ORIGINAL
Volume II

RECORD OF TRIAL

(and accompanying papers)

of

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

Name and any aliases charged

0766

Identification Number

By

MILITARY COMMISSION

Convened by the Convening Authority under 10 USC §948h

Office Military Commissions
(Name of Convening Authority)

Tried at

Guantanamo Bay, Cuba on 8 November 2007

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

Companion cases:
None.

RECORD OF PROCEEDINGS

[The 803 session was called to order at 1022, 8 November 2007.]

MJ: The commission will come to order. Trial counsel, are all the parties and persons named on the record as being present at the 4 June session present?

PROS: No, sir. In the previous sessions Staff Sergeant Ona was present as a paralegal for the prosecution and Mr. Dennis Edney was present as a foreign consultant. They are not present here today.

MJ: Thank you. At the session on 4 June I failed to note for the record the following: Mr. Dennis Edney and Mr. Nate Whitling were present as foreign consultants under the provisions of Chapter 9-6 of the DOD trial regulation. They were so designated by the convening authority on 17 May 2007, and each signed the required affidavit and agreement which made their designation effective. Those documents are contained in AE 040. Are there any other persons you need to name?

PROS: Yes, sir, Ms. Rebecca Snyder is present as the Detailed Assistant Defense Counsel. Gunnery Sergeant Daniel Sears is present as the prosecution paralegal. And Mr. John Murphy is present from the prosecution as well. Sergeant Major John E. Davis has been detailed as the court reporter for this commission and has been previously sworn.

MJ: Mr. Murphy, will you please tell the commission your

qualifications and status as to oaths?

CTC: Good morning, Your Honor. I have been detailed to this military commission by the Chief Prosecutor. I am qualified to serve under R.M.C. 503 and I have previously been sworn in accordance with R.M.C. 807. I have not acted in any manner that may tend to disqualify me in this proceeding. I am an Assistant United States Attorney with the US Department of Justice. The documenting -– the document detailing counsel is marked as Appellate Exhibit 44.

MJ: Thank you. Ms. Snyder, will you please tell the commission your qualifications and status as to oaths?

ADDC: Yes, Your Honor. I have been detailed to the military commission by the Chief Defense Counsel –-

MJ: Can you speak into the microphone?

ADDC: Yes, Your Honor. I'll try to speak more loudly. I've been detailed to the military commission by the Chief Defense Counsel. I'm qualified under R.M.C. 503 and I've previous -- previously been sworn in accordance with R.M.C. 807. I have not acted in any manner that might tend to disqualify me in this proceeding. I am a DOD civilian attorney currently performing duties with the Office of the Chief Defense Counsel. The document detailing me is marked as Appellate Exhibit 39, Your Honor.

MJ: Thank you. Before you sit down, Ms. Snyder, would you agree with the following statement: while neither the M.C.A., nor the M.M.C., specifically authorized the detailing of a civilian counsel as an assistant defense counsel, neither specifically forbids it. Further, paragraph 9-1(b)(1)(B) of the Department of Defense Regulation for Trial by Military Commission effective as of 27 April 2007, specifically authorizes the Chief Defense Counsel to detail a DOD civilian attorney who is performing duties with the Office of the Chief Defense Counsel as an assistant defense counsel?

ADDC: Yes, Your Honor.

MJ: Thank you. Government, do you have anything to say about Ms. Snyder's detail?

PROS: We have no objections, sir.

MJ: Okay. Before we kick off, let's go over some procedure, some procedural background.

At the last session on 4 June 2007, the commission dismissed the charges without prejudice, see AE 15. The government filed a motion to reconsider, see AE 17, on the 8th of June 2007. The commission declined to reconsider, see AE 23, on the 29th of June 2007 and authenticated the record of trial on that date. The government filed an appeal with the Court of Military Commissions Review; see AE 25, on the 3rd of July 2007.

The Court of Military Commissions Review ruled on 24 September 2007, see AE 26, that the military judge erred in dismissing the charges in this case and returned the case to this military commission with the instruction that the MJ conduct, I'm sorry, the military judge conduct all proceedings necessary to determine the commission's jurisdiction over the accused. While the CMCR did not directly overrule the dismissal, the commission is treating the 24 September 2007 ruling as such.

The defense filed a motion to reconsider with CMCR on 1 October 2007, which is at AE 38 and that motion, was denied on the 2 October 2007, see AE 38, also.

The defense filed an appeal with the Circuit Court of Appeals for the District of Columbia Circuit on 9 October 2007, and requested that the commission stay the proceedings pending resolution of that appeal; see AE 34, for all that. The commission declined to stay the proceedings and denied a subsequent request for delay that's at AE 41. That generally covers the procedural posture of the case at present. The documents and other materials that are cited are in the appellate exhibit listing and the filings inventory current as of this morning which is at AE 48.

Do both sides generally agree that the matters that preceded this session are covered by the appellate exhibits

listing and AE 48 the filings inventory, trial?

PROS: Yes, sir.

DDC: Yes, sir with one exception and you may intend to reach this in the next portion of the proceeding and that relates to the litigation concerning protective orders.

MJ: The litigation in terms of protective orders?

DDC: Yes, sir. If you'll recall, there were a number of e-mails exchanged between the military judge, the government, and the defense concerning the entry of protective orders ----

MJ: You're about to, you're about to hear that right now.

DDC: Yes, sir. I just want to clarify.

MJ: And I believe all of that is contained, but what the heck.

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

was authenticated on the 29th of June and see AE 006.

Once the record of trial is authenticated, the military judge has no further role concerning the release of matters from that record. The record of trial after authentication belongs to the convening authority who determines when and what matters to release from it. As for matters that are currently before this commission, the Military Commissions Trial Judiciary Rule of Court 3.9 explains the judiciary's policy on release prior to authentication. As a general rule, once a decision has been reached on a given issue the trial judiciary will release appellate exhibits to the office of military commissions for redaction of public matters and other required screening, coordination with the Assistant Secretary of Defense for Public Affairs, and release to the general public.

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

Prior to the start of today's session, the commission has authorized release of and furnished a copy of the current

appellate exhibit list and the filings inventory to OMC. Concerns or inquires about those items should be directed to OMC.

Does that answer your question?

DDC: Almost, sir. I just wanted to make sure that one thing was very clear on the record and that is that we had objected to the proposed protective orders number 002 and 003, which are marked as Appellate Exhibits 32 and 33, respectively, on the grounds that the government had failed to meet its burden of showing a need for a protective order of the nature and extent that were requested. We not only objected to the substance of the protective order, we objected to the procedure for determining whether it was the type of protective order we asked for in an evidentiary hearing pursuant to R.M.C. 905 for issuance of the protective order and I just want to make sure that those objections are clarified and preserved on the record.

MJ: Everything you wrote, Commander Kuebler, if you read 32 and 33, is in there. If you want to make a motion, make a motion. I'm here, you're here, we can have a motion. All this stuff that you just talked about is right in 32 and 33.

Prior to this session, there were a number of conferences held under R.M.C. 802. Specifically there were conferences held on the 6th and 7th of November and this morning

on the 8th of November. Two of those conferences are summarized at AE 46 and 47 and before I made those AE's counsel agreed with the summary. I'm going to be going over the contents of the conference last night when we get to the trial schedule and I'll give you all a chance to comment or object to my summary then.

The session this morning involved a request to realign portions of the script and I agreed to do it. Present at all those conferences were various combinations of counsel from both sides.

Do you agree with what I generally said – what I said generally?

PROS: Yes, sir.

DDC: Yes, sir.

MJ: Okay. The court refers the parties for both sides to page 4 of the transcript of the 4 June 2007 session.

Mr. Khadr, I'm just making sure you can hear me.

ACC: Yes, thank you.

MJ: Okay. I'm going to go over counsel rights now. Pursuant to the Military Commissions Act, you are represented by Lieutenant Commander Kuebler, your detailed defense counsel and he is assisted by Ms. Snyder, the detailed assistant defense counsel.

You also may request a different military lawyer to

represent you. If you were to make such a request, it would be subject to determination by the chief defense counsel for the military commissions in accordance with the applicable provisions of the Military Commissions Act, the Manual for Military Commissions, and the DOD regulation for Trial by Military Commissions. If you are represented by a detailed defense counsel whom you select personally, you would normally lose the services of your current detailed defense counsel. However, you could request that they remain on your case and the chief defense counsel could grant or deny that request.

Do you understand that?

ACC: Yes.

MJ: Court reporter, are you picking up Mr. Khadr's responses?

Okay, the court reporter said “yes.”

Commander Kuebler and Ms. Snyder are provided to you free of charge.

Do you understand that?

ACC: Yeah.

MJ: In addition to detailed defense counsel you may be represented by a qualified civilian lawyer. A civilian lawyer would represent you at no expense to the government. To be qualified, a civilian lawyer must be a US citizen admitted to

the practice of law in a state, district, territory, or possession of the United States or a federal court; may not have been the subject to any disqualifying action by a bar, be eligible for a Secret clearance or higher, and agree in writing to comply with the orders, rules, and regulations of the commissions.

Now if a civilian lawyer were to represent you, your detailed counsel would serve as associate counsel unless you specifically waive the right to be represented by detailed defense counsel.

Do you understand that?

ACC: Yes.

MJ: Do you have any questions about your right to counsel before this commission?

ACC: No.

MJ: Do you desire to be represented by Commander Kuebler and Ms. Snyder?

ACC: Yes.

MJ: Do you want any other qualified counsel?

ACC: No.

MJ: Okay. I previously provided counsel for both sides a summarized biography and statements concerning R.M.C. 902 matters. Those matters were marked as AE 5. When I provided

those matters, I directed that voir dire questions be sent to me by 4 May 2007. After the CMCR ruling the date for voir dire questions was changed to 1 November 2007. I provided additional voir dire information in AE 36. I received written questions from the defense and provided the answers insofar as the questions were relevant to an R.M.C. 902 determination, to the defense and the government on AE 36.

Trial, you got any follow up or voir dire?

PROS: No, sir.

MJ: Defense?

DDC: Yes, we do, sir. May I use the podium?

MJ: You may.

DDC: Thank you.

[The detailed defense counsel moved to the podium.)

DDC: Sir, to which unit are you currently assigned?

MJ: Department of Defense, Office of General Counsel.

DDC: And to whom do you report, sir?

MJ: To Colonel Kohlmann, the Chief Trial Judge.

DDC: And does Colonel Kohlmann prepare your performance evaluation, sir?

MJ: I don't receive a performance evaluation.

DDC: None at all, sir?

MJ: None at all. Although I do have to take the PT test.

DDC: Yes, sir.

MJ: And if you could talk to Colonel Kohlmann about that.

DDC: Sir, where is your permanent place of duty?

MJ: My permanent place of duty is Washington, DC.

DDC: And is that where you, in fact, spend your time?

MJ: No.

DDC: Where do you spend your time, sir?

MJ: That's okay. I'll pass on that question.

DDC: And were you nominated to this position, sir?

MJ: I am not familiar -- I'll tell you what I know.

DDC: Please, sir.

MJ: The M.C.A. was passed and signed in October of 2006. At some time following that -- and I've seen none of these documents, so I'm just telling you what I was told -- At some time following that the general counsel recognizing the need for members of the military commissions trial judiciary sent out a request to the TJAG's, the Judge Advocates General, to nominate three people from the Army, three from the Air Force and three from the Navy-Marine Corps. Sometime -- and I'm not sure whether it was in January or February or March or April -- it was probably in January or February -- the chief trial judge of the United States Army, Colonel Stephen Henley, called and asked if I'd be willing to be nominated to serve as a military judge.

I said, “yes,” and I presume that he then nominated me -- well General Black did, and I went in to it. There is no selection process to the best of my knowledge by the DOD General Counsel, they take what the services give them.

DDC: You mentioned a moment ago that this was what you were told. By whom were you told this, sir?

MJ: I just said, I thought Colonel Stephen Henley.

DDC: Do -- I mean did Colonel Henley describe the process to you?

MJ: Yes.

DDC: And what is your relationship with Colonel Henley, sir?

MJ: Colonel Henley is the Chief Trial Judge of the United States Army.

DDC: Do you know him personally?

MJ: What?

DDC: Outside the context of this phone call?

MJ: Well, Colonel Henley has been a judge for -- I don't know, probably since '95. I've known him – I've known him since '95, '96, '97, something like that. But if you're talking about has he ever been to my house, no. Have I ever been to his house, no. Do I consider him a professional friend, sure I do.

DDC: Yes, sir. Was it your understanding that he was sort

of given the tasker by General Black to identify the Army judges that were going to be nominated?

MJ: I've gone as far as I can go. I didn't ask him, but based on what I've told you, that's what I presume. I mean if General Black is going to nominate judges I imagine he'd probably go to the chief trial judge.

DDC: Yes, sir. Do you know General Black?

MJ: I've met General Black twice.

DDC: Okay. Now when you say that you haven't been to Colonel Henley's house and he hasn't been to yours, have you seen him outside the context of military duty, I mean, have you been to social occasions or other events with him?

MJ: I don't know about the Navy, but in the Army we have things such as conferences and the like, and at the end of an arduous military judge learning about stuff conference day, it's quite common for judges to talk to each other, but that's it.

DDC: Would you consider him a friend?

MJ: I just said a professional friend, didn't I? I think I did.

DDC: Okay, sir. And do you know who did the actual selection or appointment? I understand that's the nomination process, but who actually says that you are appointed as a military judge?

MJ: I think I just told you that the way I understand it, the DOD General Counsel levied a requirement on the services for three judges apiece and the TJAG's forwarded the names of the three judges that they were coughing up.

DDC: And there was no process after that whereby someone approved the nomination or appointed you as a military judge?

MJ: Not that I know of.

DDC: Do you know the convening authority, Judge Susan Crawford?

MJ: I answered a question about that in AE -- what is it, 36? Specifically, question 87, "What contact have I had?" When she was on CAAF, the Court of Appeals for the Armed Forces, I saw her about every 2 years at a judicial conference. I would say that we have probably exchanged -- at those conferences we probably exchanged maybe a hundred words in four meetings. So the answer would be I know who she is. I doubt that she would recognize me. To my certain knowledge I have never seen her since May of '99 and it may have been before that.

DDC: Thank you sir. How about Mr. Fran Gilligan, do you know Mr. Gilligan?

MJ: I do know Mr. Gilligan.

DDC: How do you know Mr. Gilligan, sir?

MJ: Mr. Gilligan has been a judge for many years. He may

well have been the chief trial judge of the Army when I first became a judge, but I can't remember that.

DDC: How many years would you say you've known Mr. Gilligan?

MJ: From sometime in the period of '88 to '92. I've seen him speak at conferences, he used to speak routinely at the military judges conferences, but once again it's a professional friendship.

DDC: Have you seen him since you've been on the island for this hearing?

MJ: Sure, yeah.

DDC: Have you had any conversations with him?

MJ: I said, “Hi Fran. How are you?” and he said, “Hi judge. How are you?”

DDC: Anything more substantive, sir?

MJ: No, nothing of substance about this. Let me see. No, nothing of substance, meaning legal substance. I can't remember. Nothing about any case or about the Commissions proceedings, if that's what you mean by substance.

DDC: Yes, sir. Aside from sort of casual contact as part of this assignment, do you know anyone else who works for the Office of the Convening Authority?

MJ: For the Office of the Convening Authority or are you

separating out the prosecutors?

DDC: I'm separating out the pro – I'll have a separate question about the prosecution.

MJ: Okay. I have known Mr. Mike Chapman -- once again probably from the '91, '92 timeframe. I've seen him off and on. We've never been stationed together, but, you know, I've known who his face is. I haven't been in the office of military commissions for the 2 and a half years, so I don't even know who works there. That's the only name that I can tell you and if you were to tell me another name I might know who is there, but I don't know anyone who's there.

DDC: What about the Office of the Chief Prosecutor?

MJ: Okay. As I answered -- I put this in one of my voir dire things -- about Colonel Morris?

DDC: You mentioned Colonel Morris specifically, I'm just asking you generally if you know ----

MJ: Okay, I'm going through this. Colonel Morris I knew and I explained my contacts with Colonel Morris. As I wrote in my response to 82, I believe that there is a Lieutenant Colonel Will Britt assigned to – I saw his name on some e-mail or something or maybe – I saw his name somewhere. If it is the same person, then he was a captain at Bragg in the mid-80's. I haven't seen or talked to him since I got here or since then.

DDC: No one else, sir?

MJ: I don't know. You'd have to tell me who's there.

DDC: All right, sir. Just -- no one that you're aware of?

MJ: No.

DDC: Now in the –- if I can ask this, sir. In your e-mail response concerning Colonel Morris you indicated that you didn't have a personal relationship with him but you had some heated exchanges about things. Can you describe what those heated exchanges were about, sir.

MJ: Have you met Colonel Morris?

DDC: No, sir.

MJ: If you meet Colonel Morris, you'll find that he's a person of strong views and he was a prosecutor and I was a judge, and there were occasions when he didn't like my rulings. Both during trial and then after we would have heated exchanges about things. I don't say “mean,” I mean, “heated,” is the word I used. That's it.

DDC: Yes, sir. Were you, as part of coming into this position required to take an oath of some type with respect to your function as military judge? And there may be a question on the answer.

MJ: Didn't I refer you to the transcript when you asked me that question? I did. See the transcript page 3.

DDC: Did you describe the content of that oath in the transcript, sir?

MJ: Yeah. I referred you to the R.M.C.

DDC: Yes, sir. Do you have an understanding as to the nature of your duties as a military judge in this proceeding?

MJ: Say again?

DDC: Do you have an understanding as to the nature of your duties as a military judge in this proceeding?

MJ: I believe I do.

DDC: What is your understanding, sir?

MJ: To perform the duties required by the M.C.A. and the M.M.C. insofar as it is applicable to DOD Trial Regulation, the Rules of Court and provide a fair trial.

DDC: Just briefly, are you a member of any list serves. I know I asked you about organizations in the written voir dire. Are you a member of any internet list serves or e-mail list serves?

MJ: No.

DDC: Thank you, sir. Sir, you were on active duty in the Army for a period of time?

MJ: Thirty years.

DDC: When did you retire?

MJ: The 30th of June 1999.

DDC: And were you a military judge on active duty?

MJ: Eleven years, maybe 10, I don't know.

DDC: Just ballpark, sir, how many cases would you say you tried as a military judge?

MJ: 1,500.

DDC: Sir, as a military judge did you ever have the occasion through a defense motion or some sort of a motion to rule on the issue of whether or not the Uniform Code of Military Justice or federal statute complied with or conflicted with some provision of the Constitution?

MJ: Yes.

DDC: Do you recall granting any of those motions?

MJ: I'm sure I did because some people write some really stupid rules and regulations. But I can't – I mean, you have people writing regulations and rules that make no sense sometimes. But I can't tell you -- a lot of them involved haircuts.

DDC: Actually my question was directed to the UCMJ, sir. Do you recall ever finding a provision of the UCMJ to be unconstitutional?

MJ: No. I will tell you this –- no. I believe I speak with authority when I say I never found a provision of the UCMJ unconstitutional. I could be wrong, but I don't remember it.

PROS: Yes, sir. How about a provision of the Rules for Court-Martial or the Military Rules of Evidence. Do you ever recall finding one of those provisions being consistent either with the UCMJ or with the Constitution?

MJ: You mean “inconsistent”?

DDC: Inconsistent, yes, sir.

MJ: That I believe I did. It had more to do with the MRE's the 608 series, the witnesses; sequestering witnesses and things like that. I think in that arena I did, but I didn't say, “This is unconstitutional,” I just said, “Hey, may not give any effect.”

DDC: Do you have any recollection of the subject matter of that case?

MJ: I just told you, I think it had to do with sequestration of witnesses which, I don't have a Manual, I mean a Court-Martial Manual, but I believe that's 608 of the evidence.

DDC: But I'm sure you don't remember the case name, so I'm just asking you if you knew ----

MJ: No.

DDC: ---- was it in Germany or some place else?

MJ: I'm sorry, I don't remember.

DDC: Sir, while on active duty did you ever serve with the

Special Forces?

MJ: Yes.

DDC: Can you describe the nature and extent of your involvement with the Special Forces?

MJ: Yes, I went to -- I came back from Vietnam in '71. I was assigned to 5th Group and stayed with 5th Group until '73.

DDC: Is that it?

MJ: I taught at the JFK center.

DDC: Do you have ongoing contacts of a personal nature or professional nature with members of the Special Forces, individuals that you met in those assignments?

MJ: No. No.

DDC: Sir, did you ever give operational law advice as a judge advocate on active duty?

MJ: Yeah, all the time.

DDC: Did any of that operational law advice concern either handling of detainees or conduct of interrogations?

MJ: The operational law advice I gave as a JAG did not as a general rule involve completed actions about detainees or interrogation; as a general rule. In other words, I would advise commanders and their Soldiers and their units on what they could do. Okay. To the best of my knowledge, the only completed advice that I gave was when I was in Saudi in '91,

'92. You may recall that we had a -- are you using detainees to be synonymous with prisoners of war?

DDC: That's an interesting question, sir.

MJ: Well, it's your question.

DDC: Yes, sir, detainees, persons in US custody.

MJ: You may recall that we captured a great number of prisoners of war during Desert Storm and I gave various pieces of advice which I can't remember on various matters involving the prisoners of war. However, that was mostly handled by the JAG who was in charge of the PW facility. I gave no advice that I remember on interrogation.

DDC: Thank you, sir. And would that advice have involved application of the Geneva Convention, specifically the III Geneva Convention?

MJ: Yeah. They were prisoners of war.

DDC: In the context of that conflict?

MJ: They were determined to be prisoners of war. I wasn't researching that –- I wasn't reviewing that question, I was going over, "These people have been determined to be prisoners of war, what can we do?"

DDC: And aside from that experience in Desert Storm, did you have any experience in this area, sir?

MJ: No, nothing.

DDC: Sir, you said you retired in 1999. What did you do after you retired?

MJ: Nothing. I don't mind going into this, although you can find it in many of the prior voir dires. I did nothing quite peacefully until someone decided that I needed a part-time job, and so I worked on the beach for 4 or 5 months. I was a census enumerator going around knocking on doors. I taught general legal subjects at a local college, and I tutored people in math for a Princeton Review -- that's not a plug -- for a pre-SAT training course.

DDC: Did you practice law at all during this period of time, sir?

MJ: No.

DDC: And how did you first become involved in military commissions?

MJ: How is that relevant to the 902 determination? You asked that question, you could have followed up with a written question. I've been answering a lot of questions, but would you tell me the relevance?

DDC: Sir, 902 allows us to explore bases for determining whether or not you can sit impartially as a judge in this proceeding or whether or not members of the public would perceive you as impartial.

MJ: Right. Okay.

DDC: What I would like to do, sir, with this inquiry is to establish the nature and extent of your involvement with the military commissions process, your personal investment in the military commissions process, the extent to which your personal reputation may be at stake as a result of outcomes of the military commissions process. And I think I have a series of questions that I can relate to ----

MJ: Okay, well if that's what you want to do, go ahead and do it.

DDC: Right, sir. How did you first become involved in the military commissions, sir?

MJ: I was selected to be a presiding officer by the then Convening Authority, Mr. Altenburg.

DDC: When was that, sir?

MJ: June of 2004.

DDC: And did you have an understanding at that time, sir, as to the nature and purpose of military commissions?

MJ: I had read the President's Military Order of November 2001. I had read whatever military commission orders had been issued -- I forget which ones had been issued, and I had read the military commission instructions.

DDC: During this reading did you form or express an

1 opinion as to the legality of those instruments?

2 MJ: Thank you. Move on.

3 DDC: Sir, you mentioned Mr. Altenburg before. Who is he?

4 MJ: Mr. Altenburg is a retired 2-star general who was the

5 assistant to the Judge Advocate General for the United States

6 Army for a period running, I think, from '97 to 2001.

7 DDC: And could you describe your relationship with

8 Mr. Altenburg?

9 MJ: He and I are friends.

10 DDC: Sir, a moment ago I ask you if you had formed or

11 expressed an opinion as to the legality of the President's

12 Military Order. I think if the answer to that question is -– if

13 I may make an offer -- certainly if your answer is no, that's

14 one thing. If your answer is yes, that may bear upon your

15 conceptions of the legality of this process and may affect your

16 ability to sit on this ----

17 MJ: The answer is still, “move on.”

18 DDC: Sir, you were a presiding officer under the previous

19 system of military commissions?

20 MJ: Yes.

21 DDC: Did you have an understanding of what your duties

22 were as a presiding officer under the authority of the

23 President's Military Order?

MJ: Under what?

DDC: Under the authority of the President's Military Order and the subsidiary regulations?

MJ: Yes.

DDC: What were your duties as a presiding officer?

MJ: To conduct a fair trial.

DDC: How would you personally compare those duties and your understanding of those duties with your duties as a military judge in this process, particular with respect to your authority to rule on questions of law?

MJ: I think that under the current system under the Military Commissions Act, the military judge -- and this is a think and I'm not writing a law review on it – has much more authority to act unconstrained – or no, constrained only by his belief in what is correct then what you had in the prior system.

DDC: And did you serve as a presiding officer on any referred cases before military commissions?

MJ: Yeah.

DDC: Approximately how many?

MJ: Four.

DDC: And I guess similar to the question I asked you before with respect to your participation as a trial judge in courts-martial, did you have a chance during your participation

as a presiding officer to rule on any motions that dealt with the legality of the military commissions under the authority of the PMO?

MJ: Okay, there are two prior types of commissions. For ease of reference, I'll refer to them as Commissions I and Commissions II. Under Commissions I the presiding officer sat with other members and all of the members including the presiding officer rule on questions of law. Commissions I was effectively ended on the 8th of November 2004, 3 years ago today, when a federal district court judge issued a stay in the case of US v Hamdan.

We had at that time gone through a full week of motions, about 40 or 50 motions with Hicks the week before and then Commander Swift was standing in the well of the court about right where you are arguing another motion when we were stayed. So the answer is as to that, “no,” in Commissions I.

In Commissions II the role of the presiding officer was changed to much more of that of what we think of as a military judge. The Commissions II was halted effectively by two events in June of 2006, one of which was the Supreme Court's rulings in US v. Hamdan, and there were no motions presented as to the constitutionality to me.

DDC: Prior to the Hamdan ruling?

MJ: Right. If there were, I had not ruled on them. I don't know.

DDC: Thank you, sir. You mentioned the Hamdan decision. I take it you are familiar with the decision of the Supreme Court in Hamdan, sir?

MJ: I would not call anyone familiar with it, but I have read it.

DDC: Do you know what it held?

MJ: Which portion of it?

DDC: Generally, sir.

MJ: I generally believe that I know what it held. I'm not willing to be quizzed on that, but I will say that it ruled that the President had to go to the Congress to get authority to run military commissions that vary from what was in the UCMJ. There was a lot of other stuff said, but I think that was the basic holding.

DDC: Would you agree that Hamdan held that the previous system of military commissions violated common Article III of the Geneva Conventions?

MJ: I would say that the Hamdan referred to Article III of the Geneva Conventions and said that in order to hold a commission like that, the President would have to go to the Congress.

DDC: Hold a commission like what, sir?

MJ: Like the ones that had been held.

DDC: One that violated Common Article III ----

MJ: ---- That's your description. Go on.

DDC: I guess, sir, I mean it's an important point. Would you agree that Hamdan held that that previous process was, and I quote, "illegal"?

MJ: No, I don't.

DDC: Have you ever expressed an opinion as to whether Hamdan was correctly decided?

MJ: I don't actually believe so. It really doesn't matter whether Hamdan was correctly decided, that's what the Supremes said.

DDC: Well, sir, your opinion of whether Hamdan was correctly decided may be very relevant to the extent that you're going to be called upon to rule on very similar questions in this proceeding.

MJ: Well, like I said, I don't remember.

DDC: Obviously you're familiar with the Military Commissions Act.

MJ: Once again, I've read it.

PROS: Yes, sir. Have you expressed an opinion as to whether or not the Military Commissions Act complies with -- and

I'm going to ask this in two parts -- the Constitution?

MJ: No, I haven't expressed an opinion on that.

DDC: And international law?

MJ: I have not expressed an opinion on that.

DDC: Sir, in response to defense's written voir dire, you said you had knowledge or had been reading on a number of subjects that may be the subject of this case, including Afghan -- combat operations in Afghanistan, al Qaeda, and the Taliban. In fact, your response was that you had read too many periodicals or articles to list with respect to each of those subjects. I'd just like to ask you a couple of questions concerning your knowledge of those subjects.

Can you describe your understanding or your knowledge of combat operations in Afghanistan?

MJ: I think you're going to find me woefully deficient, but to my knowledge our first troops went in there sometime in October of 2001, and have been engaged in a conflict ever since then with help from other members of the coalition. Honest, that's my basic knowledge of it.

DDC: Do you have an understanding as to the legal status of the conflict in Afghanistan?

MJ: Nope.

DDC: And on specifically I asked you another question with

respect to your knowledge of the Taliban and you said you had read too many periodicals to list. What is your understanding of the Taliban –- the Taliban?

MJ: Okay, my understanding of the Taliban -- and I'm willing to be educated -- is that they were the ruling government, the ruling force in Afghanistan prior to the United States incursion there.

DDC: Last question or similar question with respect to al Qaeda. What is your understanding of al Qaeda or what al Qaeda is?

MJ: Based on general reports, al Qaeda is -- al Qaeda is an organization, group, dedicated to the spread of Islam. That's what I know about al Qaeda. I have not studied them. I answered your question I thought fairly. I've read reports just like you have. You can't pick up the paper since 2001 without getting some reference to Afghanistan, al Qaeda, or the Taliban.

DDC: And is it your understanding that -– certainly in 2002 that we were fighting both the Taliban and al Qaeda in Afghanistan?

MJ: I don't know enough about that to ----

DDC: Sir, with respect to your performance as a military judge in this case, do you consider yourself to be bound by any canons or codes of judicial ethics or judicial conduct?

MJ: Yes.

DDC: Can you tell me which ones, sir?

MJ: The Army Code of Conduct.

DDC: The Army Code of Conduct?

MJ: Yes.

DDC: Any others? Any state rules or any others?

MJ: No, the Army. You asked as a judge and I'm only a judge in the Army.

DDC: Yes, sir. And how do you understand those rules to apply -- I mean, there is something called the military commissions trial judiciary; correct, sir?

MJ: Right.

DDC: What is that entity? If you could tell us.

MJ: I don't know if it's eight or nine people right now. It's Colonel Kohlmann and the other eight judges who were detailed to the judiciary.

DDC: What about assistants?

MJ: The MCTJ staff?

DDC: Yes, sir.

MJ: Okay, there's them too.

