contends (noting that source of this Defense assertion is an article written by Mr. Hamdan's Civilian Defense Counsel in this case).

Based upon Defense assertions in the media concerning the Accused's role in the al Qaida organization a thorough analysis of the Kvocka case is helpful. Military Defense Counsel has asserted that the Accused went to Afghanistan in 1996 on his way to Tajikistan to engage in fighting (in fact *jihad*) against the Soviets. Carol Rosenberg, Driver for bin Laden in a Guantanamo Cell, Miami Herald, February 11, 2004. According to Military Defense Counsel he never made it to Tajikistan, but rather took a job where he ultimately worked for Usama bin Laden as his personal driver. Id. Based on prior statements given by the Accused to investigators, he concedes that he knew of bin Laden's Declaration of War on the United States and the fatwa issued by bin Laden and others calling for the killing of all Americans military or civilian. The Accused further admitted that he was aware al Qaida was responsible for the American Embassy bombings in 1998, the USS COLE bombing in 2000 and the attacks of September 11th.

In Kvocka the court provided the following example to explain the wide reach of liability based on connection to a joint criminal enterprise:

> An accountant hired to work for a film company that produces child pornography may initially manage accounts without awareness of the criminal nature of the company. Eventually, however, he comes to know that the company produces child pornography, which he knows to be illegal. If the accountant continues to work for the company despite this knowledge, he could be said to aid or abet the criminal enterprise. Even if

> it was also shown that the accountant detested child pornography, criminal liability would still attach. At some point, moreover, if the accountant continues to work at the company long enough and performs his job in a competent and efficient manner with only an occasional protest regarding the despicable goals of the company, it would be reasonable to infer that he shares the criminal intent of the enterprise and thus becomes a co-perpetrator.
>
> Kvocka Judgment at para. 284.

The Trial Chamber in Kvocka did an extensive analysis of post –World War II trials in solidifying its position on criminal enterprise liability. Id. at para 290-297. In conducting this review the Trial Chamber noted that an accused is liable if their participation made it easier and more efficient for the enterprise to commit crimes. Id at para 296, 309 (citing also that mere drivers and ordinary soldiers can be held liable based on their participation in a criminal enterprise).

The following factors were identified when evaluating criminal liability for those deemed to be lower level participants in a joint criminal enterprise:

(1) the size of the criminal enterprise;

(2) the functions performed;

(3) the position of the accused;

(4) the amount of time spent participating after acquiring knowledge of the criminality of the system;

(5) efforts made to prevent criminal activity; and

(6) the seriousness and scope of the crimes committed.

Id. at para. 311-312.

Applying these factors to the Accused:

(1) the al Qaida organization is a global criminal enterprise;

(2) the al Qaida organization is committed to killing Americans and other "infidels" and has committed heinous crimes in carrying out this goal;

(3) the Accused is responsible for transporting and ensuring the safety of the leader of the al Qaida organization and facilitates the transport of Usama bin Laden to terrorist training camps where motivational speeches are given encouraging the killing of Americans;

(4) the Accused most likely knew of the purpose of the al Qaida organization in 1996, but he surely knew prior to the 1998 Embassy Bombings when he stated "this was the first time bin Laden was directly going up against America";

(5) the Prosecution is unaware of any efforts by the Accused to thwart this activity; and

(6) the heinous crimes carried out are of an astronomical proportion.

To put this into perspective, in the Kvocka trial, an administrative assistant who worked at the prison camp for a mere 22 days was found guilty based upon his role in the joint criminal enterprise. Id. at para. 462-463, 726.

7. Attachments

a. Hamdan Form 40 of May 2003
b. Hamdan FBI 302 of June/July 2002
c. Hamdan FBI 302 of August 6, 2002

Please note that these items are FOUO/Law Enforcement Sensitive and are protected information in accordance with the Presiding Officer's previously issued Protective Order of August 27, 2004.

8. Oral Argument. The Prosecution is prepared to provide oral argument on this motion on the limited issues that are ripe for resolution at this time.

Commander, JAGC, USN
Prosecutor
Office of Military Commissions

Review Exhibit 26-B

REVIEW EXHIBITS 26-B AND 31-B

Review Exhibit (RE) 26-B and RE 31-B each have the same 3 attachments that are marked "FOUO / LAW ENFORCEMENT SENSITIVE." FOUO means "for official use only."

In RE 15, the Presiding Officer ordered that records designated in this manner be sealed. Pages 2 and 3 of RE 15 (pertaining to the release of information about investigators and interrogators) were separately classified "For Official Use Only."

Attachments 1-3 of RE 26-B and RE 31-B were therefore redacted from the record that will be posted on the Department of Defense Public Affairs website and sealed.

Attachments 1-3 of RE 26-B and RE 31-B will be included as part of the record for consideration of reviewing authorities.

The sealed records, Attachments 1-3 of RE 26-B, are described as follows:

Attachment 1 consists of a 10-page, CITF Form 40, summary of an interview of the Accused. It is dated May 17, 2003.

Attachment 2 consists of a 21-page, Federal Bureau of Investigation (FBI) form FD-302, summary of an interview of the Accused and other investigative activity from June 26, 2002 to July 9, 2002.

Attachment 3 consists of a 10-page, Federal Bureau of Investigation (FBI) form FD-302, summary of an interview of the Accused. It is dated August 6, 2002.

As indicated above, RE 31-B has the same 3 attachments as RE 26-B. They are, however, in a different order:

Attachment 1 consists of a 21-page, FBI form FD-302, summary of an interview of the Accused and other investigative activity from June 26, 2002 to July 9, 2002.

Attachment 2 consists of a 10-page, FBI form FD-302, summary of an interview of the Accused. It is dated August 6, 2002.

Attachment 3 consists of a 10-page, CITF Form 40, summary of an interview of the Accused. It is dated May 17, 2003.

I certify that this is an accurate summary of sealed Attachments 1-3 of RE 26-B and RE 31-B.

//signed//

M. Harvey
Chief Clerk of Commissions

UNITED STATES OF AMERICA	)	DEFENSE REPLY TO
	)	PROSECUTION RESPONSE TO **D17**
v.	)	(SUBJECT MATTER JURISDICTION)
	)	
SALIM AHMED HAMDAN	)	26 October 2004
	)	

1. Timeliness. This motion is being filed in a timely manner within the parameters established by the Presiding Officer on 24 August 2004 and the grant of relief by the Presiding Officer on 22 October 2004 to submit on 27 October 2004.

2. Relief Sought: That the Military Commission find that the sole charge against Mr. Hamdan is not within its subject matter jurisdiction as established by the Constitution of the United States, Federal Statutes, and international law and dismiss the charge against Mr. Hamdan.

3. Facts. The Defense objects to Prosecution facts "f - v" for the reasons set out in Defense response to P7 and on the grounds that these facts are irrelevant to the issue of whether the charge as stated states an offense under the laws of war.

a. Conduct alleged does not reference a period wherein the United States was either a participant in a declared war, and relies on alleged conduct prior to the United States engagement in armed hostilities in Afghanistan.

b. The sole allegation fails to allege that Mr. Hamdan was anything more than a minor actor.

c. The crime of conspiracy is the sole allegation.

4. Law and Discussion.

a. Congress Must Define Any Conduct Over Which a Military Commissions has Jurisdiction and it Has Not Defined Conspiracy as a Violation of the Laws of War

Section 821 of the UCMJ establishes the jurisdiction of military commissions over "offenders or offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821. As to the first prong, Congress has only ensured by statute that two offenses are explicitly triable by commission. See 10 U.S.C. § 904 (aiding the enemy); 10 U.S.C. § 906 (spying). With respect to the law of war, the Constitution gives Congress alone the duty and power to "define and punish . . . offenses against the law of nations." U.S. Const. art. I, § 8, cl. 10; see also *Ex parte Quirin*, 317 U.S. 1, 30 (1942) ("Congress [has] the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts."). Accordingly, Congress has defined a "war

crime" as "any conduct" that is a "grave breach" of international law. 18 U.S.C. § 2441. The Executive's MCI No. 2 makes clear that its delineation of crimes is only meant to be "declarative of existing law." MCI No. 2 para. 3(B). Thus, "[n]either congressional action nor the military orders constituting the commission authorize[] it to place [Mr. Hamdan] on trial unless the charge preferred against him is of a violation of the law of war." *In re Yamashita*, 327 U.S. 1, 13 (1946).

It is of course true that the Executive may promulgate guidelines to govern the military commissions. But, contrary to the Government's argument, it is not a part of the Executive's power to "define . . . the various offenses against the law of war." Government Motion para. 6(a) (citing *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), *cert. denied* 352 U.S. 1014 (1957)). Rather, "[t]he Constitution entrusts the ability to define and punish offenses against the law of nations to the Congress, not the Executive." *Padilla v. Rumsfeld*, 352 F.3d 695, 714 (2d Cir. 2003), *rev'd and remanded on other grounds*, 124 S. Ct. 2711 (2004).

In *Quirin*, the Court described the extent of the President's war powers: "The Constitution . . . invests the President as Commander in Chief with the power . . . *to carry into effect all laws passed by Congress* . . . defining and punishing offenses against the law of nations, including those which pertain to the conduct of war." 317 U.S. at 26 (emphasis added). The President's power cannot overstep its constitutional boundaries. In fact, *Quirin* explicitly took as an assumption that courts could police the presidential definition of offenses and that the President did not have the power to define as he wished:

> "there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, *either because they are not recognized by our courts as violations of the law of war* or because they are of that class of offenses constitutionally triable only by a jury."

Ex Parte Quirin, 317 U.S. 1, 29 (1942).

The Government points to *Quirin* and *Colepaugh v. Looney*, 235 F.2d 429 (10th Ci. 1956), as two examples where U.S. courts have permitted military commissions to convict defendants of conspiracy to violate international law.[1] But both of these cases are inapposite. It is true that in *Quirin*, the defendants were charged with conspiracy before a military commission. 317 U.S. at 23. But aside from mentioning the charge, the Court did not again refer to conspiracy. In fact, of the four charges against the defendants, the Court ruled on the adequacy of only the first charge (violation of the laws of war), and did not at any point find the conspiracy charge adequate. *Id.* at 46. *Quirin*'s silence hardly supports the Government's proposition that

[1] Nor is the government justified in its reliance on *Mudd v. Caldera*, 134 F. Supp.2d 138 (D.D.C. 2001) to support the proposition that "war crimes conspiracy convictions at military commissions did not commence with the Quirin decision." *See* Prosecution Response to Defense Motion To Dismiss at 8. In *Mudd*, the accused had been convicted of "of aiding and abetting as an accessory" to the assassination of President Lincoln for providing shelter, medicine and method of escape to John Wilkes Booth. *See* Mudd, 134 F. Supp.2d at 140. In short, there was no separate war crime of conspiracy at issue. And the charges and trial took place when Congress had specifically authorized trial by commission.

conspiracy is appropriately tried before military commissions. Rather, the plausible reading is that conspiracy was tethered to other offenses that were authorized to be tried by a commission.

Colepaugh is similarly silent with respect to conspiracy. A single sentence in the decision informs us that the defendant was faced with a conspiracy charge and conviction. But at no point did the court or the defendant engage with the question presented here—namely, whether conspiracy is an offense that can be tried by a military commission. 235 F.2d at 431. Rather, the case turned on whether the defendant's espionage activities counted as "unlawful belligerence"—a question as to which the court quickly disposed. *Id.* at 432.

In short, neither *Quirin* nor *Colepaugh* support the Government's arguments, except by their silence. Indeed, nothing in domestic law supports the type of conspiracy claim argued by the government here. Courts are clear that when someone is providing ordinary services to even a criminal enterprise, that cannot be the basis on which to impose conspiracy liability. As the classic treatment of the issue in American law by Judge Learned Hand states, background providers do not join the conspiracies to which they knowingly provide goods and services. United States v. Falcone, 109 F.2d 579 (2d Cir. 1940), aff'd 311 U.S. 215 (1940).[2]

The prosecution claims that Congress did not occupy the field in the War Crimes Acts of 1996 and 1997. But the Congress did define a long, tremendously long, list of war crimes in those two acts. See Opening Motion in D17. It defies common sense to think that they would have enumerated literally dozens of crimes without intending to occupy the field. The Prosecution contends that this would mean a perpetrator of the September 11 attacks would not be punished, which is absolutely wrong. Such an act would constitute murder, plain and simple.

b. The Military Tribunal Has No Jurisdiction To Try Mr. Hamdan Because the Government Has Not Offered Any Evidence Showing that Hamdan Conspired to Violate International Law After September 11.

The prosecution has offered no evidence showing that Mr. Hamdan conspired after what President Bush calls "the war" began on September 11. The acts of Mr. Hamdan before September 11, 2001, are irrelevant, under the very authority that the Prosecution so trumpets, the President. *See* Prosecution Response to Defense Motion To Dismiss at 3 (citing Public L. No. 107-40, 115 Stat. 224 (2001) ("The Congress, in passing the AUMF of 2001, expressly authorized the President to use 'all necessary and appropriate force' against 'nations, organizations, or **persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001**.') (emphasis added). The Government does not allege facts demonstrating that Mr. Hamdan had any role in the crimes of September 11, nor does it offer any evidence that Hamdan conspired to violate international law in the period between September 11 and his apprehension in Afghanistan and detention in Guantanamo. Conspiracy requires proof of an agreement, and there has been no proof of agreement either before or after September 11. As a result, because Military commissions can only try crimes

[2] The prosecution misleadingly claims at p. 8-9 that 18 U.S.C. 371 can be used to justify this prosecution. That is a civilian version of conspiracy inapplicable here for obvious reasons. And it is impossible to apply it in any context without some explanation of how the underlying act constitutes an offense against the United States.

once war has begun, the Prosecution has not charged Hamdan with any crime over which this court has subject matter jurisdiction.

Even more problematically, the prosecution contends that "it is irrelevant... whether a state of armed conflict exist at the time of the overt act." Prosecution Response to Defense Motion To Dismiss at 7. Beside the fact that the Government has not cited any reliable evidence that Mr. Hamdan committed an overt act to further the illegal goals of Al Qaeda, the jurisdiction the Government asserts is based upon its interpretation of the president's power to enforce the "laws of war." *See* Prosecution Response to Defense Motion To Dismiss at 3. Yet, to even reach the question of whether the Executive could charge Hamdan with a crime not authorized by Congress before a military commission, there must be a determination that the war giving rise to the "war powers" existed. That is, the Government cannot claim that the power to try alleged enemy combatants as an "important incident[s] of war" on one hand, but then turn around and proclaim that whether there was a war or not is irrelevant. *See* Prosecution Response to Defense Motion To Dismiss at 3 *quoting Hamdi v. Rumsfeld* 124 S. Ct. 2633 (2004) (plurality opinion). After all, *Quirin* rested its justification for allowing Congressionally authorized military commissions based on the need "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942). As a result, for the Government to claim that the Executive can use this argument to try individuals in military commissions for supposed acts committed before the armed conflict even began turns this rationale on its head.

c. International Law Does Not Import General Conspiracy Law and Offers No Support for the Government's Charge of Conspiracy against Mr. Hamdan

International Law does not recognize any conspiracy as an independent crime, and to the extent it considers conspiracy at all, it only contemplates it in the rare instances when high-level official are engaged in genocide or other crimes against humanity. The Government claims that "[t]he crime of conspiracy was clearly established in the Nuremberg Charter" and that this was "reflective of customary international law." Government Motion at para. 6(g). In truth, the Nuremberg Charter's invocation of conspiracy was heavily criticized because "the concept of conspiracy . . . had never before been recognized in continental Europe." Michael P. Scharf, *The International Trial of Slobodon Milosevic: Real Justice or Realpolitik?*, 8 ILSA J. Int'l & Comp. L. 389, 392 (2002). Furthermore, the Nuremberg Trial's anomalous use of conspiracy bears little resemblance to the conspiracy charge leveled against Mr. Hamdan. In part because of the criticism over the conspiracy charges, the Nuremberg court did not even treat the Charter's mention of "conspiracy" as referring to a crime separate from the underlying substantive offense. *See* Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 Minn. L. Rev. 30, 56-57 (2003); Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 Mil. L. Rev. 275, 281 (1995). Rather, as a commentator on Nuremberg explained, "even though the Charter provided that complicity in the commission of a crime against peace, a war crime, or a crime against humanity is a crime under international law, the tribunal considered this provision to be a theory of individual liability and not separate crimes." See Barrett & Little, *supra*, at 57; see also Amnesty International, The International Criminal Court: Making the Right Choices, pt. 1, VI(D) (1997) (explaining that because "the separate crime of conspiracy to commit acts of aggressive war was not defined in the Nuremberg Charter"

the Nuremberg tribunal construed conspiracy very narrowly). By contrast, the Government here seeks to try Mr. Hamdan under MCI No. 2's expansive definition of conspiracy, an offense of which Mr. Hamdan "may be criminally liable [as a] separate offense" "regardless of whether the substantive offense was completed." MCI No. 2 para. 6(C).

Nor do the subsequent developments cited by the Government establish that the current conspiracy charge derives from international law. It is true that conspiracy is included in certain international agreements after Nuremberg, such as the Genocide Convention of 1948. But the mere fact that conspiracy is criminalized in those certain narrow circumstances does not imply that a general crime of conspiracy attaches to *all* offenses under international law. After all, the Nuremberg judges themselves—the ostensible originators of the conspiracy charge that the Government applies today—were wary of the dangerous expansion of conspiracy liability and sought to limit such liability both in the Charter and in their rulings. Jonathan A. Bush, Book Review, *Nuremberg: The Modern Law of War and Its Limitations*, 93 Colum. L. Rev. 2022, 2077 (1993). And European civil-law nations—whose understanding of the term "conspiracy" guides the meaning of the term as it is used in international documents—would object to expanding conspiracy liability because they consider conspiracy to apply only narrowly "where its purpose is to commit certain crimes considered as extremely serious." Prosecutor v. Musema, Case No. ICTR-96-13-T, para. 186 (Int'l Crim. Trib. for Rwanda Trial Chamber Jan. 27, 2000); see also Steven Powles, *Joint Criminal Enterprise*, 2 J. Int'l Crim. Just. 606, 613 (2004) ("Other than the fact that genocide is the most serious crime contained in the ICTY Statute, there is no logical reason why there should be additional modes of liability [including conspiracy] for genocide."); see also Barrett & Little, *supra*, at 57.

While conspiracy can be found in only a limited number of international treaties, it is strikingly missing in several important areas. In particular, the recently passed statute of the International Criminal Court (ICC) contains *no language* concerning conspiracy. This was not just an oversight: at various stages in the drafting process, the ICC statute contained specific conspiracy provisions, but disagreements caused those provisions to be excised. Barrett & Little, *supra*, at 80-81. Thus, as at Nuremberg, there is still no international consensus on a general conspiracy offense like the one charged here. Conspiracy is simply *not* a violation of the law of war today.

The Government cites several cases from the International Tribunals of Yugoslavia (ICTY) and Rwanda (ICTR) to bolster its case. However, the Government itself admits that these cases concern "joint criminal enterprise" liability and not conspiracy liability. Government Motion at para. 6(g). The difference is that conspiracy is "a free-standing crime"; by contrast, joint criminal enterprise liability "attaches to substantive offenses," Barrett & Little, *supra*, at 43, so that a defendant guilty of joint criminal enterprise is in fact found liable "for the ultimate substantive offenses because of sharing a common criminal purpose with others in the enterprise." Government Motion at para. 6(g). The ICTY has expressly distinguished these two types of liability, holding that "while mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise." Prosecutor v. Milutinovic, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, IT-99-37-AR72, para. 23 (ICTY Appeals Chamber, May 21, 2003); see also *id.* para. 26 ("Criminal liability pursuant to

joint criminal enterprise is not liability . . . for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise.").[3]

These decisions therefore patently do not support the Government's claim that *its* conspiracy charge stems from settled international law. The Government cavalierly justifies its reliance on these cases by arguing that "[f]rom a practical perspective this is a matter of little import." *Id.* However, it is well established that a jurisdictional defect cannot be cured by a party's claim of harmless error. Cf. United States v. Prentiss, 206 F.3d 960, 975 (10th Cir. 2000) (An indictment's failure to allege a federal crime "is a fundamental jurisdictional defect that is not subject to harmless error."). Therefore, the ICTY and ICTR decisions cannot support the Government's claim that its conspiracy charge is founded in international law. And of course the import is huge – since the elements of the two offenses are entirely different.

The Prosecution claims that the *Prosecutor v. Musema*, Case No. ICTR-96-13-T, (ICTR Trial Chamber I, January 27, 2000) and Professor Cassese support their view of conspiracy. This is not true. Neither shows that a prosecution has ever been used, in practice, for an inchoate offense, and certainly not against a low-level individual. *Musema*, in any event, dealt with an instance of conspiracy that is limited to a particular setting, namely genocide. *Id.* para. 194. And its conclusion that conspiracy to commit genocide is a separate offense stems from its reading of the legislative history of the Genocide Convention, not its reading of customary international law. *Id.* para. 187. Finally, while *Musema* ostensibly adopted the "common law" definition of conspiracy, it nevertheless tempered that definition to preclude convicting a defendant of *both* conspiracy *and* the underlying substantive offense. *Id.* para. 197-98.

Given these considerations, the Government's repeated reliance on Prosecutor v. Tadic to support several propositions essential to its case is especially inappropriate. *See* Prosecution Response to Defense Motion To Dismiss at 12-14 citing *Prosecutor v. Tadic*, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999). While the Government attempts to cite the case for "discussing the war crimes conspiracy convictions in France, Great Britain, United States and other countries," the actual case relies solely on joint liability- a fact repeatedly emphasized by the court. *Id. at para. 196-220.* In fact, the court explicitly emphasizes that its decision is based on the view that "the common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a **joint criminal enterprise."** *Id. at para. 227* (emphasis added).

The word "conspiracy" appears only twice in the entire opinion, and those are both passing references having nothing to do with the propositions that the Government wants to cite *Tadic* for. *Id.* at para. 189 (merely listing parts of the Statute of the International Tribunal- "Article 4 which sets forth various types of offences in relation to genocide, including *conspiracy*, *incitement*, *attempt* and *complicity*); *Id.* at 211 (describing one of the arguments of

[3] *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), cited by the Government, see Government Motion para. 6(g), confuses joint criminal enterprise liability with conspiracy liability. It is partially due to this confusion that it announces (mistakenly) that conspiracy is an offense in international law. See 244 F. Supp. 2d at 322-23.

defense counsel). As a result, the Government's attempt to use *Tadic* to support of its false contention that international law recognizes the crime of conspiracy and that it does so in a broad manner is severely misplaced. *Tadic* is merely one international tribunal's explanation of the "joint criminal enterprise" offense, which is not at issue in this case. Moreover, by spelling out the three different bases for joint criminal enterprise in *Tadic* and then explaining how, in his opinion, Hamdan falls under the most expansive basis for joint criminal enterprise from Tadic, the Prosecutor attempts to obfuscate the fact that Mr. Hamdan is charged with conspiracy rather than joint criminal enterprise.[4] And they certainly do not extend conspiracy to low-level individuals.

After all, in the very rare cases where international law recognizes conspiracy as an offense, conspiracy does not apply to minor actors. Where international law has recognized a limited conspiracy offense, it has limited it to major actors engaged in a common criminal enterprise. This trend began with the Nuremberg Tribunal, which decided early that "conspiracy liability must rest on *high-level, active* involvement." Bush, *supra*, 93 Colum. L. Rev. 2022, 2077 (emphasis added). It continued in European civil-law countries, which limit conspiracy liability to "serious crimes." Prosecutor v. Musema, Case No. ICTR-96-13-T, para. 186 (Int'l Crim. Trib. for Rwanda Trial Chamber Jan. 27, 2000).

International law does not support the Prosecution's contention that considerations therefore patently do not support the Government's claim that *its* conspiracy charge stems from settled international law. Moreover, even its chief source, Richard P. Barrett and Laura E. Little *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, an article whose aim is to expand the use of conspiracy law in the international context, admits "the somewhat ambiguous" nature of international law's recognition of conspiracy, and acknowledges the heretofore limitation of conspiracy convictions to those engaged in genocide. *Id.* at 38-39, 56 ("the word [conspiracy in the ICTY] may simply be an artifact of its earlier use in the Genocide Convention").

Prosecutor v. Kvocka, Case No: IT-98-30/1, Judgment 2 November 2001, does not support the Government's contention that minor actors can be charged with conspiracy. The tribunal was careful to emphasize that liability for a *joint criminal enterprise* (a very different type of offense)[5] depended upon an actor's *substantial* involvement:

> [A]n accused must have carried out acts that *substantially* assisted or *significantly* effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise.

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[4] That is not to say that the evidence against Mr. Hamdan would qualify even under intent to take part in the "criminal purposes of that enterprise" standard. The Government has not alleged any reliable facts that would justify a finding that Hamdan, a mere driver for Al Qaeda, intended to engage in the criminal purpose of the organization.

[5] We reiterate that these decisions simply do not deal with the kind of conspiracy charge that the Government is invoking today; rather, they deal with joint criminal enterprise liability or accomplice liability, which attaches to the underlying substantive offense.

Id. para. 312 (emphasis added). In the paragraph after the accountant example cited by the Government, Government Motion para. 6(h), the tribunal gives an example of a mere participant in the joint criminal enterprise who would *not* be criminally liable:

> The man who merely cleans the office afterhours, however, and who sees the child photos and knows that the company is participating in criminal activity and who continues to clean the office, would not be considered a participant in the enterprise because his role is not deemed to be *sufficiently significant* in the enterprise.

Kvocka, *supra*, para. 286 (emphasis added). More specifically, the tribunal later notes:

> In general, participation would need to be assessed on a case by case basis, especially for low or mid level actors who do not physically perpetrate crimes. . . . In most situations, the aider or abettor or co-perpetrator would not be someone readily replaceable, such that any "body" could fill his place. He would typically hold a higher position in the hierarchy or have special training, skills, or talents.

Id. para. 309.

Mr. Hamdan did not physically perpetrate any of the crimes committed by Al Qaeda or Usama Bin Laden. Nor was he irreplaceable: rather, he was simply a driver. As a result, *Kvocka* does not support the Government's contention that Mr. Hamdan can be charged with conspiracy liability.

One last point about *Kvocka:* we note that the Government significantly misquotes one of the factors enumerated by the Tribunal. The Government lists the sixth factor as "the seriousness and scope of the crimes committed," and notes that "the heinous crimes carried out are of an astronomical proportion." Government Motion para. 6(h). In fact, the tribunal writes: "Perhaps the most important factor to examine is *the role the accused played* vis-à-vis the seriousness and scope of the crimes committed." *Kvocka*, *supra*, para. 311 (emphasis added). Therefore, a proper analysis centers not on the seriousness of the crimes, but rather on *Mr. Hamdan's specific role* in contributing to the seriousness of the crimes.

d) *The Government's Erroneous Reliance on Undersigned Civilian Counsel's Academic Work Further Illustrates the Inappropriate Nature of Applying Conspiracy Law to Mr. Hamdan*

The Prosecution has attempted to introduce undersigned civilian defense counsel's academic articles on conspiracy doctrine into these proceedings and asserts that those Articles support the charge here, but has selectively and misleadingly quoted from those Articles. Prosecution Response, at 3, 14 (quoting Neal Katyal, Why it Makes Sense to Have Harsh Punishments for Conspiracy, Legal Aff., Apr. 2003, at 44). Here is the conclusion of the Article that they cite:

> It's still possible that conspiracy charges, like many other aspects of criminal law, can be used by powerful prosecutors to harm small fish unfairly. But that's a larger, systemic problem that we should deal with by paying enough for public defenders, giving defense attorneys broad latitude to cross-examine

cooperating witnesses and iron-clad access to inculpatory and exculpatory evidence, and making sure that juries get cautionary instructions to guard against lying by cooperating witnesses. If it turns out that prosecutors can't be trusted with the discretion that conspiracy doctrine gives them, then the dangers posed by unscrupulous prosecutors are even higher than we think.

At the same time, the virtues of the conspiracy doctrine go only so far. The permissive rules make sense in the context of a system with strong constitutional protections for defendants, including the right to counsel, trial by jury, indictment by a grand jury, cross-examination of witnesses, and pretrial access to the prosecution's evidence.

In the wake of September 11, however, the federal government apparently wants to use conspiracy law to detain terrorism suspects indefinitely. Some of these suspects may even be tried for conspiracy in front of military tribunals that offer few of the protections federal and state courts do. The wide latitude that conspiracy doctrine gives prosecutors *only works* when defense lawyers have the power to probe the government's claims. *If conspiracy law is transplanted to a military setting that lacks these procedural rules, America's commitment to justice, as well as truth, will be tainted.*

Katyal, at 48. See also Neal Katyal, *Conspiracy Theory*, 112 Yale L.J. 1307, 1392-94 (2003); Neal Katyal, Gitmo Better Blues, Mar. 19, 2004, Slate Magazine, available at http://slate.msn.com/id/2097397/:

There are good reasons why the laws of war, unlike American civilian law, place powerful limits on the conspiracy doctrine. Recall that the civilian offense is based largely on a theory of deterrence—that draconian punishments will scare people into avoiding association with criminal organizations. But these arguments fail with respect to the military proceedings at Guantanamo. For one thing, the idea that other would-be war criminals are watching the proceedings at Guantanamo and modifying their conduct is far-fetched, ... For another, deterrence works best when the perceived costs of the action exceed the perceived benefits, and it is very difficult to make a claim that the speculative risk of punishment in U.S. military courts would change the calculus of future war criminals (particularly when military operations against them are already ongoing). This isn't to say that there is no upside to conspiracy charges, only that the benefits are more attenuated than they are in ordinary criminal cases and eroded by serious risks of error. And if there are cases in which the advantages of a conspiracy charge become apparent, then the administration is free to use the civilian offense of conspiracy—one written into law by Congress instead of drafted by a Pentagon bureaucrat—in a standard criminal action.

...American criminal law has been able to develop a vibrant offense of conspiracy only because of its strong commitment to criminal procedural guarantees. So, while charges can be somewhat vaguer in a civilian conspiracy trial and hearsay evidence may be admitted, the standard checks on prosecutorial and judicial abuse

exist—indictment by a grand jury, the right to a jury trial, the right to confront witnesses, the right to obtain exculpatory evidence, and so on. Those of us who defend a broad substantive offense of conspiracy treat these procedural rights as preconditions before such a wide-ranging offense could be established. Yet the military tribunals offer no such guarantees....The administration thus gives birth to a legal Frankenstein. ...The chief criticism of the tribunals has always been that the president cannot have the unilateral power to define offenses, pick prosecutors, select judges, authorize charges, select defendants, and then strip the civilian courts of all powers to review tribunal decisions. This principle goes all the way back to the Declaration of Independence, which listed, among the founders' complaints against King George, that he "has affected to render the Military independent of and superior to the Civil Power"; "depriv[ed] us, in many Cases, of the benefits of trial by jury"; "made Judges dependent on his Will alone"; and "transport[ed] us beyond Seas to be tried for pretended Offences." For these reasons, the Supreme Court said during the Civil War that if tribunals are ever appropriate, it is up to Congress to define how and when they are to be used.[6]

It is absolutely inappropriate to rely on the broad domestic concept of conspiracy – a concept that arises against a vibrant backdrop of individual rights – and apply it in this commission. Consider, in total, the Prosecution's claims in these motions: the Constitution does not apply, treaties cannot protect individuals, Mr. Hamdan has no rights at all, the mere say-so of the Executive is enough to breathe life into military commissions, the Executive can hand-pick the judges, the Commissions can depart flagrantly from military law, and the like. None of that is true in the civilian context, and that is why the Prosecutor's civilian cases, as well as the very Article by undersigned defense counsel that he cites, cut exactly the other way.

Moreover, international law conspiracy doctrine, to the extent it exists independently, is limited to cases of top-level actors perpetrating crime against humanity or genocide. Given this understanding, the Prosecution's reliance on domestic conspiracy case law (as well as the domestic rationale for strongly enforcing conspiracy law) is completely inapt. *See* Prosecution Response to Defense Motion To Dismiss at 5. Defining the contours and elements of conspiracy charges, which has been repeatedly limited and confined in the international context, to the robust role it plays in the domestic sphere illustrates the Government's misunderstanding of both international law and the justifications for robust enforcement of domestic law. Of course, it is not surprising that the Government relies on domestic cases in delineating what it hopes will be the contours of the conspiracy offense for Mr. Hamdan, as the paucity of international precedent on the issue would leave them with no authority to cite.

Undersigned counsel is probably the leading proponent of an aggressive prosecutorial approach to conspiracy law in the civilian courts, but that has nothing to do with the laws of war, for the reasons stated in the very Article quoted by the Prosecutor. It is Congress' responsibility

[6] Undersigned counsel wrote the *Legal Affairs* Article prior to having any involvement with the Office of Military Commissions. At the time of the above-mentioned *Slate* Magazine Article, Undersigned Counsel had, *pro bono*, served as Counsel of Record for the Military Attorneys Assigned to the Defense in the Office of Military Commissions in the U.S. Supreme Court *Rasul* case. Subsequent to publishing that Slate Magazine Article, he filed a challenge in federal court on behalf of Lt. Commander Swift.

to define the laws of war, and it has refused to override the international law's distrust of conspiracy law- especially in the context of minor actors engaged in non-genocidal activities. It is well outside of the scope of the Executive's power to override this Congressional decision by changing the laws of war to prosecute Mr. Hamdan in front of a military commission on this charge. If the Prosecutor is misreading the cases in the same way that he is misreading the undersigned counsel's academic work, then our problems have only begun.

As a result, this court should dismiss for failure to state an offense within the subject matter jurisdiction of a military commission.

5. Files Attached. None.

6. Oral Argument. The Defense position remains the same, please see D17.

7. Legal Authority Cited.

   a. 10 U.S.C. § 821

   b. 10 U.S.C. § 904

   c. 10 U.S.C. § 906

   d. U.S. Const. art. I, § 8, cl. 10

   e. 18 U.S.C. § 2441

   f. MCI No. 2 para. 3(B)

   g. Ex Parte Quirin, 317 U.S 1 (1942)

   h. In re Yamashita, 327 U.S. 1 (1946)

   i. Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003)

   j. Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956)

   k. Mudd v. Caldera, 134 F. Supp.2d 138 (D.D.C. 2001)

   l. 18 U.S.C. 371 Public L. No. 107-40, 115 Stat. 224

   m. Hamdi v. Rumsfeld 124 S. Ct. 2633 (2004)

   n. Michael P. Scharf, *The International Trial of Slobodon Milosevic: Real Justice or Realpolitik?*, 8 ILSA J. Int'l & Comp. L. 389 (2002)

o. Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 Minn. L. Rev. 30 (2003)

p. Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 Mil. L. Rev. 275 (1995)

q. Amnesty International, The International Criminal Court: Making the Right Choices, pt. 1, VI(D) (1997)

r. Jonathan A. Bush, Book Review, *Nuremberg: The Modern Law of War and Its Limitations*, 93 Colum. L. Rev. 2022, 2077 (1993)

s. *Prosecutor v. Milutinovic*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, IT-99-37-AR72, para. 23 (ICTY Appeals Chamber, May 21, 2003)

t. United States v. Prentiss, 206 F.3d 960 (10th Cir. 2000)

u. *Prosecutor v. Tadic*, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999)

v. *Prosecutor v. Musema*, Case No. ICTR-96-13-T, (ICTR Trial Chamber I, January 27, 2000)

w. ICTY Statute for Rwanda art. 2(3)(b), 33 I.L.M. 1602-03

x. Allison Marston Danner Constructing a Hierarchy of Crimes in International Criminal Law, 87 Va. L. Rev. 415 (2001)

y. Steven Powles, *Joint Criminal Enterprise*, 2 J. Int'l Crim. Just. 606, 613 (2004)

z. *Prosecutor v. Kvocka*, Case No: IT-98-30/1, Judgment 2 November 2001

aa. Neal Kumar Katyal, Why it Makes Sense to Have Harsh Punishments for Conspiracy, Legal Aff., Apr. 2003

bb. Neal Katyal, *Conspiracy Theory*, 112 Yale L.J. 1307, 1392-94 (2003)

cc. Neal Katyal, Gitmo Better Blues, Mar. 19, 2004, Slate Magazine, available at http://slate.msn.com/id/2097397/:

8. Witnesses/Evidence Required. The Defense position remains the same, please see D17.

9. Additional Information. None.

NEAL KATYAL
Civilian Defense Counsel

Review Exhibit 26-C

UNITED STATES OF AMERICA	)
	)
	) DEFENSE MOTION TO
v.	) DISMISS FOR VIOLATION OF
	) 42 U.S.C. § 1981
	)
SALIM AHMED HAMDAN	) 1 October 2004

1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commission's on 24 August 2004.

2. Relief Sought. That the Military Commission find that the President's Military Order authorizing trial by Military Commission is in violation of the laws of the United States and dismiss the charge against Mr. Hamdan.

3. Overview. The President's Military Order (Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism) issued 13 November 2001 is illegal because it is in direct contravention of 42 U.S.C. § 1981.

4. Facts.

a. On 13 November 2001, President Bush issued a military order pursuant to the authority vested in him as President of the United States and Commander in Chief of the Armed Forces of the United States by the Constitution and laws of the United States vesting in the Secretary of Defense the authority to try by military commission those persons that President determined were subject to the order.

b. That the President's Military Order of 13 November 2001, applies exclusively to non-citizens of the United States.

c. Subsequent to the President's Military Order of 13 November 2001, Mr. Hamdan was taken prisoner by indigenous Afghanistan forces in late November 2001, where upon he was subsequently turned over to U.S. personnel for a bounty and has been detained by the United States government ever since.

d. On 3 July 2003, the President of the United States determined that Mr. Hamdan was subject to his military order of 13 November 2001.

e. On 13 July 2004, a charge of conspiracy to commit terrorism against Mr. Hamdan was referred to this Military Commission.

5. Law.

a. 42 U.S.C. § 1981, a historic law passed right after the Civil War, guarantees equal rights for all persons to give evidence, to receive the equal benefit of all laws and proceedings for the security of persons, and to receive like punishment.

b. The prerequisite to Mr. Hamdan's eligibility for trial by Military Commission is the fact that he is a non-citizen. A citizen who committed the very same acts under the same circumstances as Mr. Hamdan would be entitled to either the rules governing courts-martial or Federal Court. The President's Military Order, therefore, violates the laws of the United States by the equal benefit of law and proceedings. *See Bowers v. Campbell*, 505 F.2d 1155, 1157 (9th Cir. 1974) (holding that "§ 1981 applies to employment discrimination by federal officials; it is not confined to state or private action").[1] When it comes to rights such as to "give evidence" and "like punishment [and] pains," the Government owes Mr. Hamdan a clear and nondiscretionary duty to treat Mr. Hamdan in the same way as they treat American citizens.

c. 42 U.S.C. § 1981 was originally part of the Voting Rights Act of 1870. It forbids exactly the type of distinction made by the President's Order establishing military tribunals:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, *give evidence*, and to the *full and equal benefit of all laws and proceedings for the security of persons* and property as is enjoyed by *white citizens*, and shall be subject to *like punishment*, *pains*, *penalties*, taxes, licenses, and *exactions* of every kind, and to no other.[2]

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[1] In 1991, however, Congress added a new subsection with the following language: "The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law." Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072 (codified as amended at 42 U.S.C. § 1981(c)). Accordingly, some courts have found that § 1981 does not apply to the federal government. *E.g.*, *Lee v. Hughes*, 145 F.3d 1272, 1277 (11th Cir. 1998). The holding in *Lee* is quite odd, however, for the 1991 language is expansive rather than restrictive in thrust, and Congress did not delete the word "territory" from the existing statute. It thus seems plain that Congress did not intend to limit, but only to supplement, existing civil rights laws by confirming their applicability to non state as well as state actors. *See La Compania Ocho, Inc. v. U.S. Forest Serv.*, 874 F. Supp. 1242, 1251 (D.N.M. 1995) (arguing that the 1991 amendments did not undercut the applicability of § 1981 to the federal government because the amendments were "intended to expand the scope of civil rights protection, not limit it").

[2] 42 U.S.C. § 1981(a) (1994) (emphasis added). The law began as part of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27, but was later modified in 1870 to protect not only "citizens," but *all* "persons." *See* Voting Rights Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140, 144; *Yick Wo*, 118 U.S. at 369 (stating that the provisions of the Equal Protection Clause "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws," and that the predecessor statute to § 1981 was "accordingly enacted").

d. Section 1981 makes clear that the government cannot change our nation's fundamental rules only for aliens, either in the States or in the "Territories." Yet the Government has sought to do exactly that to Mr. Hamdan. There is no way that he has "the full and equal benefit of all laws and proceedings for the security of persons and property." Instead, he has been shunted into an inferior, illegal process by dint of his nationality. This is strikingly different treatment than that in World War II, for the United States treated the Nazi Saboteurs equally, even though at least one of them was a citizen, *Quirin*, 317 U.S., at 20.

6. Files Attached. None.

7. Oral Argument. Is required. The Presiding Officer has instructed the Commission members that he will provide the Commission members with his interpretation of the law as he sees it, but that the Commission members are free to arrive at their own conclusions. The Defense asserts its right to be heard following the Presiding Officer's pronouncement via oral argument in order for the remainder of the Commission members to be informed as to the reasons for the Defenses support or opposition to the Presiding Officer's position. Additionally, the Defense intends to call expert witnesses and to incorporate their testimony into this motion via oral argument.

8. List of Legal Authority Cited.

a. President's Military Order, 13 Nov 2001

b. 42 U.S.C. Sec. 1981

c. *Bowers v. Campbell*, 505 F.2d 1155, 1157 (9th Cir. 1974)

d. *Ex Parte Quirin*, 317 U.S. 1, 20

e. Voting Rights Act, 31 May 1870, ch. 114, Sec 16, 16 Stat. 140, 144

f. *Yick Wo v. Hopkins*, 118 U.S. 356, 369

9. Witnesses and/or Evidence Required. The Defense intends to call Professor Bruce Ackerman, Sterling Professor of Law and Political Science at Yale University. (Curriculum Vitae attached). As an expert witness in the area of equal protection, specifically protections provided by 42 U.S.C. § 1981. Professor Ackerman's expert testimony is probative to a reasonable person under the circumstances presented, specifically, based on the Professor's skill, knowledge, training and education. He possesses specialized knowledge of the laws of the United States relating to equal protection. The application and substance of such laws is a legal finding to be made by members of the Military Commission beyond the training and expertise of lay persons as such Professor Ackerman's specialized knowledge will assist the Commission members in understanding and determining whether the President's Military Order of 13 November 2001 violates 42 U.S.C. § 1981.

10. Additional Information. None.

CHARLES D. SWIFT
Lieutenant Commander, JAGC, US Navy
Detailed Military Defense Counsel
Office of Military Commissions

BRUCE ARNOLD ACKERMAN

Curriculum Vitae

Date of Birth: August 19, 1943

Marital Status: Married, two children

Present Position: Sterling Professor of Law and Political Science, Yale University, July 1, 1987 -

Past Positions:

(1) Law Clerk, Judge Henry J. Friendly, U.S. Court of Appeals, 1967-8

(2) Law Clerk, Justice John M. Harlan U. S. Supreme Court, 1968-9

(3) Assistant Professor of Law, University of Pennsylvania Law School, 1969-71

(4) Visiting Assistant Professor of Law and Senior Fellow, Yale Law School, 1971-72

(5) Associate Professor of Law & Public Policy Analysis, University of Pennsylvania, 1972-73

(6) Professor of Law and Public Policy Analysis, University of Pennsylvania, 1973-74

(7) Professor of Law, Yale University, 1974-82

(8) Beekman Professor of Law and Philosophy, Columbia University, 1982-87

Education:

(1) B.A. (summa cum laude), Harvard College, 1964
(2) LL.B. (with honors), Yale Law School, 1967

Languages: German, Spanish, French

Professional Affiliations: Member, Pennsylvania Bar; Member, American Law Institute

Fields: Political philosophy, American constitutional law, comparative law and politics, taxation and welfare, environmental law, law and economics, property.

Honors: American Philosophical Society, Henry Phillips Prize in Jurisprudence ("for

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lifetime achievement"); Fellow, American Academy of Arts and Sciences; Fellow, Collegium Budapest, Fall 2002; Fellow, Center for Advanced Study in the Behavioral Sciences, Spring 2002; Fellow, Woodrow Wilson Center, 1995-96; Fellow, Wissenschaftskolleg, Berlin 1991-92; Guggenheim Fellowship, 1985-86, Rockefeller Fellow in the Humanities, 1976-7; 1982 Henderson Prize of the Harvard School for *The Uncertain Search for Environmental Quality* as the best book on "law and government published during the years 1972 through 1980"; 1981 Gavel Award of the American Bar Association for *Social Justice in the Liberal State.*

Other Awards and Positions: 2001-02 Jorde Lecture, Yale University and University of California, Berkeley; 2000 Moffett Lecture, Princeton University; 1999 Marks Lecture, University of Arizona; 1999 Terrell Lecture, University of Texas; 1997 Hart Lecture, Georgetown University Law School; 1996 McCorkle Lecture, University of Virginia; 1994 Order of the Coif, Inaugural Lecture, University of California, Berkeley; 1993 University of Connecticut Law Review Award; 1990 Friedrich Lecture, Harvard University; 1987 Leary Lecture, University of Utah; 1986 Currie Lecture, Duke University; 1984 Harris Lecture, University of Indiana; 1983 Storrs Lecture, Yale University.

Kyoto Seminar in American Studies, July, 2000; Visiting Professor, University of Rome, May, 1984; Research Scholar, International Institute for Applied Systems Analysis, Vienna, Austria, Summer 1982; Visiting Professor, Environmental Protection Agency, May 1979.

Grants from National Science Foundation, Council on Law Related Studies.

Order of the Coif; Phi Beta Kappa.

Publications:

I. Books:

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3. The Uncertain Search for Environmental Policy: Part I with James Sawyer), *University of Pennsylvania Law Review*, vol. 120, pp. 419-503 (1972); Part II (with Rose-Ackerman and Henderson), *University of Pennsylvania Law Review*, vol. 121, pp. 1225-1308 (1973).

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9. The Marketplace of Ideas, *Yale Law Journal*, vol. 90, pp. 1131-1148 (1981)

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11. What is Neutral about Neutrality?, *Ethics*, vol. 93, pp. 372-390 (1983)

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13. Foreword: Law in an Activist State, *Yale Law Journal*, vol. 92, pp. 1-45 (1983) (Dutch: Het recht in een activistische staat, *Staatkundig jaarboek, 1983-1984*, pp. 313-328, Leiden, December 1983).

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UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	)	PROSECUTION RESPONSE TO DEFENSE MOTION FOR DISMISSAL (MILITARY COMMISSIONS IMPROPERLY CONSTITUTED IN VIOLATION OF 42 U.S.C. §1981) 15 October 2004

1. Timeliness: This Motion is filed in a timely manner as required by POM 4.

2. Position on Motion: The Prosecution submits that the Defense's Motion should be denied in total.

3. Facts Agreed upon by the Prosecution: The Prosecution admits the facts alleged by the Defense in subparagraphs 4(b) and 4(d) for the purposes of this motion.