DDC: They assist the judges collectively in the performance of their duties?

MJ: Right.

DDC: What's your understanding of how your code of judicial ethics applies to your assistants with respect to things like *ex parte* communications, maintenance of judicial privilege, what's ----

MJ: You'd have to give me a specific question and I'd have to go look it up under the code of conduct.

DDC: For example, *ex parte* communications.

MJ: You'd have to give me a specific question, I'd go look it up under the code of conduct.

DDC: So you don't have a current understanding as to what -- for example, Colonel Chappell, what his obligations are with respect to *ex parte* communications with the government?

MJ: I say again, give me a specific question and I'll go look it up. I feel, however, to answer -- which I probably should just make you write the question -- if I need Colonel Chappell to call Commander Kuebler, then Colonel Chappell can do it. One reason that you have a staff is so that you don't have the government or the defense talking to the judge, they can talk to the staff.

DDC: Okay, then let me sort of –- I don't want to ask you hypotheticals, sir, because I don't want that to be the substance of the conversation, but -- I mean, I take it you would agree that there are some obligations that as a judge your

assistant can't do things that you would otherwise not be able to do. For example, if there is a prohibition on *ex parte* communications -– without getting into the weeds about what particular *ex parte* communication we're talking about -– just *ex parte* communications. Your clerk couldn't do it if you couldn't. Is that generally understanding or am I misstating the rules?

MJ: I think that my clerks can talk to counsel for either side on matters not of substance, meaning legal matters, and there's no prohibition on that.

DDC: Would you consider logistical issues ----

MJ: No.

DDC: ---- to be ----

MJ: No. Go on.

DDC: Would you consider those to be matters of substance?

MJ: No. Schedules, timing, flights, how to be, where to be, how to dress, no those aren't substance.

DDC: Let me ask this question, sir. If Colonel Chappell were to have a conversation with somebody in the Convening Authority's office or the Office of Military Commissions about –- let's say you had a defense request for a continuance in front of you and we requested a specific date and Colonel Chappell called the government to say, “Are there beds in Guantanamo for

that date? Can we get flights for that date? What is the logistical picture in Guantanamo Bay?" Is that something that would be appropriate or inappropriate?

MJ: Appropriate.

DDC: And to your knowledge, do those kinds of communications take place?

MJ: Well that's why I'm not making them. I'm sure they do. I'm sure they take place, I don't know. I feel certain that if you were aware of an inappropriate *ex parte* conversation, you would have brought it to my attention and I haven't received any such notice, so -- and I think the government would do the same thing.

DDC: And I guess this is not necessarily your responsibility, sir, because, you know, you're not the chief judge, but to what extent does the MCTJ engage in training or briefing with the MCTJ staff about where the lines are? What's appropriate as far as *ex parte* communications, what's inappropriate, and to what extent they are bound by those rules. What is in place to make sure that those folks are following your rules?

MJ: You were right to start off with. You have to ask Colonel Kohlmann that. But I think that the people on the staff -- this is one of those things that you wouldn't know it was

going to happen until it did. I'm not aware of any *ex parte* matters of substance. If you know of something, tell me.

DDC: Well, sir, for example, the court's e-mails say -– they're usually from Colonel Chappell and they say, “Please forward to other interested parties.” Well who are the interested parties in your knowledge? Who is he communicating with?

MJ: Have you looked at the e-mails addresses?

DDC: Yes, sir, but then it says, “Please send to designees and other interested parties."

MJ: No, what it says is, “Please send it to counsel in the case and forward to other interested parties.”

DDC: Sir. I don't think that's a full picture though. I can have this marked. I've got a document here. It's a ----

MJ: Wait a second. I'm referring to Appellate Exhibit 30, page 2 thereof, an e-mail from me to Colonel Chappell saying, "Lieutenant Colonel Chappell, please forward the e-mail below to the parties in US v Khadr. Please furnish a copy of it to other interested personnel." That's what I type on almost every one I send. I've sent some from here when I was just sending it, I didn't type it on that. The other interested personnel appear to be people such as -– well, he sends it to people who are -- Sergeant Jackson, Mr. Berrigan, LNC Redman, Tech Sergeant Gibbs,

and then he cc's a lot of other people. So, yes.

DDC: Yes, sir, and I guess I'm concerned about not just who he's cc'ing, but who is he blind copying. I can have this marked or I can just represent ----

MJ: Just tell me what it is.

DDC: Yes, sir. It's an e-mail from Colonel Chappell which inadvertently sent to the distribution list in our case and I guess it was supposed to be from him to Ms. Bley, another assistant with the MCTJ staff, and said, “Who did you bcc? Thanks. v/r Mike Chappell.” So my question, sir, obviously there are communications going on between the MCTJ staff, other people within the government, and I'm simply asking what you or Colonel Kohlmann are doing to figure out where those communications are and to make sure that your people are not doing things that cross ethical lines. I'm not accusing anybody of anything, I'm just asking what measures are in place to make sure those things don't happen.

MJ: When I saw that e-mail that you're referring to, I said, “Huh?” And I believe that his answer was, “I was sick.” I don't know. I have no knowledge that he is bcc'ing anyone for whom it would be inappropriate and given the wide distribution of that e-mail, I can't see anyone who would be inappropriate. So I don't know. However, I'll make it a point to talk with the

MCTJ staff and Colonel Kohlmann about this subject.

DDC: Thank you, sir. Turning to this case and previous actions in this case, sir. Do you receive what are called or go by the Office of Military Commissions daily press clippings? It's an e-mail that goes out every day?

MJ: No.

DDC: No. Do you know whether or not anybody on the MCTJ staff receives them?

MJ: I've got no idea.

DDC: Have you seen or did you see any press coverage of your June ruling dismissing charges in this case?

MJ: I don't know why you ask me questions on written if you don't want to read the answers. Somewhere in the list of voir dire questions you asked me that same one and I said, "yes."

DDC: I think I asked you a general question about coverage of the Khadr case. My question was focused more on the specific question of your ruling in June.

MJ: Yes, I've seen coverage.

DDC: And what coverage did you see, sir.

MJ: I've got no idea. I don't write down what I read. Why don't you ask me the question that's underlying this?

DDC: Did you have any particular reaction to the press

coverage that you saw?

MJ: Obviously, I hope, I made the ruling I made on the 4th of June because I believed it was the correct thing to do. Unfortunately, at times matters are reported without, shall we say, a full background and a full understanding and that's especially of concern in legal matters and even more especially of concern in the military commissions practice. I saw a couple of things that said that I had done wrong, a couple of things that said I had done right. And at the end of the day -- if you're asking does the press bother me, the reports, is that what you're asking?

DDC: Well not so much from that –- not the press, but the things that they're reporting.

MJ: I mean the press. When I say press, I mean the reporting. No, it doesn't bother me.

DDC: Well let me ask you this, sir. Did you see the report where the White House spokesman specifically said that the White House disagreed with your ruling?

MJ: No. Did they?

DDC: Yes, sir. You did not see that?

MJ: I don't believe so. When did it come out?

DDC: Days after your ruling in June, sir.

MJ: I've read that Mr. Gates said he'd like to read the

ruling.

DDC: Did you read comments from the DOD spokesperson that said they thought that your ruling, the issue, was essentially one of “mere semantics.” Do you recall hearing that?

MJ: From whom? Say that again.

DDC: From the DOD official spokesperson.

MJ: Yes, I saw that the DOD spokesperson thought it was semantics.

DDC: And that's somebody who speaks on behalf of the Department of Defense; right, sir?

MJ: Okay.

DDC: Is that your understanding?

MJ: Go on.

DDC: Is that your understanding?

MJ: I hope he does.

DDC: Have you read our heard recent press accounts of statements by the former Chief Prosecutor, Colonel Davis about military commissions?

MJ: Yes, I've heard some things he said.

DDC: What have you seen or heard?

MJ: That he thought that the commissions were going down the wrong track. I have not dealt with OMC much, so I wasn't in a position to evaluate. The only cases I know that are referred

are Mr. Khadr and Mr. Hamdan. I don't know about any other cases that he might have been talking about.

DDC: Anything else about the substance of his comments, like the pressure from high levels of government to get the commissions moving –- I mean, have you read that in terms –- or heard that in terms of Colonel Davis' statement?

MJ: Yes. I was aware of what he said and I don't know what -- that's really none of my business.

DDC: Sir, do you recall an *ex parte* -- yes, it was an *ex parte* 802 conference that was conducted in this case the week of 22 October?

MJ: Yes.

DDC: And, sir, in the course of that conference, we the defense asked that we'd be seeking delay of approximately 3 to 4 weeks to resolve certain counsel issues that -- of which you are aware. Do you recall that, sir?

MJ: Yes.

DDC: And, again, sir, I apologize if I'm misquoting you. Let me just make that clear up front. I recall and I want to know if you recall saying that you had, “taken heat” or “taken a lot of heat” for your decision in June to dismiss the charges without first doing certain administrative matters on the record. Do you recall making that statement in the course of

the 802 conference?

MJ: The court is referring to Appellate Exhibit 40, page 7 of 77 which is a summary of the *ex parte* telephone conference call on 24 October 2007, in the case of US v. Omar Khadr. This was prepared by Commander Kuebler and forwarded to me and I approved and sent it on. I don't see it in there. You agree with that; right?

DDC: I agree with that, sir.

MJ: Okay. I may well have said something like that. If I'd known that you were going to copy down and not put it in the summary and try to quote it against me, I probably would have thought more. But I'm not saying that I didn't say it.

DDC: Can I ask you, sir, from whom you took heat for that decision?

MJ: You just told me that you read from the DOD people that they didn't like what I wrote; right?

DDC: Yes, sir.

MJ: Okay. That's what I mean by "heat." You mean, I didn't say I feel certain, Commander Kuebler, that I never said anyone who has any influence over me said anything?

DDC: Thank you, sir.

MJ: Did I?

DDC: No, sir, you did not. I tried to quote you to the

1 best of my memory and that's why I asked you the question to
2 clarify, sir.
3 DDC: Sir, in a -- and obviously we're going to talk about
4 this on the record I think in a few moments, but there was any
5 issue with respect to the status determination -- the unlawful
6 enemy combatant determination that was scheduled to take place
7 today. Please correct me if I'm misconstruing the record, but
8 you elected to raise this issue upon remand from the CMCR. Part
9 of your order required the parties to limit their litigation of
10 the issue to whether Mr. Khadr met the statutory criteria for
11 unlawful enemy combatant designation under the Military
12 Commissions Act and specifically precluded argument with respect
13 to the application of the Constitution, international law,
14 criminal law, and can I ask you why you elected to ----
15 MJ: No, that is a legal question that you may raise in a
16 motion -- you have raised in a motion. No, you may not do that.
17 DDC: Sir, have you heard anything to the effect that the
18 government was waiting or is waiting for the first successful
19 status determination to take place before it would refer
20 additional case?
21 MJ: No.
22 DDC: Sir, as of today, how long have you been personally
23 involved in the military commissions process? All three

systems.

MJ: Do I have to give you days? How about from the 13th of July 2004.

DDC: So a little over 3 years?

MJ: Right.

DDC: And during that time -- and again I don't think I asked you this specific question, but have you read press coverage of the military commissions process in general?

MJ: Yes.

DDC: Have you read legal periodicals about the military commissions?

MJ: Yes.

DDC: And overall, if you were asked to characterize, would you characterize the majority of those accounts favorable or unfavorable?

MJ: Of the general press reporting, I would say that overall the great majority was unfavorable to the military commissions system, meaning that they disapproved of it. I'm not using unfavorable meaning they wrote badly about it. Of the legal matters, I'd say maybe split may be 50/50. I couldn't tell you.

DDC: Thank you, sir. I have no further questions. Thank you, sir.

MJ: Trial?

PROS: No questions, sir.

MJ: Challenge, trial?

PROS: No, sir.

MJ: Defense?

DDC: Sir, I respectfully request a brief recess both as a comfort break and to consider whether or not we have a challenge for cause before proceeding.

MJ: I don't believe that we have ever been able to have a recess in this commission that lasted less than 20 minutes. The court will -- excuse me, the commission will come back to order at 1145.

Commission's in recess.

[The 803 session recessed at 1130, 8 November 2007.]

[The 803 session was called to order at 1159, 8 November 2007.]

MJ: Court will come to order -- the commission will come to order. Let the record reflect -- are all parties present, trial?

PROS: Yes, sir.

MJ: Okay thank you. Trial, challenge?

PROS: No, sir.

MJ: Defense?

DDC: Yes, sir.

MJ: Come forward and make it.

[The detailed defense counsel moved to the podium.]

DDC: Sir, pursuant to Rule for Military Commission 902, the defense challenges the participation of the military judge on the general grounds that the military judge's impartiality might be reasonably questioned in these proceedings and this military judge may possess a personal bias or prejudice concerning a party, particularly the interests of the United States in this case.

MJ: Say that again.

DDC: That the military judge may possess a personal bias concerning the interests of a party, in this case, the United States that interferes or precludes the military judge's ability to sit in this proceeding. May I elaborate?

MJ: Yes.

DDC: Thank you, sir. Sir, based upon your responses to the voir dire questions that I asked you earlier, it appears -- and I think it would appear to a reasonable person observing these proceedings – that, with all due respect, you are too personally invested in the military commissions process. Based upon your long service, your participation in a number of these proceedings over what you acknowledge to be three separate systems, it would appear to an outside observer that you as an

individual are too personally interested and that your reputation in the ultimate success of this process is too much at stake.

I asked you about the Hamdan opinion during the course of voir dire. And the Hamdan opinion, sir, -- and I'll quote from page 62 of the U.S. Report opinion. Says, and I quote, that, "Article 36 not having been complied with the rules specified for Hamdan's trial are illegal," and I asked you a specific question in connection with Hamdan during the voir dire and you said that, "No. That Hamdan had not held that the military commissions were illegal."

The opinion goes on to say, sir, that the procedures adopted to try Hamdan also violated the Geneva Conventions, and again, sir, I mean no disrespect and I'm not calling into question your competence, but I am saying that as someone who has been involved in this process for such a long time and I as counsel -- defense counsel in this process who have had a number of conversations with people who have been involved in this process on the other side of the table that the interpretation of Hamdan, that it was simply a question of an absence of statutory authorization is something that people who have an ongoing involvement in the military commissions say, I think, to avoid the inescapable conclusion that the military commissions

1 system in place before the Military Commissions Act was in clear
2 violation as held by the Supreme Court and the Geneva
3 Conventions, and under federal laws that existed at that time
4 tantamount to a war crime.
5 And so I think that the fact that you have that
6 interpretation of Hamdan and that you carry that interpretation
7 of Hamdan into your participation in these proceedings might
8 cause a reasonable observer to question your impartiality and
9 your ability to sit and hear the issues that are going to be
10 litigated before you.
11 Then you move on to, I think, some of the specific
12 pressures that you are under, sir. There is no question the
13 military judge -- a Department of Defense military judge in your
14 position -- any military judge would be under a great deal of
15 pressure certainly in light of the ruling that you issued in
16 June where the Department of Defense – and again, sir, I
17 contrast the situation here with that of an Article 3 judge.
18 You, unlike an Article 3 judge, the executive branch can bad
19 mouth and say bad things about all time do not have life tenure.
20 You're not insulated from those influences or those pressures.
21 You are a subordinate official of the Department of Defense.
22 You report to the Secretary of Defense, you report to the
23 President, and to have the President's office and the Secretary

of Defense's office stating specifically that they disagree with what you're doing would cause, I think, any military judge in your position to feel a certain degree of pressure.

Then we go on to the specific pressures in this case, sir, which you've acknowledge. The comment about taking heat in connection with a previous decision in June being traced to the same DOD people that Colonel Davis was talking about. Again, sir, I think you'd acknowledge that there are pressures being applied on you that are specific to your participation here.

MJ: I specifically deny that comment. I'm telling you that is not a valid comment. Go.

DDC: And then, sir, moreover, there appears to be no structural insulation or measures being taken at all to ensure that the kinds of pressures that we're talking about don't influence the staff and the decision makers within the trial judiciary. I don't necessarily agree, sir, and I think this may be an issue that we end up litigating in this case, that it's appropriate for members of the MCTJ staff to be having extensive conversations with the Office of Military Commissions about logistical issues to the extent that those logistical considerations are relevant to legal decisions before the court without having the government come in here and explain those things on the record. Because what one might believe based upon

1 your answers is that logistical issues may play some sort of a
2 hidden role in the legal decisions that are made by you as the
3 military judge. And the fact that you have participated in the
4 process thus far without ensuring that your assistants and
5 without taking any steps to ensure that other members of the
6 staff are complying with any type of rules of ethics or judicial
7 canons of conduct – again, sir, it creates those same
8 impressions to an outside observer that this process is subject
9 to inappropriate external influences.
10 And so -– and one more, sir, one more item. In
11 response to my question about whether – or what your
12 understanding was as to your duties as a military judge, you
13 recited a number of sources of law that you were bound to apply
14 in this proceeding and I don't believe that you mentioned the
15 Constitution. I believe you started with the Military
16 Commissions Act.
17 And the problem, sir, is that, you know, our concern
18 is less that you will not apply the rules as they exist within
19 this system to achieve a fair trial, but that you won't be in a
20 position to rule on issues of the basic legitimacy of the system
21 in the first place. And, frankly, sir, those are the real
22 issues to be resolved in this process. And so when it comes
23 time to rule on questions of whether the M.C.A. complies with

the Constitution, whether the M.C.A. complies to international law to the extent that it's applicable, based on your involvement with this process, sir, and your responses to these questions, your actions in the initial status determination of limiting us to the M.C.A. and not considering matters of constitutional law or international law. It would cause someone sitting outside this process to say, you know he may apply the rules fairly as they exist under the M.C.A., but he's not going to question the legitimacy of the M.C.A. So when you rule on those issues, sir, and you deny our motions or you grant our motions, the question is, what is the degree of public confidence that is an impartial, unbiased decision and to what extent does the public believe that that’s a product of some personal interest in this process or reputational interest in this process, sir. Because there is no question we are at a historic moment and this entire military commission scheme that has been going on for 3 years now is either going to be an exceptional historical moment where our country did something necessary in the face of a great danger or a failed legal experiment that we're all going to want to forget. And the problem, sir, is that you sitting in that chair have too much of a personal interest in answering that question a certain way to be trusted to answer those questions the right way. Thank you,

sir.

MJ: Do you want to say anything, trial?

PROS: Briefly, sir. I would just say that counsel's argument much like many of their questions during voir dire are irrelevant to the issue at hand. None of the materials previously provided by the military judge in response to the questions provide a basis for cause, and none of the military judge's answers today provided a basis. So we oppose this challenge.

MJ: I specifically find that there has been no instance of the MCTJ staff acting improperly presented to the commission. I specifically find that no one –- and if you had asked me this question I would have said it -- no one above the grade of O6, which is what I am, has talked to me about the commissions. I specifically state that the only -- apparently the basis is that I feel some pressure to do something, I'm not quite sure what -- a retired recall officer such as myself cannot be promoted, that's why I don't get OER's, and I guess in Commander Kuebler's challenge the worst that could happen to me is that I would not be on active duty which would mean I'd go back in being quite happy as I was before I took on this role and duty. I refer Commander Kuebler to the oath of office for commissioned officers.

As for the personal bias on behalf of the United States, if that, I guess, meant that I am interested in making sure that the prosecution wins in these cases, there has been nothing to indicate that. To say that I am too personally involved and interested, I am, in fact, personally involved and interested in these proceedings. Not only do I admit that, but I state it as a fact.

Reviewing R.M.C. 902, I find I am qualified to serve as the military judge of this military commissions. The challenge is denied.

Counsel for both sides understand the provisions of the Manual for Military Commissions concerning safeguarding and securing classified information? Trial?

PROS: Yes, sir.

MJ: Defense?

DDC: Yes, sir.

MJ: As soon as practicable, notify me of any intent to offer evidence involving classified information so that I can take appropriate measures.

I am required by the M.M.C. to consider the safety of witnesses and others at these proceedings. So counsel for both sides have to understand that they must notify me of any issues that they learn of regarding the safety of potential witnesses

so I can determine appropriate measures.

The only protective orders of which I am aware are protective orders 1, 2, and 3 which have been marked as Appellate Exhibit 31, 32, and 33, respectively. All of the traffic involving those orders is contained in the AE. I specifically set a date and time for counsel to see me in chambers to talk about this. Since there was some concern. Counsel failed to show, and counsel failed to notify the military judge that they were not going to show. If you wish to make a motion on the protective orders, defense, feel free to make a motion and we'll cover it at an appropriate time.

Filings inventory, the current filings inventory is marked as AE 48. Counsel for both sides got any objections to AE 48?

PROS: No, sir.

DDC: No, sir.

MJ: The defense filed a motion for a fair status determination, D004. In that motion, the defense conceded that the CMCR ruling on 24 September 2007, establishes for the purpose of this case that there is a *prima facia* jurisdiction over the accused. Consequently, the necessity for making an initial or threshold determination in order to establish for the accused that he is before a court which has jurisdiction over

him is eliminated. The motion, the government response, and some other matters are all contained -- and the ruling, are contained in AE 42.

Trial, do you have any comments about that?

PROS: No, sir.

MJ: Defense?

DDC: Yes, sir. Would you like me to approach the podium?

MJ: Yes, if you're going to talk for awhile.

[The detailed defense counsel moved to the podium.]

DDC: Yes, sir, I think it's very important to clarify this on the record. The military judge mentioned again -- and I'll say, I don't think there is disagreement between the judge and the defense on this matter, I think any tension on this is going to come from the government side. The judge used the term “concession” a moment ago and in the ruling D004 to which you referred. As we expressed in the 802 yesterday and I'll express again, we take issue with your use of the term "concession." We don't believe that we're conceding anything, we're simply acknowledging that the Court of Military Commission Review said that this court -- or this commission, may exercise jurisdiction based upon a *prima facia* showing. That *prima facia* showing is established by the preferral and referral of charges against the accused, and that you are bound by that decision as the trial

1 court subject to the appellate court.

2 So we acknowledge that, we recognize that. We

3 disagree with that. We believe that the judge's ruling from the

4 4th of June was correct, that this commission lacks the

5 jurisdiction to make the determination of unlawful enemy

6 combatant status and that must be done by a separate tribunal.

7 That matter is the subject of review currently before the DC

8 Circuit Court of Appeals. That was why we had sought -- the

9 issue that we are confronting now is the reason why we sought a

10 stay of proceedings first from the military judge and then from

11 the DC Circuit because this type of issue arises where the trial

12 court is proceeding while the question of the trial court's

13 jurisdiction to proceed and the legality of its proceedings is

14 on review before an appellate court.

15 So it is our understanding based upon discussions both

16 in e-mails to the court and discussions off the record, the

17 government intends to take the position that we are somehow

18 waving a challenge with respect to personal jurisdiction. The

19 judge heard that yesterday in the course of the 802. And we

20 want to make very clear on the record, sir, that we're not

21 conceding that the CMCR opinion was correct. We're not

22 conceding anything. We're simply acknowledging that you're

23 bound by it ----

MJ: You see the trouble in writing this ruling. But go on.

DDC: I do, sir. But we want to make that very clear. And I want to state for the record that we have a number of objections to the exercise of personal jurisdiction by this tribunal based upon Mr. Khadr's presumptive POW status ----

MJ: Please don't feel free to list them all ----

DDC: I feel that I have to list at least a few.

MJ: Okay.

DDC: His age at the time of the offenses under applicable provisions of international law that require differentiating treatment for minors. A number of challenges to *in personam* jurisdiction, that consistent with the CMCR opinion we may raise by motion at an appropriate time. And I want to be very clear on the record because I fear that if we're not, the government's going to run to the press as soon as we're done here and say, “the defense concedes jurisdiction of the tribunal,” and so I respectfully request the military judge, notwithstanding the use of the term “concede,” make it very clear on the record that the defense does not waive any challenge as to personal jurisdiction. And that the defense retains the right to bring those challenges by motion at the appropriate time consistent with the court's scheduling order.

MJ: Are you finished?

DDC: Yes, sir.

MJ: Do you feel the need to say something?

PROS: Yes, sir, thank you.

MJ: Okay, you go on up there.

[The detailed defense counsel resumed his seat at defense counsel table and the prosecutor moved to the podium.]

PROS: Your Honor, shortly after the Court of Military Commission Review's 24 September decision, the military judge ordered the parties to prepare -- or to provide evidence that we would rely upon in determining whether the accused is an unlawful enemy combatant. Following that initial guidance on at least three separate occasions, the military judge has been adamant in setting both the scope and the schedule for this hearing. Relying upon Your Honor's often repeated instructions, the government has actively -- actively prepared for this evidentiary hearing over the last 6 weeks.

The government has prepared its witnesses, collected its documents, assembled its exhibits, and brought all of them to Guantanamo Bay. All for the singular purpose of making one factual showing; that Omar Khadr is, in fact, an alien who was fighting as an unlawful enemy combatant in Afghanistan in 2002 by conducting surveillance on US forces, by making and planting

1 improvised explosive devices to target United States Soldiers,
2 by throwing a grenade killing a US service member, and being
3 captured on the battlefield in Afghanistan.
4 To be clear, the government does not dispute the
5 commission's 7 November order. The premise of that order was
6 made clear to all parties on 24 September 2007, when the Court
7 of Military Commission Review issued their opinion. But there
8 is more than *prima facia* jurisdiction in this case.
9 The government respectfully requests that this court
10 determine either on the basis of the information previously
11 provided to the military judge or information -- additional
12 information that the government is willing and ready to offer
13 today. Your Honor, in statements to the media, the federal
14 courts, and the commission, the defense has repeatedly decried
15 the delays in this case. Notwithstanding their specific efforts
16 that caused many of those delays and repeatedly demanded Omar
17 Khadr's day in court.
18 Today, Your Honor, the government is prepared to
19 provide it. Specifically, Your Honor, I would refer you to the
20 evidence that we have previously provided that are appellate
21 exhibits in this case. Initially Appellate Exhibit 17 ----
22 MJ: Okay, stop for a second, Major Groharing. I asked if
23 you wanted to say anything about what he said. If what you're

telling me is that you're prepared to prove jurisdiction and you want me to let you do it even though you know I told you yesterday you're not going to be able to do it, I don't know what more your getting out of this comment.

PROS: Sir, the government would request that we at least be allowed to provide a proffer of the evidence that we provided that would establish jurisdiction -- personal jurisdiction in this case.

MJ: Is that the matters that you have previously provided to the commission?

PROS: Your Honor, and just to be clear for the record, this is the second instance in which the government is requesting to provide evidence or information to this court to make this determination. Following the last proceeding there was some confusion over whether the government intended to offer evidence to make this determination. We want to make crystal clear that that is our intent and that that is our request.

MJ: Okay, you've made that crystal clear.

PROS: Thank you, sir. If I could continue, and I will be brief and I would beg the court's indulgence. I do note that the court allowed defense counsel to go on for some time during voir dire on seemingly irrelevant questioning. I would only ask for a couple of minutes to cover these materials.

MJ: Okay. Please don't make side comments like that. Go on.

PROS: Thank you, sir. The government would rely on a video tape showing the accused making and planting improvised explosive devices. This video tape was found at the scene where the accused was captured.

Sir, I would also point your attention to the statement of the commander that led the unit resulting in the accused's capture ----

DDC: Sir, the defense objects to this.

MJ: Are all of these matters there contained in AE 17?

PROS: The majority of them are, sir, with the exception of the items that we provided specifically at your request for this hearing.

MJ: AE 17 is part of the record of trial; right, Commander Kuebler?

DDC: Yes, it is, sir.

MJ: Okay, that's part of the record and I understand what it is you are talking about. I really don't want to listen to a –- if you feel -- would you be willing to accept a proffer if he writes it up and provides it to the commission tomorrow? Do you have any problem with that Commander Kuebler?

DDC: Sir, it's already part of the record. He wants to

summarize what's already part of the record.

MJ: I understand what you want to do here, Major Groharing, and I understand your frustration with the military judge for not allowing you to do this. However, that frustration should have -- well it hasn't diminished, but please don't list for me all the matters, they are in AE 17.

PROS: Sir, I would ask that the government be allowed to list these matters and specifically establish on record that to the extent this becomes an issue either in appellate proceedings or that the defense decides at a later point to challenge on the same basis, the government very well may decide to rely upon the record made here today and the argument made here today to answer that challenge. The government does not want to go through the same procedure we did this week to transport witnesses to prepare for this jurisdictional hearing. We would like to make the record today and ask the military judge to make that determination today.

MJ: Have I already ruled on this?

PROS: I believe so. You did in your ruling; yes, sir.

MJ: So the answer is “no,” you may not do that. I said I understand the problems that you are facing and if I – well, I understand the problems. However, you provided certain matters to the defense and to the commission by e-mail on a date given

and those combined with AE 17 are certainly on the record as having happened before today.

If your complaint is that at some future session the commission failed to let you put those on the record, they're already on the record. If you wish to provide to the court reporter prior to the close of the session a list of any witnesses you might call and mark it as the next appellate exhibit in line, you may do so.

PROS: Sir, I believe we've already done -- provided information to the court. We will provide it again. Sir, I understand that the military judge will not allow me to discuss the specific evidence but I do -- and I understand this evidence is already in the record. What I would ask is that the military judge today specifically find that personal jurisdiction exists over the accused, and that jurisdiction exists through trial of the accused absent a proper challenge before the court.

MJ: Thank you.

PROS: Could I have response on that please, sir?

MJ: From me?

PROS: That's what I'm asking.

MJ: I'm going to wait for him. Look at him, he's crouched to stand up. He wants to say something.

PROS: Are you asking me to sit down, sir?

MJ: Are you going to talk for a long time, Commander Kuebler, or can you speak from your bench?

DDC: I can speak from here, sir.

MJ: Speak into the microphone so people can hear you.

DDC: Sir, what that sounded like to defense is that the government is now filing a motion raising the same issue that the judge initially raised *sua sponte* that we objected to and brought a motion and prevailed on. So if they're going to make an oral motion now for a finding of status, that is, I just want to point that out we interpret that as what the government is asking for, sir. That's not what the subject matter of this initial conversation was, it was about clarifying your previous ruling, not a separate government request to find jurisdiction.

MJ: Thank you. Okay. The commission has written this down in Appellate Exhibit 42. I have discussed it with counsel, and I believe I may have already read part of this. I'll make a further note of some things.

I directed the parties to advise the commission of the matters upon which each party would rely for the initial determination. Neither party gave the commission any notice that would rely on the testimony of a witness. The commission recognizes that the defense has appealed the CMCR ruling and that appeal the defense is propounding the same line of

reasoning which the commission used in making its ruling of 4 June 2007. However, the defense's concession as to the *prima facia* jurisdiction over the accused is directed to the trial level, not to the appellate level. There's nothing improper in the defense acknowledging the law of the case at the commission level while simultaneously attempting to change the law at the appellate level.

Reviewing the CMCR ruling, the commission has determined that in the absence of a defense motion to dismiss for lack of jurisdiction, there is no challenge to the jurisdiction of the commission. Consequently, there is no need for a preliminary hearing on the unlawful enemy combatant status of the accused. That's your ruling. And my response to you is that I'm not going to hold a separate ruling right now or hearing right now.

PROS: If I could add, sir.

MJ: Sure.

PROS: From defense counsel's comments it sounds as if they specifically challenge personal jurisdiction over Omar Khadr today and the fact that he is an alien unlawful enemy combatant. If that is the case, we would ask the military judge to then review all the evidence that we have provided and make specifically that determination that as we stand here today Omar

Khadr is an alien unlawful enemy combatant subject to the personal jurisdiction of this court and he will be so until and through trial unless properly challenged by the defense.

MJ: The commission is a trial level court. Its actions and rulings are reviewed by an appellate court, or more than one. Specifically, the Court of Military Commission Review stated, "The government's facial compliance with all the prereferral criteria contained in the Rules for Military Commissions combined with an unambiguous allegation in the charges and specifications in this case entitled the military commission to initially and properly exercise *prima facia* personal jurisdiction over the accused until such time as jurisdiction was challenged by a motion to dismiss for lack there of, or proof of jurisdiction was lacking on the merits."

948(d) of the Military Commissions Act states, “A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant."

If what you're asking me to do is to say that I have jurisdiction -- the commission has jurisdiction over Mr. Khadr at this time and until such time as that jurisdiction might be successfully challenged, you have it.

PROS: Thank you, sir.

MJ: Okay.

DDC: Sir, I just feel compelled to ----

MJ: If you're going to talk for a long time – okay.

[The detailed defense counsel moved to the podium.]

DDC: I'm going to try not to, sir. We want it very clear on the record, sir, and I think this is consistent with what you said yesterday in the 802 that by virtue of what you just said, we have not waived any challenge to personal jurisdiction in this tribunal.

MJ: You have not waived your ability to bring such a challenge. Right? You can make a motion right now for lack of personal jurisdiction.

DDC: Yes, sir, or at any time consistent with the court's ----

MJ: Right.

DDC: Again, sir, understand how they are going to take the nuance of your language and use in the appellate courts and I just would ask that the military judge would be very mindful of that, they will do that.

MJ: Thank you.

PROS: Sir, if I could just follow up briefly.

MJ: Yes, you may.

PROS: I think I can do so from here, sir. I would just

ask the military judge to inquire specifically whether the defense challenges the personal jurisdiction for this military commission today to arraign the accused.

MJ: No. Thank you.

The court stated earlier and will state again that if the defense wishes to challenge jurisdiction, the commission having been satisfied that the need to assure Mr. Khadr has been met, the defense may do so by a motion. I can't say anything more than that. I said it about 20 times.

The accused will now be arraigned.

All personnel appear to have the requisite qualifications and all personnel required to be sworn have been sworn. Commander Kuebler, have you and Mr. Khadr previously been provided a copy of the charges?

DDC: We have, sir.

MJ: All parties to the trial have been furnished with a copy of the charges. Prosecutor, please announce the general nature of the charges.

PROS: Sir, the general nature of the charges in this case are: murder in violation of the law of war; attempted murder in violation of the law of war; conspiracy; providing material support for terrorism; and spying.

MJ: Does the accused desire the charges be read?

DDC: No, sir.

MJ: The reading of the charges may be omitted.

Accused and counsel, please rise.

[The accused and his defense counsel did as directed.]

MJ: Mr. Khadr, I now ask you how do you plead. Before you plea I must advise you that any motion addressed or listed under R.M.C. 905(b)must be made prior to the entry of the pleas. Please be seated.

[The accused and his defense counsel did as directed.]

MJ: Not you Commander Kuebler.

[The detailed defense counsel stood up.]

DDC: Sir, the defense ----

MJ: Commander Kuebler, do you desire to defer pleas in this case?

DDC: Yes, sir, we do.

MJ: That request is granted. You may be seated now.

DDC: We additionally desire to reserve motions.

MJ: The real key is the 905(b).

[The detailed defense counsel resumed his seat.]

MJ: Discovery. During the past several days, the parties have had numerous discussions about discovery and the military judge has been involved in that several times. Some of those discussions are listed in the summaries of various 802

conferences. Without going through the whole litany and without either side standing up and objecting, the government position is basically that discovery was provided to the defense team as of approximately February 2007, and discovery refurnished to the defense by this past weekend.

The defense position is that discovery has not been provided to the defense team until this past weekend and the defense has not had an opportunity to examine all the materials. The ins and outs of that are laid out in some of the 802 summaries. The commission is taking no position on either of those positions right now.

Complicating the discovery issue is a defense asset issue. As of the arrival of Colonel David, the Chief Defense Counsel in September 2007, the defense requested investigative assistance and intelligence analysts. Colonel David is working with the convening authority to handle this matter. The records of past commissions reveal that the matter of investigative assistance and intelligence analysts has been an ongoing issue since at least September 2005, when the issue was litigated in a commissions II case of US v. Hicks.

With regard to all of these matters, the commission notes that the defense has not yet made any motions for relief in any regard with respect to discovery. A motion for relief in

connection with these matters could and should be made in accordance with the R.M.C. Both defense and the government will comply with R.M.C. 701. If the defense makes defense discovery requests that are not granted, the defense will apply to the commission for relief. The decision on the relief requested will be either made on motions and briefs, or the commission will hold a hearing.

Does that fairly cover the discussions that we've had in 802's on discovery without whether your side is right or his side, it doesn't matter. Does that basically cover it?

PROS: Generally, yes, sir.

MJ: That's all I want.

DDC: Sir, I just want to note one exception to that. The defense did request the deposition of an FBI agent that the government transported to Guantanamo who is here on island who has refused to talk to defense. That request is pending before the judge.

MJ: Okay. Trial schedule. There was an R.M.C. 802 conference last night concerning the subject of trial schedule going from late at night to later at night. Present were Commander Kuebler, Ms. Snyder, Colonel David for a portion of the hearing; Major Groharing, Captain Petty, Mr. Murphy, and the military judge.

Both sides provided the military judge a proposed trial schedule which will be attached to the trial order when I issue it. Counsel and the military judge will meet again tomorrow. By the time we got to this the ability to make decisions was -- it would be easier to do it tomorrow. For now the following dates are set.

On the 7th of December the defense will provide five to seven law motions meaning dispositive motions to the government and they'll be responded and replied to in accordance with Rules of Court. On the 11th of January the defense will provide the remainder of its law motions. After the conference tomorrow I'll issue a trial order setting forth any other dates and instructions relevant to the trial schedule. Any objections or comments about that, trial?

PROS: Could I just have one minute, sir, please?

MJ: Yes.

[The prosecutor, the assistant prosecutor, and the civilian trial counsel conferred.]

PROS: Sir, I recognize that tomorrow we'll be meeting to discuss a schedule. I want to make clear for the record today that the government is prepared to go to trial and that we understand that there are reasons why the defense wants delays in this case. We have no motions to file and are prepared to go

to trial at the earliest opportunity.

MJ: Okay. You got anything you want to say?

DDC: Yes, sir. I just want to note that the 11 January and 7 December dates should be all law motions with the exception of those requiring additional discovery. I think that was the content of our discussion last night in the 802.

MJ: I thought I said that, but if I didn't, I stand corrected. Discovery motions will be made as necessary.

DDC: No -- law motions after the 11th of December [sic] that may be filed based upon additional facts or additional discovery.

MJ: Okay.

DDC: Thank you, sir. And then there was one other matter. We previously provided to the court reporter a copy of – I don't know if it has been marked as the appellate exhibit next in order. It's a defense summary of the R.M.C. 802 conference from last evening and we respectfully request the military judge make that part of the record.

PROS: We have no objection, sir.

[The court reporter handed AE 049 to the military judge.]

MJ: AE 49, the summary, is admitted – or not admitted, it is attached to the record. Okay, anything further before I recess?

PROS: No, sir.

DDC: No, sir.

MJ: Court's in recess.

[The 803 session recessed at 1241 hours, 8 November 2007.]

[END OF PAGE]

CERTIFICATION OF TRANSCRIPT

in the case of:

UNITED STATES v. OMAR AHMED KHADR,
also known as AKHBAR FARHAD,
AKHBAR FARNAD,
AHMED MUHAMMED KHALI
ISN: 0766

This is to certify that pages 24 through 98 are an accurate verbatim transcript of the proceedings held in the above styled case on 8 November 2007.

JOHN E. DAVIS
SGM, USA
Chief Court Reporter

19 November 2007
DATE

Reviewed by:

PETER E. BROWNBACK III
COL, JA
Military Judge

19 NOVEMBER 2007
DATE

APPELLATE EXHIBITS

[redacted]

From: [redacted]
Sent: Tuesday, July 03, 2007 2:04 PM
To: [redacted]
Cc: [redacted]

Subject: Notice of Appeal

Attachments: US v. Khadr - Certificate of Notice of Appeal - 20070703.pdf

Sir,

Please forward the attached notice of appeal to Colonel Brownback.

US v. Khadr - Certificate of N...

V/r,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

UNITED STATES OF AMERICA	)	
	)	
	)	
	)	
	)	**CERTIFICATE OF**
v.	)	**NOTICE OF APPEAL**
	)	
	)	
	)	
OMAR AHMED KHADR	)	
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	**3 JULY 2007**
a/k/a "Ahmed Muhammed Khali"	)	

1. On June 4, 2007, at or about 1145, the Military Judge issued a ruling dismissing the charges and specifications in the above-captioned case without prejudice. On June 8, 2007, the Prosecution filed a motion for reconsideration of the Military Judge's dismissal of charges. The Military Judge denied the motion to reconsider in a written ruling transmitted to the Prosecution via email at 1552 on June 29, 2007.

2. Notice is hereby given that the Prosecution appeals each of the decisions of the Military Judge under 10 U.S.C. § 950d(b). The Military Judge will be served with this notice no later than 1700 on July 3, 2007. The appeal will be filed directly to the Court of Military Commission Review as required by 10 U.S.C. § 950d(c).

3. Additionally, as required by the Manual for Military Commissions, the Prosecution certifies that the appeal is not taken for the purpose of delay.

4. **Submitted by**:

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

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

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

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

Before
ROLPH, FRANCIS, HOLDEN
Appellate Military Judges

UNITED STATES OF AMERICA
Appellant

v.

OMAR AHMED KHADR
Appellee

CMCR 07-001
Military Commission
Guantanamo Bay, Cuba

Military Judge: Peter E. Brownback, III, JA, U.S. Army.

For Appellant: Francis A. Gilligan (argued); Major Jeffrey D. Groharing, JA, U.S. Army (on brief); Captain Keith A. Petty, JA, U.S. Army (on brief); Lieutenant Clay G. Trivett, Jr., JAGC, U.S. Navy (on brief).

For Appellee: Lieutenant Commander William C. Kuebler, JAGC, U.S. Navy (on brief; argued); Rebecca S. Snyder (on brief); Dennis Edney (on brief); Nathan Whitling (on brief; argued).[1]

Amicus Curiae for Appellee: Frank W. Fountain (on brief); Madeline Morris (Professor of Law, Duke University)(on brief); Stephen Bornick (Special Editorial Associate for Professor Morris)(on brief); Landon Zimmer (Special Editorial Associate for Professor Morris)(on brief); Allison Hester-Hadded (law student, Duke University)(on brief).

September 24, 2007

OPINION OF THE COURT AND ACTION ON APPEAL BY THE UNITED STATES FILED PURSUANT TO 10 U.S.C. § 950d

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[1] Mr. Edney and Mr. Whitling are both admitted to the bar in Canada and, upon motion, were authorized to appear as counsel for Mr. Khadr's appeal to argue *pro hac vice* pursuant to Rule 8(f) of our Rules of Practice.

ROLPH, Deputy Chief Judge:

In this appeal by the Government (hereinafter Appellant) we are called upon to interpret for the first time the jurisdictional provisions contained in *the Military Commissions Act of 2006* (hereinafter M.C.A.)[2] as they relate to the trial by military commission of a Canadian citizen, Omar Ahmed Khadr, Appellee (hereinafter Mr. Khadr). Mr. Khadr was captured on the battlefield in Afghanistan in 2002, is currently detained in Guantanamo Bay, Cuba, and was pending trial upon charges that were referred for trial before a military commission. This interlocutory appeal was taken after the military judge presiding over Mr. Khadr's trial dismissed all charges against him without prejudice on June 4, 2007. The military judge's ruling was based upon his *sua sponte* determination that the military commission lacked personal jurisdiction over Mr. Khadr. Where a court has no personal jurisdiction over an accused appearing before it, it is generally powerless to act. *See, e.g., Ryder v. United States*, 515 U.S. 177, 187 (1995)(Coast Guard Court of Criminal Appeals could not decide appeals because not properly appointed); *Solorio v. United States*, 483 U.S. 435, 442-451 (1987)(describing history of court-martial jurisdiction); *Reid v. Covert*, 354 U.S. 1, 32-36 (1957)(no court-martial jurisdiction over civilians accompanying the forces overseas); *Toth v. Quarles*, 350 U.S. 11, 22-23 (1955)(no court-martial jurisdiction over soldier discharged from service).

The basis for the military judge's ruling was Appellant's failure to properly determine Mr. Khadr's status as an "alien unlawful enemy combatant" before his Combatant Status Review Tribunal (C.S.R.T.), which the judge ruled was an indispensable prerequisite to the military commission's ability to exercise personal jurisdiction under the M.C.A. The military judge further ruled that "the military commission is not the proper authority, under the provisions of the M.C.A., to determine that Mr. Khadr is an unlawful enemy combatant in order to establish initial jurisdiction for this commission to try Mr. Khadr." *See* Military Judge's Order on Jurisdiction of June 4, 2007 at 1-2; Record at 21.

Background

Appellant charged Mr. Khadr with various offenses arising during the period from on or about June 2002 to on or about July 27, 2002. The allegations include murder of a U.S. Soldier in violation of the law of war; attempted murder of U.S. military or coalition forces by making and planting improvised explosive devices (IEDs) in violation of the law of war; conspiracy with Osama bin Laden, Ayman al Zawahiri and other members of al Qaeda, an international terrorist organization, to attack civilians, destroy property, and commit murder – all in violation of the law of war; providing material or resources in support of al Qaeda and international terrorism; and spying, in violation of 10 U.S.C. §§ 950v(b)(15); 950t; 950v(b)(28); 950v(b)(25); and 950v(b)(27) respectively. Each charge and specification alleged against Mr. Khadr asserts the jurisdictional claim that he is "a person subject to trial

[2] Pub. L. No. 109-366, 120 Stat. 2600 (October 17, 2006), codified at 10 U.S.C. §§ 948a-950w.

by military commission as an ***alien unlawful enemy combatant***." *See* Charge Sheet, Charges I-V (Appellate Exhibit (AE) 1 at 4-7) (emphasis added).

The record of trial, pleadings of the parties, and allied documents contain allegations that Mr. Khadr received one-on-one "private al Qaeda basic training" in Afghanistan during June 2002, consisting of instruction in the use of rocket propelled grenades, rifles, pistols, hand grenades, and various other explosives. *See* AE 1 at 6; AE 17. In July 2002, Mr. Khadr is also alleged to have participated in "land mine training," which involved the conversion of landmines to IEDs and their strategic placement as weapons to be deployed against U.S. military and coalition forces. *Id.* On or about July 27, 2002, at a compound near Abu Ykhiel, Afghanistan, Mr. Khadr is alleged to have been a member of a group of al Qaeda members that engaged U.S. military and coalition forces with small arms fire, killing two Afghan Militia Force members, and throwing a hand grenade which killed Sergeant First Class Christopher Speer, U.S. Army. *Id.* Mr. Khadr, though badly wounded in the engagement, was immediately treated on scene by U.S. military medical personnel. He was thereafter taken into custody, and ultimately transported to the U.S. detention facility located at Guantanamo Bay Naval Base, Cuba, where he presently remains.

On September 7, 2004, a three-member C.S.R.T. unanimously determined that Mr. Khadr was properly classified as an "enemy combatant" and an individual who was "a member of, or affiliated with al Qaeda," as defined by a memorandum issued by the Deputy Secretary of Defense on July 7, 2004. *See* Report of C.S.R.T. (AE 11 at 6).

Appellate Jurisdiction and Standards of Review

The military judge's ruling in this case dismissing all charges without prejudice qualifies for appeal by Appellant under 10 U.S.C. § 950d(a)(A) in that it "terminates proceedings of the military commission with respect to a charge or specification." *See* Rule for Military Commission (R.M.C.) 908(a)(1), Manual for Military Commissions (M.M.C.)(2007). Appellant properly gave notice of appeal to the military judge on July 3, 2007,[3] and filed the appeal directly with this Court within the time limits established in our Rules of Practice. *See* Rule 22, Rules of Practice, Court of Military Commission Review (2007). In ruling upon this appeal, we may act only with respect to matters of law. 10 U.S.C. § 950d(c); R.M.C. 908(c)(2).

We have reviewed the military judge's factual determinations applying a highly deferential standard of review mandating that findings of fact not be

[3] The military judge's ruling became final for purposes of the notice provisions of 10 U.S.C. § 950d(a)(2)(b) on June 29, 2007, the day the military judge denied Appellant's Motion for Reconsideration. *See United States v. Ibarra*, 502 U.S. 1, 6-7 (1991); *see also* Court of Military Commission Review Ruling on Appellant's Motion to Dismiss of September 19, 2007.

disturbed unless they are "clearly erroneous." *See Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *United States v. Cabrera-Frattini*, 65 M.J. 241, 245 (C.A.A.F. 2007). Regarding all matters of law, we review the military judge's findings and conclusions *de novo*. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2001); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 869 (5th Cir. 2000); *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007).

Combatant Status Generally

The determination of whether an individual captured on the battlefield is a "lawful" or "unlawful" enemy combatant carries with it significant legal consequences (both international and domestic) relating to the treatment owed that individual upon capture and ultimate criminal liability for participating in war-related activities associated with the armed conflict. The Third Geneva Convention Relative to the Treatment of Prisoners of War (GPW III) -- signed in 1949 and entered into force in 1950 following battlefield atrocities occurring during World War II -- sought to carefully define "lawful combatant" for all signatory nations. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, Art. 4.[4] *See also* Hague Convention No. IV Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, T.S. No. 539 (Hague Regulations).

Article 4, GPW III makes it clear that lawful combatants will generally only include the regular armed forces of a party to the conflict, including "members of militias or volunteer corps forming part of such armed forces." Also included are members of other militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict so long as they fulfill the following conditions:

1) They are under the command of an individual who is responsible for their subordinates;
2) They wear a fixed distinctive sign or symbol recognizable at a distance;
3) They carry their arms openly; and

[4] The United States is a signatory nation to all four Geneva Conventions. The Geneva Conventions are generally viewed as self-executing treaties (i.e., ones which become effective without the necessity of implementing congressional action), form a part of American law, and are binding in federal courts under the Supremacy Clause. *See* U.S. Const. art VI, § 2 ("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 . . . ."). *United States v. Lindh*, 212 F. Supp. 2d 541, 553-54 (E.D. VA. 2002) (citing *United States v. Noriega*, 808 F. Supp. 791, 796 (S.D. Fla. 1990)). The Geneva Conventions stand preeminent among the major treaties on the law of war. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)(citing "Geneva" 123 times in the opinion). The Geneva Conventions have been acceded to by 194 states. International Committee of the Red Cross, available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions. The United States implemented the Geneva Conventions via 18 U.S.C. § 2441, Pub. L. No. 104-192, 110 Stat. 2104 (1996).

4) They conduct their operations in accordance with the laws and customs of war.

This critical determination of "lawful" or "unlawful" combatant status is far more than simply a matter of semantics. Without any determination of lawful or unlawful status, classification as an "enemy combatant" is sufficient to justify a detaining power's continuing detention of an individual captured in battle or taken into custody in the course of ongoing hostilities. However, under the well recognized body of customary international law relating to armed conflict, and specific provisions of GPW III, lawful combatants enjoy "combatant immunity"[5] for their pre-capture acts of warfare, including the targeting, wounding, or killing of other human beings, provided those actions were performed in the context of ongoing hostilities against lawful military targets, and were not in violation of the law of war. *See Johnson v. Eisentrager,* 339 U.S. 763, 793 (1950)(Black, J. dissenting)("Legitimate 'acts of warfare,' however murderous, do not justify criminal conviction . . . . It is no 'crime' to be a soldier . . . .")(citing *Ex parte Quirin,* 317 U.S. 1, 30-31 (1942)("Mere membership in the armed forces could not under any circumstances create criminal liability . . . ."); *Lindh,* 212 F. Supp. 2d at 553 (citing Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949,* 9 Case W. Res. J. Int'l L. 205, 212 (1977)). Lawful enemy combatants enjoy all the privileges afforded soldiers under the law of war, including combatant immunity and the protections of the Geneva Conventions if wounded or sick, and while being held as prisoners of war (POWs).[6] Additionally, lawful enemy combatants facing judicial proceedings for any of their actions in warfare that violate the law of war, or for post-capture offenses committed while they are POWs, are entitled to be tried by the same courts, and in accordance with the same procedures, that the detaining power would utilize to try members of its own armed forces (i.e., by court-martial for lawful enemy combatants held by the United States). *See* Arts. 84, 87 and 102, GPW III.

Indeed, GPW III codified many existing principles of customary international law and added numerous additional provisions, all aimed at protecting lawful combatants from being punished for their hostile actions prior to capture;[7] ensuring that POWs were treated and cared for humanely upon capture; and seeking to

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[5] Also referred to as "belligerent privilege."

[6] *Lindh,* 212 F. Supp. 2d at 553-54; *see also* U.S. Army Judge Advocate General's Legal Center and School, Dept. of the Army, Operational Law Handbook 16 (2006)(hereinafter Army Op. Law Handbook).

[7] *See e.g.*, GPW III, Article 87 ("[POWs] may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed force of the said Power who have committed the same acts.") and Article 99 ("No [POW] may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed."). These two Articles, when read together, have been interpreted to "make clear that a belligerent in war cannot prosecute the soldiers of its foes for the soldiers' lawful acts of war." *Lindh,* 212 F. Supp. 2d at 553.

guarantee the general welfare and well-being of POWs during the entire period they remained in captivity. *See* R.C. Hingorani, *Prisoners of War* 9 (1982). Accordingly, technical "crimes" committed by lawful combatants authorized to use force in the context of ongoing hostilities may not be prosecuted unless those offenses are unrelated to the conflict, or violate the law of war or international humanitarian law. *Lindh*, 212 F. Supp. 2d at 553; *See* John Cerone, *Status of Detainees in International Armed Conflict, and Their Protection in the Course of Criminal Proceedings,* The American Society of International Law, Jan. 2002. At the conclusion of the armed conflict, lawful combatants who are held as POWs are entitled to be safely and expeditiously repatriated to their nation of origin.[8]

Unlawful combatants, on the other hand, are not entitled to "combatant immunity" nor any of the protections generally afforded lawful combatants who become POWs. Unlawful combatants remain civilians and may properly be captured, detained by opposing military forces, and treated as criminals under the domestic law of the capturing nation for any and all unlawful combat actions. *Lindh,* 212 F. Supp. 2d at 554 (citing *Ex parte Quirin,* 317 U.S. at 30-31); *see* Army Op. Law Handbook 17.

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

Ex parte Quirin, 317 U.S. at 30. M.C.A. § 948b(f) addresses Common Article 3's application, stating, "A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of [C]ommon Article 3 of the Geneva Conventions."[9] Under the M.C.A., unlawful enemy combatants who

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[8] *See* Articles 118 and 119, GPW III.

[9] Article 3, GPW – an Article common to all four Geneva Conventions – suggests that even unlawful combatants are entitled to be tried in a "regularly constituted court." The Supreme Court in *Hamdan* explained:

> Common Article 3, then, is applicable here and, . . . requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people." 6 U.S.T., at 3320 (Art. 3, ¶ 1(d)). While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources have disclosed its core meaning. The commentary accompanying [Article 66 of the Fourth Geneva Convention] defines "'regularly constituted'" tribunals to include "ordinary military courts" and "definitely exclude[e] all special tribunals." GCIV Commentary 340 (defining the term "properly constituted" in Article 66, which the

engage in hostilities against the United States or its co-belligerents, or materially support such, are subject to trial by military commission for violations of the law of war and other offenses made triable by that statute. *See* §§ 948a(1)(A)(ii) and 948b(a).

The burden of raising the special defense that one is entitled to lawful combatant immunity rests upon the individual asserting the claim. *Lindh,* 212 F. Supp. 2d at 557-58. Once raised before a military commission, the burden then shifts to the prosecution to prove beyond a reasonable doubt that the defense does not exist. R.M.C. 916(b). Determining lawful and unlawful combatant status under existing international treaties, customary international law, case law precedent (both international and domestic), and the M.C.A. is a matter well within the professional capacity of a military judge.

It is against this legal backdrop that we now examine the significance of Mr. Khadr's 2004 C.S.R.T. classification as an "enemy combatant," the subsequent referral of criminal charges against him to a military commission, and the military judge's *sua sponte* dismissal of those charges without prejudice.

Issues on Appeal

Appellant's appeal requires us to address two important issues. First, whether the military judge erred in ruling that Mr. Khadr's September, 2004 C.S.R.T. classification as an "enemy combatant" was insufficient to satisfy the congressionally mandated requirement, established in the M.C.A., that military commission jurisdiction shall exist solely over offenses committed by "alien unlawful enemy combatants," *see* M.C.A. §§ 948c and 948d(a). Second, if we answer the first question negatively, we must determine whether the military judge

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> commentary treats as "regularly constituted"); see also *Yamashita,* 327 U.S., at 44, 66 S. Ct. 340, 90 L. Ed. 499 (Rutledge, J., dissenting)(describing military commission as a court "specially constituted for a particular trial"). And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organized in accordance with the laws and procedures already in force in a country." Int'l Comm. of Red Cross, 1 *Customary International Humanitarian* Law 355 (2005); *see also* GCIV Commentary 340 (observing that "ordinary military courts" will "be set up in accordance with the recognized principles governing the administration of justice").

Hamdan, 126 S.Ct. at 2797-98, 165 L. Ed. 2d at 778. Justices Breyer, Kennedy, Souter, and Ginsburg agreed in *Hamdan,* that those military commissions which generally adopt the structure and procedure of courts-martial, and are "conducted[] similarly to courts-martial" are regularly constituted military courts under United States law. *Hamdan,* 126 S. Ct. at 2803-04 (Souter, J., concurring in result). Notably, Justices Thomas, Alito, and Scalia agreed that the military commission at issue in Hamdan was a "regularly constituted tribunal" under Common Article 3, despite being substantially dissimilar from courts-martial. 126 S. Ct. at 2850-52, 165 L. Ed. 2d at 836-38 (Alito, J., dissenting). "If 'special' means anything in contradistinction to 'regular,' it would be in the sense of 'special' as 'relating to a single thing,' and 'regular' as 'uniform in course, practice or occurrence.' Webster's Third New International Dictionary 2186, 1913." 126 S. Ct. at 2852, 165 L. Ed. 2d at 838.

erred in ruling that neither the military commission nor the military judge were empowered under the M.C.A. to receive evidence, and thereafter assess Mr. Khadr's status as an "alien unlawful enemy combatant" for purposes of determining the commission's criminal jurisdiction over him.

The M.C.A. and Mr. Khadr's C.S.R.T. Classification

Section 948d of the M.C.A. defines the jurisdictional limits of military commissions stating:

> (a) JURISDICTION. A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an *alien unlawful enemy combatant* before, on, or after September 11, 2001.
>
> (b) LAWFUL ENEMY COMBATANTS. *Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants*. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.
>
> (c) DETERMINATION OF UNLAWFUL ENEMY COMBATANT STATUS DISPOSITIVE. A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, *by a Combatant Status Review Tribunal or another competent tribunal* established under the authority of the President or the Secretary of Defense that a person is *an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter*.
>
> (d) PUNISHMENTS. A military commission under this chapter may, under such limitations as the Secretary of Defense may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when authorized under this chapter or the law of war.[10]

(italics added).

The military judge in this case dismissed all charges and specifications (without prejudice) against Mr. Khadr based upon his conclusion that the jurisdictional provisions of M.C.A. § 948d had not been met.[11] The judge correctly

[10] *See also* R.M.C. 103(a)(24).

[11] R.M.C. 201(b)(3) sets forth the specific requisites for military commission jurisdiction, which include:

> (a) The military commission must be convened by an official empowered to convene it;

noted that the M.C.A. appeared to be clear in limiting jurisdiction for trial by military commission solely to *unlawful enemy combatants*,[12] and excluding from a commission's jurisdiction any *lawful enemy combatants*, who instead must be tried under the provisions of the Uniform Code of Military Justice, 10 U.S.C. §§ 801 *et seq*. [13] We agree with the military judge that Mr. Khadr's 2004 C.S.R.T. classification as an "enemy combatant" failed to meet the M.C.A.'s jurisdictional requirements in that it did not establish that Mr. Khadr was in fact an "*unlawful* enemy combatant" to satisfy the jurisdictional prerequisite for trial by military commission.

Under M.C.A. § 948c, only an "alien unlawful enemy combatant is subject to trial by military commission." The M.C.A., in § 948a(1)(A), defines "unlawful enemy combatant" as follows:

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[14]

Appellant contends Mr. Khadr's designation as an "enemy combatant" by his C.S.R.T. in 2004 was itself sufficient to establish the military commission's jurisdiction and that the military judge erred in ruling otherwise. In its motion asking the military judge to reconsider his dismissal action, Appellant argued that the judge failed to give proper consideration and deference to a White House

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(b) The military commission must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here, "personnel" includes only the military judge and the members.
(c) Each charge before the military commission must be referred to it by a competent authority;
(d) The accused must be a person subject to military commission jurisdiction; and
(e) The offense must be subject to military commission jurisdiction.

[12] *See* M.C.A. § 948d(a). Mr. Khadr's status as an "alien" is not in dispute.

[13] *See* M.C.A. § 948d(b)(lawful combatants who violate the law of war are subject to the provisions of the Uniform Code of Military Justice; courts-martial shall have jurisdiction to try lawful combatants for any offense made punishable under the M.C.A.). *See also* Articles 84, 87 and 102, GPW III (mandating that lawful enemy combatants shall be tried by the same courts and procedures the detaining power would use to try members of its own armed forces).