4. Facts:

a. On 13 July 2004, a charge of conspiracy to commit the following offenses was referred to this Military Commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

5. Legal Authority Cited:

a. 42 U.S.C. § 1981

b. Bowers v. Campbell, 505 F.2d 1155 (9th Cir. 1974)

c. Davis-Warren Auctioneers, J.V v. F.D.I.C., 215 F.3d 1159 (10th Cir. 2000)

d. Davis v. United States Department of Justice, 204 F.3d 723 (7th Cir. 2000)

e. Lee v. Hughes, 145 F.3d 1272 (11th Cir. 1998)

f. La Compania Ocho, Inc. v. United States Forest Service, 874 F.Supp. 1242 (D. N.M. 1995)

g. Grutter v. Bollinger, 529 U.S. 306 (2003)

h. General Bldg. Contractors Ass'n. Inc. v. Pennsylvania, 458 U.S. 375 (1982)

6. Discussion:

The Defense asserts that military commissions violate 42 U.S.C. § 1981. 42 U.S.C § 1981(a) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id. The Defense argues that this passage prohibits the trial of the Accused at a military Commission because the Commission does not have equal jurisdiction over U.S. citizens. In making this argument, the defense relies on Bowers v. Campbell, 505 F.2d 1155, at 1974 case out of the Ninth Circuit. In addition to the complications associated with stretching the plain meaning of the words of §1981 to apply to the Accused, the Defense's reliance on Bowers is misplaced because the law has changed since the Ninth Circuit decided Bowers. In 1991, §1981 was amended and the following language was added: "[t]he rights protected by this section are protected against impairment by *nongovernmental* discrimination and impairment under color of *State* law." 42 U.S.C. § 1981(c) (emphasis added). Therefore, the plain language of § 1981 renders the statute inapplicable to federal action. That being the case, the Military Commissions, created by order of the federal executive, is unaffected by § 1981, a law dealing with discrimination by individual States. Every federal court of appeals that has considered this issue since the 1991 amendment reached the same conclusion. See generally Davis-Warren Auctioneers, J.V. v. F.D.I.C., 215 F.3d 1159, 1161 (10th Cir. 2000), Davis v. United States Department of Justice, 204 F.3d 723, 725-726 (7th Cir. 2000), and Lee v. Hughes, 145 F.3d 1272, 1277 (11th Cir. 1998). Only one case after 1991 has adopted a contrary point of view, La Compania Ocho, Inc. v. United States Forest Service, 874 F.Supp. 1242 (D. N.M. 1995), but that case was overruled by Davis-Warren.

Even if § 1981 did apply to federal action, the Supreme Court has held (in the context of State action) that § 1981 provides the exact same protections against state action that the Fifth Amendment provides for federal action. See generally Grutter v. Bollinger, 539 U.S. 306, 343 (2003); General Bldg. Contractors Ass'n. Inc. v. Pennsylvania, 458 U.S. 375, 389-391 (1982). Thus, if § 1981 applied to federal action at all, the analysis would be the same as that applied under the equal protection clause of the Fifth and Fourteenth Amendments. We, therefore, incorporate by reference the arguments made in the Prosecution's Response to Defense's Motion to Dismiss for Violation of Equal Protection and do not burden the Military Commission by repeating them here.

Because 42 U.S.C. § 1981 is inapplicable and, if applicable, applies only the same protections as those found in the Fifth and Fourteenth Amendments (inapplicable to this Accused), the Accused's claim should be denied.

7. Attachments: None

8. Oral Argument: Although the Prosecution does not specifically request oral argument, we are prepared to engage in oral argument if so required.

9. Witnesses: No witnesses will be needed to decide this motion.

[redacted]
Captain, U.S. Army
Prosecutor

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	)	DEFENSE REPLY TO PROSECUTION'S RESPONSE TO DEFENSE MOTION FOR DISMISSAL (MILITARY COMMISSIONS IMPROPERLY CONSTITUTED IN VIOLATION OF 42 U.S.C. §1981) **D18** 22 October 2004

1. Timeliness. This reply is filed in a timely manner as required by the Presiding Officer's schedule set 24 August 2004.

2. Relief Sought. Grant Defense motion.

3. Facts.

See D18.

4. Law and Discussion.

The prosecution of Mr. Hamdan flatly violates 42 U.S.C § 1981(a), which states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

Notably, the Prosecution does not contend that the prosecution of Mr. Hamdan meets the above text:

- They do not deny that Mr. Hamdan is a "person[] within the jurisdiction of the United States."
- They do not deny that Mr. Hamdan has been deprived of "the same right . . . to sue, be parties, [and] give evidence."
- Rather, they admit that Mr. Hamdan is *not* subject to "like punishment, pains, penalties . . . and exactions of every kind," and that he is not receiving the "equal benefit of all laws and proceedings for the security of persons and property." The Prosecution confesses that Mr. Hamdan comes before this commission

unlike every United States citizen, who has an entirely different set of procedures and rights.

Instead of arguing that they comply with 42 U.S.C. 1981(a), the Prosecution makes two excuses. First, they rely heavily on a 1991 Amendment to 42 U.S.C. 1981. As noted in the Defense Motion to Dismiss for Violation of Section 1981, at page 2, the Prosecution is foreclosed from relying on that 1991 Amendment because that Amendment simply *expanded* the scope of Civil Rights Protections. Before the Amendment, courts throughout the land, including *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974) but also many others, had held that the statute applied to the federal government. *See, e.g., NAACP. v. Levi*, 418 F. Supp. 1109, 1117 (D.D.C. 1976) (applying Sec. 1981 to federal government); *Kurylas v. U. S. Dep't of Agric.*, 373 F. Supp. 1072 (D.D.C. 1974) (same), *aff'd*, 514 F.2d 894 (D.C. Cir. 1975).

In 1989, the United States Supreme Court limited the ability of individuals to sue State Governments under Section 1981 in the Rehnquist Court decision *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989). Two years later, Congress enacted legislation to overrule that interpretation of the statute in the *Jett* case. That is what subsection (c), on which the prosecution relies, is about. But that section nowhere says what the prosecution wants it to say. Nowhere does it *exclude* protection from federal misconduct, and it is worth recalling that 1981 has always protected against it (and *Jett* said nothing to the contrary). The 1991 Act said not one word about *restricting* its reach to the federal government, it merely added state actors to the already existing protection against federal wrongdoing.

The sole intent of the 1991 Amendment was to expand the reach of Section 1981, not contract it. The Act of Congress in 1991 had four stated "purposes," all to increase civil rights. *See* P.L. 102-166 (1991), Sec. 3(4) (purpose is to "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.") Had restricting the reach of Section 1981 been on the agenda, one would have expected commentary somewhere about it. Senators Kennedy, Wellstone, and every other Democratic Senator save one (who abstained) voted for the 1991 Amendments. It strains credulity to argue that they were voting to restrict the application of Section 1981. http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=102&session=1&vote=00238. (The only five Senators to vote against the Amendments were Senators Helms, Coats, Smith, Symms, and Wallop.) The House of Representatives is no different. Representatives Rangel, Frank and 250 other Democrats voted for the Amendments. See http://clerk.house.gov/evs/1991/roll386.xml. For these reasons, La Compania Ocho, Inc. v. U.S. Forest Service, 874 F. Supp. 1242, 1251 (D.N.M. 1995), is the correct view of the law. While some courts have reached a different conclusion, those courts have known that *some other* federal civil rights statute would give the same protections against the federal government, unlike the case at hand.[1]

[1] For example, *Williams v. Glickman*, 936 F. Supp. 1 (D.D.C. 1996) grounded its holding not only in the text of the statute, but also the fact that the plaintiffs there could use a different statute, Section 1982. *Williams*, 936 F. Supp. 5 & n.6 ("Especially in view of the fact that the plaintiffs may seek equitable relief here under § 1982, the Court does not conclude that the result reached by applying the statute's plain meaning is absurd."). 42 U.S.C. 1982 gives property rights to "citizens" and is plainly not applicable here. The prosecution's interpretation of Section 1981

Grutter v. Bollinger, 539 U.S. 306 (2003), and *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), merely confirm that Section 1981 requires purposeful discrimination. Neither of them concern with a situation whereby the very rights enumerated in Section 1981 are specifically and purposefully not provided to aliens. The meaning of the equal protection clause has absolutely no bearing on whether the statute has been infringed in this way. Section 1981 does not permit the government to make excuses: it does not say that the federal government can treat people unequally with respect to "like punishment, pains, penalties . . . and exactions of every kind" when they have a reason for doing so. Rather, its text and command are clear: discriminations in matters of fundamental justice are not the kind of thing that can be made by our Government. America learned this lesson after our horrific experience in the Civil War. This commission should not betray it.

If anything, the Prosecution has it backward: the clear conflict between the original words of Section 1981 and the Military Order highlight the Order's equal protection problems.

5. Files attached. None.

6. Oral Argument. We strongly believe oral argument is necessary. Again see D18.

7. Legal Authority Cited.

a. 42 U.S.C § 1981(a)

b. *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974)

c. *NAACP. v. Levi*, 418 F. Supp. 1109 (D.D.C. 1976)

d. *Kurylas v. U. S. Dep't of Agric.*, 373 F. Supp. 1072 (D.D.C. 1974) (same), *aff'd*, 514 F.2d 894 (D.C. Cir. 1975)

e. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989)

f. 1991 Amendment to 42 U.S.C. § 1981, P.L. 102-166 (1991)

g. *La Compania Ocho, Inc. v. U.S. Forest Service*, 874 F. Supp. 1242 (D.N.M. 1995)

h. *Grutter v. Bollinger*, 539 U.S. 306 (2003)

i. *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982)

8. Witnesses. See D18.

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would thus force the 1991 Amendments to be read in a way entirely inconsistent with equity and with Congress' stated intent.

9. Additional Information. None.

NEAL KATYAL
Civilian Defense Counsel

Review Exhibit 27C

UNITED STATES OF AMERICA	)
	)
	) DEFENSE MOTION TO
v.	) DISMISS FOR VIOLATION OF
	) EQUAL PROTECTION CLAUSE
	)
SALIM AHMED HAMDAN	) 1 October 2004

1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004.

2. Relief Sought. That the Military Commission find that the President's Military Order authorizing trial by Military Commission is in violation of the laws of the United States and dismiss the charge against Mr. Hamdan.

3. Overview. The President's Military Order (Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism) issued 13 November 2001 is illegal because it is in direct contravention of Equal Protection Guarantees in the Constitution of the United States of America.

4. Facts.

a. On 13 November 2001, President Bush issued a military order pursuant to the authority vested in him as President of the United States and Commander in Chief of the Armed Forces of the United States by the Constitution and laws of the United States vesting in the Secretary of Defense the authority to try by military commission those persons that President Bush determined were subject to the order.

b. The President's Military Order of 13 November 2001 applies exclusively to non-citizens of the United States.

c. Subsequent to the President's Military Order of 13 November 2001, Mr. Hamdan was taken prisoner by indigenous Afghanistan forces in late November 2001, where upon he was subsequently turned over to U.S. personnel for a bounty and has been detained by the United States government ever since.

d. On 3 July 2003, the President of the United States determined that Mr. Hamdan was subject to his military order of 13 November 2001.

e. On 13 July 2004, a charge of conspiracy to commit terrorism against Mr. Hamdan was referred to this Military Commission.

5. Law.

a. The President's Military Order Violates the Fifth Amendment's Guarantee of Equal Protection Because It Unlawfully Discriminates Against A Suspect Class

1. Aliens Are a Suspect Class under the Fourteenth Amendment

(a) The Fourteenth Amendment to the United States Constitution, a fundamental provision passed in the wake of the Civil War, states that government shall not "deny to any person within its jurisdiction the equal protection of the laws." It is this provision that led to the desegregation of the American school system in *Brown v. Board of Education* (1954), as well as any number of other landmarks throughout our history.

(b) The President's Military Order bars citizens from appearing before the commission as defendants. Mr. Hamdan is thus being held for trial before a military commission only by virtue of his status as an alien. This order is the first of its kind to make this citizen/alien distinction in a matter of fundamental justice, whether in the military or the civilian system. In doing so, it runs afoul of the animating purpose of the Equal Protection Clause.

(c) The Framers of the Clause understood that discrimination against aliens was pervasive and problematic and intentionally extended the reach of the Clause to "persons" rather than confining it to "citizens." Foremost in their minds was the language of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449 (1857), which had limited due process guarantees by framing them as nothing more than the "privileges of the citizen." The drafters of the Amendment wanted to overrule that tortured precedent, which gave only citizens rights.

(d) The Supreme Court has long recognized that "classifications based on alienage" are "inherently suspect and subject to close judicial scrutiny" under the Fourteenth Amendment. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). This treatment of aliens as a suspect class accords with both the original understanding of the Fourteenth Amendment and the fundamental purpose of the Equal Protection Clause. The Framers of the Equal Protection Clause intentionally extended the reach of the Clause beyond merely "citizens" to all "persons." *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1442-47 (1992). As the Amendment's principal author, John Bingham, asked, "Is it not essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection?" Akhil Reed Amar, *The Bill of Rights*, 173 (1998); *see generally id.* at 170-72. This heightened solicitude for aliens flows naturally from the Clause's purpose of protecting "discrete and insular minorities" from prejudice. *United States v. Carolene Prods.*, 304 U.S. 144, 152-53 n.4 (1938). Aliens are "a prime example of a 'discrete and insular' minority" because they cannot vote. *Graham*, 403 U.S. at 372. The Supreme Court, therefore, has applied heightened scrutiny to state laws that heap special disfavor on aliens. *See, e.g.*, *In re Griffiths*, 413 U.S. 717, 721-22 (1973) (finding alienage to be a suspect classification); *Graham*, 403 U.S. at 372 (stating that state "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny" (citations omitted)).

2. Aliens Should be Treated as a Suspect Class for Purposes of this Case

(a) The guarantees of equal protection generally apply with equal force to the federal government. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) ("Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

(b) The Supreme Court has noted a narrow exception to this general rule when the government exercises its "paramount federal power over immigration and naturalization." *Hampton*, 426 U.S. at 100. Plainly, the federal government can make immigration and citizenship rules "that would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976). The Supreme Court has therefore refused to apply heightened equal protection scrutiny to laws related to federal immigration policy. Thus, in *Diaz*, the Court upheld a Medicare provision denying federal medical insurance to aliens who had not been continuous residents for at least five years. The Court recognized that Congress could withhold an entitlement based on "the character of the relationship between the alien and this country" under its "broad power over naturalization and immigration." 426 U.S. at 79-80. *See also Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (noting "the limited scope of judicial inquiry into immigration legislation").

(c) But this exception does not apply to actions of the federal government unrelated to immigration or naturalization policy. "When the Federal Government asserts an overriding national interest as a justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest." *Hampton*, 426 U.S. at 103. In *Hampton*, the Court struck down a Civil Service Commission regulation restricting aliens' participation in the federal civil service. The Court reasoned that the regulation could not be justified by any plausible immigration rationale because the Commission's "normal responsibilities" do not include immigration policy. *Id.* at 105. *Hampton* and *Diaz* thus stand for the proposition that judicial scrutiny of federal classification of aliens "is relaxed to a 'rational basis' standard" *only* when "overriding national interests" in the field of immigration actually "predominate." *United States v. Lopez-Flores*, 63 F.3d 1468, 1473 (9th Cir. 1995). No such overriding national interest predominates here.

3. <u>The Military Order Discriminates against Aliens and Therefore is Unconstitutional</u>

(a) The Military Order subjects a person in the United States to trial before a military tribunal only if the person is an alien. The Order thus discriminates between citizens and non-citizens. In justifying this blatant facial discrimination, the Government "bears a heavy burden." *In re Griffiths*, 413 U.S. 717, 721 (1973). In particular, the Government must show that the discrimination in the Order is "necessary . . . to the accomplishment of its purpose." *Id.* at 722.

(b) The government cannot meet this burden. The stated purpose of the Military Order is to "protect the United States and its citizens [from] terrorist attacks." The Order accomplishes this purpose by subjecting suspected terrorists to military tribunals. But nothing in the Order suggests that military tribunals are *more necessary* for aliens than for

citizens suspected of terrorist activities. There is simply no reason why the government must subject aliens who have "engaged in, aided or abetted, or conspired to commit, acts of international terrorism" to military tribunals, but need not do so for citizens suspected of the same crimes. If a strong government need exists for treating aliens this way, that need would exist for citizens as well. Because the Military Order thus discriminates against a suspect class without any justification, the Order violates the Fifth Amendment.

b. The President's Military Order Violates the Fifth Amendment Because It Discriminates In the Allocation of Fundamental Trial Rights

1. Even were alienage not a suspect classification, the commission nevertheless would violate the Fifth Amendment because it discriminates in the allocation of fundamental trial rights. The Supreme Court has recognized that the government may not discriminate in the provision of fundamental trial rights on a merely rational basis, even based on non-suspect classifications. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 221, 230 (1982) (stating that, because education plays a "fundamental role in maintaining the fabric of our society," a Texas statute denying free public schooling to children who were not legally admitted into the United States must be justified by a "substantial" state interest and finding no such justification). Thus, the Court has struck down state statutes depriving the poor of appellate counsel, *Douglas v. California*, 372 U.S. 353 (1963), trial transcripts, *Griffin v. Illinois*, 351 U.S. 12 (1956), and appeal rights, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), even though poverty is not a suspect classification. *Harris v. McRae*, 448 U.S. 297 (1980).

2. Unlike the Supreme Court's cases extending deference to the federal government's classification of aliens, this case does not involve the simple preferential treatment of American citizens for government employment or economic benefits. Instead, this case touches the raw nerve of equal justice under law. The President's Military Order, based on citizenship, deprives individuals of the right to a jury trial presided over by a judge not answerable to a prosecutor. It further deprives individuals of the right to appeal to an independent tribunal. In short, the President's Military Order gives aliens an inferior method of adjudication. And it does so without even the pretense of a showing that such discrimination is necessary, and without any Congressional action. This departure from the fundamental protections of civilian justice violates the Fifth Amendment's guarantee of equal protection, irrespective of the degree of scrutiny at issue.

3. Crucially, the President's Military Order curtails rights that, at least when made available to others similarly situated, have long been deemed too fundamental to be dispensed with on a merely rational basis. If trial by jury, in cases where it is not independently mandatory, were, for example, made available to those who could afford to pay a certain fee (to defray the marginal costs to government of actually putting on a jury trial, protecting jurors, and the like), but not to those too poor to afford that fee, strict scrutiny, or something very close to it, would be mandatory, *e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Douglas v. California*, 372 U.S. 353, 355 (1963), despite the fact that poverty is not a suspect or even a semi-suspect classification. The same follows when rights as basic as the jury trial are dispensed to citizens but not to aliens who are charged with identical offenses and who have exactly the same

relationship to the *very same* international terrorist organizations with which we are at war.[1] In short, although considerable deference to the President is afforded in treating aliens less favorably than citizens in the distribution of Medicare, social security, or other similar benefits, or even in matters of employment, there is little or no room for government by approximation when it puts people on one side or another of a crude line that makes the difference between giving them access to the fundamental protections of civilian justice—from indictment to a jury trial presided over by a judge not answerable to the prosecutor, not to mention access to an appeal before a tribunal independent of the prosecuting authority—and relegating them to a distinctly less protective, and frankly inferior, brand of adjudication.[2] If the President may ever take such a step, shunting aliens into a procedure from which all U.S. citizens are spared, he may do so only upon a convincing showing of necessity, one that matches the claims of threat to the fact of alienage.

4. "There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *see also Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) ("Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."). When defenders of the line being drawn in this case can, in truth, invoke little beyond the obvious political convenience of stilling the voices that might otherwise rise up in protest were American citizens subject to trial by military commissions, the Constitution demands more evenhanded treatment by the government.

6. Files Attached. None.

7. Oral Argument. Is required. The Presiding Officer has instructed the Commission members that he will provide the Commission members with his interpretation of the law as he sees it, but that the Commission members are free to arrive at their own conclusions. The Defense asserts its right to be heard following the Presiding Officer's pronouncement via oral argument in order for the remainder of the Commission members to be informed as to the reasons for the Defenses support or opposition to the Presiding Officer's position. Additionally, the Defense intends to call expert witnesses and to incorporate their testimony into this motion via oral argument.

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1. While such discrimination may have had some plausibility in fights against nation-states, in a situation like the one we confront vis-à-vis al Qaeda, where we confront a supranational terrorist organization drawing support from many nations but being identifiable with none of them, it seems irrational to distinguish among unlawful belligerents—all of whom are members of the same terrorist group and with all of whom we are thus at war—on the basis of whether or not they happen also to be citizens of the United States as opposed to being citizens of, say, Saudi Arabia, France, or some other nation that may or may not be among the sponsors of terror but with which we are not, in any event, at war. In other words, it is one thing to give preferential treatment to U.S. citizens over their alien counterparts when that means giving less favorable treatment to citizens of a nation with which we are at war (and members of that enemy nation's military), and quite another thing to give preferential treatment to U.S. citizens when noncitizenship, rather than being a proxy for membership in the armed forces of the enemy, simply means that one is merely an unlawful belligerent rather than being a traitor as well—hardly a reason to be treated *more* harshly.

2. To be sure, if America is at war with one or more sovereign states, as it was in World War II with Germany, Japan, and Italy (the now-old "axis" powers), the federal government's decision to treat citizens of those enemy states in a harsher manner than it treats American citizens, and indeed even American citizens who might have taken up with the enemy, at least has a long-standing statutory tradition under the still-existing Alien Enemy Act of 1798, which authorizes the government to detain and deport nationals of a nation against which Congress has declared war.

8. List of Legal Authority Cited.

a. 14th Amendment, United States Constitution

b. 5th Amendment, United States Constitution

c. *Brown v. Board of Education*, 347 U.S. 483 (1954)

d. President's Military Order, 13 November 2001

e. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449 (1857)

f. *Graham v. Richardson*, 403 U.S. 365, 372 (1971)

g. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1442-47 (1992)

h. Akhil Reed Amar, *The Bill of Rights* 173 (1998)

i. *United States v. Carolene Prods.*, 304 U.S. 144, 152-53 n.4 (1938)

j. *In re Griffiths*, 413 U.S. 717, 721-22 (1973)

k. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976)

l. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)

m. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995)

n. *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)

o. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)

p. *United States v. Lopez-Flores*, 63 F.3d 1468, 1473 (9th Cir. 1995)

q. *Plyler v. Doe*, 457 U.S. 202, 221, 230 (1982)

r. *Douglas v. California*, 372 U.S. 353 (1963)

s. Trial Transcripts, *Griffin v. Illinois*, 351 U.S. 12 (1956)

t. Appeal Rights, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)

u. *Harris v. McRae*, 448 U.S. 297 (1980)

v. *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949)

w. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990)

9. Witnesses and/or Evidence Required. The Defense intends to call Professor Bruce Ackerman, Sterling Professor of Law and Political Science at Yale University (Curriculum Vitae attached) as an expert witness in the area of constitutional law and statutory law including the application of the Equal Protection Clause. Professor Ackerman's expert testimony is probative to a reasonable person under the circumstances presented specifically, based on the Professor's skill knowledge, training and education. He possesses specialized knowledge of the laws of the United States relating to equal protection. The application and substance of such laws is a legal finding to be made by members of the Military Commission beyond the training and expertise of lay persons. As such, Professor Ackerman's specialized knowledge will assist the Commission members in understanding and determining whether the President's Military Order of 13 November 2001 violates 42 U.S.C. 1981.

10. Additional Information. None.

CHARLES D. SWIFT
Lieutenant Commander, JAGC, US Navy
Detailed Military Defense Counsel
Office of Military Commissions

Review Exhibit 28A

Page 7 **Of** 7

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	)	PROSECUTION RESPONSE TO DEFENSE MOTION FOR DISMISSAL (MILITARY COMMISSIONS IMPROPERLY CONSTITUTED IN VIOLATION OF THE EQUAL PROTECTION CLAUSE) 15 October 2004

1. Timeliness: This Motion is filed in a timely manner as required by POM 4.

2. Position on Motion: The Prosecution submits that the Defense's Motion to Dismiss should be denied.

3. Facts Agreed upon by the Prosecution: The Prosecution admits the facts alleged by the Defense in subparagraphs 4(b) and 4(d) for the purposes of this motion.

4. Facts:

a. On 13 July 2004, a charge of conspiracy to commit the following offenses was referred to this Military Commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

5. Legal Authority Cited:

a. The President's Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

b. Hampton v. Mow Sun Wong, 426 U.S. 88, (1976)

c. Rodriguez v. United States, 169 F.3d 1342, (11th Cir. 1999)

d. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)

e. United States v. Lopez-Florez, 63 F.3d 1468 (9th Cir. 1995)

f. Chesna v. United States Department of Defense, 850 F.Supp. 110 (D.CT. 1994)

g. Grutter v. Bollinger, 123 S. Ct. 2325 (2003)

h. U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990)

i. Johnson v. Eisentrager, 339 U.S. 763 (1950)

j. In Re Griffiths, 413 U.S. 711 (1973)

k. Graham v. Richardson, 403 U.S. 365 (1971)

l. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)

m. Dandridge v. Williams, 397 U.S. 471 (1970)

n. U.S. v. Carolene Products Co., 304 U.S. 144 (1938)

o. Matthews v. Diaz, 426 U.S. 67 (1976)

p. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)

q. Bowers v. Campbell, 505 F.2d 1155 (9th Cir. 1974)

r. Rasul v. Bush, 124 S. Ct. 2686 (2004)

6. Discussion:

The Defense asserts that the case against the Accused should be dismissed because the President's Military Order violates equal protection under the Fifth and Fourteenth Amendments of the United States Constitution as the Commissions are available to try only non-citizens. This assertion is based on the argument that the President's Military Order must be subjected to strict scrutiny and that it would fail under this scrutiny. Alternatively, they argue that the President's Military Order is also invalid under the less exacting rational basis test. The Defense assertion is merit-less because non-resident aliens have no recourse to the United States Constitution and, therefore, the President's Military Order does not interfere with a fundamental constitutional right. Even if the Accused could assert rights under the Fifth and Fourteenth Amendments, the President's Military Order would not violate the guarantee of equal protection. The United States has a proper basis for treating citizens who take up arms against their country differently from non-citizens. In the Treason clause and elsewhere, the Constitution itself recognizes the need for special care when charging citizens with hostile and disloyal acts.

a. Non-resident aliens are not entitled to Constitutional Protections.

The Supreme Court determined in Johnson v. Eisentrager, 339 U.S. 763 (1950), that the Fifth Amendment does not afford protection to aliens outside the United States. In that case, the United States captured German citizens who were engaged in unlawful

combat in China. Id. at 766. After a military commission convicted them of war crimes, the United States transported them to Germany for imprisonment. Id. While in Germany, they filed habeas corpus petitions challenging their detention on grounds that it violated the Fifth Amendment. Id. Although the Supreme Court ultimately concluded that it lacked jurisdiction to entertain their habeas petitions, Id. at 777-778, the Court asserted that the Fifth Amendment does not apply to non-resident aliens. The Court said:

> 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. Cf. Downes v. Bidwell, 182 U.S. 244 [21 S. Ct. 770, 45 L.Ed. 1088 (1901)]. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

Id. at 784.

The Supreme Court has, however, also held that aliens are entitled to some constitutional rights. See United States v. Verdugo-Urquidez, 494 U.S. 259, 270-271 (1990) (Citing Plyer v. Doe, 457 U.S. 202, 211-212 (1982)(illegal aliens protected by Equal Protection Clause); Kwong Hai Chew v. Colding, 344 U.S. 590-596 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment); Bridges v. Wixson, 326 U.S. 135, 148 (1945)(resident aliens have First Amendment Rights); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931)(Just Compensation Clause of Fifth Amendment); Wong Wing v. United States, 163 U.S. 228, 238 (1896)(resident aliens entitled to Fifth and Sixth Amendment rights); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)(Fourteenth Amendment protects resident aliens). Each of the cases cited by the Verdugo-Urquidez court, though, stand only for the proposition that aliens may gain limited constitutional rights after coming within the territory of the United States and developing substantial connections with this country. Id.

> The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders.

Id.

In Verdugo-Urquidez, United States and Mexican Official arrested Rene Martin Verdugo-Urquidez in Mexico and brought him to the United States for trial. At the time, Verdugo-Urquidez was a both a citizen and resident of Mexico. Id. at 262. At his trial, Verdugo-Urquidez sought to exclude evidence obtained by searching his residences in Mexico on grounds that the searches violated the Fourth Amendment. Id. The Supreme Court rejected this argument, concluding that the Fourth Amendment does not apply to

the search and seizure by United States agents of property owned by a non-resident alien and located in a foreign country. Id. at 274-275. Citing Eisentrager to support this proposition, the Court said that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." Id. at 269.

In Verdugo-Urquidez, the respondent – like the Accused in the present case – argued that treating him differently from United States citizens and residents would violate equal protection. The Court emphatically dismissed this contention. The Court said:

> Respondent also contends 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. . . . But the very cases previously cited with respect to the protection extended by the Constitution to aliens undermine this claim. They are constitutional decisions of this Court expressly according differing protection to aliens than to citizens, based on our conclusion that the particular provisions in question were not intended to extend to aliens in the same degree as to citizens. *Cf. Mathews v. Diaz*, 426 U.S. 67, 79-80, 96 S.Ct. 1883, 1891, 48 L.Ed.2d 478 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens").

Id. at 273.

Finally, in Verdugo-Urquidez, the Court emphasized that applying the Constitution to aliens living abroad would have "significant and deleterious consequences for the United States in conducting activities beyond its boundaries." Id. The Court explained that the United States regularly employs Armed Forces outside this country, and that Armed Forces engage in many activities that might constitute searches and seizures. Id. at 273-274. The same reasoning applies to the Fifth Amendment. The United States unavoidably treats U.S. citizens differently from foreign citizens when it uses its military power abroad.

Saying that the Constitution does not afford rights to non-resident aliens does not mean that the United States can act unrestrained by any law. The United States must abide by the law of war. The law of war requires that the Accused receive a full and fair trial by military commission. But it does not require the United States to treat him exactly as it would treat a U.S. citizen.

The Accused in this case is not a resident of the United States, nor has he ever been, either legally or otherwise. He has no contacts whatsoever with the United States other than engaging in conspiracies to attack it and being detained at the U.S. Naval Station at Guantanamo Bay, Cuba. The fact that he is detained in Guantanamo does not help him because, "this sort of presence – lawful but involuntary – is not the sort to

indicate any substantial connection with our country." Id. at 271. Therefore the Accused has no recourse at all to the Fifth or Fourteenth Amendments and his motion must, therefore, fail at its inception.[1] [2]

b. The President's Military Order doesn't deny an accused a fundamental right.

The conduct of Military Commissions pursuant to the President's Military Order does not discriminate in the allocation of fundamental rights. The Defense claims that Military Commissions discriminate in the allocation of fundamental rights. However, heightened scrutiny applies only to the differential allocation of *constitutionally guaranteed* rights. See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 32-33 (1973). Because it has already been established by the Supreme Court that the Accused has no right to equal protection under the Fifth Amendment, indeed he has no constitutionally guaranteed rights, there is no deprivation upon which heightened scrutiny may be applied. Thus, the Accused's claim must also fail in this regard.

c. Even if the Accused had a colorable equal protection claim, federal action regarding aliens is subjected only to the rational basis test.

"The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." See Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976). Although both amendments typically require the same analysis, the two protections are not always coextensive. Id. The fact that all persons, aliens, and citizens alike, have some protections under the amendments does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship. See Matthews v. Diaz, 426 U.S. 67, 77 (1976).

> Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and some of its guests.

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[1] The Supreme Court's recent decision in Rasul v. Bush, 124 S.CT. 2686 (2004), in no way affects the validity of the Eisentrager and Verdugo-Urquidez holdings denying constitutional protections to non-resident aliens. Rasul merely interpreted 28 U.S.C. § 2241 to provide a vehicle for persons detained by the United States to challenge the circumstances of their detentions. The Court's holding was based on statutory construction and did not rely on the existence of any constitutional right.

[2] The fact is the United States has always given its citizens more rights than non-citizens when it comes to constitutional rights. The Constitution is the social compact between the United States and its citizenry. To hold that it has unfettered and equal application to all persons, wherever situated and regardless of alienage, would provide the full penumbra of procedural and substantive protections guaranteed to citizens via the Constitution to all people of the world.

Id. at 80. Therefore, while it is generally true that the strict scrutiny standard applies to Fourteenth Amendment equal protection challenges to a state's classification of aliens, courts have firmly rejected the argument that the same standard also applies to a Fifth Amendment challenge to federal classification of aliens. See Rodriguez v. United States, 169 F.3d 1342, 1347 (11th Cir. 1999) (Citing Matthews v. Diaz). That is so because the equal protection analysis involves significantly different considerations when it concerns the relationship between aliens and the States rather than between aliens and the Federal Government. Id. In situations where the federal government treats aliens differently than citizens, that treatment is normally subjected only to a rational basis test.[3] See Hampton at 103.

Because the President's Military Order is action by the Executive of the federal government, the Military Commission in which the Accused finds himself is created by federal action treating citizens and non-citizens differently. According to all federal case law, this order must be subjected only to the rational basis test.

The defense has argued that the rule in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) requires the same analysis under the Fifth and Fourteenth Amendments with only a minor exception carved out for the federal government when dealing with

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[3] Thus there are a multitude of federal provisions that rest on the premise that the legitimate distinction between citizens and aliens can justify attributes and benefits for one class not accorded to the other.

> The Constitution protects the privileges and immunities only of citizens, Amdt. 14, § 1; see Art. IV, § 2, cl. 1, and the right to vote only of citizens. Amdts. 15, 19, 24, 26. It requires that Representatives have been citizens for seven years, Art. I, § 2, cl. 2, and Senators citizens for nine, Art. I, § 3, cl. 3, and that the President be a "natural born Citizen." Art. II, § 1, cl. 5. A multitude of federal statutes distinguish between citizens and aliens. The whole of Title 8 of the United States Code, regulating aliens and nationality, is founded on the legitimacy of distinguishing between citizens and aliens. A variety of other federal statutes provide for disparate treatment of aliens and citizens. These include prohibitions and restrictions upon Government employment of aliens, e.g., 10 U.S.C. § 5571; 22 U.S.C. § 1044(e), upon private employment of aliens, e.g., 10 U.S.C. § 2279; 12 U.S.C. § 72, and upon investments and businesses of aliens, e.g., 12 U.S.C. § 619; 47 U.S.C. §17; statutes excluding aliens from benefits available to citizens, e.g., 26 U.S.C. § 931 (1970 ed. and Supp. IV); 46 U.S.C. § 1171(a), and from protections extended to citizens, e.g., 19 U.S.C. § 1526; 29 U.S.C. § 633a (1970 ed., Supp IV); and statutes imposing added burdens upon aliens, e.g., 26 U.S.C. § 6851(d); 28 U.S.C. § 1391(d). Several statutes treat certain aliens more favorably than citizens. e.g., 19 U.S.C. § 1586(e); 50 U.S.C. App. § 453 (1970 ed., Supp IV). Other statutes, similar to the one at issue in this case provide for equal treatment of citizens and aliens lawfully admitted for permanent residence. 10 U.S.C. § 8253; 18 U.S.C. § 613(2) (1970 ed., Supp IV). Still others equate citizens and aliens who have declared their intention to become citizens. e.g., 43 U.S.C. § 161; 30 U.S.C. § 22. Yet others condition equal treatment of an alien upon reciprocal treatment of United States citizens by the alien's own country. e.g., 10 U.S.C. § 7435(a); 28 U.S.C. § 2502.

See Diaz at 78, note 12.

immigration issues. That is simply not the case.[4] The cases cited above stand firmly for the proposition that federal regulation of aliens is normally given great deference with higher scrutiny being the exception that is applied only when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved. See Hampton at 100. In fact, the Adarand case is distinguishable in that the Adarand Court dealt with a race-based classification rather than a classification based on alienage. In that case, the court properly held that for purposes of race-based classifications, the analyses under the Fifth and Fourteenth amendments were the same. There is no basis to argue that Adarand's holding can be extended to the line of cases dealing with the treatment of aliens, otherwise the cases above would have been overruled by Adarand. That is not the case. Rodriguez v. United States was decided the same year as Adarand and the Supreme Court has since denied *certiorari*. See Hernandez v. U.S., 516 U.S. 1082 (1996) and Perez v. Garcia, 516 U.S. 1092 (1996).

Therefore, because the President's Military Order is federal action, because it involves national interests, and because deference to the federal branch is the norm in the area of law dealing with aliens, the President's Military Order should be reviewed under the rational basis test.

d. Even if Fourteenth Amendment Equal Protection analysis is applied, the Accused does not belong to a suspect class and the President's Military Order must still be reviewed under the rational basis test.

As stated above, the Defense suggests that the Supreme Court's holding in Adarand dictates that the analysis of the Fifth and Fourteenth Amendment for purposes of Federal action regarding aliens should be the same. That would allow the defense to use cases where *states* have passed laws involving aliens and have had them struck down using the strict scrutiny standard. Even if that were the case and the President's Military Order were subject to Fourteenth Amendment analysis, the test applied would still have to be the rational basis because non-resident aliens are not a suspect class under the Fourteenth Amendment.

The Accused alleges that he is a member of a suspect class, citing In re Griffiths, 413 U.S. 717, 721-722 (1973), and Graham v. Richardson, 403 U.S. 365, 372 (1971). The Defense's statement of the applicability of these cases is overbroad. In fact, the cases stand for two narrower propositions. First, that *lawful resident* aliens are a suspect

[4] Not only is the Defense's assertion legally inaccurate, it is also disingenuous. None of the cases cited by the Prosecution in this brief concern immigration. Diaz deals with the extension of welfare benefits to aliens. Hampton deals with the denial of federal jobs to aliens and, despite the fact that the law was found to violate equal protection, the rational basis test was applied. It is fair to note that dicta in Hampton suggested that if Congress or the President had made the rule that was found invalid, as opposed to the Civil Service Commission or the General Services Administration, the rule would have been upheld. Hampton at 103. Rodriguez v. United States deals with withholding of certain social security benefits to aliens. Finally, United States v. Lopez-Florez, 63 F.3d 1468 (9th Cir. 1995), cited by the defense, dealt with a criminal law that provided harsh punishments for smuggling aliens. In that case, the rule was subjected only to the rational basis test, and the rule was found not to violate equal protection.

class for equal protection purposes. Second, that policies that differentiate between *lawful resident* aliens and other similarly situation persons are subject to "close judicial scrutiny." Graham at 372. Nothing in these cases suggests that the same rationale would apply to a non-resident alien with no substantial contacts to the United States. In fact, every equal protection case applying strict scrutiny to a law with disparate effects on aliens involves resident aliens. The Defense will not be able to produce one case where a law affecting non-resident aliens was subjected to strict scrutiny. That is because non-resident aliens are not a suspect class. Further, similarly to the argument found above, the Accused's detention at Guantanamo Bay, Cuba cannot be argued to make him a resident alien because, "this sort of presence – lawful but involuntary – is not of the sort to indicate any substantial connection with our country." See Verdugo-Urquidez at 271.

While it may be argued that nothing currently prohibits Military Commissions from trying both resident and non-resident aliens, the Accused does not have standing to seek invalidation of the Commissions on this ground as he is not a member of the group, resident aliens, who might have Fifth Amendment rights as related to the Commission. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

Therefore, as a member of the unprotected class of non-resident aliens, the Accused's claim would be subject only to a "rational basis" review.[5] See Dandridge v. Williams, 397 U.S. 471, 485 (1970) and U.S. v. Carolene Products, 304 U.S. 144, 152 (1938).

e. Applying the Rational Basis Test, the President's Military Order must be upheld.

Under the rational basis standard, a court must uphold a rule if a court can identify any rational basis for it. Carolene Products at 152. "Absent the use of a suspect classification or the implication of a fundamental right, a governmental classification will pass constitutional muster if it bears a rational relationship to a legitimate governmental interest." See Chesna v. United States Department of Defense, 850 F.Supp. 110, 118 (D.CT. 1994). If the agency which promulgates the rule has direct responsibility for fostering or protecting that interest, it may reasonably be presumed that the asserted interest was the actual predicate for the rule. Hampton at 103. "Alternatively, if the rule were expressly mandated by the Congress or the President, we might presume that *any* interest which *might* rationally be served by the rule did in fact give rise to its adoption." Id. Furthermore, the burden would be on the Accused to show that the classification had no rational basis, and the standard of review would be an extremely deferential one. Chesna at 118 (citing Vance v. Bradley, 440 U.S. 93, 97 (1979)).

Thus the rational basis need not be specifically articulated. However a rational basis for the exclusion of citizens from the purview of Military Commissions is easily articulated. The commission of any criminal act triable before this Commission when committed by a U.S. citizen necessarily implicates the crime of treason. Treason is the

[5] Again, this argument is only relevant if the Commission finds that Fourteenth Amendment analysis applies in the first instance.

only constitutional crime specifically enumerated and described in Article III, § 3 and it may be committed only by a U.S. citizen. As such, there is a compelling interest in prosecuting a crime, originating in Article III of the Constitution, in an Article III court. This compelling interest easily furnishes a rational basis for excluding citizens from the Military Commission process.

Because the rational basis test is easily met in this case, the Defense's Motion should be denied.[6]

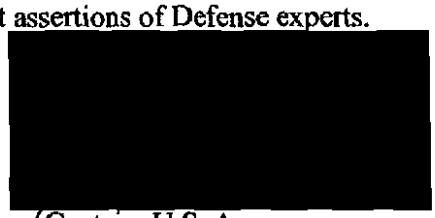
f. Conclusion.

The Accused, as a non-resident alien has no constitutional rights. Thus his motion must be dismissed in the first instance. Even if he had a right under the Fifth Amendment, that analysis would be different than that under the Fourteenth and would only afford him a review of the President's Military Order under the rational basis test. Even were Fourteenth amendment analysis to apply, non-resident aliens are not a suspect class and the rational basis test would still apply. Finally, the rational basis test is easily met in this case. For these reasons, the Defense Motion should be denied.

7. Attachments: None

8. Oral Argument: Although the Prosecution does not specifically request oral argument, we are prepared to engage in oral argument if so required.

9. Witnesses: The Prosecution has already objected via motion to the calling of legal experts. Should the Commission allow expert testimony on the law, the Prosecution reserves the right to call an expert to rebut assertions of Defense experts.



/Captain, U.S. Army
Prosecutor

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[6] Even if this Commission found that the Fifth and Fourteenth Amendment analyses of the question presented were the same and the Accused belonged to a suspect class and that the Accused was deprived of a fundamental constitutional right, the President's Military Order is still valid and constitutional. If that were the case, the President's Military Order would be subject to the strict scrutiny test. Under this test, government enactments are constitutional so long as they are narrowly tailored to serve a compelling government interest. See Grutter v. Bollinger, 123 S.Ct. 2325, 2337-2338 (2003).

In the present case, the interest cited above is not only rationally related to the President's Military Order, but is also a compelling government interests. The government has a compelling interest in having its citizenry tried in an Article III court for an Article III offense. Given this compelling government interest, the President's Military Order is narrowly tailored to address it and allows the trial of Americans for treason in Article III courts while allowing war crimes committed by aliens to be tried at Military Commissions.

UNITED STATES OF AMERICA	)
	)
	) DEFENSE REPLY TO
v.	) GOVERNMENT RESPONSE TO
	) **D19** (EQUAL PROTECTION)
	)
SALIM AHMED HAMDAN	) 27 October 2004

1. Timeliness. This reply is filed within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004, and the grant of relief by the Presiding Officer on 22 October 2004 to submit on 27 October 2004.

2. Relief Sought. That the original Defense Motion, D19, be granted.

3. Facts. See D19.

4. Law and Discussion.

A. The Constitution Extends to Guantanamo Bay

In *Rasul v. Bush*, 124 S.Ct. 2686 (2004), the Supreme Court reaffirmed the principle that fundamental constitutional rights extend to territory under the "exclusive jurisdiction and control" of the United States. *Id.* at 2698, n.15. The Government refuses to recognize the implications of the Court's holding in *Rasul* and persists in misconstruing prior cases in order to suggest that the Constitution extends only as far as the nominal sovereignty of the United States. The Government's Motion mentions *Rasul* only once—in a footnote—but it cannot bury the fact that the Supreme Court's holding in this case directly contradicts the government's argument that the Constitution does not reach those detained at Guantanamo Bay. *Rasul* held that Guantanamo detainees possess constitutional rights that they can effectuate through habeas corpus:

> Petitioners' allegations - that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws and treaties of the United States." 28 U.S.C. § 2241(c)(3). *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278 (1990) (Kennedy, J., concurring), and cases cited therein.*Id.* at 2698, n.15.

Despite the government's claim that *Rasul* involves only the habeas statute, this passage obviously concerns constitutional violations, otherwise the Court's citation to pages in Justice Kennedy's *Verdugo* concurrence would make no sense.

The "cases cited" in Justice Kennedy's concurrence, known as the *Insular Cases*, hold that "fundamental" constitutional rights extend by their own force to "unincorporated" territories. *See, e.g.*, *Downes v. Bidwell*, 182 U.S. 244 (1901). The *Insular Cases* thus guarantee fundamental constitutional rights in territory where the United States possesses governing authority; it is the exercise of exclusive jurisdiction and control, rather than nominal sovereignty that obligates the United States to recognize fundamental rights. *See, e.g., Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) (holding under the *Insular Cases* that the fundamental constitutional right to equal protection applies to citizens and aliens alike within the unincorporated territory of Puerto Rico); *Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974) ("[N]on-citizens and citizens of the United States resident in such territories are treated alike, since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive.").[1] *Rasul*'s reliance on these cases explains its holding that those in unincorporated territories like Guantanamo have constitutional rights. That is why it held "nothing in *Eisentrager* or in any of our other cases categorically exclude aliens detained in military custody outside the United States from the 'privilege of litigation' in U.S. courts." 124 S. Ct. at 2698.

The Government acknowledges "that aliens are entitled to some constitutional rights." (Motion at 3, citing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), *Plyler v. Doe*, 457 U.S. 202, *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931), *Wong Wing v. United States*, 163 U.S. 228 (1896), and other cases in which the Supreme Court has found that aliens may not be deprived of certain constitutional rights). However, the government marshals these cases in support of the proposition that aliens are entitled to constitutional rights only after coming within the sovereign territory of the United States and developing substantial connections with this country.

The cases do not support the proposition for which the government cites them. Justice Kennedy's concurrence in *Verdugo*, which the government studiously avoids even though it states the holding in that case,[2] endorses Justice Harlan's position: "The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place." *Verdugo*, 494 U.S. at 277 (Kennedy, J., concurring) (quoting *Reid v. Covert*, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)). Justice Kennedy held that courts should determine whether the application of a particular constitutional provision would be "impracticable and anomalous." *Id.*

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[1] *See* Brief Amici Curiae of Former U.S. Government Officials in Support of Petitioners, *Rasul v. Bush & Al Odah v. United States* (providing an in-depth analysis); *Ralpho v. Bell*, 569 F.2d 607, at 618-19 (D.C. Cir. 1977) (holding that Due Process constrained the Micronesian Claims Commission in its adjudication of inhabitants' claims); *United States v. Tiede*, 86 F.R.D. 227, 249-53 (U.S. Ct. for Berlin 1979) (holding that the Constitution guarantees rights to an alien defendant in the American Sector in Berlin).