[14] *See also* R.M.C. 103(a)(24).

memorandum signed by President Bush in February 2002[15] which, in Appellant's view, declared all members of the Taliban and al Qaeda to be "unlawful combatants" under the Geneva Conventions. *See* Prosecution Motion for Reconsideration of June 8, 2007 at 4-6; *see also* Brief on Behalf of Appellant at 5 ¶c. Appellant makes a similar argument regarding a July 2004 memorandum from the Deputy Secretary of Defense (then Mr. Paul Wolfowitz) to the Secretary of the Navy establishing the procedures to be employed for C.S.R.T.'s, and summarily declaring:

> For purposes of this Order, the term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.[16]

According to Appellant, Congress enacted the M.C.A. "fully aware" of the 2002 White House memorandum and the 2004 Wolfowitz memorandum, including the definitional provisions and declarations contained in both. Appellant argues that it was the "clear intent" of Congress to adopt the memoranda's categorical declarations of combatant status regarding members of the Taliban and al Qaeda, and that C.S.R.T. determinations of "enemy combatant" status made prior to the adoption of the M.C.A. are sufficient to establish military commission jurisdiction. *See* Brief on Behalf of Appellant at 11-14. To buttress these assertions, Appellant has directed us to R.M.C. 202(b), which discusses *in personam* military commission jurisdiction and declares, "[a] finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a [C.S.R.T.] or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by a military commission under the M.C.A." Appellant also highlights the following statement contained in the nonbinding Discussion to R.M.C. 202 regarding C.S.R.T. determinations:

> At the time of the enactment of the M.C.A., C.S.R.T. regulations provided that an individual should be deemed to be an "enemy combatant" if he "was part of or supporting al Qaeda or the Taliban, or associated forces engaged in armed conflict against the United States or its coalition partners." The United States previously

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[15] *See* White House Memorandum, Humane Treatment of al Qaeda and Taliban Detainees 2 (February 7, 2002) available at http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf (hereinafter White House memorandum) (AE 13).

[16] *See* Deputy Secretary of Defense Memorandum, Order Establishing C.S.R.T. 1 (July 7, 2004), available at http://www.globalsecurity.org/security/library/policy/dod/d20040707review.pdf. (hereinafter Wolfowitz memorandum) (AE 14).

determined that members of al Qaeda and the Taliban are unlawful combatants under the Geneva Conventions.

From the President's 2002 White House memorandum, the 2004 Wolfowitz memorandum, and this nonbinding Discussion to R.M.C. 202, we are now asked to categorically equate the administration's prior pronouncements regarding members of the Taliban and al Qaeda, and use of the term "enemy combatant" throughout the C.S.R.T. process, with "unlawful enemy combatant" as defined in the M.C.A., and attribute that extrapolation to the "clear intent" of Congress. In this regard, Appellant invites us to interpret the parenthetical language contained in M.C.A. § 948a(1)(A)(i) -- "including a person who is part of the Taliban, al Qaeda, or associated forces" -- as evidence that "Congress statutorily ratified the President's prior determination" and that "[t]his crucial parenthetical established, as a matter of statute, that a member of al Qaeda or the Taliban – without more – is an 'unlawful enemy combatant' who can be tried by military commission." Supplemental Brief on Behalf of Appellant at 5. In light of the plain language of the M.C.A., and applying common logic and reasoning, we decline to accept the Appellant's position. We believe the Congress, well aware of the fact that "trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure," *see Hamdan,* 126 S.Ct. at 2759, 165 L. Ed. 2d at 738-39 (citing *Ex parte Quirin,* 317 U.S. at 19), was abundantly clear in precisely establishing the jurisdictional prerequisites it intended to mandate prior to any criminal proceeding before such a commission could occur.

As with all matters of statutory interpretation, we look first and foremost to the language contained in the statute itself. *See Duncan v. Walker,* 533 U.S. 167, 172 (2001); *Williams v. Taylor,* 529 U.S. 420, 431 (2000). In doing so, we give the words contained in the text their ordinary meaning and interpret the statute in a manner that does not render words or phrases superfluous, unless no other reasonable interpretation can be made.[17] It is unequivocally clear to us from the plain language of the M.C.A. that Congress intended trials by military commission to be utilized solely and exclusively to try only "alien unlawful enemy combatants." The M.C.A.'s jurisdictional provisions (§§ 948c and 948d) and definitions section (§ 948a(1)(A)(i)) make this intent perfectly clear. So also does the M.C.A.'s express admonition in § 948d(b) that military commissions "shall not have jurisdiction to try a lawful enemy combatant." Congress further stated that a C.S.R.T.'s (or other competent tribunal's) determination that a person is an "unlawful enemy combatant" would be dispositive for purposes of establishing jurisdiction for trial by military commission. *See* M.C.A. § 948d(c).[18] No such statement is made regarding a prior

[17] *See TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001)("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant")(internal quotation marks and citations omitted); *Caminetti v. United States,* 242 U.S. 470, 453 (1917)(if a statute's language is plain and clear, "the sole function of the courts is to enforce it according to its terms").

[18] Though Congress intended to create a "safe harbor" for C.S.R.T. determinations made prior to and after the M.C.A.'s enactment, this provision cannot be used to transform an "enemy

designation of a detainee as simply an "enemy combatant" and, in our opinion, such designation is not useful in resolving this ultimate issue of criminal jurisdiction under the M.C.A.

Congress was undoubtedly aware of the White House (2002) and Wolfowitz (2004) memoranda when they wrote and enacted the M.C.A. in 2006. This is yet another case where "Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches." *Hamdan*, 126 S.Ct. at 2799, 165 L. Ed. 2d at 781 (Kennedy J., concurring). Had Congress intended prior designations of detainees as mere "enemy combatants" to be sufficient to establish military commission jurisdiction, it was fully capable of saying this in the legislation. It did not. Indeed, neither the White House nor Wolfowitz memoranda are ever referenced in the M.C.A. In our opinion, Congress, clearly aware of the previously troubled military commission process -- and armed with affirmative guidance from the Supreme Court provided in the June, 2006 decision in *Hamdan v. Rumsfeld* -- sought to enact new, clear, and unequivocal legislation to unambiguously guide and successfully implement trials by military commissions.[19]

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combatant" designation made for one purpose into a declaration of "unlawful enemy combatant" status for another. From the M.C.A.'s language, this "safe harbor" exists only for previously made "*unlawful* enemy combatant" designations (italics added). Congress intended that properly made individual C.S.R.T. determinations of "unlawful enemy combatant" status established by a preponderance of the evidence should be afforded great deference by the military commission. *See* R.M.C. 905(c)(1), 2(B). For purposes of resolving this Government appeal, we need not determine whether this "dispositive jurisdiction" provision deprives a military commission accused of a critical "judicial guarantee[ ] . . . recognized as indispensable by civilized people" under Common Article 3 of the Geneva Conventions (i.e., the right to affirmatively challenge the commission's *in personam* jurisdiction over him).

[19] The Supreme Court determined that the military commissions deviated substantially from regular court-martial practice without an adequate demonstration that procedures more similar to courts-martial were not practicable. *Hamdan*, 126 S. Ct. at 2792-93, 165 L. Ed. 2d 773-74. Article 36, UCMJ, 10 U.S.C. § 836 required either uniformity or justification for variation from UCMJ procedures, rendering those military commissions variations illegal. *Id*. The Court noted, "Prior to enactment of Article 36(b), [UCMJ] it may well have been the case that a deviation from the rules governing courts-martial would not have rendered the military commission "illegal." *Hamdan*, 126 S. Ct. at 2793 n. 54, 165 L. Ed. 2d 774 n. 54 (citations omitted). The M.C.A. 948b(d) explicitly ended the applicability of Article 36, UCMJ, to military commission proceedings stating:

> (d) INAPPLICABILITY OF CERTAIN PROVISIONS.—
> (1) The following provisions of this title shall not apply to trial by military commission under this chapter:
> (A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts-martial relating to speedy trial.
> (B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsory self-incrimination.
> (C) Section 832 (article 32 of the Uniform Code of Military Justice), relating to pretrial investigation.

We find no support for Appellant's claim that Congress, through the M.C.A., created a "comprehensive system" which sought to embrace and adopt all prior C.S.R.T. determinations that resulted in "enemy combatant" status assignments, and summarily turn those designations into findings that persons so labeled could also properly be considered "unlawful enemy combatants." Similarly, we find no support for Appellant's position regarding the parenthetical language contained in § 948a(1)(A)(i) of the M.C.A. -- "including a person who is part of the Taliban, al Qaeda, or associated forces." We do not read this language as declaring that a member of the Taliban, al Qaeda, or associated forces is *per se* an "unlawful enemy combatant" for purposes of exercising criminal jurisdiction before a military commission. We read the parenthetical comment as simply elaborating upon the sentence immediately preceding it. That is, that a member of the Taliban, al Qaeda, or associated forces *who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents* will also qualify as an "unlawful enemy combatant" under the M.C.A. (emphasis added). This interpretation is consistent with § 948b of the M.C.A., which describes the general purpose of military commissions as existing "to try alien unlawful enemy combatants *engaged in hostilities against the United States* for violations of the law of war and other offenses triable by military commission." (italics added). Critical to this analysis is the understanding that -- unlike the White House and Wolfowitz memoranda, both of which declared "enemy combatant" status solely for purposes of continued detention of personnel captured during hostilities and applicability of the Geneva Conventions -- Congress in the M.C.A. was carefully and deliberately defining status for the express purpose of specifying the *in personam* criminal jurisdiction of military commission trials. In defining what was clearly intended to be limited jurisdiction, Congress also prescribed serious criminal sanctions for those members of this select group who were ultimately convicted by military commissions.[20]

Contrary to the claims in Appellant's briefs, the 2002 White House memorandum never affirmatively declared members of al Qaeda to be "unlawful enemy combatants." In the memorandum, the President simply stated, "I also accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva." White House memorandum at 1, ¶ 2a. The memorandum later states that "because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees . . . do not qualify as prisoners of war." *Id.* at 2, ¶ 2d. It is reasonable to assume that Congress would seek to affirmatively declare the circumstances under which individual members of al Qaeda could become "unlawful

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> (2) Other provisions of chapter 47 of this title shall apply to trial by military commission under this chapter only to the extent provided by this chapter.

[20] *See* § 948d(d) (a military commission may adjudge any penalty up to and including death, when authorized under the M.C.A. or the law of war).

enemy combatants" for purposes of exacting criminal liability under the M.C.A.. Limiting criminal responsibility solely to an individual (including a member of al Qaeda or the Taliban, or associated forces) who actually "engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents" appears to be the clear intent of Congress, and requires more than mere membership in an organization for criminal responsibility to attach. [21]

Regarding the Taliban, the 2002 White House memorandum pronounced "the provisions of Geneva will apply to our present conflict with the Taliban." *Id.* at ¶ 2b. However, it then declared that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva." *Id.* at ¶ 2d. This decision was based upon the Taliban's failure to comply with fundamental law of war requirements.[22] Again, Congress, clearly aware of this language, appears to have decided that only a Taliban member who actually "engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents" should be subject to trial by military commission. To accept Appellant's interpretation would allow criminal jurisdiction at a military commission to attach to members of the Taliban or al Qaeda who had never engaged in or supported hostilities.

Finally, the 2002 White House memorandum concluded that Common Article 3 of the Geneva Conventions "does not apply to either al Qaeda or Taliban detainees." *Id.* at ¶ 2c. The Supreme Court subsequently determined that legal conclusion was erroneous. *See Hamdan,* 126 S.Ct. at 2795-96, 165 L. Ed. 2d 776-78.[23] Congress, clearly aware of the *Hamdan* decision when it drafted the M.C.A.,

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[21] Summary determinations of a group's unlawful combatant status would appear to violate the Supreme Court's ruling in *Hamdi v. Rumsfeld,* 541 U.S. 507, 533 (2004), which recognized the fundamental right to notice and an opportunity to be heard on matters affecting a detainee's "enemy combatant" status determination. In *Hamdi,* Justice Souter suggested that U.S. Army regulations governing combatant status determinations, which were premised upon Article 5 of GPW III, would appear to preclude any "categorical pronouncement" regarding an individual's combatant status. *Id.* at 550 (Souter, J., concurring); *see also Rasul v. Bush,* 542 U.S. 466 (2004); § 948d(c) M.C.A. (requiring that "unlawful enemy combatant" status -- in order to be "dispositive" of jurisdiction -- be established by "a C.S.R.T. or another competent tribunal"); *see* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, § 1005. Appellant appears to concede the necessity of individualized combatant status determinations. *See* Reply Brief on Behalf of Appellant at 16.

[22] *See* Press Release, White House Office of the Press Sec'y, White House Press Secretary Announcement of President Bush's Determination re Legal Status of Taliban and al Qaeda Detainees (February 7, 2002), available at http://www.state.gov/s/l/38727.htm ("The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.").

[23] The Supreme Court in *Hamdan* found that Common Article 3 of the Geneva Conventions was applicable to the conflict with al Qaeda because it was a conflict not of an international character occurring in the territory of one of the High Contracting Parties." *Hamdan,* 126 S.Ct. at 2795, 165

appears to have embraced the minimal safeguards guaranteed by Common Article 3 requiring that even "unlawful enemy combatants" be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See* § 948b(f), M.C.A. (quoting Common Article 3 -- "A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of Common Article 3 of the Geneva Conventions"); *see also* Art. III, GPW III, ¶ 1(d). No serious legal authority would contest the notion that one of the most indispensable and important judicial guarantees among civilized nations honoring a tradition of due process and fundamental fairness is the right to adequate notice and an opportunity to be heard in regard to allegations which might result in criminal sanctions.[24] The M.C.A. did not exist until October 2006. Mr. Khadr could not have known at the time of his C.S.R.T. in 2004 that a determination of "enemy combatant" status pursuant to declarations contained in the 2002 White House memorandum, or definitions contained in the 2004 Wolfowitz memorandum, could dispositively qualify him two years after the fact for potential criminal liability before a military commission as an "unlawful enemy combatant." We need not speculate how Mr. Khadr's personal participation in his 2004 C.S.R.T. evaluation may have been impacted had he been on notice of the potential criminal liability the C.S.R.T.'s findings could impose upon him. Such lack of notice offends our most basic and fundamental notions of due process; therefore, it also violates Common Article 3.

The declared purpose of the C.S.R.T. process used to review the status of hundreds of foreign national detainees captured in Iraq and Afghanistan and currently held under Defense Department control at Guantanamo Bay Naval Base, Cuba -- including Mr. Khadr -- was solely to afford detainees "the opportunity to contest designation as an enemy combatant." Wolfowitz memorandum at 1. The Wolfowitz memorandum never discusses addressing the issue of "lawful" or "unlawful" enemy combatant status; nor does the memorandum from the Secretary of

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L. Ed. 2d 776 (quoting Common Article 3). Among the minimal protections provided by Common Article 3 is the prohibition against "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U.S.T. at 3320 (Art. 3 at P1(d)); *Hamdan*, 126 S. Ct. at 2797, 165 L. Ed. 2d at 779 (Stevens, J., concurring). The plurality opinion in *Hamdan* postulated that a regularly constituted court "must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law." *Id.*; *see also* Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, Am. Jour. Int'l L. 58 (2006).

[24] Article 75 of Protocol I to the Geneva Conventions of 1949 articulates many of the fundamental guarantees "which are recognized as indispensable by civilized peoples." *See* Protocol I, Art. 75(4)(a)-(j). Although the United States has declined to ratify Protocol I as a whole, Article 75 has been accepted by our government "as an articulation of safeguards to which all persons in the hands of an enemy are entitled." *Hamdan*, at 2797, 165 L. Ed. 2d at 779 (quoting Taft, *The Law of Armed Conflict After 9/11; Some Salient Features*, 28 Yale J. Int'l L. 319, 322 (2003)(Stevens, J., concurring). Among the many rights set forth in Article 75 are notice and "opportunity to be heard" provisions. *See* Protocol I, Art. 75(4)(a) and (g).

the Navy implementing the C.S.R.T. process.[25] As far as we can discern, the C.S.R.T.s were never tasked with making that determination. Instead, they conducted non-adversarial proceedings aimed at deciding, by a preponderance of the evidence, whether each detainee met the criteria for designation as an "enemy combatant" under the definition in the Wolfowitz memorandum[26] to permit continued detention at Guantanamo Bay. *Id.* at 2. In doing so, Mr. Khadr's 2004 C.S.R.T. employed a less exacting standard than that contained in the M.C.A. for establishing "unlawful enemy combatant" status. A detainee could be classified as an "enemy combatant" under the C.S.R.T. definition simply by being a "part of" the Taliban or al Qaeda, without ever having engaged in or supported hostilities against the United States or its coalition partners. *Id.* While such a classification would certainly be appropriate for authorizing continued detention during ongoing hostilities, it does not address in any way the "lawful" or "unlawful" nature of the detained combatant's belligerency under the M.C.A. Congress never stated that mere membership in or affiliation with the Taliban, al Qaeda, or associated forces was a sufficient basis for declaring someone to be an "unlawful enemy combatant" for purposes of exercising criminal jurisdiction over that person.[27] In the M.C.A., military commission jurisdiction is limited solely to those who actually "*engaged* in hostilities or who . . . *purposefully and materially* supported hostilities. . . ." *See* § 948a(1)(A)(i)(emphasis added). While Mr. Khadr's C.S.R.T. may have had more than sufficient evidence before it to properly classify him as an "alien unlawful enemy combatant," it was not charged with making that determination, and could not have applied the definition established by Congress, as it did not come into existence until October 2006 -- two years later.

We will apply the clear and unambiguous jurisdictional language Congress provided in the M.C.A. Doing so, we affirm the military judge's conclusion that Mr. Khadr's C.S.R.T. classification in 2004 as an "enemy combatant" was insufficient to establish the military commission's criminal jurisdiction over him.

The Military Commission's Authority to Determine "Unlawful Enemy Combatant" Status.

We next examine the military judge's determination that "the military commission is not the proper authority, under the provisions of the M.C.A., to determine that Mr. Khadr is an unlawful enemy combatant in order to establish

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[25] *See* Secretary of the Navy memorandum of July 29, 2004 ("Implementation of Combatant Status Review Tribunal procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba"), AE 21 at 1.

[26] *Id.* at Enclosure (1), ¶ B (An "enemy combatant" for purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.").

[27] *See* Protocol I, Art. 4(b)("no one shall be convicted of an offense except on the basis of individual penal responsibility").

initial jurisdiction for this commission to try Mr. Khadr." *See* Military Judge's Order on Jurisdiction of June 4 2007 at 1-2; Record at 21. A brief chronology of the procedural evolution of this military commission illuminates the judge's ultimate ruling:

Date	**Event**
June-July 2002	Mr. Khadr's alleged offenses take place.
July 27, 2002	Mr. Khadr is captured in Afghanistan following being wounded in a firefight.
September 7, 2004	Mr. Khadr's C.S.R.T. proceeding is held. He is determined to be an "enemy combatant" and "a member of, or affiliated with al Qaeda."
September 10, 2004	Legal Sufficiency Review of Mr. Khadr's C.S.R.T. proceeding concludes he is properly classified as an "enemy combatant."
April 5, 2007	Charges are sworn against Mr. Khadr.
April 24, 2007	Charges are referred non-capital for trial before a military commission and served upon Mr. Khadr.
June 3, 2007	Military judge conducts an R.M.C. 802[28] conference with counsel. Military judge raises jurisdictional concerns based on Mr. Khadr's C.S.R.T. determination.
June 4, 2007	Mr. Khadr's military commission meets at Guantanamo Bay, Cuba. The military judge *sua sponte* raises issue of *in personam* jurisdiction and ultimately dismisses charges without prejudice for lack thereof.
June 8, 2007	Appellant submits a Motion for Reconsideration to the military judge.

[28] R.M.C. 802 authorizes the military judge to conduct pretrial conferences with the parties to "consider such matters as will promote a fair and expeditious trial."

June 29, 2007	Military judge issues a "Disposition" of Mr. Khadr's Motion for Reconsideration declining to reconsider his ruling.
July 3, 2007	Appellant provides written notice to the military judge of intent to appeal ruling to Court of Military Commission Review.
July 4, 2007	Appellant files interlocutory appeal with Court of Military Commission Review.

After ruling that Mr. Khadr's C.S.R.T. classification as an "enemy combatant" was insufficient to establish the military commission's jurisdiction over him, the military judge went on to conclude that he was not empowered to independently decide the matter of *in personam* jurisdiction because "the M.C.A. requires [that] determination be made in advance for there to be jurisdiction to refer charges against the accused. This is what Congress directed, and the Military Judge lacks authority to ignore this mandate." Disposition of Prosecution Motion for Reconsideration (AE 23) at 4, ¶ (3)(a). After affirmatively concluding that neither he nor the military commission was authorized to render a determination on Mr. Khadr's "unlawful enemy combatant" status,[29] and that such a determination had to be made as a prerequisite to referral, the military judge faulted Appellant for not presenting proof at the military commission hearing of Mr. Khadr's unlawful enemy combatant status, or requesting a continuance to more thoroughly brief the issue. *Id.* at ¶¶ 3a(3) & 3b(1)-(3). In his ruling, he also categorically rejected "the implication that the prosecution was not allowed to present argument or evidence on jurisdiction." *Id.* at ¶ 3b. He then decided that the Military Commission did not have jurisdiction." *Id.* at ¶ 4a.[30]

We hold the military judge erred in two respects: first, in not affording Appellant the opportunity to present evidence in support of its position on the jurisdictional issue before the military commission; and second, in concluding that a C.S.R.T. (or another competent tribunal) determination of "unlawful enemy combatant" status was a prerequisite to referral of charges to a military commission, and that the military commission lacked the power to independently consider and decide this important jurisdictional matter under the M.C.A.

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[29] The military judge expressly stated in his written disposition of the prosecution's Motion for Reconsideration that, "In this case, the prosecution was alerted [by the military judge] well ahead of time that it was going to be required to state in open court that there was a C.S.R.T. determination that the accused was an alien *unlawful* enemy combatant. Such a determination was not presented." *Id.* at ¶ 3.

[30] *See also id.* at ¶ f(7) where the judge concluded, "The Military Judge does not find that the Commission is a competent tribunal to establish initial jurisdiction."

a. Admission of Evidence on the Motion to Dismiss.

We review a military judge's decision in regard to admitting or excluding evidence utilizing an "abuse of discretion" standard. *United States v. Billings*, 61 M.J. 163, 166 (C.A.A.F. 2005); *see also General Electric Co. v. Joiner*, 522 U.S. 136, 139 (1997). "The abuse of discretion standard of review recognizes that a judge has a range of choices [in such matters] and will not be reversed so long as the decision remains within that range." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)(citing *United States v. Wallace*, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992)); *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). Applying this standard is also appropriate in reviewing a judge's decisions regarding evidence production during a motion hearing or at trial.

Both the record of trial and the military judge's actions and rulings in this case demonstrate that the prosecution was not afforded the opportunity to present evidence to establish the military commission's *in personam* jurisdiction over Mr. Khadr. Although the assistant prosecutor argued the military commission should interpret Mr. Khadr's 2004 C.S.R.T. "enemy combatant" classification as satisfying the M.C.A's jurisdictional language, he also articulated a clear alternative position on the record. *See* Record at 11-13.

> This court is competent to make such a determination [on *in personam* jurisdiction], and the government will prove the jurisdictional element at trial by a preponderance of the evidence. In the event, Your Honor, that you're not willing to go forward absent a finding of jurisdiction by a preponderance of the evidence, the government is willing to prove jurisdiction today.

Record at 12.[31] The assistant prosecutor then specifically listed the evidence the Government would present in support of Mr. Khadr's "unlawful enemy combatant" status, which, *inter alia*, included a videotape of Mr. Khadr "engaged in unlawful combat activities including wearing civilian attire and making and planting roadside bombs," admissions made by Mr. Khadr, and other statements that implicated him in conducting such unlawful activities. Record at 12.[32] The military judge did not allow the government to present their evidence and instead inquired whether "anyone thought about going back and doing new [combatant status] review tribunals." Record at 17. Then, after a very brief recess, the military judge

[31] *See also* Record at 15, ". . . the government would be willing to prove before the military commission that he is, in fact, an unlawful enemy combatant. And if the court is not willing to move forward without a jurisdictional determination, then we are willing to produce evidence proving his status today."

[32] Mil. Comm. R. Evidence 104(a) makes it clear that the military judge, when deciding preliminary questions relating to determining a military commission's jurisdiction, is not bound by the rules of evidence, except those with respect to privileges. *Accord* MANUAL FOR COURTS-MARTIAL, UNITED STATES, Mil. R. Evid. 104(a)

immediately announced his ruling on his own *sua sponte* motion, and dismissed the charges without prejudice. Record at 22.

We disagree with the military judge's statement in his ruling on the Motion for Reconsideration "that the prosecution did not make a formal offer of proof concerning any of the evidence which it now proposes be used." Disposition of Prosecution Motion for Reconsideration (AE 23) at 3, ¶ 3b(1). The record demonstrates Appellant offered and was ready to present evidence to affirmatively establish the military commission's jurisdiction over Mr. Khadr, but was summarily denied that opportunity. The record does not support the assertion that the military judge afforded the prosecution an opportunity to present evidence on the jurisdiction and that they failed to do so. Asking counsel whether they have "anything else to say" in oral argument upon a pending motion is not the equivalent of an invitation or offer to present evidence. *Id.* at ¶ 3b(3); *see e.g.*, Record at 15 – 16. Indeed, oral argument upon a motion should rarely take place at all prior to evidence regarding the factual matters in dispute first being adduced at the motion hearing.[33] Finally, if there was any genuine confusion on this matter at the initial session of Mr. Khadr's military commission, Appellant's subsequent Motion for Reconsideration made it clear the prosecution "was and remains fully prepared to present evidence that would clearly establish jurisdiction over the accused." Prosecution Motion for Reconsideration of June 8, 2007 at 7. For these reasons, and those addressed in the next section of this opinion, we find the military judge abused his discretion in deciding this critical jurisdictional matter without first fully considering both the admissibility and merits of evidence Appellant offered to present on this issue.

b. Ruling Concerning the Military Commission's Authority to Determine Jurisdiction.

We also conclude that the military judge erred in ruling he lacked authority under the M.C.A. to determine whether Mr. Khadr is an "unlawful enemy combatant" for purposes of establishing the military commission's initial jurisdiction to try him. *See* Military Judge's "Order on Jurisdiction" of June 4, 2007 at 1-2; Record at 21. The unambiguous language of the M.C.A., in conjunction with a clear and compelling line of federal precedent on the issue of establishing jurisdiction in federal courts, convince us the military judge possessed the independent authority to decide this critical jurisdictional prerequisite. "[A] federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 627 (2002). A military commission is no different. *See* R.M.C. 201(b)(3)("A military commission always has jurisdiction to determine whether it has jurisdiction.").

The military judge expressly acknowledged in his ruling upon the Motion for Reconsideration, "there is no express statutory directive that the government must

[33] Arguments of counsel in motion hearings or at trial are not evidence. Instead, counsel may only properly argue factual issues based upon previously admitted evidence at trial or an agreed upon stipulation of fact.

establish jurisdiction before it is allowed to proceed with a Military Commission." *See* Disposition of Prosecution Motion for Reconsideration at 6, ¶ 4e(3). Nevertheless, the military judge concluded there were "clear and unambiguous indicia that Congress intended . . . initial jurisdiction be established before the mechanism set up by the M.C.A. was used in the case of a given person[.]" *Id.* He concluded the only avenue for establishing initial jurisdiction was through a prior determination of "unlawful enemy combatant status by a C.S.R.T. (or other competent tribunal)." *Id.* at 7, ¶ 4e(3)(c). While we agree with the military judge's view that Congress contemplated an initial assessment of an accused's "unlawful enemy combatant" status prior to referral of charges to a military commission, we disagree with his conclusion that the only avenue for the assessment is that delineated in M.C.A. § 948a(1)A(ii). *See* M.C.A. § 948a-d.

As previously noted, any alien unlawful enemy combatant engaged in hostilities against the United States or its co-belligerents is subject to trial by military commission for violations of the law of war and other offenses triable by military commission. *See* M.C.A. § 948a-d; R.M.C. 201(b)(1). This jurisdiction attaches upon the formal swearing of charges against an accused, after an individual subject to the Uniform Code of Military Justice avers under formal oath that the charges are "true in fact." *See* R.M.C. 202(c) and 307(b). Charges may then be referred for trial by military commission under R.M.C. 601 as long as "reasonable grounds [exist] to believe that an offense triable by a military commission has been committed and that the accused committed it." R.M.C. 601(d). The only relevant limitation upon referral of charges is the requirement in R.M.C. 406(b) that, *inter alia*, prior to referral, the charge(s) must be referred to the convening authority's legal officer for pretrial advice, and that individual must state his/her conclusion as to "whether a military commission would have jurisdiction over the accused and the offense." *See* R.M.C. 406(b)(3). All of these steps occurred in this case, and, as previously stated, each offense referred for trial against Mr. Khadr clearly alleges the express jurisdictional language used in the M.C.A., that he is "a person subject to trial by military commission as an *alien unlawful enemy combatant*." AE 1 at 4-7 (emphasis added). We find that this facial compliance by the Government with all the pre-referral criteria contained in the Rules for Military Commissions, combined with an unambiguous allegation in the pleadings that Mr. Khadr is "a person subject to trial by military commission as an alien unlawful enemy combatant," entitled the military commission to initially and properly exercise *prima facie* personal jurisdiction over the accused until such time as that jurisdiction was challenged by a motion to dismiss for lack thereof, or proof of jurisdiction was lacking on the merits.

In our opinion, the M.C.A. is clear and deliberate in its creation of a bifurcated methodology for establishing an accused's "unlawful enemy combatant" status so as to permit that individual's trial before a military commission. These two methods are laid out in M.C.A. § 948a(1)A where an "unlawful enemy combatant" is defined as:

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

(emphasis added). The disjunctive "or" between subsections (i) and (ii) clearly sets forth alternative approaches for establishing military commission jurisdiction. *See In re Espy,* 80 F.3d 501, 505 (D.C. Cir. 1996)("'[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings,' and a statute written in the disjunctive is generally construed as 'setting out separate and distinct alternatives.'")(quoting *Reiter v. Sonotone Corporation,* 442 U.S. 330, 339 (1979)). The military judge did not apply the disjunctive separation of these two provisions, and erroneously interpreted the distinct provisions as if written in the conjunctive; that is, as if joined by the word "and" rather than "or."[34] Such an interpretation would render subsection (i) nothing more than a definition in aid of a C.S.R.T. (or other competent tribunal) determination of combatant status under subsection (ii), and is contradictory to the statute's clear structure, wording, and overall intent.