[2] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 185, 193 (1977) (quotation and citation omitted). If anything, *Verdugo* establishes that the Constitution *does* apply abroad. When Justice Kennedy's vote is added to the dissenters, there are five votes for this proposition. Swift here is not alleging a comparatively weaker Fourth Amendment violation; rather he is alleging Constitutional violations that go to the heart of American Government. *See Milligan*, 71 U.S. (4 Wall.) 2, at 118-19 (1866) ("Had this tribunal the legal power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people.").

at 278. Application of the Fourth Amendment, Justice Kennedy held, would be impracticable due to the "absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials." *Id.* But these factors are not present in Mr. Hamdan's case. Unlike Mexico, Guantanamo is under exclusive jurisdiction and control of the United States. And military officers and judges at Guantanamo stand ready to execute any command from a federal court.

The government tries to evade this reasoning by repeatedly invoking a phrase from the opinion in *Verdugo* ("this sort of presence—lawful but involuntary—is not the sort to indicate any substantial connections with our country," *Id.* at 271) and using it to create the impression that constitutional protections apply only to those who have voluntary and substantial contacts with the United States. The government is able to create this impression only by lopping off the sentence in which the Chief Justice explicitly brackets the question of whether such contacts are necessary: "the extent to which respondent might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged—by a prison sentence, for example—we need not decide." *Id.* at 271-72. The individual detained in *Verdugo* was under United States control for a matter of days; Hamdan has been under U.S. control for two-and-a-half years. Thus even under the most generous reading of the opinion in *Verdugo*, the permissibility of the sustained constitutional deprivations in this case would remain an open question.

The Prosecution's suggestion that *Verdugo* means that the Constitution protects only those possessing voluntary, substantial contacts with the United States, is untrue, as is their claim that it decided the equal protection issue. *See Verdugo*, 494 U.S. at 264 ("Before analyzing the scope of the Fourth Amendment, we think it significant to note that it operates in a different manner than the Fifth Amendment, which is not at issue in this case.") For example, the Chief Justice began his analysis by explaining that, under the Fourth Amendment, "if there were a constitutional violation, it occurred solely in Mexico," where the defendant was captured. *Id.* at 264. This was in contrast to the Fifth Amendment, which protects defendants from trial in United States territory. *Id.* As Justice Kennedy's concurrence put it, "I do not mean to imply, and the Court has not decided, that persons in the position of the respondent have no constitutional protection. The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. *All would agree*, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant." *Id.* at 278 (emphasis added).

Here, Mr. Hamdan is not claiming that the Constitution was violated by his capture in Afghanistan. Rather, he is saying that the Constitution was violated by his confinement in Guantanamo for purposes of a military trial. That trial is under the auspices of the PMO, and the constitutional violation has therefore occurred in a very different location, Washington, DC, from the Mexican search and seizure of Mr. Verdugo.

Not only are the factors that militated against applying the Fourth Amendment in *Verdugo* absent in the current case, the reasons for extending the Constitution's reach are stronger. Although the protection of one's residence against warrantless searches is valuable, the rights afforded by the due process and equal protection components of the Fifth Amendment are considerably more fundamental. Mr. Hamdan's life, his freedom, his right to a fair trial, and his dignity and integrity as a human being hang in the balance.

In addition to *Verdugo*, the government deploys the recently questioned *Eisentrager*

decision, whose Fifth Amendment language is dicta and concerns only proven enemy combatants.[3] Unlike the habeas petitioners in *Eisentrager*, moreover, Mr. Hamdan is being held in a place where no other law applies.[4] If anything, *Eisentrager* itself establishes that the Equal Protection Clause protects those at Guantanamo.[5] The Prosecution overreads a purely descriptive sentence from the opinion that mentioned "sovereign territory," but *Eisentrager* was about territory, not sovereignty. *See Gherebi v. Bush*, 352 F.3d 1278 (2003) (subsequent history omitted). *See also Verdugo*, 494 U.S. at 266, 271, 274-75.

B. Even under the Most Extreme Version of Extraterritorial Rights and Military Deference, Petitioner Has Shown a Constitutional Violation

The acceptance of the government's anachronistic claim that the Constitution applies with muted force outside the U.S. would not alter this suit. "The Constitution creates a Federal Government of enumerated powers," *United States v. Lopez*, 514 U.S. 549, 552 (1995). Even under that cramped claim, civilian courts always retain the power to decide whether federal action is authorized. *See Verdugo*, 494 U.S. at 277 (Kennedy, J., concurring) ("[T]he Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic."); *Reid*, 354 U.S. at 5-6 (plurality) (the "United States is entirely a creature of the Constitution. Its power and authority have no other source").

Verdugo was based on a notion of the social compact whereby individuals who voluntarily come into the nation join the community and are burdened and benefited by its obligations and rights. Courts have found one other group to be similarly situated in this way to non-resident aliens for these purposes, and that is American servicemen and servicewomen. The military "is a specialized society separate from civilian society with laws and traditions of its own." *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (internal quotations and citation omitted). Members of the military do not have the same Bill of Rights protections. See *Brown v. Glines*, 444 U.S. 348, 354 (1980).

As a result, were this tribunal to disregard *Rasul*'s footnote 15, the cases involving servicemen are the best analogy for how this Court should treat individuals under the *Verdugo*

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[3] In light of the Supreme Court's overruling of *Ahrens v. Clark*, 335 U.S. 188 (1948), and its holding in *Rasul v. Bush*, 124 S.Ct. 2686 (2004), it is unclear whether *Eisentrager* remains good law. *See, e.g.*, *Rasul*, 124 S.Ct. at 2701 (Scalia, J., dissenting) (arguing that *Rasul* effectively overruled *Eisentrager*).

[4] Unlike *Eisentrager*, where the Government claimed "enemy aliens in enemy lands are not subject to duties under the American Constitution and laws, and * * * * like Englishmen in England, or Frenchmen in France, they must look to the rights and remedies open to them under their country's present laws and government," U.S. *Eisentrager* Br. at 67, there appears to be no inclination whatsoever to let Cuban law apply to those facing military tribunals. Deference to local practices as in Puerto Rico or the Philippines, *see Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904), is not compatible with American policy.

[5] *See* 339 U.S., at 771 ("And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties--such as the due process of law of the Fourteenth Amendment. But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its *territorial jurisdiction* that gave the Judiciary power to act. In the pioneer case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court said of the Fourteenth Amendment, 'These provisions are universal in their application, to all persons within the *territorial jurisdiction*, without regard to any differences of race, of color, or of nationality.'" (citations omitted, emphasis added)).

analysis. While civilians can raise full Bill of Rights protections, *Ex parte Milligan*, 71 U.S. 2 (1866), servicemen have only a limited ability. Nevertheless, every court permits servicemen to challenge whether a tribunal is appropriately authorized and properly constituted. *See In re Grimley,* 137 U.S. 147, 150 (1890); *Carter v. McClaughry*, 183 U.S. 365, 401 (1902). Servicemen can use habeas corpus to examine whether the tribunal: (1) is legal; (2) has personal jurisdiction over the accused; and (3) has subject-matter jurisdiction to hear the offense charged. *Hiatt v. Brown,* 339 U.S. 103, 111 (1950).

Federal courts have, all along, extended the very same tripartite formulation to unlawful belligerents. See *Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.") *Quirin* didn't give the saboteurs rights because they decided to directly threaten the U.S. by landing on its shores. To do so would have meant *rewarding* with special rights those who had infiltrated our soil instead of remaining abroad. Ironically, the government's reading, were it law, would therefore weaken national security.[6]

Yet the government today asserts nothing more than "the obnoxious doctrine asserted by the Government . . . to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review" – a view that "has been rejected fully and unquestionably." *See Yamashita*, 327 U.S. at 30 (Murphy, J., dissenting). *Eisentrager* never held what the Prosecution claims. Parts II and III of the opinion declined to extend certain Bill of Rights protections to convicted war criminals. But in Part IV, the Court reached the merits of whether the commission was appropriately authorized and properly constituted. Ever since *Milligan,* those latter inquiries have been the foundational questions that every Court has reached.[7]

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[6] Similarly, *Yamashita* permitted a convicted enemy belligerent to examine the authority of the commission on habeas:

> [W]e held in *Ex parte Quirin*, as we hold now, that Congress . . . has not foreclosed their right to contend that the *Constitution or laws of the United States withhold authority to proceed with the trial*. It has not withdrawn, and the Executive. . . could not, unless there was suspension of the writ, withdraw from the courts the *duty and power* to make such inquiry into the *authority* of the commission as may be made by habeas corpus.

327 U.S. at 9 (citations omitted, emphasis added). Petitioner stands in the same procedural position as General Yamashita, in that he has been labeled an "enemy alien" who contends that the "Constitution or laws" "withhold authority to proceed" with the trial. The Supreme Court's consideration of the petitioners' claims in Quirin and Yamashita stemmed not from any right gained by sneaking into America but from the fact that we are a nation bound by law and claim no power to punish except that permitted by law.

[7] *Eisentrager* quoted *Yamashita*'s language, that "'We consider here only the lawful power of the commission to try the petitioner for the offense charged,'" and its explanation that it *must* reach these claims on habeas. *Id.* at 787. *Eisentrager*'s Part IV mirrored the system of military justice at the time, where despite the uncertainty about Fifth and Sixth Amendment rights in the military, habeas review was always present to examine whether the tribunals had "lawful power."

The Prosecution's claim that *Eisentrager* trumps *Rasul* also faces the particular problem that Mr. Eisentrager did not even bring the same kind of habeas action as Petitioner. Eisentrager's counsel made the unusual choice to assert only one type of habeas jurisdiction, that for "being a citizen of a foreign state and domiciled therein . . . in custody for an act done or omitted under any alleged . . . order or sanction of any foreign state, or under order

Finally, the Supreme Court has already rejected the government's claim by citing to President Johnson's veto of a congressional bill establishing commissions: The Constitution "shields every human being who comes or is brought under our jurisdiction. We have no right to do in one place more than in another that which the Constitution says we shall not do at all." *Duncan v. Kahanamoku,* 327 U.S. 304, 324 n.21 (1946).

C. Guantanamo is Sovereign US Territory

Rasul v. Bush, 124 S.Ct. 2686, directly reverses the conclusion in *Al Odah v. U.S.*, 321 F.3d 1134 (D.C. Cir. 2003) that the United States lacks sovereign power over Guantanamo Bay. In *Al Odah*, the D.C. Circuit "rejected the argument—which the detainees make in this case—that with respect to Guantanamo Bay control and jurisdiction is equivalent to sovereignty." *Al Odah*, 321 F.3d at 1143 (citation and punctuation omitted). Yet the Supreme Court explicitly called the D.C. Circuit's characterization of Guantanamo into question. Whereas the D.C. Circuit claimed that "the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*," because "they are now abroad," *id.* at 1140, the Supreme Court held that the detainees *differed* from the prisoners in *Eisentrager* in that respect. It held that the *Eisentrager* detainees were "at all times imprisoned outside the United States," while the Guantanamo detainees "have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." 124 S.Ct. at 2694.

For the *Rasul* Court, this exercise of "exclusive jurisdiction and control" is the crucial marker of sovereign power. *See id.* at 2697 (citing historical evidence that the reach of sovereign power depended not on formal territorial boundaries but on "the exact extent and nature of the jurisdiction or dominion exercised in fact..."). *Rasul* thus embraced the notion "of *de facto* sovereignty" that the D.C. Circuit rejected. 321 F.3d at 1144. *Rasul* provides strong evidence that the Supreme Court considers the United States sovereign over territory where it exercises the exclusive power of a sovereign.[8] This means that the fundamental protections of the Constitution extend to Guantanamo Bay.

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thereof, the validity and effect of which depend upon the law of nations." 28 U.S.C. § 2241 (c)(4). *See also* Resp. Br., *Johnson v. Eisentrager*, at 2 (reprinting statute involved and only reprinting (a) and (c)(4)); *id.* at 24-26 (making argument based solely on (c)(4)). Lothar Eisentrager, unlike General Yamashita, eschewed a (c)(3) claim, that his trial violated the Constitution and laws. As such, Eisentrager could not benefit from, and the Supreme Court did not confront the possible tension with, *Yamashita*'s foundational claim. *Yamashita* built on the bedrock of *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325-26 (1867) (emphasis added) where the Court observed that the habeas corpus statute "is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge *every possible case of privation of liberty contrary to the National Constitution, treaties, or law*." (emphasis added). Petitioner invokes that (c)(3) claim, unlike Mr. Eisentrager, but like Mr. Rasul. Footnote 15 of *Rasul* therefore controls.

[8]Put differently, the DC Circuit's decision hinged on the fact that Guantanamo was not part of the territory of the United States. It was that crucial finding that permitted it to distinguish the leading previous case, *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977). In *Ralpho*, Congress established a commission to disburse funds for claims against the United States for damages arising out of the World War. "Because Congress intended the Micronesia Trust Territory to be treated as if it were territory of the United States, the court held that the right of due process applied to the commissions actions." *Al Odah,* 321 F.3d at 1144. Now, however, the Court has said that Guantanamo is like Micronesia in *Ralpho*.

D. The PMO Violates Equal Protection

For the very first time since the enactment of the Fourteenth Amendment, the federal government has discriminated against aliens in a matter of fundamental justice.[9] The guarantee of equal protection exists not only to safeguard a foundational concept of parity, but to ensure that politically motivated Government action may not target weak minorities. The PMO unfairly singles out aliens and has done so outside the normal channels of political accountability, thereby opening the door to the "arbitrary and unreasonable" processes infecting the commissions. *See Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring). For that reason, the Court should not award the deference typically afforded Presidential decisions to any aspect of this case, including its equal-protection justification.

1. The PMO Fails to Satisfy Any Rational Basis

The Prosecution characterizes rational-basis review as an essentially toothless standard. The Supreme Court has explicitly rejected this characterization, *see Romer v. Evans*, 517 U.S. 620, 632 (1996). *See also* Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. Chi. L. Rev. 657, 664 (2001). Indeed, rational basis is far from toothless even in cases that involve *no* suspect classifications or fundamental rights. *See, e.g., Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam). When, as here, the measure in question targets a politically unpopular group, this scrutiny has been particularly searching. *See Lawrence v. Texas*, 123 S.Ct. 2472, 2485 (2003) ("When a law exhibits... a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.") (O'Connor, J., concurring).[10] Such groups lack power in the political process, meaning that "such discrimination is unlikely to be soon rectified by legislative means." *Cleburne*, 473 U.S. at 440.

The PMO's targets face not one, but two obstacles. As aliens, they cannot vote, and as prisoners, they lack access to society. "Indeed, the special place of prisoners in our society makes them more dependent on judicial protection than perhaps any other group. Few minorities are so 'discrete and insular,' so little able to defend their interests through participation in the political process, so vulnerable to oppression by an unsympathetic majority.

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[9] The commissions in the World War II cases applied symmetrically to aliens and citizens. They also differed in scope. *See* Fisher, *Nazi Saboteurs on Trial* 160 (2003) (President Bush's "group of noncitizens and resident aliens represented a population of an estimated 18 million people. FDR had looked backward at a handful of known saboteurs who had confessed. Bush looked forward to a large population of unknowns, not yet apprehended or charged."). The Order used in the Mexican-American War also subjected both citizens and non-citizens to military tribunals. *See* General Orders, No. 287, at ¶ 9 (Sept. 17, 1847).

[10] The Court has applied this "more searching form of rational basis review" to strike down statutes that singled out for unfavorable treatment not only homosexuals, but also the mentally disabled, *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985); the children of illegal immigrants, *Plyler v. Doe*, 457 U.S. 202 (1982); hippies, *U.S. Dep't. of Agric. v. Moreno*, 413 U.S. 528 (1973); those who lack real property, *Quinn v. Millsap*, 491 U.S. 95 (1989), *Turner v. Fouche*, 396 U.S. 346 (1970); recent immigrants to a state, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), *Williams v. Zobel*, 457 U.S. 55 (1982); and those who are not married, *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Federal courts have a special responsibility to ensure that the members of such defenseless groups are not deprived of their constitutional rights." *Doe v. District of Columbia*, 701 F.2d 948, 960 n.14 (D.C. Cir. 1983) (separate statement of Edwards, J.).

The government has failed to provide any rational justification for the PMO's singling out of aliens. Instead, it has consistently asserted that the President's *ex ante* determination that commissions are "necessary" is all the justification that is needed. Yet nothing explains why commissions would be "necessary" *only* for aliens. Indeed, it is impossible to discern any logical – never mind constitutionally permissible – reason why commissions might be essential for safeguarding the homeland from Mr. Hamdan, but not from John Walker Lindh, Yaser Esam Hamdi, Jose Padilla, or terrorists who might actually intend to harm Americans.[11] As history has repeatedly demonstrated, governments have a tendency to single out outsiders for detention and punishment; the equal protection clause serves as a critical bulwark against devastating and unwarranted abuses of non-citizens in times of war. *Cf.* Presidential Comm'n on Wartime Relocation and Internment of Civilians Report (1982); Attorney General A. Mitchell Palmer, Hearing Before the House Comm. On Rules, 66th Cong. 27 (1920); Harries & Harries, *The Last Days of Innocence: America at War 1917-1918* 307-08 (1997).[12]

Accordingly, it is not surprising that the United States Supreme Court recently gutted the Prosecution's argument here:

> Nor can we see *any reason* for drawing such a line here. A citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States,' Brief for Respondents 3; such a citizen, if released, would pose *the same threat* of returning to the front during the ongoing conflict.

Hamdi, 124 S. Ct. at 2460-61 (2004).

The government's new line of argument—that the Treason Clause provides a rational basis for depriving aliens of fundamental trial rights—highlights just how far they need to strain to come up with any reason at all that might conceivably justify its blatant discrimination. To begin with, the Constitution *nowhere* says that Treason cases must be heard in federal civilian courts. See U.S. Const. Art. III, Sec. 3 ("Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."). And for that reason, Winthrop's treatise says that "'Treason' has sometimes been charged before military commissions." Winthrop,

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[11] Indeed, the Government has itself acknowledged that Congress did not want to draw an alien/citizen distinction in the AUMF. See U.S. Gov't Reply Br., at 17, in *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) ("The Authorization supports the President's use of force against any 'organization' or 'person' that 'he determines' aided the September 11 attacks, without suggesting any condition on that authority based on citizenship").

[12] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 225 (1998) (stating that the past abuses of civil liberties during wartime make it "both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty.").

Military Law and Precedents 629 n.74 (1920). The rationale the Prosecution asserts crumbles that quickly.

Not only is the rationale offered by the Prosecution at odds with the text and history of the Treason Clause, but it also doesn't even justify the line drawn by the Government. If the government were interested in distinguishing between the treasonous and non-treasonous, it would have done so by making Article III courts available to those who were charged with treason and relegating those who were not facing treason charges to the inferior commission process. But this is not what the government did. Instead, it distinguished between detainees on the basis of citizenship—not because this was a rational way to separate those accused of treason from those who were not, but because the government knew that citizens would be able to resist its unconstitutional proposals more effectively than aliens. Indeed, the prosecution, pointedly, does *not* even say that were Mr. Hamdan an American citizen, they would charge him with treason. And they cannot, for they have adduced not even one witness, let alone the constitutionally required two, that would be necessary to meet the elements of the offense.

This disingenuousness of the government's eleventh-hour invocation of the Treason Clause becomes immediately apparent when one considers how it has treated citizen detainees. The government now asserts that citizens suspected of terrorist activities must be subject to Article III courts so that they can be tried for treason. Yet in every case where the government has detained a citizen in connection with alleged terrorist activities (see, e.g., Jose Padilla, John Walker Lindh, and the recently emancipated Yaser Esam Hamdi), it has *steadfastly refused* to charge the individual with treason.

If the government consistently charged *every* citizen accused of terrorist activities with treason and brought them to justice in Article III courts, then the government's Treason Clause argument might be somewhat plausible. But given that the government has not charged *a single detainee* with treason in an Article III court, the argument is an obvious fiction. In short, the prosecution cannot manufacture a rational basis out of this tortured rationale.

The Prosecution's newly minted rationale regarding the treason clause has an even deeper problem: it directly contradicts the United States Government's **own filing in this very case in civil court**. For in Swift v. Rumsfeld, the government's defense was that

> "One of the Nazi saboteurs in Quirin was an American citizen who could have been charged with treason, but that fact did not negate his eligibility for trial by commission. 317 U.S. at 38. See also Colepaugh v. Looney, 235 F.2d 429, 432-433 (10th Cir. 1956) ("an accused has no constitutional right to choose the offense or the tribunal in which he will be tried.")

Memorandum of Points and Authorities in Swift v. Rumsfeld, Aug. 8, 2004, at 54 n.33. This argument demolishes whatever rationale the Prosecution was trying to claim, and in the very same case no less.

2. The PMO Unlawfully Discriminates Against a Suspect Class and Deprives Detainees of Fundamental Rights

The Supreme Court has long recognized that "classifications based on alienage" are "inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971). *See also In re Griffiths*, 413 U.S. 717 (1973) (finding alienage to be a suspect

classification); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948). The government argues that, although the PMO classifies on the basis of alienage, only lawfully admitted aliens residing within our geographic borders are eligible for heightened scrutiny, and that heightened scrutiny only applies to state governments. These claims are false.

First, the Supreme Court has repeatedly found that fundamental constitutional rights, including those guaranteed by the Fifth and Fourteenth Amendments, extend by their own force to territories over which the United States maintains complete jurisdiction and control. *See Otero*, 426 U.S. at 601-602. Because Guantanamo Bay is "in every practical respect a United States territory," *Rasul*, 124 S.Ct. at 2700 (Kennedy, J., concurring), these fundamental rights extend to the citizens and aliens alike within that territory.

The government's other claim, that the equal protection component of the Fifth Amendment is substantially weaker than that of the Fourteenth Amendment, is discredited by a long line of case law.[13] The government has sprinkled its footnotes with federal statutes and cases demonstrating that it is sometimes permissible for the federal government to make distinctions between citizens and aliens. Of course this is true. The federal government has broad powers to regulate all matters relating to immigration and naturalization. See, for instance, *Fiallo v. Bell*, 430 U.S. 787 (1977), *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), which counsel courts to grant Congress substantial deference in the area of immigration and naturalization.

The government argues that cases such as *Mathews v. Diaz*, 426 U.S. 67 (1976), *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), and *Rodriguez v. United States*, 169 F.3d 1342 (11th Cir. 1999), demonstrate that the federal government may discriminate against aliens not simply in matters concerning immigration, but in all matters, as long as it has a rational basis for doing so.[14] These cases do not demonstrate anything of the sort. *Diaz, Hampton*, and *Rodriguez* involve instances in which the federal government decided to privilege citizens in the allotment of federal benefits and privileges. Mr. Hamdan is not challenging the federal government's authority to condition discretionary benefits on citizenship; the government clearly has the authority to regulate incentives to immigrate to the United States and to become a citizen. The Supreme Court held as much in *Diaz* when it found that Congress could withhold an entitlement based on "the character of the relationship between the alien and this country" under its "broad power over naturalization and immigration." *Diaz*, 426 U.S. at 79-80. Thus, *Diaz, Hampton*, and *Rodriguez* stand for the principle that the federal government enjoys wide latitude when it makes policy choices governing all aspects of immigration and naturalization. That

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[13] Indeed, the Court has explicitly held that "Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995). The Court has long recognized that the Fifth Amendment's Due Process Clause embraces the "concept of equal justice under law." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). See also *News America Publishing, Inc. v. F.C.C.*, 844 F.2d 800, 804 (D.C. Cir. 1988) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

[14] The government also cites *United States v. Lopez-Flores*, 63 F.3d 1468 (9th Cir. 1995), in support of the proposition that federal laws that discriminate against aliens do not receive strict scrutiny. But this case implicated the federal government's power over immigration and foreign relations. The court in *Lopez-Flores* held that the federal government has broad power over immigration and foreign relations, that the statute at issue was an exercise of these powers, and that it therefore merited deferential review.

principle is not under dispute in this case.[15]

While the federal government has considerable power in the area of immigration and naturalization, the Supreme Court has rejected the notion that this power bleeds over into all other policies involving aliens. *Wong Wing v. United States*, 163 U.S. 228, 227 (1896), carefully distinguished between the wide latitude granted the federal government in devising policies affecting immigration and *punishment*, holding that "[i]t is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents." See also *Chan Gun v. United States*, 9 App. D.C. 290, 298 (D.C. Cir. 1896) (citing *Wong Wing* for the proposition that "[w]hen . . . the enactment goes beyond arrest and necessary detention for the purpose of deportation and undertakes also to punish the alien for his violation of the law, the judicial power will intervene and see that due provision shall have been made, to that extent, for a regular judicial trial as in all cases of crime").[16]

The PMO's discrimination against aliens is therefore constitutional only if "narrowly tailored [to] further compelling governmental interests." *Adarand Constructors*, 515 U.S. at 227. The Prosecution has failed to come close to satisfying this standard.