Upon challenge, the first method by which the M.C.A. contemplates jurisdiction being established is by evidence being presented before the military judge factually establishing that an accused meets the definition of "unlawful enemy combatant" as contained in subsection (i). *In personam* criminal jurisdiction over a criminal accused is generally a question of law to be decided by the military judge, and is usually resolved only after presentation of evidence supporting jurisdiction and entry of corresponding findings of fact. *See United States v. Melanson,* 53 M.J. 1, 2 (C.A.A.F. 2000)("When an accused contests personal jurisdiction on appeal, we review that question of law *de novo,* accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record."); *United States v. Ernest,* 32 M.J. 135, 136-37 (C.M.A. 1991)(twenty-four findings of fact entered by the trial court in determining whether to grant motion to dismiss for lack of personal jurisdiction); *United States v. Cline,* 26 M.J. 1005, 1007 (A.F.C.M.R. 1988)(returning record to trial court to more fully develop and analyze factual matters serving as basis for assertion of personal jurisdiction); *see also United States v. Anderson,* 472 F.3d 662, 666-67 (9th Cir. 2006)(determining personal jurisdiction in light of alleged violation of extradition treaty). There is a

[34] The military judge ruled, "A strict reading of the MCA would appear to require that, until such time as a CSRT (or other competent tribunal) makes a finding that a person is an unlawful enemy combatant, the provisions of the M.C.A. do not come into play and such person may not be charged, charges may not be referred to a military commission for trial, and the military commission has no jurisdiction to try him." Order on Jurisdiction of 04 Jun 2007 at 1, ¶ 7; *see also* Disposition of Prosecution Motion for Reconsideration of 29 Jun 2007 at 4, ¶ 4(d)(3)(a-b).

long and well-developed tradition in U.S. federal courts and, specifically, throughout military court-martial jurisprudence of military judges deciding matters of personal jurisdiction. *See e.g.*, *Solorio*, 483 U.S. 439, 450-51 (listing military cases where personal jurisdiction litigated); J. Horbaly, *Court-Martial Jurisdiction* 375-534 (1986)(unpublished dissertation, Yale Law School)(listing numerous cases involving court-martial litigation to determine jurisdiction); Department of the Army Pamphlet 27-173, *Legal Services Trial Procedure* 40-112 (Dec. 31, 2002). Congress, clearly aware of historical court-martial practice, and desiring that military commissions mirror this firmly rooted practice to the maximum extent practicable,[35] would not have deprived military commissions of the ability to independently decide personal jurisdiction absent an express statement of such intent. No such statement is contained anywhere in the M.C.A.

The military judge's reliance on M.C.A. § 948a(1)(A)(ii) for the proposition that a military commission itself cannot determine personal jurisdiction is misplaced. This provision supports Appellant's position rather than detracts from it. Although Congress assigned a jurisdictional "safe harbor" for prior C.S.R.T. (or other competent tribunal) determinations of "unlawful enemy combatant" status by statutorily deeming them "dispositive" of jurisdiction, it did not in any way preclude Appellant from proving jurisdiction before the military commission in the absence of such a determination. Indeed, the existence of a statutorily recognized path to achieve a "dispositive" determination of jurisdiction suggests that pretrial procedures and pleadings alleging jurisdiction should simply be viewed as "nondispositive."[36] Subsection (ii) does not eliminate traditional methods of proving jurisdiction before the commission itself. We agree with Appellant's suggestion that Congress, through subsection (ii), merely carved out an exception to the military commission's authority to itself determine jurisdictional matters. *See* Supplemental Brief on Behalf of Appellant at 12. As Appellant notes, subsection (ii) makes it clear that the military judge is not at liberty to revisit a C.S.R.T.'s (or other competent tribunal's) finding of "unlawful enemy combatant" status *when there is*

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[35] *See* M.C.A. § 949a(a)(mandating that military commission procedures shall, to the extent practicable, "apply the principles of law and the rules of evidence in trial by general courts-martial."); *see also* M.C.A. § 948b(c)(stating that the procedures for military commissions "are based upon the procedures for trial by general courts-martial under . . . the Uniform Code of Military Justice.")

[36] M.C.A. § 948a(1)(A)(ii) appears simply to acknowledge the standards and definitions, enhanced procedural safeguards, and other general rights afforded a detainee through the C.S.R.T. process after passage of the *Detainee Treatment Act of 2005*. Of course, that Act was not in existence on the date Mr. Khadr's C.S.R.T. was conducted. Also, only C.S.R.T. (or other competent tribunal) determinations of "unlawful enemy combatant" status are considered dispositive of a military commission's personal jurisdiction over an accused detainee. No such determination has ever been rendered in this case. As mentioned earlier, the C.S.R.T. which considered Mr. Khadr's status classified him only as an "enemy combatant." Having rendered no determination of Mr. Khadr's "lawful" or "unlawful" status, the C.S.R.T. finding of "enemy combatant" status is not entitled to enter Congress' statutory "safe harbor." An "enemy combatant" finding is necessary for deciding whether to impose continuing detention upon an individual, but it is not dispositive for purposes of establishing military commission jurisdiction.

such a finding. *See* Appellant's Supplemental Brief in Response to Court's Request at Oral Argument at 7. However, nothing in the M.C.A. *requires* such a finding in order to establish military commission jurisdiction. Had they so intended, Congress could have clearly stated in the M.C.A. that the only way to establish military commission jurisdiction is through a prior C.S.R.T. (or other competent tribunal) determination of "unlawful enemy combatant" status. It did not. Accordingly, we may properly find -- as clearly indicated in the language of M.C.A. §§ 949a(a) and 948b(c) -- that Congress intended for military commissions to "apply the principles of law" and "the procedures for trial [routinely utilized] by general courts-martial . . . ." This would include the common procedures used before general courts-martial permitting military judges to hear evidence and decide factual and legal matters concerning the court's own jurisdiction over the accused appearing before it.

This view is supported in the Rules for Military Commissions, which provide exactly such procedures. R.M.C. 907(b) allows an accused to raise a "Motion to Dismiss for Lack of Jurisdiction," and recognizes lack of jurisdiction as a nonwaivable ground for dismissal of charges at any stage of the proceedings. R.M.C. 905c(2)(B) assigns the burden of persuasion to the prosecution on a motion to dismiss for lack of jurisdiction; R.M.C. 905c(1) sets that burden on any factual issue necessary to resolve the motion as "a preponderance of the evidence." Clearly, these rules contemplate potential litigation of personal jurisdictional issues by the military commission, and provide the procedures necessary to address such a challenge.[37] If the only avenue to achieve military commission jurisdiction was through a previously rendered C.S.R.T. (or other competent tribunal) determination of "unlawful enemy combatant" status, all of these rules would be superfluous, as "dispositive" jurisdiction would have attached before the fact.

The text, structure, and history of the M.C.A. demonstrate clearly that a military judge presiding over a military commission may determine both the factual issue of an accused's "unlawful enemy combatant status" and the corresponding legal issue of the military commission's *in personam* jurisdiction. A contrary interpretation would ignore the bifurcated structure of M.C.A. § 948(1)(A) and the long-standing history of military judges in general courts-martial finding jurisdictional facts by a preponderance of the evidence, and resolving pretrial motions to dismiss for lack of jurisdiction. The M.C.A. identifies two potential jurisdiction-establishing methodologies based upon an allegation of "unlawful enemy combatant" status. The first, reflected in § 948a(1)(A)(i), involves the clear delineation of the jurisdictional standard to be applied by a military commission in determining its own jurisdiction. The second, contained in § 948a(1)(A)(ii), involves a non-judicial related jurisdictional determination that is to be afforded "dispositive" deference by the military commission. Either method will allow the

[37] *See* R.M.C. 202(b), Discussion ("The M.C.A. does not require that an individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a military commission proceeding. If, however, the accused has not received such a determination, he may challenge the personal jurisdiction of the commission through a motion to dismiss.").

military commission's exercise of jurisdiction where "unlawful enemy combatant" status has been established by a preponderance of the evidence. This interpretation is consistent with the requirements of both the M.C.A. and with international law.[38] *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)(acts of Congress will generally be construed in a manner so as not to violate international law, as we presume that Congress ordinarily seeks to comply with international law when legislating).

Because we find the military judge had the power and authority under subsection (i) of § 948a(1)(A) of the M.C.A. to hear evidence concerning, and to ultimately decide, Mr. Khadr's "unlawful enemy combatant" status, we need not address whether or not a military commission is "another competent tribunal" under subsection (ii) to make that decision.

Conclusion

The military judge's ruling he lacked authority to hear evidence on, and ultimately decide, the matter of Mr. Khadr's "unlawful enemy combatant status" under the provisions of the M.C.A. is reversed. The record of trial is returned to the military judge, who shall, consistent with this opinion, conduct all proceedings necessary to determine the military commission's jurisdiction over Mr. Khadr.

Judge FRANCIS and Judge HOLDEN concur.

FOR THE COURT:

SEP 2 4 2007

LEROY F. FOREMAN
Clerk of Court

[38] *See e.g.*, Article 45(2) of Protocol I to the Geneva Conventions. That Article suggests that a detained individual who is not being held as a POW has the right to assert an entitlement to POW status before a judicial tribunal, and that judicial adjudication of combatant status shall occur before trial for any alleged substantive offense. Following the M.C.A. procedures, as we interpret them here, would allow an accused to assert a claim of POW (i.e., lawful combatant) status at a pretrial motion session before the military judge. This pretrial determination of status would be fully in accord with Article 45(2) of Protocol I.

[redacted]

From: [redacted]

Sent: Monday, September 24, 2007 18:33

To: [redacted]

Cc:

Subject: Khadr - Decision and 2 Orders

Attachments: Clerk Forwarding Letter (Sep 24, 07 (1 page).pdf; Khadr-Judicial Order RE RECON OF AMICUS (Sep 24)(1 page).pdf; Khadr USCMCR Order RE Abatement (24 Sept 07) (6 pages).pdf; KHADR Decision (24 Sep 07)(25 pages).pdf

The four attached documents are forwarded as directed by the Court.

I have carefully reviewed the attached documents and see no reason to redact any of the contents.

Mark Harvey
Deputy Clerk, USCMCR

UNITED STATES COURT OF MILITARY COMMISSION REVIEW
Office of the Clerk of Court

SEP 2 4 2007

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: Decision of the Court, *United States v. Khadr*, CMCR No. 07-001

The decision of the Court on the appeal by the United States in the above captioned case is enclosed.

LEROY F. FOREMAN
Clerk of Court

DISTRIBUTION:

Convening Authority (for file)
Convening Authority (for service on appellee)
Appellate Defense Counsel
Appellate Government Counsel
DoD General Counsel

[redacted]

From: [redacted]

Sent: Tuesday, September 25, 2007 14:48

To: [redacted]

Cc: [redacted]

Subject: Khadr - Decision and Orders--Affidavit of Service

Attachments: Khadr Aff of Service 9-25-07.pdf

All

Attached is an electronic copy of the affidavit of service of the decision and orders of the Court of Military Commission Review.

When I receive the original copy of the affidavit, I will arrange for it to be placed in the record of trial at the appropriate place.

[redacted]

Clerk of Court
Office of Military Commissions
Office of the Convening Authority

[redacted]

[redacted]

CAUTION: Information contained in this message may be protected by the attorney/client privilege, attorney work product, deliberative process or other privileges. Do not distribute further without approval from the Office of the Convening Authority for Military Commissions.

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

Date: 25SEP07

MEMORANDUM FOR Omar Ahmed Khadr, 0766, Guantanamo Bay, Cuba

SUBJECT: Service of decision and orders of the Court of Military Commission Review in the Case of United States v. Omar Ahmed Khadr, a/k/a "Akhbar Farhad", a/k/a "Akhbar Farnad," a/k/a "Ahmed Muhammed Khali"

You are hereby served with a copy of the decision and orders of the Court of Military Commission Review on 25 SEP 07, pursuant to Chapter 25 of the Regulation for Trial by Military Commissions and the Rules for Military Commission. A copy of the decision and the orders have been provided to your detailed defense counsel.

You are advised that Rules for Military Commission 908 and 1201 provide a "right to petition the United States Court of Appeals for the District of Columbia Circuit" within 20 days of the date of this notification. The petition must be filed directly with the United States Court of Appeals for the District of Columbia Circuit.

You are further advised that the Court of Military Commission Review may reconsider its decision in any case upon motion filed by either the detailed appellate defense counsel within five days after receipt by counsel of a decision or order, or by the detailed appellate government counsel within five days after the decision or order is received by counsel.

AFFIDAVIT OF SERVICE AND NOTIFICATION OF RIGHTS

I hereby certify that a copy of the decision and orders of the Court of Military Commission Review were served on Omar Ahmed Khadr this 25th day of September 2007. At the time of service, the accused was advised of his right to petition the United States Court of Appeals for the District of Columbia Circuit discussed above and provided a copy of this memorandum.

[redacted]
Typed/Printed Name/Grade

[redacted]
Signature

JTF-GTMO / SJA
Organization

APO AE 09360
Address of Organization

[redacted]

From: [redacted]
Sent: Wednesday, September 19, 2007 4:44 PM
To: [redacted]
Cc: [redacted]
Subject: Khadr USCMCR Motion to Dismiss
Attachments: Khadr - USCMCR Order (Sep 19) (10 pages).pdf

Subject to redaction suggestions, the attached Order, dated September 19, 2007, will be sent to be posted on the DoD PAO Military Commissions website along with the other materials I provided on September 11, 2007.

Mark Harvey
Deputy Clerk, USCMCR

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES OF AMERICA	)	**CMCR CASE NO. 07-001**
	)	
	)	
v.	)	
	)	
	)	
	)	**RULING ON MOTION TO DISMISS**
	)	
OMAR AHMED KHADR	)	
	)	**DATE: SEPTEMBER 19, 2007**
	)	

On August 7, 2007, Appellee filed a Motion to Dismiss all or a portion of the government's appeal because: (1) the appeal was not timely filed with this Court; and (2) the Court's Rules of Practice were not properly promulgated and therefore did not exist when the appeal was filed. Both parties extensively briefed the issues raised by the Motion and it was one of several matters addressed during oral argument to this Court on August 24, 2007.

PROCEDURAL HISTORY

On June 4, 2007, the military judge in the above-styled case dismissed without prejudice the charges then pending against Appellee.

On June 8, 2007, the prosecution filed a motion with the military judge, asking that he reconsider his June 4, 2007 ruling. The motion inferred a prosecution belief that the time within which to file a government appeal of the military judge's June 4, 2007 ruling would not begin to run until the judge acted on the motion for reconsideration. However, out of an "abundance of caution", the motion for reconsideration asked that the time period for filing an appeal "be tolled pending a decision on [the motion for reconsideration]". By order issued June 8, 2007, the military judge, without ruling on the motion for reconsideration, specifically denied the prosecution request to toll the appeal period pending his decision on the underlying motion.

On June 29, 2007, the military judge issued an order denying the motion for reconsideration. He appended a copy of his order to the record of trial before authenticating the record on that same date. The order provided two primary

reasons for denial. First, the military judge found the prosecution motion failed to meet the threshold requirements for a valid request for reconsideration, in that it presented no new facts or new law. Based on that failure, the military judge, while "elect[ing] to clarify and make clearer the rationale for [his] 4 June 2007 ruling", specifically "decline[d] the opportunity to reconsider". Second, the military judge denied the motion for reconsideration on the merits of the underlying jurisdictional issue. Based on the language used, it is evident the military judge's ruling on the merits was intended to be provisional, issued in the interest of judicial economy in the event a higher court found his refusal to reconsider erroneous. The military judge authenticated the record of trial that same date, after first appending his order denying the motion for reconsideration.

On July 3, 2007, the prosecution filed a Certificate of Notice of Appeal, notifying the military judge the government was appealing his dismissal of the case.

On July 4, 2007, the prosecution filed an interlocutory appeal with this Court, challenging the military judge's dismissal of the case below.

TIMELINESS OF APPEAL

The Military Commissions Act (hereinafter referred to as the "M.C.A." or "Act") requires that notice of a government interlocutory appeal of an adverse order or ruling by a military judge be filed with the judge "within five days after the date of such order or ruling." 10 U.S.C. § 950d(b). This statutory requirement is reiterated in the Manual for Military Commissions (January 18, 2007) and in the Regulation for Trial by Military Commissions (April 27, 2007), both of which were promulgated by the Department of Defense to implement the M.C.A. Rule for Military Commissions (R.M.C.) 908(b)(2); Regulation for Trial by Military Commissions, ¶ 25-5b.

Applying these statutory and regulatory provisions, and relying on the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. ___, 127 S. Ct. 2360 (2007), the military judge determined, and Appellee asserts, that the five-day statutory appeal period cannot be extended by the military judge. Accordingly, Appellee argues that, to be timely, any appeal by the United States of the judge's June 4, 2007 dismissal order must have been filed within five days of that date.

Neither the military judge nor any higher court, including this one, can extend the five-day statutory limitation established by the M.C.A. for filing a government interlocutory appeal from a final order or ruling by a military judge. The Supreme Court "has long held that the taking of an appeal within the time prescribed is 'mandatory and jurisdictional'". *Bowles*, 551 U.S. at ___, 127 S. Ct. at 2363-2364 (citations omitted). The Supreme Court enforces such time limits by refusing to accept appeals and writs itself, and upon lower courts through appropriate orders. *Id*. However, the issue presented by the circumstances of the case *sub judice* is not

whether the time period within which to appeal can be extended. The issue here is when that appeal period starts to run if the government has submitted a motion for reconsideration of the underlying order or ruling.

The M.C.A. does not address the impact of a motion for reconsideration on the time limitation for the United States to appeal. In the absence of an explicit statutory direction to depart from the ordinary judicial treatment of a request for reconsideration at the trial level, we will follow the Supreme Court's decision in *United States v. Ibarra*, 502 U.S. 1 (1991). *Ibarra* held that a timely motion renders the underlying order or ruling "nonfinal for purposes of appeal as long as the petition is pending." 502 U.S. at 4 (quoting from *United States v. Dieter*, 429 U.S. 6, 8 (1976)). Treating orders as nonfinal for purposes of review during the pendency of a motion for reconsideration promotes judicial economy because "there is always a possibility that the order complained of will be modified in a way which renders [appellate] review unnecessary." *Stone v. INS*, 514 U.S. 386, 392 (1995) (citation omitted). We decline to adopt Appellee's suggestion for application of a different rule to M.C.A. proceedings.[1]

The provisions of the Manual for Military Commissions concerning rulings by the military judge are consistent with the principle enunciated in Ibarra. R.M.C. 801(e)(1)(A) indicates that a military judge's ruling on a question of law or interlocutory matter is "final." However, the very next section states that, with one exception not here applicable, the judge may change his ruling "at any time during the trial." R.M.C. 801(e)(1)(B). Similarly, R.M.C. 905(f) provides that "[o]n request of any party or sua sponte, the military judge may, prior to authentication of the record of trial, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge." For these provisions to have any meaningful effect, the underlying order logically must be deemed "nonfinal" for purposes of appeal while a timely reconsideration request is pending. To hold otherwise would force the United States to appeal an order even though the judge who issued it was still in the process of reconsidering or risk losing its right to appeal altogether. That type of Hobbesian choice, and the resulting inefficiencies to the judicial process, is the very problem sought to be avoided by the ruling in *Ibarra*. 502 U.S. at 4.

In this case, the government's motion for reconsideration of the military judge's dismissal order was filed on June 8, 2007, only four days after the order was entered and well before the military judge's authentication of the record on June 29, 2007. As a result, the judge's original dismissal order was not "final" until he

[1] We are not persuaded by Appellee's argument that the Supreme Court's ruling in *Ibarra* addressed a "regulatory" versus a "statutory" appeal limitation and is therefore not controlling. Although the appeal period there at issue was also contained in Fed. R. Appellate Procedure 4(b), it was based on the identical time limitation specifically established by 18 U.S.C. § 3731, and was thus statutorily based. Contrary to the Appellee's assertion, Congress' inclusion of a provision in that statute indicating that "[t]he provisions of this section shall be liberally construed to effectuate its purposes", does not make the appeal period set forth therein any less binding than the appeal period at issue in the current case.

ruled on the motion for reconsideration on June 29, 2007, which in turn started the five-day clock for filing a government appeal. Since the government's appeal was filed July 4, 2007, it met the five-day statutory deadline.

We find no merit in Appellee's argument that, because the military judge, in his June 29, 2007 ruling, specifically refused to reconsider his June 4, 2007 ruling, the start of the time within which to submit a government appeal reverted back to that earlier date. Whether the military judge refused to reconsider his original ruling or reconsidered and declined to change it, the impact on the government was the same -- it was in limbo until the judge ruled on its motion and could not know until the June 29, 2007 ruling was issued whether there was anything to appeal.

We also attach no legal significance to the military judge's order of June 8, 2007 specifically denying the prosecution request to "toll" the appeal period pending his decision on the underlying motion. First, as the Supreme Court made clear in *Ibarra*, filing a timely motion for reconsideration does not "toll" the running of the statutory appeal period, but simply renders the underlying order nonfinal until the court rules on the motion. The distinction is an important one, because it impacts the amount of time available to appeal after action on the motion for reconsideration is taken. *Ibarra*, 502 U.S. at 3. Second, as evident from the result in *Ibarra*, operation of the legal principle enunciated in that case does not depend on whether the government, in connection with a motion for reconsideration, has requested "tolling" of an appeal period, or on the military judge's decision to grant or deny such a request. Rather, the underlying order is rendered nonfinal by operation of law while a timely motion for reconsideration is pending.

VALIDITY OF COURT RULES

In addition to requiring that any government appeal be filed within five days of a final adverse order or ruling, the M.C.A. provides that such appeals "shall be forwarded, by means specified in regulations prescribed [by] the Secretary of Defense, directly to the Court of Military Commission Review." 10 U.S.C. § 950d(c). This requirement is carried forward into the Department of Defense implementing regulations through R.M.C. 908(b)(3) & (11) and Regulation for Trial by Military Commissions, ¶ 25-5c. The same implementing regulations specify how the procedures for appellate review used by the Court of Military Commission Review are to be created. Specifically, R.M.C. 1201(b)(4) provides, "In consultation with the other appellate military judges of the Court of Military Commission Review, and subject to the review and approval of the Secretary, the Chief Judge shall prescribe procedures for appellate review by the Court of Military Commission Review." Regulation for Trial by Military Commissions, ¶ 25-3, similarly states, "The Chief Judge of the CMCR [Court of Military Commission Review], in consultation with other members of the CMCR, shall issue operating guidelines for the CMCR consistent with the [Military Commissions Act, the Manual for Military Commissions] and this Regulation."

Appellee asserts that the rules of appellate procedure (hereinafter Court Rules or Rules of Practice) adopted by this Court at the time of Appellant's appeal were not properly promulgated and were therefore invalid. Further, because those Court Rules were invalid, Appellant's appeal, filed under those rules, cannot have been filed in accordance with "regulations prescribed [by] the Secretary of Defense" as prescribed in the statute. Appellee argues the appeal itself is therefore invalid and must be dismissed.

The basic issue presented is whether a perceived flaw in the adoption of internal rules of appellate procedure by a newly created appellate court precludes exercise of a statutory right of appeal from a lower court decision. We conclude it does not, drawing guidance from Supreme Court precedents in cases addressing changes to existing court rules. The Supreme Court, in a variety of contexts, has consistently held that procedural rules adopted for the orderly transaction of court business are not jurisdictional in nature. *See, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004); *Schacht v. United States*, 398 U.S. 58, 64 (1970); *Am. Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970). As a result, discretionary changes to such rules are "not reviewable except upon a showing of substantial prejudice to the complaining party." *Am. Farm Lines, Id*. Applying this same rationale to the circumstances of this case, we find no merit in Appellee's assertion that errors in the procedure used to formulate this Court's Rules of Practice, if they occurred, preclude consideration of Appellant's appeal.

In reaching this holding, we recognize that statutory restrictions take precedence over discretionary procedural rules prescribed by a court for the orderly transaction of business. *Hibbs v. Winn*, 542 U.S. 88, 99 (2004). However, nothing within the body of this Court's Rules of Practice conflicts with the requirements imposed by the M.C.A. Moreover, the M.C.A.'s general statutory requirement for this Court to adopt rules of appellate procedure in accordance with regulations promulgated by the Department of Defense cannot override the substantive rights and obligations afforded the parties by the same statute. Appellee does not suggest, nor would it be reasonable to do so, that an accused convicted and sentenced by a Military Commission could be deprived of the statutory right of appeal guaranteed him by 10 U.S.C. § 950c because of delays or perceived errors in the establishment of the court designated to hear his appeal or in the creation of such court's procedural rules of practice. In such a situation, the substantive rights afforded by the statute would clearly take precedence. The same holds true for the statutory right of appeal afforded the United States under 10 U.S.C. § 950d.

Appellee has made no showing, or even assertion, of substantial prejudice from the operation of any of this Court's Rules of Practice, nor does the record support a finding of prejudice. Most of the Rules of Practice are purely procedural in nature, addressing items such as the length and format of appellate briefs, the procedures for oral argument, or the admission and conduct of counsel. Any

substantive provisions, such as Rule 2, addressing jurisdiction of the Court, or Rule 13, addressing waiver or withdrawal of appellate review, simply restate the requirements of the M.C.A., the Manual for Military Commissions, or the Regulations for Trial by Military Commission. Moreover, as an additional measure to ensure compliance with the M.C.A. and promulgating regulations, Rule 1(b) provides that in the event of a conflict between the Rules of Practice and the statute or the Manual for Military Commissions, the statute and Manual control. Finally, Rule 1(c) permits a party to seek suspension of any of the rules upon a showing of good cause. If Appellee believed that any particular Rule of Practice imposed a prejudicial hardship under the circumstances of this case, he could have requested suspension of that rule. We have received no such request.

Beyond the above, we in any event find no actual defect in the promulgation of this Court's Rules of Practice. Appellee raises three main assertions in support of his argument that the process used in establishing this Court's Rules of Practice was flawed: 1) the rules were issued without the required review and approval by the Secretary of Defense; 2) the Rules were promulgated by the Deputy Chief Judge, who was not authorized to do so; and 3) nothing establishes that the Deputy Chief Judge conducted the required consultation with this Court's other Judges before purporting to approve and promulgate the rules. We address each argument in turn.

Secretarial Review and Approval

On December 1, 2006, Secretary of Defense Rumsfeld appointed former Attorney General Griffin Bell as a judge on the United States Court of Military Commission Review. Attachment A to Appellee's Motion of July 19, 2007. On May 8, 2007, Deputy Secretary of Defense England appointed Captain John Rolph, Chief Judge of the Navy-Marine Corps Court of Criminal Appeals, as a judge on the United States Court of Military Commission Review. Attachment B to Appellee's Motion of July 19, 2007.

On June 15, 2007, Deputy Secretary of Defense England created the position of Deputy Chief Judge of the United States Court of Military Commission Review, "to provide continuity of operations." Attachment D to Appellee's Motion of July 19, 2007. The Deputy Chief Judge was authorized "full discretion to exercise all authority vested in the Chief Judge, except as otherwise directed by the Chief Judge. *Id*. Former Attorney General Griffin Bell was appointed Chief Judge and Captain John Rolph was appointed Deputy Chief Judge in that same Action Memo. *Id.*

Deputy Chief Judge Rolph completed coordination of the Court's Rules of Practice with the other United States Court of Military Commission Judges, and issued a notice promulgating this Court's Rules of Practice on June 28, 2007, with an effective date of June 27, 2007. *See* Appellant's Opposition to Appellee's Motion to Dismiss, August 13, 2007, and this Court's Ruling on Motions to Attach and Disclosure, August 14, 2007. On June 29, 2007, the Court's Rules were sent to

the Department of Defense Office of General Counsel to be transmitted to the Secretary of Defense. On August 9, 2007, the Deputy Secretary of Defense approved the Court's Rules of Practice. *See* Appellant's Motion to Attach, August 13, 2007, and this Court's Ruling on Motions to Attach and Disclosure, August 14, 2007.

Judge Bell became available to act as Chief Judge on August 17, 2007. On August 20, 2007, he ratified the same Rules of Practice for the United States Court of Military Commission Review that Deputy Chief Judge Rolph promulgated and prescribed on June 28, 2007. Chief Judge Bell stated, "These Rules shall apply to all matters and cases that may currently be docketed with (or pending before) the Court, and to all matters and cases that may come before the Court after this date of promulgation." On August 20, 2007, Chief Judge Bell sent those Rules for review and approval of the Secretary of Defense. Appellee subsequently filed documents with the Court, and oral argument occurred on August 24, 2007. Appellee has not requested an exception to the Rules as permitted under Rule 1(c), or proposed any changes to the Rules.

Appellee argues that the Deputy Secretary of Defense's action was ineffective, in that the M.C.A. and R.M.C. 1201(b)(4) required Secretary of Defense approval of the Rules. He further asserts that the Deputy Secretary's action was in any event too late, as it was not in place at the time Appellant's appeal was filed on July 4, 2007.

10 U.S.C. § 113 legislates the duties and responsibilities of the Secretary of Defense. Subsection (d) of that statute provides that "[u]nless specifically prohibited by law, the Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate." Acting pursuant to this authority, the Secretary of Defense has delegated to the Deputy Secretary of Defense the "full power and authority to act for the Secretary of Defense and to exercise the powers of the Secretary of Defense upon any and all matters concerning which the Secretary of Defense is authorized to act", except as "expressly prohibited by law." Department of Defense Directive 5105.02, *Deputy Secretary of Defense*, (February 26, 2007), ¶ 1.2. The Deputy Secretary of Defense is authorized to make specific further delegations as necessary, *Id*. at ¶ 1.2, such as to the Chief Judge and Deputy Chief Judge of this Court. Nothing in the M.C.A., the Manual for Military Commissions, or the Regulation for Trial by Military Commissions specifically or expressly limits the authority of the Deputy Secretary of Defense to exercise that delegated authority with respect to matters affecting military commissions.[2] Accordingly, the Deputy Secretary had full power and authority to review and approve the Court's Rules of Practice.

[2] Contrary to the Appellee's assertion at oral argument, we find no meaningful distinction between "expressly" and "specifically" for purposes of this issue. Both terms preclude limitation of the Deputy Secretary of Defense's delegated power through the "inferences" drawn by the Appellee from the language of the M.C.A. -- none of which this Court gleans from its reading of the Act.

The fact that the Deputy Secretary of Defense did not complete his review and approval until August 9, 2007, well after Appellant's July 4, 2007 appeal was filed, is of no legal significance. Although R.M.C. 1201(b)(4) indicates that the Court's rules are "subject to review and approval", the words "subject to" do not necessarily mean "prior to operation of" such rules. Nothing in the M.C.A., the Manual for Military Commissions, or the Regulation for Trial by Military Commissions specifies that the required review and approval must occur before an appeal is filed, or even before the rules themselves can go into effect. Indeed, because the right to appeal afforded the United States under 10 U.S.C. § 950d, like the right of appeal afforded Appellee by 10 U.S.C. § 950c, is statutorily based, requiring approved procedural rules of this Court to be in place as a condition of an effective appeal would do violence to that statutory right and be legally untenable.

Role of Deputy Chief Judge

Appellee argues that Deputy Chief Judge Rolph had no authority to promulgate the Court's Rules of Practice because: 1) he was improperly appointed to the Court by the Deputy Secretary of Defense, who had no authority to do so; 2) the position of "Deputy Chief Judge" did not properly exist; and 3) authority to promulgate Court rules of procedure rests with the Chief Judge.

Based on the Secretary of Defense's delegation of authority to the Deputy Secretary of Defense discussed above, and as further detailed in this Court's separate ruling on Appellee's Motion to Abate, we find the Deputy Secretary of Defense has authority to appoint judges to the Court of Military Commission Review. Accordingly, Deputy Chief Judge Rolph was properly appointed to the Court.

We find no legal defect in the designation of Judge Rolph as "Deputy Chief Judge". The M.C.A. requires the Secretary of Defense to establish a Court of Military Commission Review, but sets only very broad guidelines as to the composition of the Court and its operation. 10 U.S.C. § 950f. Beyond those broad guidelines, details of the Court's structure and operation are left to the discretion of the Secretary. Further, the statute itself makes no mention of the position of Chief Judge. That designation appears only in the Manual for Military Commissions and the Regulation for Trial by Military Commission. Neither publication expressly precludes the additional appointment of a Deputy Chief Judge. Moreover, given the responsibilities of this Court, appointment of a Deputy Chief Judge to assist in the efficient operation of the Court is both reasonable and prudent. Such action was well within the authority of the Deputy Secretary of Defense, acting pursuant to his delegation from the Secretary of Defense.

We also find no error in the action taken by the Deputy Chief Judge, rather than the Chief Judge, to promulgate the initial iteration of this Court's Rules of Practice. As Appellee notes, both the Manual for Military Commissions and the

Regulation for Trial by Military Commissions specify that the Chief Judge will promulgate the Court's rules. However, that requirement is purely regulatory, and is not set forth in the statute itself. As a result, it was and is subject to deviation by the same authority which created the requirement, i.e., either the Secretary of Defense or the Deputy Secretary of Defense, acting under the authority delegated to him by the Secretary. The action appointing Judge Rolph as Deputy Chief Judge gave him "full discretion to exercise all authority vested in the Chief Judge, except as otherwise directed by the Chief Judge." Attachment D to Appellee's Motion of July 19, 2007. That broad authority clearly was sufficient to encompass the task of promulgating this Court's initial Rules of Practice. Further, the Action Memorandum endorsed by the Deputy Secretary of Defense approving the Court's Rules of Practice clearly indicated on its face that the rules had been promulgated by Judge Rolph in his position as Deputy Chief Judge. The Deputy Secretary of Defense's endorsement of that action thus implicitly approved the deviation from the regulatory requirement that such rules be established by the Chief Judge. This minor deviation from the requirements of the regulations implementing the M.C.A. does not in our view constitute a "change" to those regulations within the meaning of 10 U.S.C. § 949a(d), which would otherwise trigger a requirement for Congressional notification.[3] Finally, we note that the Chief Judge, by memorandum of August 20, 2007, specifically ratified the Rules of Practice previously promulgated by the Deputy Chief Judge, thereby effectively mooting this issue. *See* Memorandum from Chief Judge to Secretary of Defense re: Ratification of Rules of Practice for United States Court of Military Commission review, available for review at http://www.defenselink.mil/news/courtofmilitarycommissionreview.html.

Consultation Requirement

Subsequent to the date of the Appellee's Motion to Dismiss, in response to a separate Appellee Motion for Judicial Disclosure, the Court issued notice to the parties that prior to Deputy Chief Judge Rolph's promulgation of the Rules of Practice, consultation with the other Judges occurred through e-mail exchanges, telephone conversations, and in-person discussion. *See* Ruling on Motions to Attach and Disclosure, August 14, 2007. Such consultations satisfy the requirements of R.M.C. 1201(b)(4) and the Regulation for Trial by Military Commission, ¶ 25-3.

[3] The Court has not inquired, and the parties have not provided evidence, as to Department of Defense notification to Congress concerning the Rules of Practice or other documentation concerning the Court's establishment.

ORDERED

After review and consideration of Appellee's Motion to Dismiss, Appellant's Opposition, Appellee's Response to Appellant's Opposition, the Record of Trial by Military Commission and oral argument of the parties, Appellee's Motion to Dismiss is **DENIED.**

DAVID R. FRANCIS
Judge

Deputy Chief Judge Rolph did not participate in ruling on this motion.

[redacted]

From: [redacted]
Sent: Friday, September 28, 2007 1:51 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Initial Notice - US v. Khadr Trial Proceedings Following CMCR Ruling - DEADLINE CHANGES
Importance: High

COL Brownback has directed me the inform parties of the following deadline changes:

1. Based upon the delay granted in the 1817 hours, 27 September 2007 ruling on the Defense Motion to Vacate or Request a Continuance, the following changes are made to the 1614 hours, 25 September 2007 Initial Notice - US v. Khadr Trial Proceedings Following CMCR Ruling (attached below):

2. The suspense date established by paragraph 3 remains the same.

3. The suspense date established by paragraph 5 is changed to 1600 hours, 29 October 2007. The government will have until 1600 hours, 1 November 2007 to respond.

4. The suspense date established by paragraph 6 is changed to 1600 hours, 30 October 2007.

5. The suspense date established by paragraph 8 is changed to 1600 hours, 30 October 2007.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Thursday, September 27, 2007 18:16
To: [redacted]

Cc: [redacted]
Subject: FW: Ruling - Defense Motion to Vacate or Request a Continuance - United States v. Khadr
Importance: High

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

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

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

[redacted],

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

COL Brownback

Counsel in the case of United States v. Khadr,

1. Chronology:

a. 4 June 2007 - Dismissal of charges - see AE 15.
b. 8 June 2007 - Government request for reconsideration - see AE 17.
c. 29 June 2007 - Disposition of request for reconsideration - see AE 23.
d. 3 July 2007 - Government notice of appeal - see AE 25.
e. 24 September 2007 - Court of Military Commission Review opinion - see AE 26.
f.. 24 September 2007 - MJ notified of CMCR opinion - see AE 27.
g. 25 September 2007 - Notification of CMCR opinion served on accused - see AE 28.

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

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

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

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

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

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

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

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

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

[redacted]

From: [redacted]
Sent: Tuesday, October 02, 2007 3:13 PM
To: [redacted]
Subject: Defense Suspense clarificatoin

-----O
From: [redacted]
Sent [redacted]o Vacate or Request a Continuance - United States v. Khadr

Sir,

1. We are in receipt of the prosecution e-mail of this date concerning protective orders and other matters. Defense counsel are currently TAD OCONUS.

2. We had assumed that the deadlines for the submission of certain preliminary matters in connection with the 11 October hearing (since continued) would shift with the new hearing date.

3. For reasons discussed at length in our motion and my e-mail of 27 Sep 07, defense counsel are unable to submit the matters called for by the Military Judge's order on the dates specified in the order. Defense counsel's inability to fairly meet those deadlines formed a substantial part of the request for delay, and presumably, of the Military Judge's rationale for granting the request. Nonetheless, the government has indicated its intention to submit matters IAW the original order.

4. Based on the foregoing, the defense respectfully requests clarification of the Military Judge's 27 Sep 07 order granting a continuance with respect to the submission of preliminary matters, or, in the alternative, a continuance of those dates to correspond with the new hearing date set by the Military Judge.

5. This is not intended to operate as a waiver with respect to any claim the defense might make as to the propriety of the proposed manner of determining UEC status.

Thank you.

Vr,

LCDR Kuebler

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

Sent from my BlackBerry Wireless Handheld

[redacted]

From: [redacted]
Sent: Thursday, September 27, 2007 6:16 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Ruling - Defense Motion to Vacate or Request a Continuance - United States v. Khadr
Importance: High

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

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

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

LTC Chappell,

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

COL Brownback

Counsel in the case of United States v. Khadr,

1. The Commission has considered the Defense Motion to Vacate, or, Alternatively, to Request a

Continuance filed at 2308 hours, 25 September 2007. The Commission has also considered the defense supplement filed at 1015 hours, 27 September 2007. The Commission has also considered the government response of 1608 hours, 27 September 2007.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

case.

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

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

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

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

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

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

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

[redacted]

From: [redacted]
Sent: Tuesday, October 02, 2007 3:06 PM
To: [redacted]
Subject: Prosecution Response to Defense Motion to Vacate
Attachments: Prosecution response to Defense Motion to Vacate or request continuance (FINAL).doc

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From: [redacted]
Sent: Thursday, September 27, 2007 4:07 PM
To: [redacted]
Subject: Prosecution Response to Defense Motion to Vacate

Sir,

Please find attached the Prosecution's response to Defense's motion.

V/r,

Keith A. Petty
Captain, U.S. Army
Prosecutor
Office of Military Commissions
[redacted]

UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	**PROSECUTION RESPONSE** **To Defense Motion** **To Vacate, or Alternatively, for a Continuance** October 2, 2007

1. Timeliness: The Prosecution response is filed within the timelines required by the Military Judge and Rule 6(b)(1) of the Military Commission Rules of Court (May 4, 2007).

2. Relief Sought: The Prosecution respectfully requests that the Military Judge deny the Defense's motion in its entirety and proceed in accordance with the Military Judge's 25 September scheduling order.

3. Facts: The facts material to the Defense's motion appear to be that the Defense is contemplating petitioning the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") for review of the United States Court of Military Commission Review ("CMCR") decision, and that an expedited consideration of this motion is necessary to facilitate Defense counsel's scheduled travel to the United Kingdom for an unspecified purpose.[1]

[1] In an email sent earlier today, the Defense reiterated its belief that a delay in the military commission proceedings is warranted in light of the "factual and legal components" of the 11 October hearing, in addition to Lieutenant Commander Kuebler's travel schedule. With respect to the facts, Khadr's previously assigned Defense counsel, Lieutenant Colonel Vokey, advised the Prosecution that he has already provided all the relevant discovery materials to Khadr's current Defense team. The Prosecution intends to offer nothing in addition to those materials at the 11 October hearing. With respect to the law, the Prosecution notes that paragraph 9 of the Military Judge's 25 September scheduling order places clear and narrow limits on the scope of the scheduled proceedings, and respectfully suggests that the Defense's stated intention to raise "a number of legal claims" is out of order. Finally, the Prosecution has sought clarification on the purpose for and urgency of Lieutenant Commander Kuebler's travel plans, and the Defense has refused to provide it.

4. Law and Argument:

A. The Defense has no statutory right to appeal to the United States Court of Appeals for the District of Columbia Circuit absent a "final judgment" by the military commission, as approved by the convening authority.

The Defense has no statutory right to appeal to the U.S. Court of Appeals for the D.C. Circuit in this instance. Under the Military Commissions Act ("MCA"), the Defense may appeal to the D.C. Circuit only after "a *final judgment* [has been] rendered by a military commission (as approved by the convening authority) under this chapter." 10 U.S.C. § 950g(a)(1)(A) (emphasis added). In light of the CMCR's remand order in this case, there is no "final judgment" for the D.C. Circuit to review. *See, e.g., San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 632-33 (1981) (holding there is no "final judgment" under 28 U.S.C. § 1257 for purposes of appellate jurisdiction when the intermediate appellate court remanded for further proceedings). Nor has any final judgment been approved by the convening authority. *See* 10 U.S.C. § 950b(a). Therefore, the procedural predicate for an appeal to the D.C. Circuit does not exist here, and the Defense's reliance on a "possible" petition to the D.C. Circuit for purposes of a stay of proceedings at the trial court is misplaced.

The Defense argues that Rule for Military Commissions ("RMC") 908(c)(3) grants a right to petition to the Court of Appeals. This provision—which itself would not stay the military commission process, as detailed below—cannot supersede the requirements of § 950g(a)(1)(A) of the Military Commission Act. The MCA does not charge the Secretary of Defense to interpret a statutory provision conferring jurisdiction on an Article III court—the United States Court of Appeals for the District of Columbia Circuit. That matter may be addressed only by statute, and thus the clear terms of the MCA must control here. *See, e.g.*, *Murphy Exploration & Prod. Co. v. U.S. Dept. of the Interior*, 252 F.3d 473, 478 (D.C. Cir.

2001) ("*Chevron* does not apply to statutes that . . . confer jurisdiction on the federal courts. It is well established that interpreting statutes granting jurisdiction to Article III courts is exclusively the province of the courts.") (internal citations and alteration omitted).

B. The appellate courts are the appropriate authority to stay the military commission proceedings based upon a properly filed petition for review.

In any event, the question whether to stay a commission trial pending an appeal is conferred exclusively upon the appellate courts. RMC 908(c)(3) provides:

> If the decision by the Court of Military Commission Review permits it, the military commission trial *may proceed as to the affected charges and specifications* pending further review by the United States Court of Appeals for the District of Columbia Circuit, *unless either court orders the proceedings stayed*."

(emphases added). The term "either court" refers to the two courts expressly mentioned in the rule—the CMCR and the D.C. Circuit. Accordingly, the Military Judge should not entertain the request for a stay under RMC 908(c)(3).

Moreover, the CMCR's 24 September 2007 opinion not only "permits" the military commission trial to proceed, the CMCR's opinion directs the Military Judge to go forward. *See United States v. Khadr*, CMCR 07-001, at 25 (Sept. 24, 2007) ("The record of trial is returned to the military judge, who shall, consistent with this opinion, conduct all proceedings necessary to determine the military commission's jurisdiction over Mr. Khadr.").[2] The Defense's claim—that RMC 908, upon the filing of a petition for review, "would . . . deprive the

[2] Assuming *arguendo* that Khadr has a statutory right to appeal , Khadr has not demonstrated the extraordinary circumstances required to justify a stay. *See, e.g.*, *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985) (describing a stay pending appeal as "extraordinary relief," which requires, *inter alia*, a showing of "the likelihood of irreparable harm").

Commission of jurisdiction to proceed until such time as the U.S. Court of Appeals for the D.C. Circuit acts on his petition"—simply cannot be squared with the rule's text.[3]

Moreover, Defense's argument is *refuted* by the very caselaw upon which the Defense attempts to rely. Defense quotes *dicta* from *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam), to suggest that the filing of a notice of appeal would divest the Military Judge of jurisdiction. *See* Def. Mot. at 2. The *Griggs* Court held, however, that a "premature notice of appeal"—that is, one filed before the trial court's judgment becomes final—is "not merely defective; it [i]s a nullity." *See* 459 U.S. at 61. As explained above, the Military Judge has not yet entered a final judgment, and, as a result, any notice of appeal that the Defense might attempt to file at this stage of the proceedings would be a "nullity."

5. Conclusion:

The Defense's motion is misplaced because, at this stage of the proceedings, there is no statutory right to appeal to the D.C. Circuit in the MCA, thereby removing the Defense's stated reason to vacate the 25 September 2007 order or grant a continuance. Furthermore, this appeal is filed in the wrong forum, as only the CMCR or the D.C. Circuit may stay the proceedings under the full text of RMC 908(c)(3). The Government therefore requests that the Military Judge deny the Defense motion in its entirety and hold the 11 October 2007 hearing as scheduled.

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[3] Moreover, the structure of Rule 908 undercuts any assertion that stays pending appeal from the CMCR are to be granted as a matter of course. Where the Secretary intended to provide for automatic stays pending an appeal, he did so expressly. *See* RMC 908(b)(8). The lack of any such provision in Rule 908(c)(3) critically undermines Khadr's claim. *Cf., e.g.*, *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

By: /s/
Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

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

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to Lieutenant Commander Kuebler on the 27th day of September 2007.

/s/
Jeffrey D. Groharing
Prosecutor
Office of Military Commissions

[redacted]

From: [redacted]
Sent: Tuesday, October 02, 2007 3:04 PM
To: [redacted]
Subject: Khadr - Defense additional info email

From: [redacted]
Sent: Thursday, September 27, 2007 11:47 AM
To: [redacted]
Subject: RE: Khadr - Defense Motion to Vacate or Alternatively for a Continuance

COL Brownback will consider the matters contained in the email below, along with the matters contained in the original defense motion, before making his ruling on the Defense Motion to Vacate or Alternatively for a Continuance. The government may respond to said matters in their response due NLT 1612, 27 September 2007.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Thursday, September 27, 2007 10:15
To: [redacted]
Cc: [redacted]
Subject: RE: Khadr - Defense Motion to Vacate or Alternatively for a Continuance

Sir,

I just want to provide some additional information relevant to the matter before the military judge.

Ms. Snyder and I returned from Gitmo last night. We've had the opportunity to review the CMCR decision, but as we indicated in our motion, we have not had time to do much more than that. The government went out of its way to provide counsel and the accused with written notice informing the defense that it would have 20 days in which to seek review of the CMCR decision. It is simply impossible for the defense to evaluate and pursue its appellate options (i.e., file a petition for review and/or motion for reconsideration) and, at the same time, prepare for an 11 October hearing, given the scope of what the military judge proposes to accomplish at the hearing.

Moreover, the defense has a number of objections to the proposed agenda for the 11 October hearing.

First, I am not in a position, at this time, to file a motion with respect to the status of Messrs. Edney and Whitling.

Second, it appears from the military judge's e-mail that he intends for the parties to litigate the highly-complex issue of Mr. Khadr's purported "unlawful enemy combatant" status at the arraignment. As the military judge noted in his original ruling dismissing charges against Mr. Khadr, the upshot of the government's argument that the Military Commissions Act permits the Commission to determine Mr. Khadr's status is that it requires the military judge to, in effect, conduct a "mini trial" to determine Mr. Khadr's status as a precondition to further action by the Commission. This process obviously has both factual and legal components.

With respect to the factual component, I should note that the defense has not even been served with discovery by the government in connection with this military commission case. This is because of the government's insistence that no discovery be turned over without being subject to a protective order; obviously, when the military judge dismissed charges, he could not (and did not) issue protective orders governing discovery. We have cobbled together what we have been able from discovery provided to the previous defense team. I fear it is incomplete (we were just alerted last week that there is classified discovery in a safe at the Convening Authority's office, of which we were unaware). The previous legal team has been unresponsive to our efforts to obtain a comprehensive accounting of the discovery or other "turnover" in connection our assuming responsibility for the case -- voicemails, e-mails, and offers to travel to California (where Lt Col Vokey is stationed) to review case files have gone unanswered. We have attempted to review and familiarize ourselves as much as possible with the materials we do have, but, given the extent of the appellate litigation with which we have been involved (before both the CMCR and the U.S. Supreme Court), we have not had the opportunity to conduct the type of thorough investigation necessary to our preparation to litigate Mr. Khadr's status. As a result, it is difficult to see how the defense can reasonably be expected to be in a position to litigate the factual issues in connection with the "mini trial" that must take place in light of the CMCR decision (assuming that the decision withstands appellate review). Instead, the defense, it seems should be afforded the opportunity to conduct reasonable discovery (including, at the very least, receiving the government's initial disclosure) *before* being made to litigate Mr. Khadr's "UEC" status.

With respect to the legal component, the defense has a number of legal claims to bring in connection with the application of the MCA definition of "unlawful enemy combatant." While much of the research has been done, given our tasks in connection with the appellate process, the defense will not be able to adequately brief these issues before the 11 October hearing. Moreover, the defense is simply unaware of any authority that would permit the military judge to limit the scope of legal arguments that can be raised in connection with this determination. RMC 801 empowers the military judge to rule on questions of law -- the issue, for example, of whether the MCA can be lawfully applied (i.e., without violating the Constitution or relevant international law) to someone, such as Mr. Khadr, who was a minor at the time of the alleged misconduct is undoubtedly a question of law that would have to be resolved by the military judge in connection with the UEC status determination. Nothing in the MCA, or common judicial practice, would permit the type of "bifurcated" determination of legal issues proposed by the military judge.

In short, the defense is not prepared to go forward with the proposed agenda on 11 October and has a number of objections thereto. The fact is that *the government* took the position that the Commission was empowered to determine UEC status with the benefit of full warning from the military judge of the pitfalls and problems associated with that position, i.e., that it would require precisely the type of "mini trial" the military judge predicted. Now, the necessary consequence of that position (again, assuming it survives appellate review) is that the defense must be afforded an adequate opportunity to prepare (both factually and legally) for that "mini trial," which it cannot do by 11 October. If we proceed as anticipated, the result would be a status determination effectively

affording the defense less "due process" than that provided in connection with CSRT/DTA process under the decision of the U.S. Court of Appeals for the D.C. Circuit in *Bismullah v. Gates*, 2007 U.S. App. LEXIS 17255 (D.C. Cir. Jul. 20, 2007) (establishing procedures for discovery in connection with review of CSRT determinations).

I apologize for sending this information informally (i.e., via e-mail), however, counsel are scheduled to leave the office in approximately 3 hours to go TAD OCONUS and believed it imperative for the military judge to have the benefit of our views on this matter.

Thank you.

VR,

LCDR Kuebler

[redacted]

From: [redacted]
Sent: Tuesday, October 02, 2007 2:42 PM
To: [redacted]
Subject: Khadr - Prosecution Email Opposing Motion

From: [redacted]
Sent: Wednesday, September 26, 2007 5:35 PM
To: [redacted]
Subject: RE: Khadr - Defense Motion to Vacate or Alternatively for a Continuance

Maj Groharing,

COL Brownback has directed me to inform you that the Government's response to the Defense Motion to Vacate or Alternatively for a Continuance is due NLT 1612, 27 SEP 07.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Wednesday, September 26, 2007 17:19
To: [redacted]
Subject: RE: Khadr - Defense Motion to Vacate or Alternatively for a Continuance

[redacted],

The Prosecution opposes the motion and request for continuance. We are currently drafting a formal response.

Since the initial notice provides for 48 hours to object to the date of arraignment (per paragraph 4), is it acceptable for the Prosecution to respond within that same timeframe? In other words, can we file by COB tomorrow?

Please clarify with Colonel Brownback.

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

[redacted]

From: [redacted]
Sent: Wednesday, September 26, 2007 10:38 AM
To: [redacted]
Cc: [redacted]
Subject: FW: Khadr - Defense Motion to Vacate or Alternatively for a Continuance
Attachments: 2007-09-25 Defense MTV or MFC.doc

Based on LCDR Kuebler's comments in the email below, COL Brownback has directed that I forward that email and attachment to all personnel who received the "Initial Notice - US v. Khadr Trial Proceedings Following CMCR Ruling" sent yesterday .

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Tuesday, September 25, 2007 23:07
To: [redacted]
Cc: [redacted]
Subject: Khadr - Defense Motion to Vacate or Alternatively for a Continuance

Sir,

Please find attached Defense Motion to Vacate, or Alternatively, for a Continuance in Mr. Khadr's case. I have copied as many people as I can on this email, but may not have everyone that needs to receive it. I do not have everyone's email addresses as I am sending this from GTMO.

V/r
WCK

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** **To Vacate, or Alternatively, for a Continuance** October 2, 2007

1. **Timeliness**: This motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and the military judge.

2. **Relief Sought**: The defense respectfully requests the Military Judge to vacate his 25 September 2007 order, *inter alia*, scheduling arraignment in this case for 11 October 2007. In the alternative, the defense requests the Military Judge to continue proceedings in this case until the week of 5 November 2007.

3. **Facts**: On 4 June 2007, the Military Judge dismissed charges against the accused, Omar Khadr ("Khadr"), on the grounds that the government had failed to show that Khadr was subject to jurisdiction under the Military Commissions Act as an "unlawful enemy combatant." The government subsequently filed a motion for reconsideration of the Military Judge's ruling, which the Military Judge denied on 29 June 2007. The government then appealed the Military Judge's ruling to the Court of Military Commission Review (CMCR) on 4 July 2007. In the course of litigation before the CMCR, the defense/appellee filed additional motions challenging the composition of the court and the court's jurisdiction over the appeal based on the government's failure to file its notice of appeal within five days of the Military Judge's original ruling as required by 10 U.S.C. § 950d.[1] The CMCR issued its final decision in the case on 24 September 2007. On 25 September 2007, the Military Judge issued an order, via e-mail, scheduling arraignment in this case for 11 October 2007 and directing the parties to submit various matters to the Commission in advance of the 11 October hearing.

[1] Interestingly, the Military Judge warned the government as early as 8 June that it would be subject to the MCA's statutory five-day limitations period for taking of an interlocutory appeal by the government.

4. **Law and Argument**:

A. Khadr must be afforded time to exercise his appeal rights under the Rules for Military Commissions; in the likely event the defense seeks reconsideration of or appeals the CMCR decision the Military Commission will be without jurisdiction to proceed.

The Military Judge should vacate his 25 September order. The accused has a right to appeal the decision of the CMCR. And the exercise of this right would preclude the Commission from exercising jurisdiction over this case until the appellate process is completed. R.M.C. 908(c)(3) provides that "[a]after the [CMCR] has decided any appeal, the accused may petition for review by the United States Court of Appeals for the District of Columbia Circuit . . . If the decision is adverse to the accused, the accused shall be notified . . . of the *right* to petition the United States Court of Appeals for the District of Columbia Circuit within 20 days in accordance with R.M.C. 1205 (emphasis added)."

Khadr has 20 days to make a decision regarding whether to exercise his right to seek review of the CMCR decision. He also has five days in which to seek reconsideration of the CMCR ruling. The filing of such a petition and/or motion for reconsideration would then deprive the Commission of jurisdiction to proceed until such time as the U.S. Court of Appeals for the D.C. Circuit acts on his petition. *Cf. Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). Thus, as a prudential matter, to the extent the Military Judge believes it necessary to schedule an arraignment in this case, he should so allowing enough time for the defense to decide whether to file an appeal and/or motion for reconsideration, and if so, to allow the Court of Appeals a sufficient amount of time to decide whether to accept jurisdiction over the appeal. The defense has until approximately 15 October

2007 to file a petition for review. Assuming the Court of Appeals takes one or two weeks to decide whether it will accept jurisdiction, it is difficult to see how the case could proceed before the Commission prior to approximately the week of 5 November. As an additional possibility, the defense may seek reconsideration from the CMCR and then, assuming no change in the CMCR decision, seek review in the Court of Appeals. This would have the obvious effect of making it even less likely that the case could proceed before the Commission prior to the week of 5 November. As a result, the Military Judge should vacate his order or continue proceedings in this case until the week of 5 November 2007 at the earliest.

7. **Oral Argument**: The Defense does not request oral argument on this motion.

8. **Witnesses and Evidence**: None.

9. **Certificate of Conference**: The Defense has not conferred with the Prosecution regarding the requested relief. Defense counsel are currently TAD to Guantanamo Bay, have not had the opportunity to consult with the prosecution and believe it imperative that this motion be filed immediately.

10. **Additional Information**: Defense counsel are currently scheduled to go TAD to the United Kingdom on 28 September for a period of approximately one week. As a result, the defense requests expedited consideration of this request so that defense counsel can assess the potential impact of a scheduled hearing on planned TAD travel.

11. **Attachments**: None.

By: /s/
William Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

[redacted]

From: [redacted]
Sent: Tuesday, September 25, 2007 4:12 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Initial Notice - US v. Khadr Trial Proceedings Following CMCR Ruling

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

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

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

[redacted],

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

COL Brownback

Counsel in the case of United States v. Khadr,

1. Chronology:

    a. 4 June 2007 - Dismissal of charges - see AE 15.
    b. 8 June 2007 - Government request for reconsideration - see AE 17.

c. 29 June 2007 - Disposition of request for reconsideration - see AE 23.
d. 3 July 2007 - Government notice of appeal - see AE 25.
e. 24 September 2007 - Court of Military Commission Review opinion - see AE 26.
f.. 24 September 2007 - MJ notified of CMCR opinion - see AE 27.
g. 25 September 2007 - Notification of CMCR opinion served on accused - see AE 28.

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

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

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

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

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

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

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

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

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

[redacted]

From: [redacted]
Sent: Tuesday, October 09, 2007 2:36 PM
To: [redacted]
Cc: [redacted]
Subject: RE: US v KHADR Protective Order # 001
Follow Up Flag: Follow up
Flag Status: Yellow
Attachments: PO#1- FOUO and ClassInfo US v Khadr 9OCT07.pdf

COL Brownback has signed/issued the attached Protective Order #001, dated 09 OCT 2007.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Tuesday, October 09, 2007 12:14
To: [redacted]
Cc: [redacted]
Subject: RE: Protective Orders

Sir,

The Prosecution and the Defense discussed the proposed protective orders on 3 October 2007. We agreed to the FOUO and Classified Information Protective Order; however, we were unable to come to an agreement on the Witnesses and Intelligence Personnel Protective Order. The Prosecution requests the Military Judge issue the attached orders. Please advise whether the Prosecution needs to submit an additional motion regarding the Witnesses and Intelligence Personnel Protective Order.

V/R

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

From: [redacted]
Sent: Friday, September 28, 2007 3:43 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Protective Orders

Maj Groharing,

COL Brownback has directed me to inform you and defense counsel of the following:

1.) There was a change of Detailed Defense Counsel shortly before the hearing on 4 June 2007 and a recent CMCR decision. Please confer with current defense counsel regarding the proposed Protective Orders and then advise the court if an agreement can be reached or not. After consultation, please resubmit any proposed Orders.

2.) Regarding evidence the parties intend to present, AEs may be referred to and need not be re-submitted.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]

Sent: Friday, September 28, 2007 10:14
To: [redacted]
Cc: [redacted]
Subject: Protective Orders

Sir,

1. Pursuant to paragraph 10 of the Military Judge's 1731, 28 September 2007 email, the Government proposes the attached protective orders.

2. The Prosecution requests the Military Judge review the two attached motions requesting Protective Orders that were previously filed by the Prosecution on 27 May 2007. Those motions were not resolved prior to the Military Judge's 4 June 2007 dismissal.

3. The Prosecution remains prepared to provide the Khadr defense team with a discovery release immediately upon issuance of protective orders.