Even were alienage not a suspect classification, the PMO nevertheless would be entitled to heightened scrutiny because it dispenses fundamental rights to citizens but not to aliens who are charged with identical offenses and who have exactly the same relationship to the *very same* international terrorist organizations. *See, e.g., Plyler*, 457 U.S. at 221. As discussed above, fundamental rights are not limited to United States citizens or United States soil – and therefore apply to aliens in Guantanamo Bay.

The government argues that the law of war "does not require the United States to treat [an alien] exactly as it would treat a U.S. citizen." Motion at 4. Regardless of what the law of war mandates, the Constitution requires that the United States accord all defendants fundamental trial rights.[17] The government studiously overlooks numerous cases holding that

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[15] The government argues that these cases demonstrate that *Adarand's* strict scrutiny framework does not apply to governmental policies involving aliens. In fact, race and alienage are both suspect classes under federal law—the different levels of scrutiny applied in *Adarand, Diaz, Hampton,* and *Rodriguez* result from the fact that the latter three cases implicate the federal government's exceptional authority in matters concerning immigration and naturalization and are therefore accorded a higher degree of deference.

[16] The Supreme Court has recently reaffirmed its commitment to the principle that the federal government may not abrogate aliens' constitutional rights when it enacts policies that do not directly bear on immigration. *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). The Military Order has even less to do with immigration than the policies declared unconstitutional in *Wong Wing* and *Zadvydas*. When "overriding national interests" in the field of immigration do not actually "predominate," judicial scrutiny remains strict, rather than sinking to rational basis. *United States v. Lopez-Flores*, 63 F.3d 1468, 1473 (9th Cir. 1995); *Hampton*, 426 U.S. at 103. *Mathews v. Diaz*, 426 U.S. 67 (1976).

Finally, even in the context of immigration the federal government's "power is subject to important constitutional limitations." *Zadvydas, supra,* at 695. *See also INS v. Chadha*, 462 U.S. 919, 941-42 (1983). And to the extent that the government has greater leeway when it comes to unlawful aliens who violate immigration rules, that rationale cannot justify the current policy of denying rights to individuals who were forced against their will into United States territory by the American government.

[17] *See, e.g., Wong Wing*, 163 U.S. at 238 ("[A]ll persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments . . . even aliens. . . ."); *Tiede*, 86 F.R.D. at 242-44, 249 (holding that the Constitution guarantees criminal defendants overseas such fundamental rights as due

trial rights form the core of the Constitution's equal protection and due process guarantees.[18] If the government wishes to deprive the aliens detained by the United States at Guantanamo Bay of these fundamental rights, it will have to demonstrate that the abrogation of these rights is "narrowly tailored [to] further compelling governmental interests." *Adarand Constructors*, 515 U.S. at 227. The government's crude differentiation between citizens and aliens in matters of fundamental justice does not meet this standard—a failure that is brought into high relief by the government's new treason rationale.

Finally, even if this Court were to accept the novel position that nonresident aliens have no rights, the PMO is substantially overbroad because it sweeps resident aliens into it. The Supreme Court has repeatedly invoked an overbreadth rationale to strike down laws which threaten to chill other's fundamental rights. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 894 (1992) (striking down a spousal consent requirement on its face despite respondent's arguments that "the statute affects fewer than one percent of women seeking abortions"); *Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996) (Stevens, J., concurring in denial of certiorari) (collecting non-First Amendment cases); Michael C. Dorf, *Facial Challenges to States and Federal Statutes*, 46 STAN. L. REV. 235, 266 (1994).

5. Files Attached. None.

6. Oral Argument. See D19, Defense position remains the same.

7. Legal Authority Cited.

a. *Rasul v. Bush*, 124 S.Ct. 2686 (2004)

b. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)

c. President's Military Order, 13 November 2001

d. *Downes v. Bidwell*, 182 U.S. 244 (1901)

e. *Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976)

f. *Canal Zone v. Scott*, 502 F.2d 566 (5th Cir. 1974)

g. *Ralpho v. Bell*, 569 F.2d 607, at 618-19 (D.C. Cir. 1977)

h. *United States v. Tiede*, 86 F.R.D. 227 (U.S. Ct. for Berlin 1979)

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process and trial by jury regardless of their citizenship status whenever "the United States is acting as prosecutor *in its own court*").

[18] The Supreme Court has consistently applied heightened scrutiny to invalidate state statutes that deprive defendants of trial rights—not because the defendants belong to a suspect class, but because these rights are fundamental. *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

i. *Marks v. United States*, 430 U.S. 185 (1977)

j. *Johnson v. Eisentrager*, 339 U.S. 763 (1950)

k. *United States v. Lopez*, 514 U.S. 549 (1995)

l. *Balzac v. Porto Rico*, 258 U.S. 298 (1922)

m. *Dorr v. United States*, 195 U.S. 138 (1904)

n. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886)

o. *Duncan v. Kahanamoku,* 327 U.S. 304 (1946)

p. *Ry. Express Agency v. New York*, 336 U.S. 106 (1949)
q. *Romer v. Evans*, 517 U.S. 620 (1996)

r. Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. Chi. L. Rev. 657, 664 (2001).

s. *Bush v. Gore*, 531 U.S. 98 (2000)

t. *Lawrence v. Texas*, 123 S.Ct. 2472 (2003)

u. *Doe v. District of Columbia*, 701 F.2d 948 (D.C. Cir. 1983)

v. *Graham v. Richardson*, 403 U.S. 365 (1971)

w. *In re Griffiths*, 413 U.S. 717 (1973)

x. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948)

y. *Fiallo v. Bell*, 430 U.S. 787 (1977)

z. *Shaughnessy v. United States* ex rel. *Mezei*, 345 U.S. 206 (1953)

aa. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952)

bb. *Mathews v. Diaz*, 426 U.S. 67 (1976)

cc. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976)

dd. *Rodriguez v. United States*, 169 F.3d 1342 (11th Cir. 1999)

ee. *Adarand Constructors, Inc. v. Pena*, 515 U.S 200 (1995)

ff. *Wong Wing v. United States*, 163 U.S. 228 (1896)

gg. *Chan Gun v. United States*, 9 App. D.C. 290 (D.C. Cir. 1896)

hh. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)

ii. *Janklow v. Planned Parenthood*, 517 U.S. 1174 (1996)

jj. Michael C. Dorf, *Facial Challenges to States and Federal Statutes*, 46 STAN. L. REV. 235 (1994).

8. Witnesses/Evidence Required. See D19. However, the Defense objects to the Prosecution's mention, for the first time, in its 15 Oct 04 response that it may call a witness with respect to this motion. The time for providing notice of witnesses has long since passed, and the Prosecution has been notified of the Defense witnesses in a timely fashion.

9. Additional Information. None.

NEAL KATYAL
Civilian Defense Counsel

UNITED STATES OF AMERICA	)
	)
	) DEFENSE MOTION TO
v.	) DISMISS FOR LACK OF
	) LEGISLATIVE AUTHORITY
	)
SALIM AHMED HAMDAN	) 1 October 2004

1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004.

2. Relief Sought. The Military Commission find that there is no lawful authority to convene the military commission. The Military Commission should declare the proceedings illegitimate.

3. Overview. This military commission is itself illegal. The President's Military Order issued on 13 November 2001 providing for the establishment of military commissions is an unconstitutional exercise of legislative and judicial power by the Executive Branch. Our Founding Fathers wisely decreed that no President, however wise, can have the unilateral power to define offenses, pick prosecutors, select judges, authorize charges, select defendants, and then strip the civilian courts of all powers to review tribunal decisions. This principle goes all the way back to the Declaration of Independence, which listed, among the founders' complaints against King George, that he "has affected to render the Military independent of and superior to the Civil Power"; "depriv[ed] us, in many Cases, of the benefits of trial by jury"; "made Judges dependent on his Will alone"; and "transport[ed] us beyond Seas to be tried for pretended Offences." For these reasons, the Supreme Court said during the Civil War that if tribunals are ever appropriate, it is up to Congress to define how and when they are to be used.

The Constitution vests "All legislative Powers" in Congress, and requires, at a bare minimum, that unlawful conduct be defined in advance, either by positive legislation, or by reference to a recognized body of law. Article I of the Constitution grants Congress, not the Executive, the power "To define and punish...Offenses against the Law of Nations" and "To constitute Tribunals inferior to the Supreme Court." Accordingly, absent a national-security crisis so exigent as to demonstrably rule out resort to Congress, that lawmaking body and not the Chief Executive must be the authorizing agent of the military commissions and the body that defines the offenses for which an accused will be answerable before such commissions. No Act of Congress grants to the Executive under the present circumstances the authority to establish military commissions, or to define offenses subject to their exclusive jurisdiction. In addition to unlawfully exercising legislative powers, the Military Order purports to suspend the writ of habeas corpus and to circumscribe the jurisdiction of the federal courts in violation of Art. I § 9 and Art. III § 2 of the Constitution, by denying to persons held subject to the Military Order any access, remedy, or proceeding before "any court of the United States." (Military Order § 7. To allow the Chief Executive to proceed in this manner to alter the jurisdiction of the federal courts, redesigning the very architecture of American justice, is to submit to an executive unilateralism

decried by both our Founders and by federal courts, and all that came between. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Neal Katyal & Laurence Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale L.J. 1259 (2002).

Military tribunals are wartime quasi-courts borne out of necessity. As the Supreme Court concluded in *Reid v. Covert*, "the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Reid*, 354 U.S. 1, 21 (1957) (plurality op.) (footnote omitted). By tracing the jurisdiction of such tribunals to Article I, Section 8 of the Constitution, the *Reid* Court held explicitly what had long since been implicitly understood, *i.e.*, that such tribunals must be *legislative* creations, and must operate in accordance with a proper separation of powers: Congress defines the offenses and creates jurisdiction, the Executive captures offenders and runs the tribunals, and the judiciary reviews aspects of the process.

4. Facts. a. On September 11, 2001, Mohammed Atta, Abdul Alomari, Wail al-Shehri, Waleed al-Shehri, and Satam al-Suqami hijacked American Airlines Flight 11, bound from Boston to Los Angeles, and crashed it into the North Tower of the World Trade Center in New York. Mohammed Atta piloted the plane after it was hijacked. Near-simultaneously, Marwan al-Shehhi, Fayez Ahmed, a/k/a Banihammad Fayez, Ahmed al-Ghamdi, Hamza al-Ghamdi, and Mohald al-Shehri hijacked United Airlines Flight 175, bound from Boston to Los Angeles, and crashed it into the South Tower of the World Trade Center in New York. Marwan al-Shehhi piloted the plane after it was hijacked. As a result of the crashes, the towers of the World Trade Center collapsed. Approximately 2,752 people, almost all of them civilians, were killed. At the time of the hijackings and attacks, the tenants of the World Trade Center were civilian in nature. The occupants consisted of approximately 430 tenants for business and commerce purposes only. Each of the named individuals are alleged to be members of Al Qaeda.

b. On September 11, 2001, Khalid al-Midhar, Nawaf al-Hazmi, Hani Hanjour, Salem al-Hamzi, and Majed Moqed hijacked American Airlines Flight 77, bound from Washington D.C. to Los Angeles, and crashed it into the Pentagon in Arlington, Virginia. Hani Hanjour piloted the plane after it was hijacked. As a result of the crash, approximately 184 people including many civilians were killed in and around the Pentagon. Each of the named individuals are alleged to be members of Al Qaeda.

c. On September 11, 2002, Ziad Jarrah, Ahmed al-Haznawi, Saaed al-Ghamdi, and Ahmed al-Nami hijacked United Airlines Flight 93, bound from Newark to San Francisco, and crashed it into a field near Shanksville, Pennsylvania. Ziad Jarrah piloted the plane after it was hijacked. 44 civilians died in the crash. Each of the named individuals are alleged to be members of Al Qaeda.

d. The organization known as al Qaida, or "The Base," was founded in or around 1989 by Usama bin Laden, and others. Al Qaida is composed of private individuals and did not constitute the armed force of any recognized state.

e. In response to the events of September 11, 2001, on September 18, 2001, Congress passed a joint resolution authorizing the President to use all necessary and appropriate force . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Sept. 18, 2001 Joint Res.

f. On 7 October 2001, pursuant to Presidential Order the United States commenced armed hostilities in Afghanistan in support of the Northern Alliance.

g. At the time that the United States commenced armed hostilities the Northern Alliance consisted of ethnic Tajiks that opposed the Taliban regime by military force. The Northern Alliance controlled approximately 10% of Afghanistan. The remainder of Afghanistan was controlled by military force/government, commonly referred to as the Taliban.

h. The Taliban exercised political and military control over that portion of Afghanistan that it controlled. The Taliban had been recognized as the government of Afghanistan by Pakistan and Saudi Arabia. The United States, however, did not recognize the Taliban as government of Afghanistan.

i. The United States, however, prior to the commencement of the use of military force negotiated with the Taliban seeking that they capture and turn over Usama Bin Laden and other members of al Qaeda to the United States.

j. On 13 November 2001, President Bush issued a military order pursuant to the authority vested in him as President of the United States and Commander in Chief of the Armed Forces of the United States by the Constitution and laws of the United States vesting in the Secretary of Defense the authority to try by military commission those persons that the President determined were subject to the order.

k. Subsequent to the President's Military Order of 13 November 2001, Mr. Hamdan was taken prisoner by indigenous Afghanistan forces in late November 2001, where upon he was subsequently turned over to U.S. personnel for a bounty and has been detained by the United States government ever since.

l. On 3 July 2003, the President of the United States determined that Mr. Hamdan was subject to his military order of 13 November 2001.

m. 13 July 2004, a charge of conspiracy to commit terrorism against Mr. Hamdan was referred to this Military Commission.

5. Law.

a. Under the United States Supreme Court Decisions in *Milligan* and *Quirin*, Military Tribunals Must be Authorized by Congress, Not the President Acting Alone.

1. The United States Supreme Court has recognized, on limited occasions, the constitutional validity of military commissions, but has always required those commissions to be authorized by Congress. Congress has not done so here.

2. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court unanimously struck down military tribunals created unilaterally by President Lincoln to try Southern sympathizers in the North during the Civil War in areas where the civilian courts were functioning. *Id.* at 127. "No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people," the Court intoned, than whether a military "tribunal [had] the legal power and authority" to punish Milligan. Id., at 118-19. This is precisely the issue presented by the Military Order, which contemplates detention and "tri[al by military commission . . . and . . . punishment . . . including life imprisonment or death." §3(a), §4(a).

3. The Court then announced its holding that the military trial was unconstitutional. "Martial rule can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction," it stated, for the "Constitution of the United States is the law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." 71 U.S., at 120, 127. The Court specifically rejected the claim that military "jurisdiction is complete under the 'laws and usages of war,'" repeating that martial law cannot be applied when "the courts are open and their process unobstructed." Id. To the Court, "[o]ne of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress." Id., at 122. The President could not unilaterally create such a tribunal:

> [F]rom what source did the military commission that tried [Milligan] derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it 'in one supreme court and such inferior courts as the Congress may from time to time ordain and establish,' and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws' and there is 'no unwritten criminal code to which resort can be had as a source of jurisdiction.'" Id., at 121.

4. This was true "no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety." 71 U.S., at 119. Though the Court split 5-4 on the question of whether *Congress* could create such courts, *see id.* at 136-37 (Chase, C.J.), it was unequivocal on the lack of independent executive authority thereto. *Cf. United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955) ("[T]his assertion of military authority over civilians *cannot* rest on the President's power as commander-in-chief, or on any theory of martial law." (emphasis added)). Both opinions in *Milligan* thus "leave[] the President little unilateral freedom to craft an order to detain people on his own suspicion for

indefinite warehousing or trial at his pleasure in a system of military justice." Katyal & Tribe, *supra*, at 1279-80.[1]

5. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court relied on the Articles of War in force during World War II—a statute passed by Congress in 1920—as the source of President Franklin D. Roosevelt's authority to try eight Nazi saboteurs captured on U.S. soil during the war. *See id.* at 26-27. In a critical passage, the Court noted how:

> By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war his invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon

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[1] These limits on executive power were made clear by Attorney General Thomas Gregory's construction of *Milligan*'s holding in 1918 in the case of Pable Waberski. Waberski was a German agent who had come to the United States during World War I. He had evidently admitted to plans to demolish various targets, and to having previously demolished "munition barges, powder magazines, and other war utilities in the United States." Nevertheless, the Attorney General opined that a military trial would be unconstitutional:

> Milligan was a citizen of the United States. But the provisions of the Constitution upon which the decision was based are not limited to citizens. . . . [Even if] there were no Milligan case to furnish us with an authoritative precedent, the provisions of the Constitution would themselves plainly bring us to the same conclusions as those set forth in the opinion of the court in that case, namely, that in this country, military tribunals, whether courts-martial or military commissions, can not constitutionally be granted jurisdiction to try persons charged with acts or offences committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers. Were this not the correct conclusion, then any person accused of espionage, for instance, wherever apprehended and wherever the act charged may have been committed, would immediately become subject to the jurisdiction of a military court, and all the above-cited provisions of the Constitution [the Fourth, Fifth, and Sixth Amendments] would be rendered nugatory in the cases of the most grave class of crimes, generally carrying the death penalty. Any other conclusion would be tantamount to applying martial law, where no justification for martial law exists and none had been declared, and would be a suspension of the Constitution during war times.

Trial of Spies by Military Tribunals, 31 U.S. Op. Atty. Gen. 356, 361-62 (1918). Attorney General Gregory then explained why he believed that Article III also "precludes the jurisdiction of a military court." Id. Just in case there was any doubt, the Attorney General then reproduced the passage from the *Milligan* majority block-quoted above, that it was "not pretended that the commission was a court ordained and established by Congress" so the President could not unilaterally create the tribunals because he "has his appropriate sphere of duty, which as to execute, not to make, the laws." Id. at 362

> him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war. *Id.* at 28.

6. Thus, in *Quirin*, the Court sustained the use of military tribunals pursuant to Presidential proclamation because Congress had expressly provided for such. *See id.*; *see also Padilla,* 352 F.3d, at 715-16 ("[T]he *Quirin* Court's decision to uphold military jurisdiction rested on express congressional authorization of the use of military tribunals to try combatants who violated the laws of war."); Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* 121-25 (2003) (emphasizing the importance of affirmative Congressional action to the Court's decision). As the *Quirin* Court continued, "[i]t is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions." *Quirin*, 317 U.S. at 29; *see also In re Yamashita*, 327 U.S. 1, 7-8 (1946) (similar).

7. *Quirin* left undisturbed the Supreme Court's previous jurisprudence, which made it clear that the President cannot, by mere executive decree, establish military commissions. Therefore, at least when the tribunals are held off the battlefield,[2] *Milligan* and *Quirin*, read together, compel the result that such tribunals must be held pursuant to some form of congressional authorization. *See also Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (highlighting the battlefield distinction).

b. <u>*Quirin* Interpreted Article 15 of the Articles of War to Authorize Tribunals, but that Authorization was Confined to Specific Charges that the Law of War Recognized as Triable by Commission and for which the Constitution did not Require Trial by Jury.</u>

1. The World War II trials by military commission for violations of the law of war were conducted under the auspices of Article 15 of the 1920 Articles of War,[3] which provided:

> The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders

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2. Tribunals conducted in the zone of combat (or in occupied territory) during times of war raise different—though no less important—questions that Mr. Hamdan takes no position on here. The Supreme Court has at least implicitly suggested that such tribunals *do* fall under the President's constitutional authority as Commander-in-Chief. *See Madsen v. Kinsella*, 343 U.S. 341 (1952). *Madsen* was strictly distinguished as discussing only tribunals conducted in occupied territory, however, by *Reid v. Covert*. *See Reid*, 354 U.S. at 35 & n.63 (plurality op.).

3 As the *Quirin* Court concluded, "Congress has the choice of crystallizing in permanent form and minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course." *Quirin*, 317 U.S. at 30.

or offenses that that by statute or the law of war may be triable by such military commissions, provost courts, or other military tribunals. Act of June 4, 1920, ch. 227, art. 15, 41 Stat. 759, 790 [hereinafter 1920 Articles of War].[4]

2. Thus, Congress authorized the trial by military tribunal of any offense triable by such tribunals under the "law of war." *See Yamashita*, 327 U.S. at 7-8 (reaching this conclusion).

3. A critical aspect of the Court's decision in *Quirin* thus turned on the extent to which the alleged offenses were, at the time, universally accepted violations of the law of war. *See Quirin*, 317 U.S. at 29 ("We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal."). Finding spying and sabotage behind enemy lines to be two such offenses against the law of war, the Court sustained the tribunals. Nevertheless, the Court commented on the limited jurisdiction of such tribunals: "We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury." *Id.* at 29.

4. The President's Military Order today, by contrast, extends the range of offenses that it makes subject to military tribunals to include "any and all offenses triable by military commission"—not just acts of unlawful combatants that offend the laws of war, but also "violations of . . . *other applicable laws*."[5] Military Order, §§ 1(e), 4(a) (emphasis added). As such, it is facially unconstitutional and unconstitutional as applied to Mr. Hamdan. Unlike the specific laws in *Quirin*, neither the terrorism statutes on the books as of September 11, nor the ones that Congress enacted afterward, provide for a military trial for acts of terrorism.

5. Again, this lack of authority is strikingly different than *Quirin,* where the *charges* brought against the Nazi saboteurs—and not merely the *tribunals* before which such charges could be heard—were explicitly authorized by Congress. Charges 2 and 3 against the saboteurs, essentially mirroring parts of the United States Code, accused the defendants of committing specifically defined capital wartime offenses; those federal statutes explicitly authorized trial of such crimes by military commission.[6] It is unclear whether the Court believed that the two other charges were pendant to or derivations of these specific authorizations. Either

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[4] The 1920 Articles, with some modifications, were codified, in 1950, as the Uniform Code of Military Justice (UCMJ). *See* Act of May 5, 1950, ch. 169, 64 Stat. 115. Specifically, Article 15 of the 1920 Articles of War was codified with no material differences as Article 21 of the UCMJ, and remains on the books there today. *See* 10 U.S.C. § 821 (2000).

5. *Id.*

6. *See* Act of Aug. 29, 1916, ch. 418, § 3, art. 82, 39 Stat. 619, 663 ("Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by general court-martial *or by a military commission*, and shall, on conviction thereof, suffer death." (emphasis added)); *id.* § 3, art. 81, 39 Stat. at 663 ("Whosoever relieves the enemy with arms, ammunition, supplies, money, or other thing . . . shall suffer death, or such other punishment as a court-martial *or military commission* may direct." (emphasis added)).

way, of course, the Court in *Quirin* had before it what this Court does not: specific language from Congress that authorized the charges against the defendants.

6. *Quirin* analyzed the first charge in terms that grounded its holding in specific congressional authorization. In particular, the Court looked to the language of a federal statute, Article 82, and emphasized that the provision had been part of the United States Code since the Founding.[7] In fact, the Government's two specifications of the first charge each tracked the statutory language of Articles 81 and 82. Its first specification was based on Article 82:

> The gravamen of the specification [of the first charge] is that, contrary to the law of war, each of the accused persons, acting for and on behalf of the German Reich, a foreign state with which the United States is at war . . . secretly passed through coastal military or naval lines or defenses of the United States and, in civilian dress, *went within zones of military operations or elsewhere* behind one or more of those lines or defenses.[8]

The second specification was based on Article 81, for it charged that "each of the accused persons, acting for and on behalf of the German Reich . . . appeared within zones of military operations or elsewhere . . . and there . . . assembled together *explosives or money or other supplies*."[9] In other words, unlike the case against Mr. Hamdan, on the record in *Quirin* Congress had in fact specifically authorized the use of military tribunals for the charges against the saboteurs.

7. There is absolutely no indication that Mr. Hamdan faces a charge that Congress has authorized to be tried by a military commission. As such, Mr. Hamdan languishes in solitary confinement to one day hear charges brought before an unauthorized military commission. The Supreme Court has forbidden military trial in these circumstances.

c. <u>*Quirin*'s Authorization was Confined to *Declared* Wars.</u>

1. The Court's approval of the military commission in *Quirin* turned on one other fact which is woefully lacking here: a state of *declared* war. As the Supreme Court wrote at the outset of its opinion, "[t]he Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared." *Quirin*, 317 U.S. at 26. The source of the Executive power at issue in *Quirin* was traced by the Court to the state of declared war. *See id.* at 26-28. The Court expressly relied on the declaration of war as the source of its decision, in the same way that the same Court, six years later, relied on the declaration of war as the source of

7. *Quirin*, 317 U.S. at 41. In support of a reading that treats the Court as having found adequate statutory authorization in Article 82, consider also the Court's later description that, in *Quirin*, "the military commission's conviction of saboteurs . . . was upheld on charges of violating the law of war *as defined by statute*." Madsen v. Kinsella, 343 U.S. 341, 355 n.22 (1952) (emphasis added).

8. Brief of the Respondent app. III, at 78, *Quirin* (Orig. Nos. 1-7), *reprinted in* 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 397, 479 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS] (emphasis added).

9. *Id.* at 79, *reprinted in* 39 LANDMARK BRIEFS, *supra* note 8, at 480 (emphasis added).

authority for Executive action under the Alien Enemy Act of 1798 (now codified at 50 U.S.C. §§ 21-24 (2000)), *Ludecke v. Watkins*, 335 U.S. 188 (1948).

2. It is not only the Declaration of War itself, but also the words Congress used in 1941, that are significant. In World War II, Congress' Resolution underscored the government's total commitment to the war effort:

> [T]he state of war between the United States and the Government of Germany . . . is hereby formally declared; and the President is hereby authorized and directed to employ the *entire* naval and military forces of the United States and the *resources of the government* to carry on war against the Government of Germany; and, to bring the conflict to a successful termination, *all of the resources of the country* are hereby pledged by the Congress of the United States. Joint Resolution of Dec. 11, 1941, Pub. L. No. 77-331, 55 Stat. 796, 796 (emphasis added).

3. Nothing even close to that World War II authorization is present today. Significantly, the Resolution passed by Congress several days after the September 11 terrorist attacks permits only the use of "force"; applies only to persons or other entities involved in some way in the September 11 attacks; and then extends only to the "prevent[ion of] . . . future acts of international terrorism against the United States by such nations, organizations or persons."[10] In this Resolution, Congress studiously avoided use of the word "war." Representative Conyers, for example, stated that "[b]y not declaring war, the resolution preserves our precious civil liberties" and that "[t]his is important because declarations of war trigger broad statutes that not only criminalize interference with troops and recruitment but also authorize the President to

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[10] The Resolution states:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Joint Resolution: To Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

Congress intentionally rejected proposed White House language that would have authorized the use of force against all nations that harbor terrorists, whether or not connected to September 11. *See* John Lancaster & Helen Dewar, *Congress Clears Use of Force, $40 Billion in Emergency Aid*, WASH. POST, Sept. 15, 2001, at A4; *see also* 147 CONG. REC. S9949 (daily ed. Oct. 1, 2001) (statement of Sen. Byrd) ("[T]he use of force authority granted to the President extends only to the perpetrators of the September 11 attack. It was not the intent of Congress to give the President unbridled authority . . . to wage war against terrorism writ large . . . ."); *id.* at S9951 (statement of Sen. Levin) (making a similar point). The proposed White House resolution stated that the President was authorized to use force not only against those countries and entities responsible for the September 11 attacks, but also "to deter and pre-empt any future acts of terrorism or aggression against the United States." 147 CONG. REC. S9951 (daily ed. Oct. 1, 2001) (reprinting the text of the proposed White House resolution).

apprehend 'alien enemies.'"[11] But the President's Military Order, unlike Congress's Resolution, in no way confines its reach to those involved in the September 11 attacks: it explicitly asserts the power to try *any* "international terroris[t]" anywhere in the world. Military Order, § 1(a). No matter how broadly the statutes and precedents are stretched, there is no constitutional warrant for expanding the military tribunals' authority in just the way Congress refused to expand presidential power—to cover individuals unconnected to the September 11 attacks.

4. These differences are exacerbated by an important distinction between the Nazi saboteurs and alleged members of al Qaeda, such as Mr. Hamdan. Unlike the status of the eight Nazis who abandoned their uniforms, that of al Qaeda members as "unlawful belligerents" is incapable of being ascertained apart from their ultimate guilt of planning and executing acts that massacre unarmed civilians and thereby violate the laws of war. The result is that any determination today of the jurisdiction of the military tribunals is necessarily bound up with the merits of the substantive charges against a particular defendant. At least in *Quirin* it was possible for the Supreme Court to say, from the undisputed fact that it had before it Nazi soldiers who had deliberately abandoned their military garb to pass unnoticed among the civilian population, that the defendants—being analogous to the spies prosecuted by tribunals at the time of the Founding—had no historically grounded right to the usual protections of jury trial and the like, even if ultimately innocent of the charges against them. The present Order, by contrast, makes the jurisdictional question (whether someone is subject to a military trial at all) the very same one as the question on the merits (whether the person is guilty of a war crime).

5. These distinctions—that *Quirin* involved a total, declared war, with unlawful belligerents identifiable in terms distinct from the merits and with charges that were coupled to statutes that explicitly authorized a military trial—must be viewed against the backdrop of the language in the opinion going out of its way to say that the Court's holding was extremely limited. The Court said that it had "no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals" and that "[w]e hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission." *Quirin*, 317 U.S. at 45-46. Indeed, *Quirin* recognized that the use of tribunals may be conditioned by the Sixth Amendment. *See id.* at 29 (assuming that some offenses against the law of war are "constitutionally triable only by a jury," as *Milligan* held). At most, *Quirin* provides a narrow exception to the general rule announced in the earlier *Milligan* case, which found congressional authorization to be a necessary, although by no means sufficient, requirement.

d. <u>No Statute Today Authorizes a Military Commission to Try Mr. Hamdan.</u>

1. Unlike the situation in *Quirin*, where Congress had declared war and explicitly committed all the resources of the nation to its prosecution, in this case the President's Military Order invokes the vague language of 10 U.S.C. § 821 to justify the establishment of military

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[11] 147 CONG. REC. H5638, H5680 (daily ed. Sept. 14, 2001) (statement of Rep. Conyers); *see also id.* at H5653 (statement of Rep. Barr) (arguing that "[w]e need a declaration of war" from Congress to "[g]ive the President the tools, the absolute flexibility he needs").

commissions. There are two problems with this argument. *First*, Section 821 provides no authorization in it, the provision merely rebuts the negative implication that the creation of a court-martial eliminates the jurisdiction of a military commission.[12] It is not a source, therefore, of affirmative authority for a military commission, as its very words make clear: "The provisions of this chapter conferring jurisdiction upon courts-martial *do not deprive military commissions*, provost courts, or other military tribunals of *concurrent jurisdiction* with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." 10 U.S.C. 821. This provision can hardly constitute the type of affirmative assent necessary before rights are stripped from individuals.

2. *Second*, when the previous Article 15 was incorporated into the UCMJ, Congress indicated that it, along with many other provisions in the UCMJ, were limited to declared wars. During the UCMJ's codification, Congress deleted the words "in time of war" from another provision, Article of War 78, to make clear that that provision, evidently in contrast to such others as Article 15, permitted a court-martial to impose death or other punishment for certain forms of trespass in circumstances "amounting to a state of belligerency, but where a formal state of war does not exist." Hearings on H.R. 2498 Before the Subcomm. of the House Comm. on Armed Services, 81st Cong. 1229 (1949).

3. Indeed, the UCMJ's provisions have generally been read narrowly to avoid military trials, in the absence of a formal declaration of war, of those who do not serve in our armed forces. For example, when a civilian employee of the Army was charged with criminal violations in Vietnam and tried by court-martial, the United States Court of Military Appeals decided that, in determining the applicability of the UCMJ, "the words 'in time of war' mean . . . *a war formally declared by Congress*."[13] The court believed that "a strict and literal construction of the phrase 'in time of war' should" confine the jurisdiction of military courts.[14]

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[12] *See* Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 88 n.413 (1996) (stating that neither "the history of military tribunals in United States jurisprudence [nor] the rules of international law warrant such a broad and ambiguous interpretation of the phrase" and that the "better approach . . . is for Congress to amend [§ 821] and make the jurisdictional basis absolutely clear to both potential criminals and their defense attorneys"). It is also notable that some of the main proponents of military tribunals for terrorists have suggested that affirmative congressional authorization is necessary. *See* Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 398-99 (1996)

[13] United States v. Averette, 19 C.M.A. 363, 365 (1970) (emphasis added). The same court followed this line of reasoning in *Zamora v. Woodson*, 19 C.M.A. 403 (1970), holding that the term "in time of war" means "a war formally declared by Congress," and that the military effort in Vietnam could not qualify as such. *Id.* at 404; *see also* Robb v. United States, 456 F.2d 768, 771 (Ct. Cl. 1972) (holding that "short of a declared war," a court-martial did not possess jurisdiction over a civilian employee of the Armed Forces).As the *Averette* court wrote:

> We emphasize our awareness that the fighting in Vietnam qualifies as a war as that word is generally used and understood. By almost any standard of comparison—the number of persons involved, the level of casualties, the ferocity of the combat, the extent of the suffering, and the impact on our nation—the Vietnamese armed conflict is a major military action. But such a recognition should not serve as a shortcut for a formal

4. The UCMJ's term "in a time of war" thus requires a congressionally declared war to provide jurisdiction over civilians for courts-martial or military tribunals. This history underscores why *Quirin*'s reasoning was so heavily grounded in the declaration of war. Standard "clear statement" principles—that if the legislature wants to curtail a constitutional right, it should say so clearly or its legislation will be construed to avoid the constitutional difficulty—require this strict reading.[15] Without a clear statement by Congress about the need for military tribunals, it is impossible to evaluate the exigencies of the situation and to determine whether the circumstances truly justify dispensing with jury trials, grand juries, and the rules of evidence.[16]

5. If the UCMJ were stretched to give the President the power to create the tribunals purportedly authorized by this Order, it would transform the statute into an unconstitutional delegation of power.[17] Such an interpretation would leave the President free to

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> declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction.

Averette, 19 C.M.A. at 365-66.

[14] *Averette*, 19 C.M.A. at 365.

[15] *E.g.*, Kent v. Dulles, 357 U.S. 116, 129-30 (1958) (holding that the Secretary of State could not deny passports on the basis of Communist Party membership without a clear delegation from Congress, and that this permission could not be "*silently granted*" (emphasis added)); *see also* Valentine v. United States *ex rel* Neidecker, 299 U.S. 5, 9 (1936) (preventing an extradition where the treaty did not provide for it, out of a concern for liberty, stating that "the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against [an individual] must be authorized by law. . . . [T]he legal authority does not exist save as it is given by an act of Congress").

[16] Even the freedoms of speech and the press may be contingent at times on congressional authorization to curtail them when national security is at stake. In *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Supreme Court denied the President an injunction to block the *New York Times* and the *Washington Post* from publishing documents which the administration claimed would damage the military effort in Vietnam:

> The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press . . . even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law.

Id. at 718 (Black, J., concurring). Justice Marshall observed that Congress had considered legislation that would have made such disclosure criminal and "[i]f the proposal . . . had been enacted, the publication of the documents involved here would certainly have been a crime." *Id.* at 747 (Marshall, J., concurring); *see also id.* at 740 (White, J., concurring) (noting that Congress "ha[d] not, however, authorized the injunctive remedy against threatened publication"). Justice White's reluctance to defer to the executive, "[a]t least in the absence of legislation by Congress," *id.* at 732 (White, J., concurring), was echoed by Justice Douglas's indication that the case might have been different with specific congressional authorization or a declaration of war, *id.* at 722 (Douglas, J., concurring); *cf.* DAVID RUDENSTINE, THE DAY THE PRESSES STOPPED 106 (1996) (quoting Alexander Bickel's argument in the case that "any plausible conception of the separation of powers doctrine barred the government from suing the *Times* . . . . [T]he suit could go forward only if Congress had passed a statute authorizing it").

[17] *See* Clinton v. City of New York, 524 U.S. 417, 449-53 (1998) (Kennedy, J., concurring); Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting); Indus. Union Dep't v. Am. Petroleum

define a "time of war," grant him the discretion to set up military tribunals at will, bestow upon him the power to prosecute whomever he selects in a military tribunal, vest him with the authority to label something an offense and to try an offender for it, give him the power to try those cases before military judges that serve as part of the executive branch, and perhaps even empower him to dispense with habeas corpus review by an Article III court.

6. For these and other reasons, modern courts have been reluctant to construe vague statutes as authorization, even when old precedent said otherwise. For example, despite a strong statutory precedent, when the Governor of Hawaii and President Roosevelt created military tribunals in Hawaii in the wake of the bombing of Pearl Harbor, the Supreme Court in *Duncan v. Kahanamoku,* 327 U.S. 304 (1946), struck them down. An Act of Congress called the Organic Act permitted the Governor of Hawaii, with the concurrence of the President, to declare "martial law" when the public safety required it, but the Court construed the Organic Act not to permit military tribunals for the trial of garden-variety offenses coming within the jurisdiction of the civilian courts, even though Hawaii was "under fire" and a "battle field." *Id.* at 344 (Burton, J., dissenting). The Court reached this conclusion in the face of a powerful statutory precedent to the contrary: The Hawaii Constitution had a similar martial-law provision that its supreme court had construed to permit the Governor to create military tribunals, and Congress had enacted the Organic Act following the state court decision. *See id.* at 316 (majority opinion) (rejecting the government's argument that "[w]hen Congress passed the Organic Act it simply enacted the applicable language of the Hawaiian Constitution and with it the interpretation of that language by the Hawaiian supreme court").

7. The Supreme Court found the argument from statutory precedent to be unconvincing. Reasoning that Congress "did not specifically state" or "explicitly declare" that the military could close the civil courts, *id.* at 315, the Court construed Congress's statute in light of "our political traditions and our institutions of jury trials in courts of law"—traditions that "can hardly suffice to persuade us that Congress was willing to enact a Hawaiian supreme court decision permitting such a radical departure from our steadfast beliefs." *Id.* at 315. Instead, the Justices wrapped themselves firmly in the language of *Milligan*:

> [The Founders] were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the constitution itself. See *Ex parte Milligan.* Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government . . . .

Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring); Cal. Bankers Ass'n v. Schultz, 416 U.S. 21, 91-93 (1974) (Brennan, J., dissenting). *But see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (finding no violation of the nondelegation doctrine); Loving v. United States, 517 U.S..748 (1996).

> . . . [T]he only [other] time this Court had ever discussed the supplanting of courts by military tribunals in a situation other than that involving the establishment of a military government over recently occupied enemy territory, it had emphatically declared that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." *Ex parte Milligan*. *Id.* at 322, 324 (citations omitted).

8. *Duncan* makes clear that, under the *Milligan* principle, when military tribunals are substituted for available civil alternatives, specific authorization is necessary even when Congress has supposedly codified judicial precedent purporting to discern authority in preexisting statutes.

e. Subsequent Developments, Including the Codification of the UCMJ and the Ratification of the Geneva Conventions, Limited Whatever Effect *Quirin* Has As Precedent.

1. Whatever force *Quirin* may have once had has as precedent for the Government, today it has been eclipsed by subsequent developments, most notably the signing and ratification of the 1949 Geneva Conventions and the 1950 codification of the Uniform Code of Military Justice. The Geneva Conventions wholly revamped and broadened the legal rights of *all* wartime detainees, and the UCMJ replaced the Articles of War and narrowed the scope of much of the military's criminal jurisdiction. Coupled with the enactment of the War Crimes Act of 1996, these subsequent developments further support the narrow reading of *Quirin* as a case limited to the specific issue before it—military tribunals that tried enemy belligerents who admitted to espionage and sabotage during a state of declared war.

2. Congress has never, for even a moment, lent its imprimatur to the use of military tribunals to try individuals whose status is in doubt for crimes not proscribed by Congress during an undeclared war. Instead, under the President's Military Order creating the present tribunals, the power to define offenses, to detain offenders, to try them, and to sit in judgment thereof, all belong to the Executive. Yet, as James Madison famously warned:

> No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that . . . [t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

3. Military tribunals are not meant to be courts of first resort; they are courts of last resort when circumstances do not otherwise permit trial by civilian court. This principle, at the core of *Milligan*, 71 U.S. at 122, has not since been repudiated by any court, and must guide the court's decision in the instant case. After all, there is nothing preventing the Executive from subjecting detainees like Mr. Hamdan to trials for alleged crimes before Article III courts, whether for providing material support to al Qaeda, *see* 18 U.S.C. § 2339B, seditious conspiracy, 18 U.S.C. § 2384, or any other of a host of crimes that the allegations might seem to support.

Nor is there nearly the same problem with a court martial proceeding. Indeed, Congress has specifically authorized trials by court-martial for violations of the laws of war. See 10 U.S.C. § 818 ("general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.")

4. Not all military commissions are unconstitutional. But this one certainly is. Members of this esteemed body should recognize this fact and declare the prosecution null and void as an abuse of Presidential power.

6. Files Attached. None.

7. Oral Argument. Is required. The Presiding Officer has instructed the Commission Members that he will provide the Commission Members with his interpretation of the law as he sees it, but that the Commission members are free to arrive at their own conclusions. The Defense asserts its right to be heard following the Presiding Officer's position. Additionally, the Defense intends to call expert witnesses and to incorporate their testimony into this motion via oral argument.

8. List of Legal Authority Cited.

a. United States Declaration of Independence, 1776

b. Constitution of the United States, Art 1 and Art 3

c. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)

d. Neal Katyal & Laurence Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale L.J. 1259 (2002).

e. *Reid v. Covert*, 354 U.S. 1 (1957)

f. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)

g. *Cf. United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955)

h. *Ex parte Quirin*, 317 U.S. 1 (1942)

i. *Padilla,* 352 F.3d, at 715-16 695 (S.D.N.Y. 2003)

j. Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* 121-25 (2003)

k. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946)

l. Act of June 4, 1920, ch. 227, art. 15, 41 Stat. 759 (Articles of War, 1920)

m. *Yamashita*, 327 U.S., 1 (1946)

n. Alien Enemy Act of 1798 (now codified at 50 U.S.C. §§ 21-24 (2000))

o. *Ludecke v. Watkins*, 335 U.S. 188 (1948)

p. Joint Resolution of Dec. 11, 1941, Pub. L. No. 77-331, 55 Stat. 796

q. 10 U.S.C. § 821

r. Uniform Code of Military Justice, Art 15 (2002)

s. Hearings on H.R. 2498 Before the Subcomm. of the House Comm. on Armed Services, 81st Cong. 1229 (1949)

t. The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961)

u. 18 U.S.C. § 2339B

v. 18 U.S.C. § 2384

w. 10 U.S.C. § 818

9. Witnesses and/or Evidence Required. The Defense intends to call Professors Bruce Ackerman and Jordan Paust (Curriculum Vitae for Professor Ackerman attached) as expert witnesses in the area of constitutional and statutory law, specifically discussing the separation of powers, in support of this motion. The expert testimony is probative to a reasonable person under the circumstances presented based on the professors' skill knowledge, training and education. They possess specialized knowledge of the laws of the United States relating to separation of powers. The application and substance of such laws is a legal finding to be made by members of the Military Commission beyond the training and expertise of lay persons. As such, the professors' specialized knowledge will assist the Commission Members in understanding and determining whether the President's Military Order of 13 November 2001 violates the separation of powers as related in the Constitution of the United States.

10. Additional Information. Prof. Paust's Curriculum Vitae will be forwarded as soon available. The defense intends to call both Professors. Professors Paust will testify regarding developments in the UCMJ and International Law relating to War Powers and Professor Ackerman will testify regarding the President's powers under Supreme Court case law, regarding his power to convene a Military Commission.

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Office of Military Commissions

UNITED STATES OF AMERICA	)	**PROSECUTION RESPONSE TO DEFENSE MOTION TO DISMISS**
v.	)	**(LACK OF LEGISLATIVE AUTHORITY TO ESTABLISH MILITARY COMMISSIONS)**
SALIM AHMED HAMDAN	)	
	)	15 October 2004

1. Timeliness. This motion response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Defense motion to dismiss should be denied. The President's Military Order to establish military commissions is based firmly on constitutional, legislative and judicial authorities.

3. Facts in Agreement. The Prosecution does not agree with or stipulate to any of the Defense's facts as alleged except fact (l). The Prosecution will continue to work with the Defense to obtain a stipulation of fact.

4. Facts. The Prosecution alleges the following additional facts:

a. On 18 September, 2001, Congress enacted the *Authorization for the Use of Military Force Joint Resolution* (Public Law 107-40, 115 Stat. 224), which authorizes the President to "use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

b. The President's Military Order (PMO) of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, authorizes the Secretary of Defense or his designee to convene military commissions for the trial of certain individuals "for any and all offenses triable by military commission."

c. The Secretary of Defense promulgated implementing orders to establish procedures for the appointment of military commissions, setting forth various rules governing the appointment, jurisdiction, trial and review of military commission proceedings. Military Commission Order No. 1.

d. The Accused in this case was designated by the President for trial by military commission and a commission was appointed in accordance with commission orders and instructions.

5. Legal Authority.

a. U.S. Constitution, Art. I, §8 and Art II, §2
b. 10 U.S.C. §§ 821, 836, 850, 904 and 906
c. *Authorization for Use of Military Force Joint Resolution,* Public Law 107-40, 115 Stat. 224.
d. President's Military Order, *Detention, Treatment, and trial of Certain Non-Citizens in the War Against Terrorism,* November 13, 2001.
e. Ex *parte Quirin*, 422 U.S. 806 (1975).
f. Madsen *v. Kinsella,* 343 U.S. 341 (1952).
g. Ex *parte Quirin,* 317 U.S. at 32 n.10, 42
h. Ex *parte Mudd,* 17 F. Cas. 954 (S.D. Fla. 1868).
i. Mudd *v. Caldera,* 134 F.Supp. 2d 138 (D.D.C. 2001).
j. *Johnson v. Eisentrager,* 339 U.S. 763 (1950).
k. Hirota *v. MacArthur,* 338 U.S. 197 (1948).
l. In *re Yamashita*, 327 U.S. 1 (1946).
m. Loving *v. United States*, 517 U.S. 748 (1996).
n. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).
m. *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956)

6. Analysis.

Military commissions have been used throughout U.S. history to prosecute violators of the laws of war.[1] "Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts." *Madsen v. Kinsella,* 343 U.S. 341, 346-47 (1952). Military commissions have tried offenders charged with war crimes as early as the Revolutionary War, the Mexican-American War, the Civil War, and as recently as WWII. *See Ex parte Quirin,* 317 U.S. at 32 n.10, 42 n.14. President Lincoln's assassins and their accomplices were imprisoned and executed pursuant to convictions rendered by military commissions. Their offenses were characterized not as criminal matters, but rather as acts of rebellion against the government itself. *See Ex parte Mudd,* 17 F. Cas. 954 (S.D. Fla. 1868). Such use of military commissions has been repeatedly endorsed by federal courts, including as recently as 2001. *See Mudd v. Caldera,* 134 F.Supp. 2d 138 (D.D.C. 2001); *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956). The use of military commissions is firmly rooted in American military law and tradition.