4. The Prosecution further notes that efforts were made to resolve any differences with the Defense regarding the proposed Protective Orders following the 4 June 2007 ruling. Defense Counsel advised the Prosecution that it was not in their interest to have Protective Orders issued at that time. Additionally, at that time Lieutenant Commander Kuebler advised the Prosecution that they had been provided with previously issued discovery from Lieutenant Colonel Vokey, that was nearly the same as the current discovery release the Prosecution is attempting to provide the Defense.

5. Pursuant to paragraph 8 of the Military Judge's 1556, 27 September 2007 email, the Prosecution will provide the Military Judge and the Defense the evidence we intend to present at the 8 November 2007 hearing NLT 1600 hours, 2 October 2007. With the exception of the videotape showing the accused making and planting IEDs, the Prosecution can attach all of the statements via email. The Prosecution notes that the video was included as an attachment to AE 17. Please advise whether the Military Judge needs another copy.

<<...>> <<...>> <<...>> <<...>> <<...>>

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

UNITED STATES OF AMERICA	)	**Protective Order # 001**
	)	
	)	
	)	Protection of "For Official Use Only" or "Law
v.	)	Enforcement Sensitive" Marked Information
	)	and Information with Classified Markings
	)	
OMAR AHMED KHADR	)	
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	
a/k/a "Ahmed Muhammed Khali"	)	**9 October 2007**

1. This protective order is issued pursuant to the authority under the Military Commissions Act (M.C.A.) of 2006 (10 U.S.C. §§ 948a, *et seq.*), the Manual for Military Commissions (M.M.C.), and the Regulation for Trial by Military Commission.

2. The following Order is issued to provide general guidance regarding the described documents and information. Unless otherwise noted, required, or requested, it does not preclude the use of such documents or information in open court.

3. This Order pertains to information, in any form, provided or disclosed to the Defense team in their capacity as legal representatives of the accused before a military commission. Protection of information in regards to litigation separate from this military commission would be governed by whatever protective orders are issued by the judicial officer having cognizance over that litigation.

4. For the purpose of this Order, the term "Defense team" includes all counsel, co-counsel, paralegals, investigators, translators, administrative staff, and experts and consultants assisting the Defense in Military Commission proceedings against the accused. The term "Prosecution" includes all counsel, co-counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who participate in the prosecution, investigation, or interrogation of the accused.

5. This Protective Order shall remain in effect until rescinded or modified by the Presiding Officer or other competent authority. This Order shall not be interpreted to suggest that information classified under the laws or regulation of the United States may be disclosed in a manner or to those persons inconsistent with those statutes or regulations.

6. Accordingly, IT IS HEREBY ORDERED:

a. <u>UNCLASSIFIED SENSITIVE MATERIALS</u>

i. That documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall be

handled strictly in accordance with and disseminated only pursuant to the limitations contained in the Memorandum of the Under Secretary of Defense ("Interim Information Security Guidance") dated April 18, 2004. If either party disagrees with the marking of a document, that party must continue to handle that document as marked unless and until proper authority removes such marking. If either party wishes to disseminate FOUO or Law Enforcement Sensitive documents to the public or the media, they must make a request to the Military Judge.

ii. 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."

b. CLASSIFIED MATERIALS

i. That all parties shall become familiar with Executive Order 12958 (as amended), the Military Commission Act of 2006 (10 U.S.C. §§ 948a *et seq.),* the Manual for Military Commissions, The Regulation for Trial by Military Commission, and other directives applicable to the proper handling, storage, and protection of classified information. All parties shall disseminate classified documents (those marked "CONFIDENTIAL," "SECRET," or "TOP SECRET") and the information contained therein only to individuals who possess the requisite clearance and an official need to know the information to assist in the preparation of the case.

ii. 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 this case's review and final decision by the President or, if designated, the Secretary of Defense, and any posttrial U.S. federal litigation that may occur.

c. BOOKS, ARTICLES, OR SPEECHES

i. Finally, that members of the Defense team nor the Prosecution 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 Defense team or the Prosecution shall submit any book, article, speech, or other publication derived from, or based upon experience or information gained in the course of the Prosecution or Defense of the accused 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 the accused.

ii. The provisions in paragraph 8a apply to information learned in the course of representing the accused before this commission, no matter how that information was obtained. For example, paragraph 8a:

A. Does not cover press conferences given immediately after a commission hearing answering questions regarding that hearing so long as it only addresses the aspects of the hearing that were open to the public.

B. Does not cover public discourses of information or experience in representing the accused before this military commission which is already known and available in the public forum, such as open commission hearings, and motions filed and made available to the public.

C. Does cover information or knowledge obtained through any means, including experience, that is not in the public forum, and would and could only be known through such an intimate interaction in the commission process (for example, a defense counsel's experience logistically in meeting a client).

7. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it warranted.

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

// O*riginal Signed* //

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

[redacted]

From: [redacted]
Sent: Friday, October 12, 2007 11:32 AM
To: [redacted]
Cc: [redacted]
Subject: FW: US v. Khadr Protective Order #002 - Identities of Intelligence Personnel
Follow Up Flag: Follow up
Flag Status: Purple
Attachments: PO#2 - Intel Personnel US v Khadr 12 OCT 07.pdf

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

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Friday, October 12, 2007 11:03
To: [redacted]
Subject: Protective Order - Intelligence Personnel - US v. Khadr - 12 Oct 07

[redacted],

Please forward the email below and the Protective Order concerning Intelligence Personnel to the parties in the case of United States v. Khadr. Please distribute the email and the Order to other interested personnel.

COL Brownback

Counsel in the case of US v. Khadr,

1. Reference is made to:

a. MAJ Groharing's email of 1220 hours, 29 May 2007, which contained a Motion for a Protective Order concerning witnesses and intelligence personnel.

b. LCDR Kuebler's emails of 9 and 11 October 2007, which contained the defense views on the proposed protective order for witnesses and intelligence personnel.

c. MAJ Groharing's email of 9 October 2007.

2. Attached find the commission's protective order on intelligence personnel. Counsel may request modification of the order at any time. Counsel will be permitted to present evidence and argument concerning any such proposed modification of the order at the next session of the commission.

3. The commission finds that the inability of the parties to come to an agreement on the contents of this order significantly impairs the ability of the commission to fulfill its responsibility under the provisions of R.M.C. 707. Discovery must be completed so that the defense can provide proper representation of Mr. Khadr. Discovery can not be completed absent some initial protection for the matters which the government is providing to the defense.

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

From: [redacted]
Sent: Thursday, October 11, 2007 15:36
To: [redacted]
Cc: [redacted]
Subject: RE: US v. Khadr Proposed Protective Order - Identities of Witnesses and Intelligence Personnel

Sir,

1. The defense objection continues to be that the government has failed to meet its burden of demonstrating the necessity for a protective order of the scope it proposes. Indeed, it's vague and speculative proffer fails to provide justification for any protective order relating to witness identity. Nonetheless, the proposed order extends to all witnesses, without distinction or categorization, including witnesses who may be identified by the defense, whose identities are not even known at this time!

2. This overbroad order causes harm. It interferes with defense counsels' ability to form a relationship of trust and confidence with the accused, by requiring counsel to keep additional, unnecessary secrets from the client about the client's case. As the Military Judge is aware, this is of particular concern in this case as detailed defense counsel has literally invested months in attempting to establish a relationship with Mr. Khadr, under challenging circumstances, which this protective order undermines. Moreover, it interferes with the public right to follow these proceedings (note: RMC 806 protects the accused's right to a "public trial"). Finally, it interferes with the truth-seeking function of these proceedings by relieving witnesses of the appropriate moral pressure to tell the truth that comes from giving testimony, under their own names, in a public setting.

3. The government asserts, without any factual support whatsoever, that "disclosure of witness identities in this case could place their lives and the lives of their families in jeopardy." The prosecution identifies three potential sources of danger, which I will deal with in turn.

a. First, they cite to the danger posed by "the accused himself," whom they characterize as a "trained Al Qaeda operative." Getting past the absurdity of characterizing an alleged former child soldier (15 at the time of his initial detention), who is accused of nothing more than engaging in combat in the course of an armed conflict, as a "trained Al Qaeda operative," it is worth noting that Mr. Khadr is currently detained at Guantanamo Bay. He has little chance of causing harm to a potential witness, and with no unmonitored access to the outside world, it is unlikely that (assuming he were so inclined) he could cause anyone else to harm a potential witness. Moreover, Mr. Khadr is currently detained in the lowest-level security facility at Gitmo, which suggests that responsible JTF personnel do not view Mr. Khadr as particularly dangerous.

b. Second, they cite unspecified "Al Qaeda sympathizers" who might cause harm to potential witnesses. To characterize this as speculative would be an understatement. It is worth noting that literally hundreds of terrorist related prosecutions have taken place since 9/11, without the type of sweeping protective orders requested by the prosecution, and the defense is unaware of any substantiated threat of witness intimidation or retaliation by "Al Qaeda sympathizers." Certainly protective orders have been issued in such cases, but, to the knowledge of the defense, they have generally been limited to the identity of specific witnesses, based on particularized allegations of potential harm. The defense is aware of no precedent for the kind of sweeping shroud of secrecy proposed by the prosecution here.

c. Third, the prosecution points to Mr. Khadr's family members. They claim that the family has connections to "known terrorists." First, this is a factual statement for which they offer no support. Second, they do not bother to connect these unspecified "known terrorists" to any particular prospect of witness intimidation or retaliation. As a result, the claim is as speculative as the one regarding "Al Qaeda sympathizers." The concrete matter they do point to involves public statements of Mr. Khadr's mother and sister. This, however, provides no support for their claim. First, Mr. Khadr's relatives are not allowed, to my knowledge, to leave Canada. Second, the defense is aware of no conduct on the part of the mother and sister (aside from their unfortunate public comments) that would suggest they pose a danger of "harm" to anyone except themselves. Again, I would imagine that there are probably numerous examples of terrorist defendants who have had friends or family members with negative associations and who have made incendiary comments, and to the knowledge of the defense, this has not justified the type of sweeping order proposed by the government. The prosecution's invocation of Mr. Khadr's family is just the latest manifestation of a larger theme in this case, i.e., Mr. Khadr being punished for the misdeeds of others.

4. The defense does not dispute that there may, in fact, be witnesses whose identities need protection. If, for example, there are intelligence personnel expected to testify, whose ability to participate in future intelligence operations would be compromised by disclosure of their identities, then this may provide a basis for protection. However, the prosecution does not want, for some reason, to engage in this kind of careful balancing -- they want blanket secrecy for all witnesses, even ones they don't know about. Indeed, the proposed order would cover a presumptive government witness like [redacted], who has made numerous public appearances in which he has discussed the Khadr case and his participation in the events of 27 July 2002. To issue an order "protecting" [redacted] identity would, to put it mildly, strike outside observers as odd, and undermine the credibility of any claim that such measures are truly necessary to protect any security or other interest. Indeed, other potential witnesses have come out publicly, including [redacted] as a few examples (if afforded the opportunity for an evidentiary hearing, as required by RMC 905(h), the defense could present evidence in support of this contention). In addition, as noted above, the order extends to defense witnesses. It is difficult to see how the prosecution's intimidation/retaliation rationale for protection would extend to this category of potential witnesses.

5. In this regard, I would ask that the Military Judge bear in mind the impact of the prosecution's request on the perceived legitimacy of these proceedings. It's no secret that one of the greatest criticisms of the commission process involves excessive secrecy and lack of transparency. The overbreadth of the prosecution request merely serves to strengthen the claim that these proceedings lack transparency. Moreover, the manner in which this matter is being dealt with (i.e., off the record, via e-mail) creates an added level of difficulty by making it appear that the government is trying to keep the secrecy of the proceedings a secret itself. If there is a genuine need for protection of certain witness identities, the public interest (as well as the government's interest in enhancing the perceived legitimacy of this process) is served by forcing the prosecution to demonstrate the necessity for such measures on the record, in a public setting.

6. Finally, the defense notes that the prosecution request is unquestionably a "motion" (i.e., a request to the court for an order). To issue the order and then place the burden on the defense to justify departures would violate RMC 905(c)'s requirement that the moving party carry its burden. In addition, the defense has requested an evidentiary hearing on the matter pursuant to RMC 905(h) and issuance of the order based on the unsubstantiated factual and other assertions of the prosecution would violate this rule as well.

Vr,

LCDR Kuebler

From: [redacted]
Sent: Tuesday, October 09, 2007 17:41
To: [redacted]
Cc: [redacted]
Subject: RE: US v. Khadr Proposed Protective Order - Identities of Witnesses and Intelligence Personnel

Sir,

1. Pursuant to paragraph (2) in the Military Judge's email sent at 1501, 9 October 2007 the following summary is offered in support of the proposed protective order. A more lengthy argument in support of the protective order is contained in the attached motion filed with the court on 29 May 2007.

2. **Disclosure of witness identities in this case could place their lives and the lives of their families in jeopardy.**

a. The United States and our allies remain at war with al Qaeda and associated terrorist organizations. In this case, the majority of the individuals protected by this order are responsible for capturing the accused, including shooting him in the process. Members of al Qaeda and sympathizers would most certainly see witnesses and United States Government intelligence agents as viable targets for future attacks. It is conceivable, if not likely, that al Qaeda members or sympathizers could attempt to target witnesses and intelligence personnel, or their family members, in order to intimidate other witnesses from coming forward or otherwise assisting the United States Government, or to exact revenge for testifying against a member of al Qaeda.

b. The accused himself is a trained al Qaeda operative who is accused of murdering a United States soldier and attempting to murder many more. In addition to the general threat to potential witnesses posed by al Qaeda, in the event the accused is ever released he is certainly capable of exacting revenge upon his captors. The accused has made numerous statements reflecting his desire to kill Americans and once commented that when he was at Bagram and he would get "pissed off" with the guards, he would recall his killing of the U.S. soldier, and it would make him feel good. His numerous statements are detailed in the attached motion.

c. The accused's family members also have significant connections to known terrorists and have openly supported terrorist acts against the United States. The accused's eldest brother has been indicted in the United States District Court for the District of Massachusetts for numerous terrorism offenses. Additionally, the accused sister and mother have made numerous anti-American comments including openly supporting the attacks on September 11, 2001 and demonstrating respect for suicide bombers in public statements. Their comments regarding Americans, particularly those that justify the al Qaeda attacks on September 11, 2001, praising suicide bombers, and comments that highlight the significance of revenge in their culture suggest significant potential to exact revenge upon Omar Khadr's captors and others responsible for his incarceration at Guantanamo Bay.

3. Disclosure of identities of witnesses and intelligence personnel could compromise their ability to continue their service in furtherance of the prosecution of the ongoing war with al Qaeda.

a. Many of the witnesses in this case are military members who will likely be ordered to serve in overseas locations, making them more vulnerable to a terrorist attack. Disclosure of their identities would put them at increased risk when later stationed in foreign countries or while stationed in the United States and could impact their ability to perform their duties as required in support of the war on terror.

b. Additionally, potential witnesses in military commission cases have previously expressed reservations with participation in the military commission process because of fear of retaliation from al Qaeda. If witnesses cannot be assured that the United States Government will take appropriate actions to protect them and their families, it will have a detrimental impact on seeing that justice is served in cases to be tried before military commissions.

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

From: [redacted]
Sent: Tuesday, October 09, 2007 4:06 PM
To: [redacted]
Cc: [redacted]
Subject: FW:US v. Khadr Proposed Protective Order - Identities of Witnesses and Intelligence Personnel

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

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Tuesday, October 09, 2007 15:01
To: [redacted]
Cc: [redacted]
Subject: Proposed Protective Order - Identities of Witnesses and Intelligence Personnel

[redacted]

Please forward the email below to counsel in the case of the United States v. Khadr. Please also distribute to other interested parties. When you forward and distribute the email, please attach the proposed Protective Order discussed below.

COL Brownback

Counsel in the case of United States v. Khadr,

1. Reference is made to the proposed Protective Order concerning the protection of the identities of witnesses and intelligence personnel.

2. The government will provide the Commission a short and succinct summation of the reasons it believes that the protective order is necessary. This will be accomplished by 1600 hours, 10 October 2007.

3. The defense will interpose any objections or comments on the government's reasons by 1600 hours, 11 October 2007.

4. The Commission draws the attention of both parties to paragraph 3 of the proposed order.

5. The Commission determines that this action is necessary in order to insure the safety of witnesses and is in the interest of justice, so that the process of discovery may proceed in this case. See R.M.C. 701a(3) and 701l.

6. The Commission refers the defense, for the second time, to RC 2f.

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

From: [redacted]
Sent: Tuesday, October 09, 2007 14:04
To: [redacted]
Cc: [redacted]
Subject: RE: Protective Orders

Sir,

Our objection is that the government has failed to meet its burden of demonstrating a need for a protective order of the scope it proposes. *See* RMC 701 (military judge may enter protective orders "as are necessary"); RMC 905(c) (burden of persuasion in connection with motion on moving party). If the government believes it needs the proposed protective order, then government counsel should file a motion and plan on presenting evidence (in the context of an on-the-record hearing) demonstrating the need for the order. To our knowledge, they have not done so.

Major Groharing's e-mail of this date, "requesting" entry of the proposed orders could be viewed as a "motion" (defined by Black's Law Dictionary 6th ed. as "an application made to a court or judge for the purpose of obtaining a rule or order . . . .), although one failing to meet the formal requirements for a motion under Rule 3 of the MCTJ Rules of Court. The military judge could, presumably, treat it as such, in which case, the defense is entitled to seven days in which to respond (I should note in this regard that in addition to failing to meet the formal requirements for a motion, the e-mail provides absolutely nothing to support the request). Otherwise, I'm not sure how to characterize Major Groharing's e-mail "request" or the status of these communications generally. I wish to note that 10 U.S.C. section 949d(b), with certain exceptions not applicable here, requires proceedings of the commission to be conducted in the presence of the accused. RMC 804(a) echoes this requirement. The defense is not aware of any authority that allow for resolution of substantive matters such as those presented by the government's request for protective orders in this manner.

To the extent it is required, please allow this to serve as the defense's formal request for an RMC 803 session to resolve the government motion under RMC 905(h).

VR,

LCDR Kuebler

From: [redacted]
Sent: Tuesday, October 09, 2007 1:01 PM
To: [redacted]
Cc: [redacted]

[redacted]
Subject: RE: Protective Orders

Counsel,

COL Brownback has directed me to request that defense counsel advise what objections they have to the proposed Witnesses and Intelligence Personnel Protective Order no later than 1200pm, 11 OCT 2007.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Tuesday, October 09, 2007 12:14
To: [redacted]
Cc: [redacted]
Subject: RE: Protective Orders

Sir,

The Prosecution and the Defense discussed the proposed protective orders on 3 October 2007. We agreed to the FOUO and Classified Information Protective Order; however, we were unable to come to an agreement on the Witnesses and Intelligence Personnel Protective Order. The Prosecution requests the Military Judge issue the attached orders. Please advise whether the Prosecution needs to submit an additional motion regarding the Witnesses and Intelligence Personnel Protective Order.

V/R

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

From: [redacted]
Sent: Friday, September 28, 2007 3:43 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Protective Orders

Maj Groharing,

COL Brownback has directed me to inform you and defense counsel of the following:

1.) There was a change of Detailed Defense Counsel shortly before the hearing on 4 June 2007 and a recent CMCR decision. Please confer with current defense counsel regarding the proposed Protective Orders and then advise the court if an agreement can be reached or not. After consultation, please resubmit any proposed Orders.

2.) Regarding evidence the parties intend to present, AEs may be referred to and need not be re-submitted.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Friday, September 28, 2007 10:14
To: [redacted]
Cc: [redacted]
Subject: Protective Orders

Sir,

1. Pursuant to paragraph 10 of the Military Judge's 1731, 28 September 2007 email, the Government proposes the attached protective orders.

2. The Prosecution requests the Military Judge review the two attached motions requesting Protective Orders that were previously filed by the Prosecution on 27 May 2007. Those motions were not resolved prior to the Military Judge's 4 June 2007 dismissal.

3. The Prosecution remains prepared to provide the Khadr defense team with a discovery release immediately upon issuance of protective orders.

4. The Prosecution further notes that efforts were made to resolve any differences with the Defense regarding the proposed Protective Orders following the 4 June 2007 ruling. Defense Counsel advised the Prosecution that it was not in their interest to have Protective Orders issued at that time. Additionally, at that time Lieutenant Commander Kuebler advised the Prosecution that they had been provided with previously issued discovery from Lieutenant Colonel Vokey, that was nearly the same as the current discovery release the Prosecution is attempting to provide the Defense.

5. Pursuant to paragraph 8 of the Military Judge's 1556, 27 September 2007 email, the Prosecution will provide the Military Judge and the Defense the evidence we intend to present at the 8 November 2007 hearing NLT 1600 hours, 2 October 2007. With the exception of the videotape showing the accused making and planting IEDs, the Prosecution can attach all of the statements via email. The Prosecution notes that the video was included as an attachment to AE 17. Please advise whether the Military Judge needs another copy.

<<...>> <<...>> <<...>> <<...>> <<...>>

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

From: [redacted]

Sent: [redacted]

To [redacted]

Cc: [redacted]

Subject: Motion for a Protective Order - Witnesses and Intelligence Personnel

FOR OFFICIAL USE ONLY/LAW ENFORCEMENT SENSITIVE

Sir,

A Prosecution motion requesting that the Military Judge issue a Protective Order is attached.

<< File: Motion for Protective Order - Witnesses and Intelligence Personnel.pdf >>

The Prosecution requests the Defense confirm receipt.

The Prosecution offers the following attachments in support of the motion:

<< File: (attachment 2).pdf >> << File: (attachment 3).pdf >> << File: (attachment 4).pdf >> << File: (attachment 5).pdf >> << File: (attachment 6).pdf >> << File: (attachment 7).pdf >> << File: (attachment 8).pdf >> << File: (attachment 9).pdf >> << File: (attachment 11).pdf >> << File: (attachment 12).pdf >> << File: (attachment 13).pdf >> << File: (attachment 16).pdf >> << File: (attachment 18).pdf >> << File: (attachment 19).pdf >>

<< File: Protective Order - Witnesses and Intelligence Personnel (attachment 17).doc >>

Attachments (1), (10), (14), and (15) listed in the motion are too large to attach via email. Please provide instructions on how you would like these delivered. I will bring copies to GTMO unless directed otherwise.

Please note several of the attachments contain protected information and should not be released without appropriate redactions. This email is marked FOUO/LES because of the attached FOUO/LES documents. When separated from the attachments the motion and this email are not considered FOUO/LES.

V/R,

Jeff Groharing

Major, U.S. Marine Corps

Prosecutor

Office of Military Commissions

[redacted]

UNITED STATES OF AMERICA	)	**Protective Order # 002**
v.	)	Protection of Identities of Intelligence Personnel
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	)	**12 October 2007**

1. This protective order is issued pursuant to the authority under the Military Commissions Act (M.C.A.) of 2006 (10 U.S.C. §§ 948a, *et seq.*) and the Manual for Military Commissions (M.M.C.), to include but not limited to:

   a. Rules for Military Commissions (R.M.C.) 701(f)(8) and (l)(2);
   b. R.M.C. 806;
   c. Military Commission Rules of Evidence (Mil. Comm. R. Evid.) 104(a);
   d. Mil. Comm. R. Evid. 505(e);
   e. Mil. Comm. R. Evid. 611(d)(2);
   f. Regulation for Trial by Military Commissions, Section 17-3.

2. Accordingly, IT IS HEREBY ORDERED:

   a. Names or other identifying information of intelligence personnel that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;

   b. Unless disclosure has been authorized by the Military Judge, names or other identifying information of any intelligence personnel shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of intelligence personnel must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal.

3. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it warranted.

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

// O*riginal Signed* //
Peter E. Brownback III
Colonel, JA, USA
Military Judge

[redacted]

From: [redacted]
Sent: Monday, October 15, 2007 12:57 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Protective Order #3 - Witnesses - US v. Khadr
Follow Up Flag: Follow up
Flag Status: Orange
Attachments: PO #3 - Witnesses - US v Khadr 15 Oct 07.pdf

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

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Monday, October 15, 2007 12:20
To: [redacted]
Cc: [redacted]
Subject: Protective Order #3 - Witnesses - US v. Khadr

[redacted]

Please forward the email below, and the order attached thereto, to the parties in the case of US v. Khadr. Please distribute the email and the order to other interested parties.

COL Brownback

Counsel in the case of United States v. Khadr,

1. References:

    a. LCDR Kuebler, Email, October 09, 2007 2:05 PM
    b. MAJ Groharing, Email, October 09, 2007 5:42 PM
    c. LCDR Keubler, Email, October 11, 2007 3:36 PM

d. LTC Chappell, Email, October 12, 2007 12:14 PM and the Proposed Protective Order # 3 attached thereto

e. LCDR Kuebler, Email, October 12, 2007 2:21 PM

f. MAJ Groharing, Email, October 12, 2007 2:27 PM

g. LCDR Kuebler, Email, October 12, 2007 2:57 PM

2. The commission has considered the references and the pertinent provisions of the M.M.C. The commission has considered its duty to insure that the accused receives a full and fair defense. The commission has considered the need to pass discovery materials to the current defense team, even if the same materials were passed to a prior defense team.

3. The commission does not believe that this case will be set for trial before 1 January 2008. The commission, however, recognizes that during the interim, regardless of what may or may not occur in other venues, the parties must prepare for trial.

4. The commission notes, with regret, that the counsel in this case have failed to talk together and to reach an agreement on the question of what matters can be disclosed by the defense counsel to Mr. Khadr concerning persons who are called to testify at his trial - whether on the merits, on sentencing, should the proceedings extend to sentencing, or during motions practice. The commission notes that the trial counsel has been on the case for a substantial period of time and that the defense counsel was the assistant defense counsel on this case prior to his detail as defense counsel.

5. Counsel should be capable of working out what needs to be protected from Mr. Khadr by themselves. For instance, does Mr. Khadr have some need to know the SSAN of various personnel who made statements? Probably not. Does Mr. Khadr need to know the home addresses of any person who might be called to testify? Probably not. Does Mr. Khadr need to be furnished a photograph of a potential witness, so that the defense can determine if Mr. Khadr recognizes the potential witness? Probably so. Does Mr. Khadr have a need to know the unit assignments of various personnel at the time a statement was made? Perhaps. Does Mr. Khadr have a need to know the current unit assignments of various personnel who made statements some five, four, three, two, or one year in the past? Probably not.

6. Counsel know the material in this case. The commission has not seen any evidence in this case. Counsel are better positioned to determine what names must be released to Mr. Khadr. Counsel are better positioned to determine what names require other identifying data to be released to Mr. Khadr.

7. A session is set in this case for 8 November 2007. Counsel have until 1200 hours, 2 November 2007 to prepare and provide the commission a protective order on which both sides agree. Failing that, counsel will meet with the military judge at 0900 hours, 5 November 2007 at his chambers in Guantanamo Bay. The military judge will then assist counsel in reaching an agreement. So that there are no concerns, such meeting will be an R.M.C. 802 conference and it will be fully reported on the record of trial. The accused will not attend the R.M.C. 802 conference.

8. The commission has attached Protective Order #3.

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

UNITED STATES OF AMERICA	)	**Protective Order # 003**
v.	)	Protection of Identities of Witnesses
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	)	**15 October 2007**

1. This protective order is issued pursuant to the authority under the Military Commissions Act (M.C.A.) of 2006 (10 U.S.C. §§ 948a, *et seq.*) and the Manual for Military Commissions (M.M.C.), to include but not limited to:

a. Rules for Military Commissions (R.M.C.) 701(f)(8) and (l)(2);
b. R.M.C. 806;
c. Military Commission Rules of Evidence (Mil. Comm. R. Evid.) 104(a);
d. Mil. Comm. R. Evid. 505(e);
e. Mil. Comm. R. Evid. 611(d)(2);
f. Regulation for Trial by Military Commissions, Section 17-3.

2. Accordingly, IT IS HEREBY ORDERED:

a. Names or other identifying information of witnesses (Persons who have been placed on a witness list by the prosecution to be called to testify before the Commission.) that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know.

b. Names or other identifying information of witnesses (Persons who have been placed on a witness list by the prosecution to be called to testify before the Commission.) that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused, shall not be disclosed to the accused or to anyone outside of the Defense team, by the Defense Counsel, except as noted below.

c. Names or other identifying information of other personnel who have provided witness statements, but who are not listed on a prosecution witness list, may be disseminated IAW paragraph 2a above.

d. Names or other identifying information of other personnel who have provided witness statements, but who are not listed on a prosecution witness list, are subject to the limitations in paragraph 2b above.

e. NLT 21 days prior to a session in which a witness is scheduled to appear, whether before the military judge alone or before the full Commission, the prosecution shall advise the defense specifically as to whether the prosecution objects to the witness' name and/or photograph being given or shown to the accused. The defense shall respond within 7 days if it objects to any such designation.

f. NLT 21 days prior to a session in which a witness is scheduled to appear, whether before the military judge alone or before the full Commission, the prosecution shall advise the defense specifically as to whether the prosecution objects to the witness' name and/or unit designation and/or other means of identifying the witness being announced on the record in open court. The defense shall respond within 7 days if it objects to any such designation.

g. Unless disclosure has been authorized by the Military Judge, or has been agreed to by the parties IAW paragraphs 2e-f above, names or other identifying information of any person designated in paragraphs 2a thru 2d above shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of witnesses must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal.

3. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it warranted.

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

// Original Signed //
Peter E. Brownback III
Colonel, JA, USA
Military Judge

[redacted]

From: [redacted]
Sent: Monday, October 15, 2007 4:27 PM
To: [redacted]
Subject: Protective Order 3 Thread

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

From: [redacted]

Sent: Friday, October 12, 2007 2:57 PM

To [redacted]

Cc: [redacted]

Subject: RE: FW: US v. Khadr PROPOSED Protective Order #003 - Identities of Witnesses

Sir,

1. The defense respectfully requests the Military Judge to consider the following by way of brief reply:

2. Para. 3 of the prosecution submission is refreshingly candid and isolates the real issue here -- there is no genuine prospect of a threat to the safety and security of these potential witnesses after all. Instead, the government is seeking to protect what might be more accurately described as their "expectation" of privacy. The simple fact is that this is NOT a basis for issuance of protective orders under the RMC. Indeed, it is extraordinary to suggest that a witness in a criminal trial would ever have some expectation of privacy similar to the one suggested by the government. Requiring witnesses to give testimony, under their own names, in open court, goes to very essence of what it means to have a "public" trial.