[1] A military commission is a form of military tribunal recognized in American law and typically used in three scenarios: (i) to try individuals (usually members of enemy forces) for violations of the laws of war; (ii) as a general court administering justice in occupied territory; and (iii) as a general court in an area where martial law has been declared and the civil courts are closed. *See generally* William Winthrop, *Military Law and Precedents* 836-40 (2d ed. 1920). As the Supreme Court has observed: "In general...[Congress] has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war." *Madsen v. Kinsella,* at 346 n. 9 (quoting Winthrop, *supra* at 831).

On November 13, 2001, the President of the United States issued a "Military Order" concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." President's Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (*hereinafter* PMO). This Order authorized the Secretary of Defense to appoint military commissions and to promulgate orders and regulations necessary to implement that purpose. This Military Commission has been appointed to try the Accused in this case pursuant to these orders. The Defense now challenges the President's legal authority to establish this Military Commission and asks the Commission to rule that the PMO is an unlawful order.

a. Summary of the Prosecution Response.

The legal basis for the PMO is not a matter of speculation, but is forthrightly asserted in the first paragraph of the Order itself: "*By the authority vested in me* as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for the Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows...."

The President has inherent constitutional power as the Commander in Chief to establish military commissions in this case. This constitutional power is at its apogee when the President is acting in his role as Commander in Chief of the Armed Forces pursuant to a congressional authorization for the use of force. The PMO is based on clear legislative authority for the use of military commissions in both the *Authorization for the Use of Military Force Joint Resolution* (AUMF) and the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §821 and 836 (Articles 21 and 36). Finally, the Supreme Court has clearly and definitively held that the President has authority to establish military commissions under the UCMJ and antecedent provisions in the Articles of War. The President's Military Order of November 13, 2001, is based upon these authorities and is a lawful exercise of presidential powers.

b. Summary of the Defense Argument.

The Defense argues that the PMO is unlawful on the grounds that Congress alone has the constitutional authority to establish military commissions under the circumstances in this case and has not done so. Specifically, the Defense argues that existing statutory authority for the use of military commissions under UCMJ, Article 21, applies only in times of formally declared war and only for the purpose of trying offenses against the international law of war. The Defense denies that a state of war satisfying the threshold of Article 21 exists. The Defense argues that the charges referred to this Commission fall outside the subject matter jurisdiction of military commissions under Article 21. Thus, according to the Defense, the President has no constitutional or statutory authority to order the Secretary of Defense to convene this Commission. The PMO is therefore an unlawful exercise of executive power and violates the Separation of Powers doctrine.

The Defense argument is built on a faulty interpretation of Article 21 and on an unduly narrow view of the President's powers as Commander in Chief under Article II, §2 of the Constitution. The Defense motion challenges the settled authority of the

President to perform a function that has been recognized by law and custom throughout the history of constitutional government in the United States. In so doing, the Defense asks the Commission to deny the President's constitutional powers, Congress's clear intent in the Uniform Code of Military Justice, and the Supreme Court's settled judgment that the President has firm authority to establish military commissions for the trial of war criminals, including unlawful belligerents. The Defense challenge must be denied as a matter of law.

c. The President has Inherent Constitutional Power to Establish This Military Commission.

The legal foundation of the PMO consists of the interlocking elements of the President's constitutional power and the statutory recognition and approval of that power by Congress in the AUMF and the UCMJ. The President's constitutional powers are at their apogee when the nation's armed forces have been activated by Congress for the necessary defense of the nation. Thus the starting point for analysis must be the President's constitutional authority as Commander in Chief.

The Commander-in-Chief Clause, U.S. Const. art. II, §2, cl. 1, vests the President with full powers necessary to successfully prosecute a military campaign. It is a fundamental principle that the Constitution provides the federal government all powers necessary for the execution of the duties that the Constitution describes.[2] As the Supreme Court explained in *Johnson v. Eisentrager,* "[t]he first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution." 339 U.S. 763, 788 (1950).

One of the necessary incidents of authority over the conduct of military operations in war is the power to punish enemy belligerents for violations of the laws of war. The laws of war exist in part to ensure that the brutality inherent in war is confined within some limits. It is essential for the conduct of a war, therefore, that the Army have the ability to enforce the laws of war by punishing transgressions by the enemy. As the Supreme Court recently stated in *Hamdi v. Rumsfeld*: "The capture and detention of lawful combatants, and the capture, detention and trial of unlawful combatants, by 'universal agreement and practice' are 'important incidents of war.' *Ex Parte Quirin*, 317 U.S. at 28." 124 S. Ct. 2633, 2640 (2004) (plurality opinion).

It was well recognized at the time of the Founding that one of the powers inherent in military command was the authority to institute tribunals for punishing violations of the laws of war by the enemy. In 1780, during the Revolutionary War, General Washington as Commander in Chief of the Continental Army appointed a "Board of General Officers" to try the British Major Andre as a spy. *See Quirin,* at 31, n. 9. At the time, there was no provision in the American Articles of War providing jurisdiction in a court-martial to try an enemy soldier for the offense of spying. In vesting the President

[2] *Cf. Request of the Senate for an Opinion as to the Powers of the President "In Emergency or State of War,"* 39 Op. Att'y Gen. 343, 347-48 (1939)("It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance.")

with full authority as Commander in Chief, the drafters of the Constitution surely intended to give the President the same authority that General Washington possessed during the Revolutionary War to convene military tribunals to punish offenses against the laws of war.

The history of military commissions in the United States supports this conclusion, because as a matter of practice military commissions have been created under the President's inherent authority as Commander in Chief without any authorization from Congress. In April 1818, for example, General Andrew Jackson convened military tribunals to try two English subjects, Arbuthnot and Armbrister, for inciting the Creek Indians to war with the United States. *See* Winthrop, supra, at 464, 832. As one author explained, General Jackson "did not find his authority to convene [these tribunals] in the statutory law, but in the laws of war." William E. Birkhimer, *Military Government and Martial Law* 353 (3d ed. 1914).[3] Similarly, in the Mexican American War in 1847, General Winfield Scott appointed tribunals called "councils of war" to try offenses under the laws of war and tribunals called "military commissions" to serve essentially as occupation courts. *See* Winthrop, *supra* at 832-33. There was no statutory authority for these tribunals; rather, they were instituted by military command, derived from the President's ultimate authority, and without express sanction from Congress.[4]

In later practice, these various functions were all performed by tribunals known as "military commissions," while courts-martial were the accepted statutory means by which U.S. military personnel were punished for crimes and breaches of discipline. After the outbreak of the Civil War, general orders for the governance of the Army in 1862, authorized commanders to convene military commissions to try enemy soldiers for offenses against the laws of war. *See* Winthrop at 833. It was not until 1863 that military commissions were even mentioned in a federal statute, which authorized the use of military commissions to try members of the military for certain offenses committed during times of war. See Act of March 3, 1863, §30, 12 Stat. 731, 736. That statute, moreover, did not purport to create military commissions; rather, it acknowledged that they could be used as alternatives to courts-martial in certain cases.

In 1865, Attorney General Speed addressed the use of military commissions to try those accused in the plot to assassinate President Lincoln. Speed found that even if Congress had not provided for the creation of military commissions, they could be used by military commanders as an inherent incident of their authority to wage a military campaign: "[M]ilitary tribunals exist under and according to the laws and usages of war in the interest of justice and mercy. They are established to save human life, and to prevent cruelty as far as possible. The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his

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[3] Birkhimer further observed that the Presidents authority to convene military commissions was derived directly from the constitution itself: "Military commissions may be appointed either under provisions of law in certain instances, or under that clause of the Constitution vesting the power of commander-in-chief in the President, who may exercise it directly or through subordinate commanders." At 357.

[4] See George B. Davis, *A Treatise on the Military Law of the United States* 308 (1913) (explaining that military commissions "are simply criminal war-courts, resorted to for the reason that the jurisdiction of courts-martial, created as they are by statute, is restricted by law..., which in war would go unpunished in the absence of a provisional forum for the trial of offenders.")

squadrons in the field and fight battles. His authority in each case is from the law and usage of war." *Military Commissions,* 11 Op. Att'y Gen. at 305.

Following WWII, the United States and the Allied powers used military commissions extensively to try Nazi and Japanese officials for violations of the law of war and crimes against humanity. In reviewing the legal status of enemy prisoners before these commissions, the Supreme Court endorsed the view that use of military commissions is a necessary part of the tools of a commander conducting a military campaign. As the Court explained in *In re Yamashita*, "[a]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." 327 U.S. at 11.

Justice Douglas advanced the same reasoning in support of the President's authority to establish *international* war crimes tribunals after WWII without any authorization from Congress. "The Constitution makes the President the "Commander in Chief of the Army and Navy of the United States..." Art. II, §2, Cl. 1. His power as such is vastly greater than that of a troop commander. He not only has full power to repel and defeat the enemy; he has the power to occupy the conquered country, and to punish those enemies who violated the law of war." *Hirota v. MacArthur,* 338 U.S. 197, 207-08 (1948) (Douglas, concurring). As the Supreme Court recognized, the President's power extended to the creation of novel, multinational tribunals to try the enemy for war crimes. Given that broad authority, *a fortiori*, the President's power must extend to the appointment of military commissions consisting solely of his own commissioned officers.

During and after WWII the Supreme Court has consistently and repeatedly upheld the use of military commissions by the president and his subordinate officers. Because the Articles of War authorized the use of military commissions, the Court was not required to decide whether the President may convene military commissions wholly without congressional authorization. In *Quirin*, the Court expressly declined to decide "to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation." 317 U.S. at 29. However, the Court has strongly suggested that the President does possess constitutional power to establish commissions, though it may be subject to statutory limitation by Congress. Thus in *Madsen*, the Court stated, "In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions." 343 U.S. at 348.

d. Congress Has Authorized the President to Establish This Military Commission in The Uniform Code of Military Justice.

While the Supreme Court has never decided whether the President needs congressional authorization to establish military commissions, it has clearly held that in Article 15 of the Articles of War Congress gave authority for the use of military commissions during and after WWII. *See Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946); *Johnson v. Eisentrager*, 339 U.S. 763 (1950). When

Congress enacted the UCMJ in 1951, it incorporated the general authorization for military commissions from the Articles of War into 10 U.S.C. §821, using identical language and explicitly relying on the Supreme Court's decision in *Quirin*. *See* H.R. REP. NO. 81-491 at 17 (1951); S. REP. 81-486 at 13 (1951).[5] Thus it is beyond dispute that military commissions continue to fill a vital purpose in military justice in the modern era. The defense suggestion that the enactment of the UCMJ undermines the holding of *Quirin* and other Supreme Court precedents in favor of military commissions is clearly untenable.

The power to bring unlawful enemy combatants to justice, is shared by both Congress and the President under the Constitution. Under Article I, §8, Congress has authority to "declare War," "raise and support Armies," and "make Rules for the Government and Regulation of the Land and naval Forces." U.S. Const. art. I, §8, cl. 11, 12, 14. In addition, Congress has authority to "define and punish...Offenses against the Law of Nations." *Id.* art. I, §8, cl. 10. The authorization in 10 U.S.C. §821 to use military commissions to enforce the laws of war is certainly a permissible exercise of these legislative powers. The Court in *Yamashita* affirmed this understanding by explaining that congressional authorization of military commissions was an "exercise of the power conferred upon it by Article I, §8, cl. 10 of the Constitution to 'define and punish...Offenses against the Law of Nations...' of which the law of war is a part." 327 U.S. at 7.

A proper understanding of 10 U.S.C. §821 begins with its text. Section 821 is entitled "Jurisdiction of courts-martial not exclusive," and states: "The provisions of this chapter conferring jurisdiction upon courts-martial do not *deprive* military commissions...of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. §821 (emphasis added). This provision is necessary because 10 U.S.C. §818 defines the jurisdiction of general courts-martial to include "jurisdiction to try any person who by the law of war is subject to trial by military tribunal." By its terms, §821 assumes the existence of military commissions and declares that the broad jurisdiction of general courts-martial does not curtail the use of military commissions to the full extent permitted by past executive practice. By affirmatively preserving the jurisdiction of military commissions, §821 necessarily expresses congressional approval and sanction for their use. Indeed the Supreme Court concluded that identical language found in the Articles of War "*authorized* trial of offenses against the laws of war before such commissions." *Quirin,* 317 U.S. at 29 (emphasis added). [6]

The legislative history of §821 confirms legislative intent to approve the traditional uses of military commissions under past practice. When the language now codified in §821 was first included in the Articles of War in 1916, it was intended for the

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[5] The House and Senate reports on H.R. 4080, which became the UCMJ, contain the same comment on Article 21: "This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts-martial. The language of AW 15 [Articles of War, Art. 15] has been preserved because it has been construed by the Supreme Court (*Ex parte Quirin*, 317 U.S. 1 (1942))."

[6] See also *Quirin* at 28: "By the Articles of War, and especially Article 15, See also Quirin at 28: "By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals have jurisdiction to try offenders against the law of war..."

purpose of preserving the pre-existing jurisdiction of military commissions. The language was introduced as Article 15 of the Articles of War[7] at the same time that the jurisdiction of general courts-martial was expanded to include all offenses against the laws of war. The Judge Advocate General of the Army testified before the Senate as the proponent of the new article. He explained that the purpose of Article 15 was not to create military commissions, but was intended to recognize them and preserve their authority: "It just saves to these war courts the jurisdiction they now have..." S.Rep. No. 64-130, at 40 (1916).

Given the text and history of §821, the provision must be read as preserving the broad sweep of the traditional jurisdiction exercised by military commissions throughout American military history. The statute, in other words, endorses and incorporates executive branch practice. The Supreme Court has adopted precisely this understanding: "By...recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction...to any use of the military commission contemplated by the law of war." *In re Yamashita*, 327 U.S. 1, 20 (1946). In sanctioning the historic use of military commissions by the executive branch, Congress did not "attempt to codify the law of war or to mark its precise boundaries." *Yamashita*, 327 U.S. at 7. Instead, it simply adopted by reference "the system of military common law." *Id.* at 8. Similarly, in *Madsen v. Kinsella*, the Supreme Court determined that the effect of Article 15 was to preserve for military commissions "the existing jurisdiction which they had over such offenders and offenses" under the laws of war. 343 U.S. at 352. The Court summed up the constitutional origins of military commissions: "Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth." Id. at 346-47.

Indeed, if §821 were read as restricting the use of military commissions and prohibiting practices traditionally followed, it would infringe on the President's express constitutional powers as Commander in Chief. The *Quirin* Court expressly declined "to inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents" by military commissions. 317 U.S. at 47. Under Separation of Powers principles, a clear statement of congressional intent would be required before a statute could be read to effect such an infringement on core executive powers. *See, e.g., Public Citizen v. Department of Justice*, 491 U.S. 440, 446 (1989).

Other references to military commissions in the UCMJ only serve to buttress the conclusion that Congress contemplated the continued active use of these tribunals as the exigencies of national defense required. Article 36 authorizes the President to promulgate rules of procedure and evidence for "courts-martial, commissions and other military tribunals." 10 U.S.C. §836. Section 836 supplements §821 by recognizing that the

[7] The new Article 15 stated, like the current §821, that the "provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions...of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions." Act of August 29, 1916, 39 Stat. 619, 653.

President shall determine the rules of procedure that will govern military commissions. Section 850 authorizes the use of records from courts of inquiry in certain cases before courts-martial and military commissions. Finally, 10 U.S.C. §§904 and 906 specify two particular war-related offenses triable by courts-martial, that are also commonly tried by military commission. Read in conjunction with §821, these two particular references in the punitive articles cannot reasonably be read to restrict the subject matter jurisdiction of military commissions; rather they are given as cases in which Congress fully expected the use of military commissions for the trial of "any person" including U.S. servicemen.

Any question about the continued vitality of §821 is dispelled by Congress's use of identical language in the "Military Extraterritorial Jurisdiction Act." 18 U.S.C. §3261 (2004). This law was enacted in 2000 for the purpose of extending federal court jurisdiction over "persons employed by or accompanying the Armed Forces outside the United States." In so expanding the jurisdiction of Article III courts, Congress recognized the continuing role of military commissions and was careful to preserve their traditional jurisdiction and historic place in American law using the same operative language found in 10 U.S.C. §821.[8]

The Defense insistence that military commissions must be authorized by Congress and not the President acting alone is fully answered by 10 U.S.C. §821. Congress has authorized the President to establish commissions when required in the exercise of his powers as Commander in Chief. In 1942, President Roosevelt invoked this same statutory authority to establish a military commission to try eight Nazi saboteurs captured in the United States and charged with conspiracy, spying, and other violations of the law of war. The defendants sought habeas corpus relief in the federal courts arguing *inter alia* that the President's order establishing the commission was unlawful and that commissions could not exercise jurisdiction over the defendants while the federal courts were open and functioning.

Rejecting these challenges, the Supreme Court in *Ex parte Quirin* held that the President had legislative authority to establish and use military commissions to try unlawful enemy combatants. After reviewing the meaning and scope of AW 15, the Court concluded: "By his Order creating the present Commission, [the President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war." 317 U.S. 1, 28 (1942).

The Defense reliance on *Ex parte Milligan* is also patently misplaced. *Milligan* was a Civil War era case that held that a military commission lacked statutory jurisdiction to try an American civilian in Indiana for conspiring to commit acts of rebellion against the United States. The Court made it clear that it would not countenance the trial of citizens in military courts within the territorial jurisdiction of the United States unless

[8] "Nothing in this chapter [18 U.S.C. § 3261 et seq.] may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal." 18 U.S.C. §3261.

Congress expressly authorized such trials. Recently, the Court noted in *Hamdi v. Rumsfeld*, that if Milligan had been "captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." 124 S. Ct. 2633, 2642. In *Quirin,* the Supreme Court made it clear that the congressional authorization for the use of military commissions permitted the trial of unlawful enemy combatants for violations of the law of war, even within the territorial jurisdiction of the United States when the civil courts were open and had concurrent jurisdiction over the offenses.

The Defense does not deny that the UCMJ contains legislative authorization for the use of military commissions; rather, they argue that 10 U.S.C. §821 limits the subject matter jurisdiction of military commissions to violations of the law of war. As the statutory text makes abundantly clear, the jurisdiction of military commissions under the UCMJ is as broad as the law of war—and broader. In addition to subject matter jurisdiction over law of war offenses §821 states that military commissions have jurisdiction over offenders or offenses ***that by statute or by the law of war*** may be tried by military commission..." The PMO defines the jurisdictional reach of military commissions under that Order as extending to "any and all offenses triable by military commission." The apparent circularity of this language is explained by the fact that the President was authorizing the use of commissions to the full extent permitted by customary practice and 10 U.S.C. §821.

Defense attempts to undermine the plain meaning of 10 U.S.C. §821 and the holding of *Quirin* are unpersuasive. Both remain vital and active sources of authority today and provide a clear basis for the PMO at issue in this case. In *Quirin*, the Supreme Court cautioned that courts must approach any challenge to the military orders of the President in time of war with great care: "[T]he detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution and laws of Congress constitutionally enacted." 317 U.S. 1, 25 (1942).

e. A Formal Declaration of War Is Not Required Under Article 21, UCMJ.

The Defense contends that the legislative authorization for the use of military commissions found in 10 U.S.C. §821 is operative only in time of congressionally declared wars. Nothing in the text or history of this law supports that view. A formal declaration of war by Congress is not required for the laws of war to be applicable to an armed conflict or enforceable by military commission under §821. Clearly, offenses triable by military commission must occur under factual circumstances of armed conflict where the laws and customs of war are in operation. But if that condition is met, then §821 authorizes the use of military commissions.

The president based the PMO on the specific finding that such a state of armed conflict exists: "International terrorists, including members of al Qaida, have carried out attacks on the United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces." PMO, §1(a). The

The President in this case has not relied solely on his own constitutional authority in establishing military commissions. Rather, he has invoked the general congressional authorization in §821 and also the specific authority to of the AUMF to use "all necessary and appropriate force" to defend the nation and prosecute the war on terrorists and those "nations, organizations and individuals" who have aided and abetted them. The Supreme Court has construed this authorization to empower the President to exercise all of the powers incident to the prosecution of war by the Commander in Chief:

> There can be no doubt that the individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that the detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident of war as to be an exercise of the "necessary and appropriate force" Congress has authorized the president to use.

Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion). The Court went on to say that AUMF gave the President authority to fight the war, and the "capture and detention of lawful combatants, and *the capture, detention and trial of unlawful combatants, by 'universal agreement and practice' are 'important incidents of war.'*" *Hamdi,* at 2640 (quoting *Quirin*).

Since both the President and Supreme Court have found that a state of armed conflict exists, it is entirely lawful for the President to establish military commissions for the trial of those enemy combatants who violate the laws of war. Although there is not a formal declaration of war, as there was at the time that Quirin was decided, there is a state of great national peril and a congressional authorization for the President to exercise all necessary powers to prosecute a war against al Qaeda and those who assist them. The AUMF is an appropriate and functional equivalent to a declaration of war for purposes of §821. Under the Defense view, the President would be denied essential war powers authoritatively recognized by the Supreme Court.

f. The President's Order to Establish Military Commissions Does Not Violate Separation of Powers Doctrine.

The Defense contends that the President's Military Order violates the Separation of Powers doctrine by encroaching on legislative and judicial functions reserved to the other coordinate branches of government under the Constitution. This contention lacks merit because no separation of powers principle is violated where the President is exercising the very powers granted to him in Article II of the Constitution as discussed above.

In *Loving v. United States*, 517 U.S. 748 (1996) , the Supreme Court considered a Separation of Powers challenge to the President's Article 36 powers. The petitioner in that case argued that the President's promulgation of aggravating factors for the death penalty in R.C.M. 1004 was an unconstitutional exercise of legislative powers. According

to the petitioner, Article 36 was an improper delegation of legislative power to the executive branch, lacking in any intelligible principle to guide the president's rule-making function. In rejecting this contention and affirming the petitioner's death sentence, the Court noted that the delegation under Article 36 was different in kind than delegations to ordinary administrative agencies of the executive branch. The Court explained: "[T]he delegation here was to the President in his role as Commander in Chief. Perhaps more explicit guidance as to how to select aggravating factors would be necessary if delegation were made to a newly created entity without independent authority in the area." *Id.* at 772.

In *Loving*, the Court emphatically endorsed the President's independent constitutional powers in the area of military law. "The President's duties as Commander in Chief...require him to take responsible and continuing action to superintend the military, including courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by the express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" *Id.* The Court declined to consider "whether the President would have inherent power as Commander in Chief to prescribe aggravating factors in capital cases." But readily held that "Once delegated that power by Congress, the President, acting in his constitutional office of Commander in Chief, had undoubted competency to prescribe those factors without further guidance." *Id.* at 773.

Congress's longstanding decision both to recognize and approve the exercise of the President's wartime authority to convene military commissions to try violations of the laws of war reflects Congress's understanding that military exigencies require giving the President flexibility rather than detailed procedures in dealing with enemy fighters. That decision is entitled to just as much deference as Congress's decision to legislate detailed rules for the military's use of courts-martial in the UCMJ. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-636 (1952) (Jackson, J., concurring)("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.") In these circumstances, the President's action is "supported by the strongest presumption and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). Hamdan could not possibly meet his burden in attacking the lawfulness of the military commissions because, as explained above, the Supreme Court has already squarely rejected the arguments he advances here.

7. Resolution of Motion. The Defense Motion to Dismiss should be denied.

8. Oral Argument. The Prosecution is prepared to provide oral argument if desired.

[redacted]
Commander, JAGC, USN
Prosecutor