3. Arguing that Mr. Khadr doesn't need to know the identities of his accusers (because I know them) doesn't answer the mail. It is HIS trial -- he has a right to know the identities of his accusers absent a compelling justification for withholding that information. For the reasons discussed in previous defense submissions on this subject, the government simply cannot establish the necessary justification for withholding witness identities on "safety and security" grounds (and now seems to have abandoned the attempt).

4. Assuming, arguendo, that it matters in the least, given the legal theory underlying the government's prosecution of "unlawful enemy combatants" in the Global War on Terror, it was (and is) perfectly foreseeable that service members involved in combat in Afghanistan and elsewhere would be called to be witnesses in criminal prosecutions.

5. The government "agrees" with the defense that witnesses whose identities are already public should not be protected, yet the language of the proposed order would extend to such witnesses.

6. The defense respectfully requests the Military Judge to deny the government request for an additional protective order.

VR,

LCDR Kuebler

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

From: [redacted]

Sent: Friday, October 12, 2007 2:26 PM

To: [redacted]

Cc: [redacted]

Subject: Re: FW: US v. Khadr PROPOSED Protective Order #003 - Identities of Witnesses

Sir,

1. The proposed protective order is sufficient with the exception of a certain number of identities contained in witness statements that should remain protected.

2. In conducting the investigation of this case, the Department of Defense Criminal Investigative Task Force (CITF) interviewed dozens of service members who were present at the capture of the accused and subsequent exploitation of the raid site. Some of those individuals will be witnesses at trial, however many others provided a statement regarding what they witnessed, but most likely will not testify at trial.

3. These are service members whose assignment required them to be deployed to Afghanistan in support of the Global War on Terrorism. They are not investigators, and did not have any expectation that they would end up witnessing events that would require disclosing their names or other personal information to enemies of the United States, including the accused. The Defense Counsel will have their names and can interview them, and even ask the government to produce them as witnesses if they have relevant and necessary testimony.

4. No rights of the accused will be violated by witholding their names.

In order to zealously defend the accused, it is not necessary to provide these service member's names to an al Qaeda operative, particularly one with familiy members who have also committed terrorist

acts and at one point lived with Osama bin Laden. In the event the

Defense believes there is a compelling need to share a particular name with the accused, the proposed protective order provides a mechanism to seek relief from the Military Judge.

5. Additionally, the Prosecution is also producing after-action reports which contain the identies of the individuals referenced in paragraph (2). We ask for the same protection regarding those reports.

6. The Prosecution agrees with the Defense that identities of individuals who have chosen to speak to the media regarding these events need not be protected.

V/R,

Major Groharing

From: [redacted]
Sent: Friday, October 12, 2007 2:21 PM
To: [redacted]
Cc: [redacted]
Subject: RE: US v. Khadr PROPOSED Protective Order #003 - Identities of Witnesses

Sir,

1. The defense appreciates the Military Judge's efforts to deal with this matter thoughtfully and fairly. The fact is, however, that the order remains overbroad. The order extends to all prosecution witnesses, without any particularized showing of potential harm resulting from disclosure of their identities. Indeed, the order as written would still have the anomalous result of "protecting" the identity of [redacted] (who, the defense understands, will actually be appearing on Canadian TV to discuss this case on Monday night!) as well as other potential witnesses whose identities are part of the public record. It is simply preposterous to suggest (as the government does) that these witness' identities are in need of "protection."

2. This contrasts with Protective Order #002 (dealing with intelligence personnel). While the defense does not concede that the government has made the required showing for a protective order (indeed, at this point, we don't really know whether there are any "intelligence personnel" who will testify), there is at least (arguably) something inherent in the nature of being "intelligence personnel" that suggests a possible need for protection.

3. That discovery has not proceeded in this case is not the fault of either the defense or the Military Judge -- it is rather the result of the government's self-imposed restrictions concerning service of discovery. The government has taken the unreasonable and extreme position that it is entitled to the kind of blanket secrecy sought by its proposed orders, and conditioned service of discovery upon acquiescence in its view. The natural and foreseeable consequence of this choice is litigation concerning the government's unreasonable and extreme position and concomitant delay in the process of discovery. The defense respectfully submits that it is not incumbent on the Military Judge (and certainly not incumbent on the defense) to relieve the government of the consequences of its actions and decisions in this matter. There is simply no real reason why the government cannot serve discovery (including a witness list) without proposed Protective Order #003. If they do have something more to offer than the vague and speculative assertions they've made thus far, they can continue to withhold discovery and present evidence to the Military Judge in the context of an evidentiary hearing on the matter.

4. The defense respectfully requests the Military Judge to deny the government's request (in so far as it goes beyond the contents of Protective Order #002).

VR,

LCDR Kuebler

From: [redacted]
Sent: Friday, October 12, 2007 12:14 PM
To: [redacted]
Cc: [redacted]

[redacted]

Subject: FW: US v. Khadr PROPOSED Protective Order #003 - Identities of Witnesses
Importance: High

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

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Friday, October 12, 2007 10:25 AM
To: [redacted]
Cc: OMJ - COL Kohlmann
Subject: Proposed Protective Order - Witnesses - US v. Khadr

[redacted],

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

COL Brownback

Counsel in the case US v. Khadr,

1. Reference is made to:

a. MAJ Groharing's email of 1220 hours, 29 May 2007, which contained a Motion for a Protective Order concerning witnesses and intelligence personnel.

b. LCDR Kuebler's emails of 9 and 11 October 2007, which contained the defense views on the proposed protective order for witnesses and intelligence personnel.

c. MAJ Groharing's email of 9 October 2007.

2. Attached find the commission's proposed protective order on witnesses. Counsel have until 1600 hours, 12 October 2007 to comment on the proposal.

3. The commission finds that the inability of the parties to come to an agreement on the contents of an order concerning the identity of witnesses significantly impairs the ability of the commission to fulfill its responsibility under the provisions of R.M.C. 707. Discovery must be completed so that the defense can provide proper representation of Mr. Khadr. Discovery can not be completed absent some initial protection for the matters which the government is providing to the defense.

4. In connection with paragraph 5 of LCDR Kuebler's email of 11 October, the commission refers the parties to

RC 5 and to, for example, AE 012.

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

From: [redacted]
Sent: Thursday, October 11, 2007 15:36
To: [redacted]
Cc: [redacted]
Subject: RE: US v. Khadr Proposed Protective Order - Identities of Witnesses and Intelligence Personnel

Sir,

1. The defense objection continues to be that the government has failed to meet its burden of demonstrating the necessity for a protective order of the scope it proposes. Indeed, it's vague and speculative proffer fails to provide justification for any protective order relating to witness identity. Nonetheless, the proposed order extends to all witnesses, without distinction or categorization, including witnesses who may be identified by the defense, whose identities are not even known at this time!

2. This overbroad order causes harm. It interferes with defense counsels' ability to form a relationship of trust and confidence with the accused, by requiring counsel to keep additional, unnecessary secrets from the client about the client's case. As the Military Judge is aware, this is of particular concern in this case as detailed defense counsel has literally invested months in attempting to establish a relationship with Mr. Khadr, under challenging circumstances, which this protective order undermines. Moreover, it interferes with the public right to follow these proceedings (note: RMC 806 protects the accused's right to a "public trial"). Finally, it interferes with the truth-seeking function of these proceedings by relieving witnesses of the appropriate moral pressure to tell the truth that comes from giving testimony, under their own names, in a public setting.

3. The government asserts, without any factual support whatsoever, that "disclosure of witness identities in this case could place their lives and the lives of their families in jeopardy." The prosecution identifies three potential sources of danger, which I will deal with in turn.

a. First, they cite to the danger posed by "the accused himself," whom they characterize as a "trained Al Qaeda operative." Getting past the absurdity of characterizing an alleged former child soldier (15 at the time of his initial detention), who is accused of nothing more than engaging in combat in the course of an armed conflict, as a "trained Al Qaeda operative," it is worth noting that Mr. Khadr is currently detained at Guantanamo Bay. He has little chance of causing harm to a potential witness, and with no unmonitored access to the outside world, it is unlikely that (assuming he were so inclined) he could cause anyone else to harm a potential witness. Moreover, Mr. Khadr is currently detained in the lowest-level security facility at Gitmo, which suggests that responsible JTF personnel do not view Mr. Khadr as particularly dangerous.

b. Second, they cite unspecified "Al Qaeda sympathizers" who might cause harm to potential witnesses. To characterize this as speculative would be an understatement. It is worth noting that literally hundreds of terrorist related prosecutions have taken place since 9/11, without the type of sweeping protective orders requested by the prosecution, and the defense is unaware of any substantiated threat of witness intimidation or retaliation by "Al Qaeda sympathizers." Certainly protective orders have been issued in such cases, but, to the knowledge of the defense, they have generally been limited to the identity of specific witnesses, based on particularized allegations of potential harm. The defense is aware of no precedent for the kind of sweeping shroud of secrecy proposed by the prosecution here.

c. Third, the prosecution points to Mr. Khadr's family members. They claim that the family has connections to "known terrorists." First, this is a factual statement for which they offer no support. Second, they do not bother to connect these unspecified "known terrorists" to any particular prospect of witness intimidation or retaliation. As a result, the claim is as speculative as the one regarding "Al Qaeda sympathizers." The concrete matter they do point to involves public statements of Mr. Khadr's mother and sister. This, however, provides no support for their claim. First, Mr. Khadr's relatives are not allowed, to my knowledge, to leave Canada. Second, the defense is aware of no conduct on the part of the mother and sister (aside from their unfortunate public comments) that would suggest they pose a danger of "harm" to anyone except themselves. Again, I would imagine that there are probably numerous examples of terrorist defendants who have had friends or family members with negative associations and who have made incendiary comments, and to the knowledge of the defense, this has not justified the type of sweeping order proposed by the government. The prosecution's invocation of Mr. Khadr's family is just the latest manifestation of a larger theme in this case, i.e., Mr. Khadr being punished for the misdeeds of others.

4. The defense does not dispute that there may, in fact, be witnesses whose identities need protection. If, for example, there are intelligence personnel expected to testify, whose ability to participate in future intelligence operations would be compromised by disclosure of their identities, then this may provide a basis for protection. However, the prosecution does not want, for some reason, to engage in this kind of careful balancing -- they want blanket secrecy for all witnesses, even ones they don't know about. Indeed, the proposed order would cover a presumptive government witness like [redacted], who has made numerous public appearances in which he has discussed the Khadr case and his participation in the events of 27 July 2002. To issue an order "protecting" [redacted] identity would, to put it mildly, strike outside observers as odd, and undermine the credibility of any claim that such measures are truly necessary to protect any security or other interest. Indeed, other potential witnesses have come out publicly, including [redacted] as a few examples (if afforded the opportunity for an evidentiary hearing, as required by RMC 905(h), the defense could present evidence in support of this contention). In addition, as noted above, the order extends to defense witnesses. It is difficult to see how the prosecution's intimidation/retaliation rationale for protection would extend to this category of potential witnesses.

5. In this regard, I would ask that the Military Judge bear in mind the impact of the prosecution's request on the perceived legitimacy of these proceedings. It's no secret that one of the greatest criticisms of the commission process involves excessive secrecy and lack of transparency. The overbreadth of the prosecution request merely serves to strengthen the claim that these proceedings lack transparency. Moreover, the manner in which this matter is being dealt with (i.e., off the record, via e-mail) creates an added level of difficulty by making it appear that the government is trying to keep the secrecy of the proceedings a secret itself. If there is a genuine need for protection of certain witness identities, the public interest (as well as the government's interest in enhancing the perceived legitimacy of this process) is served by forcing the prosecution to demonstrate the necessity for such measures on the record, in a public setting.

6. Finally, the defense notes that the prosecution request is unquestionably a "motion" (i.e., a request to the court for an order). To issue the order and then place the burden on the defense to justify departures would violate RMC 905(c)'s requirement that the moving party carry its burden. In addition, the defense has requested an evidentiary hearing on the matter pursuant to RMC 905(h) and issuance of the order based on the unsubstantiated factual and other assertions of the prosecution would violate this rule as well.

Vr,

LCDR Kuebler

From: [redacted]
Sent: Tuesday, October 09, 2007 17:41
To: [redacted]
Cc: [redacted]

Subject: RE: US v. Khadr Proposed Protective Order - Identities of Witnesses and Intelligence Personnel

Sir,

1. Pursuant to paragraph (2) in the Military Judge's email sent at 1501, 9 October 2007 the following summary is offered in support of the proposed protective order. A more lengthy argument in support of the protective order is contained in the attached motion filed with the court on 29 May 2007.

2. **Disclosure of witness identities in this case could place their lives and the lives of their families in jeopardy.**

a. The United States and our allies remain at war with al Qaeda and associated terrorist organizations. In this case, the majority of the individuals protected by this order are responsible for capturing the accused, including shooting him in the process. Members of al Qaeda and sympathizers would most certainly see witnesses and United States Government intelligence agents as viable targets for future attacks. It is conceivable, if not likely, that al Qaeda members or sympathizers could attempt to target witnesses and intelligence personnel, or their family members, in order to intimidate other witnesses from coming forward or otherwise assisting the United States Government, or to exact revenge for testifying against a member of al Qaeda.

b. The accused himself is a trained al Qaeda operative who is accused of murdering a United States soldier and attempting to murder many more. In addition to the general threat to potential witnesses posed by al Qaeda, in the event the accused is ever released he is certainly capable of exacting revenge upon his captors. The accused has made numerous statements reflecting his desire to kill Americans and once commented that when he was at Bagram and he would get "pissed off" with the guards, he would recall his killing of the U.S. soldier, and it would make him feel good. His numerous statements are detailed in the attached motion.

c. The accused's family members also have significant connections to known terrorists and have openly supported terrorist acts against the United States. The accused's eldest brother has been indicted in the United States District Court for the District of Massachusetts for numerous terrorism offenses. Additionally, the accused sister and mother have made numerous anti-American comments including openly supporting the attacks on September 11, 2001 and demonstrating respect for suicide bombers in public statements. Their comments regarding Americans, particularly those that justify the al Qaeda attacks on September 11, 2001, praising suicide bombers, and comments that highlight the significance of revenge in their culture suggest significant potential to exact revenge upon Omar Khadr's captors and others responsible for his incarceration at Guantanamo Bay.

3. Disclosure of identities of witnesses and intelligence personnel could compromise their ability to continue their service in furtherance of the prosecution of the ongoing war with al Qaeda.

a. Many of the witnesses in this case are military members who will likely be ordered to serve in overseas locations, making them more vulnerable to a terrorist attack. Disclosure of their identities would put them at increased risk when later stationed in foreign countries or while stationed in the United States and could impact their ability to perform their duties as required in support of the war on terror.

b. Additionally, potential witnesses in military commission cases have previously expressed reservations with participation in the military commission process because of fear of retaliation from al Qaeda. If witnesses cannot be assured that the United States Government will take appropriate actions to protect them and their families, it will have a detrimental impact on seeing that justice is served in cases to be tried before military commissions.

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions

[redacted]

From: [redacted]
Sent: Tuesday, October 09, 2007 4:06 PM
To: [redacted]
Cc: [redacted]
Subject: FW:US v. Khadr Proposed Protective Order - Identities of Witnesses and Intelligence Personnel

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

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Tuesday, October 09, 2007 15:01
To: [redacted]
Cc: [redacted]
Subject: Proposed Protective Order - Identities of Witnesses and Intelligence Personnel

[redacted],

Please forward the email below to counsel in the case of the United States v. Khadr. Please also distribute to other interested parties. When you forward and distribute the email, please attach the proposed Protective Order discussed below.

COL Brownback

Counsel in the case of United States v. Khadr,

1. Reference is made to the proposed Protective Order concerning the protection of the identities of witnesses and intelligence personnel.

2. The government will provide the Commission a short and succinct summation of the reasons it believes that the protective order is necessary. This will be accomplished by 1600 hours, 10 October 2007.

3. The defense will interpose any objections or comments on the government's reasons by 1600 hours, 11 October 2007.

4. The Commission draws the attention of both parties to paragraph 3 of the proposed order.

5. The Commission determines that this action is necessary in order to insure the safety of witnesses and is in the interest of justice, so that the process of discovery may proceed in this case. See R.M.C. 701a(3) and 701l.

6. The Commission refers the defense, for the second time, to RC 2f.

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

From: [redacted]
Sent: Tuesday, October 09, 2007 14:04
To: [redacted]
Cc: [redacted]
Subject: RE: Protective Orders

Sir,

Our objection is that the government has failed to meet its burden of demonstrating a need for a protective order of the scope it proposes. *See* RMC 701 (military judge may enter protective orders "as are necessary"); RMC 905(c) (burden of persuasion in connection with motion on moving party). If the government believes it needs the proposed protective order, then government counsel should file a motion and plan on presenting evidence (in the context of an on-the-record hearing) demonstrating the need for the order. To our knowledge, they have not done so.

Major Groharing's e-mail of this date, "requesting" entry of the proposed orders could be viewed as a "motion" (defined by Black's Law Dictionary 6th ed. as "an application made to a court or judge for the purpose of obtaining a rule or order . . . .), although one failing to meet the formal requirements for a motion under Rule 3 of the MCTJ Rules of Court. The military judge could, presumably, treat it as such, in which case, the defense is entitled to seven days in which to respond (I should note in this regard that in addition to failing to meet the formal requirements for a motion, the e-mail provides absolutely nothing to support the request). Otherwise, I'm not sure how to characterize Major Groharing's e-mail "request" or the status of these communications generally. I wish to note that 10 U.S.C. section 949d(b), with certain exceptions not applicable here, requires proceedings of the commission to be conducted in the presence of the accused. RMC 804(a) echoes this requirement. The defense is not aware of any authority that allow for resolution of substantive matters such as those presented by the government's request for protective orders in this manner.

To the extent it is required, please allow this to serve as the defense's formal request for an RMC 803 session to resolve the government motion under RMC 905(h).

VR,

LCDR Kuebler

From: [redacted]
Sent: Tuesday, October 09, 2007 1:01 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Protective Orders

Counsel,

COL Brownback has directed me to request that defense counsel advise what objections they have to the proposed Witnesses and Intelligence Personnel Protective Order no later than 1200pm, 11 OCT 2007.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Tuesday, October 09, 2007 12:14
To: [redacted]
Cc: [redacted]
Subject: RE: Protective Orders

Sir,

The Prosecution and the Defense discussed the proposed protective orders on 3 October 2007. We agreed to the FOUO and Classified Information Protective Order; however, we were unable to come to an agreement on the Witnesses and Intelligence Personnel Protective Order. The Prosecution requests the Military Judge issue the attached orders. Please advise whether the Prosecution needs to submit an additional motion regarding the Witnesses and Intelligence Personnel Protective Order.

V/R

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

From: [redacted]
Sent: Friday, September 28, 2007 3:43 PM
To: [redacted]
Cc: [redacted]

Subject: RE: Protective Orders

Maj Groharing,

COL Brownback has directed me to inform you and defense counsel of the following:

1.) There was a change of Detailed Defense Counsel shortly before the hearing on 4 June 2007 and a recent CMCR decision. Please confer with current defense counsel regarding the proposed Protective Orders and then advise the court if an agreement can be reached or not. After consultation, please resubmit any proposed Orders.

2.) Regarding evidence the parties intend to present, AEs may be referred to and need not be re-submitted.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Friday, September 28, 2007 10:14
To: [redacted]
Cc: [redacted]
Subject: Protective Orders

Sir,

1. Pursuant to paragraph 10 of the Military Judge's 1731, 28 September 2007 email, the Government proposes the attached protective orders.

2. The Prosecution requests the Military Judge review the two attached motions requesting Protective Orders that were previously filed by the Prosecution on 27 May 2007. Those motions were not resolved prior to the Military Judge's 4 June 2007 dismissal.

3. The Prosecution remains prepared to provide the Khadr defense team with a discovery release immediately upon issuance of protective orders.

4. The Prosecution further notes that efforts were made to resolve any differences with the Defense regarding the proposed Protective Orders following the 4 June 2007 ruling. Defense Counsel advised the Prosecution that it was not in their interest to have Protective Orders issued at that time. Additionally, at that time Lieutenant Commander Kuebler advised the Prosecution that they had been provided with previously issued discovery from Lieutenant Colonel Vokey, that was nearly the same as the current discovery release the Prosecution is attempting to provide the Defense.

5. Pursuant to paragraph 8 of the Military Judge's 1556, 27 September 2007 email, the Prosecution will provide the Military Judge and the Defense the evidence we intend to present at the 8 November 2007 hearing NLT 1600 hours, 2 October 2007. With the exception of the videotape showing the accused making and planting IEDs, the Prosecution can attach all of the statements via email. The Prosecution notes that the video was included as an attachment to AE 17. Please advise whether the Military Judge needs another copy.

<<...>> <<...>> <<...>> <<...>> <<...>>

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

From: [redacted]

Sent: Tuesday, May 29, 2007 12:20

To: [redacted]

Cc [redacted]

Subject: Motion for a Protective Order - Witnesses and Intelligence Personnel

[redacted]

Sir,

A Prosecution motion requesting that the Military Judge issue a Protective Order is attached.

<< File: Motion for Protective Order - Witnesses and Intelligence Personnel.pdf >>

The Prosecution requests the Defense confirm receipt.

The Prosecution offers the following attachments in support of the motion:

<< File: (attachment 2).pdf >> << File: (attachment 3).pdf >> << File: (attachment 4).pdf >> << File: (attachment 5).pdf >> << File: (attachment 6).pdf >> << File: (attachment 7).pdf >> << File: (attachment 8).pdf >> << File: (attachment 9).pdf >> << File: (attachment 11).pdf >> << File: (attachment 12).pdf >> << File: (attachment 13).pdf >> << File: (attachment 16).pdf >> << File: (attachment 18).pdf >> << File: (attachment 19).pdf >>

<< File: Protective Order - Witnesses and Intelligence Personnel (attachment 17).doc >>

Attachments (1), (10), (14), and (15) listed in the motion are too large to attach via email. Please provide instructions on how you would like these delivered. I will bring copies to GTMO unless directed otherwise.

Please note several of the attachments contain protected information and should not be released without appropriate redactions. This email is marked FOUO/LES because of the attached FOUO/LES documents. When separated from the attachments the motion and this email are not considered FOUO/LES.

V/R,

Jeff Groharing

Major, U.S. Marine Corps

Prosecutor

Office of Military Commissions

[redacted]

UNITED STATES OF AMERICA	)	**<u>PROPOSED</u>** **Protective Order # 003**
v.	)	Protection of Identities of Witnesses
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	)	**12 October 2007**

1. This protective order is issued pursuant to the authority under the Military Commissions Act (M.C.A.) of 2006 (10 U.S.C. §§ 948a, *et seq.*) and the Manual for Military Commissions (M.M.C.), to include but not limited to:

   a. Rules for Military Commissions (R.M.C.) 701(f)(8) and (l)(2);
   b. R.M.C. 806;
   c. Military Commission Rules of Evidence (Mil. Comm. R. Evid.) 104(a);
   d. Mil. Comm. R. Evid. 505(e);
   e. Mil. Comm. R. Evid. 611(d)(2);
   f. Regulation for Trial by Military Commissions, Section 17-3.

2. Accordingly, IT IS HEREBY ORDERED:

   a. Names or other identifying information of witnesses (Persons who have been placed on a witness list by the prosecution to be called to testify before the Commission.) that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;

   b. Unless disclosure has been authorized by the Military Judge, names or other identifying information of any witness (Persons who have been placed on a witness list by the prosecution to be called to testify before the Commission.) shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of witnesses must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal.

3. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it warranted.

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

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

[redacted]

From: [redacted]
Sent: Monday, October 15, 2007 11:00 AM
To: [redacted]
Cc: [redacted]
Subject: FW: Ruling - US v. Khadr - Request to Hold Proceedings in Abeyance
Follow Up Flag: Follow up
Flag Status: Red

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

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Monday, October 15, 2007 09:58
To: [redacted]
Cc: [redacted]
Subject: Ruling - US v. Khadr - Request to Hold Proceedings in Abeyance

[redacted]

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

COL Brownback

Counsel in the case of United States v. Khadr,

1. References:

a. Email, LCDR Kuebler, October 10, 2007 11:18 AM, Subject: Petition for Review filed with USCA for DC Circuit -- request to hold proceedings in abeyance ICO U.S. v. Khadr.

b. Email, LCDR Kuebler, October 10, 2007 12:16 PM, Subject: U.S. v. Khadr -- request for abeyance (additional matters).

c. Email, CPT Petty, October 12, 2007 11:30 AM, Subject: Government Response to Defense Request, containing the Government Response.

d. Email, LCDR Kuebler, October 12, 2007 12:38 PM, Subject: RE: Government Response to Defense Request.

e. Petition for Review to the Court of Appeals for the District of Columbia Circuit, Khadr v. Court of Military Commission Review, 9 October 2007.

f. United States v. Khadr, Court of Military Commission Review, 24 September 2007 (AE 026).

2. The commission has considered the references and has further considered the requirements of the M.C.A., the M.M.C., and the Regulation for Trial by Military Commission. In its consideration, the commission gave no weight to the matters referred to in the third unnumbered subparagraph of paragraph 4D of the Government Response.

3. In making its determination, the commission takes no position on and makes no ruling concerning the question of jurisdiction of the Court of Appeals for the District of Columbia Circuit to hear the appeal (Reference 1e).

4. The commission has considered the open-ended nature of the defense request. "(T)he defense respectfully requests the Military Judge to hold further military commission proceedings in abeyance pending disposition of the matter by the U.S. Court of Appeals." (Paragraph 2, Reference 1a). There is no time-certain that the commission could consider as an end-point for this request. The "disposition" by the Court of Appeals could come on 12 October 2007 or 12 October 2008. Such an unlimited abeyance can not be reconciled with the commission's duties under R.M.C. 707.

5. a. The commission has also considered the defense proposition that the military commission would be acting irregularly and in an unprecedented manner if it were to continue while there was an appeal pending before the Court of Appeals:

"…it would clearly be irregular and unprecedented for multiple courts to exercise jurisdiction over this case at the same time. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.")." (Paragraph 2a, Reference 1a.)

b. The commission is aware of its authority to grant continuances in this case. It has done so at least twice.

c. The commission is further aware of the authority of the Court of Appeals to issue a stay in this case.

d. The commission agrees that it would be unprecedented if the commission held sessions while an appeal was pending at the Court of Appeals in that this is the first appeal ever taken to the Court of Appeals from a military commission. Unprecedented, however, does not mean improper or unlawful.

e. The commission does not agree with the fundamental proposition of the defense position - that the commission has some duty to stay its proceedings while waiting for the Court of Appeals to act on the appeal. To the contrary, the commission finds that it has a duty to proceed with the case in a judicious manner, absent a stay imposed by the Court of Appeals (or another body).

6. The law of this case is that the commission must comply with the ruling of the Court of Military Commission Review (Reference 1f). While counsel may seek to make continuing arguments at the appellate level, the commission is bound by the ruling from its superior court.

7. The commission has also considered the time-management and resource-management problems discussed in paragraphs 1 and 2 of Reference 1b. The commission is not unsympathetic with the demands placed on counsel, on both sides, by competing trial and appellate-level proceedings. However, the commission finds that there is no current level of activity which would require the commission to intervene.

8. a. Of greater concern to the commission are the matters discussed in paragraph 1e of Reference 1d. The commission is concerned with the time, money, and energy which might be fruitlessly expended if this case is stayed after proceedings go forward or if the Court of Appeals reverses the CMCR in such fashion that actions taken after 29 June 2007 are nullified. One need only look at the effect of federal court rulings in November 2004 (*Hamdan*) and November 2005 (*Hicks*) to see that all parties could suffer harm if proceedings are stayed or nullified after a given amount of effort has been expended.

b. However, the situations in *Hamdan* and *Hicks* are not analogous to the current situation in this case. The commission has set one session in this case. The matters to be covered in the session scheduled do not approach, in terms of time, money, and energy required to prepare for them, the matters which were involved in, for example, *Hicks* (57 defense pretrial motions - with government responses and defense replies).

c. Further, in both *Hamdan* and *Hicks*, each case was before a court which had asserted jurisdiction over the accused. Such previously asserted jurisdiction by a federal court is not present in this case.

9. The commission has a great concern with the fact that Mr. Khadr has not stated on the record in open court his desires concerning counsel. That is a matter which must be addressed on the record as soon as possible.

10. a. The commission also has a great concern with the initial or threshold determination as to whether Mr. Khadr is subject to the jurisdiction of the military commission.

b. Counsel appear to have a misunderstanding of what this determination might entail or what it might exclude. This determination will be focused solely on 948d(a) of the M.C.A. This determination will not address other possible motions or attacks upon the jurisdiction of the commission. Counsel for both sides will be free, following the initial or threshold determination, to make motions concerning the jurisdiction of the commission over Mr. Khadr and whatever other motions they might choose to make.

11. a. The commission does not find that the matters raised by the defense in references 1a, 1b, and 1d are sufficient to cause it to abate the proceedings at this time.

b. The commission does not preclude further requests by the defense in the event that circumstances change significantly from those outlined in references 1a, 1b, and 1d.

c. The commission finds that denying the request for abeyance is in the public interest.

d. The commission will allow the defense to request that the commission consider the matters raised in references 1a, 1b, and 1d when determining any future motion or trial schedule.

12. The defense request to abate the proceedings is denied.

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

[redacted]

From: [redacted]
Sent: Friday, October 12, 2007 12:38 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Government Response to Defense Request
Follow Up Flag: Follow up
Flag Status: Red

Sir,

I apologize -- my previous e-mail should have been a "reply" to this one. Please disregard. Thank you.

1. The defense respectfully requests the Military Judge to consider the following brief points in reply to the government's opposition:

a. The government does not dispute that the Military Judge may grant the requested relief pursuant to his authority to continue proceedings under RMC 707.

b. The government's opposition is premised on the notion that the U.S. Court of Appeals lacks jurisdiction over the defense petition for review. The position is, to say the least, ironic in light of (a) the fact that the Secretary of Defense (i.e., the government) wrote the very rule they now claim to be invalid, and (b) notwithstanding their apparent belief that the rule is invalid, the government has now served notice on the accused on two occasions, informing the accused of his right to petition the Court of Appeals for review under RMC 908 and RMC 1205. Whatever the merits of their *Chevron*/statutory jurisdiction argument, the rule (and the government's action thereon) creates, at the very least, a colorable claim that the U.S. has consented to the jurisdiction of the Court of Appeals. Furthermore, there appears to be a strong argument that the U.S. is estopped from denying the jurisdiction of the Court of Appeals.

c. The government does not seriously deal with the argument that the Military Judge's order of 4 June might alternatively be viewed itself as a "final judgment," appealable as such under the MCA.

d. Whatever the merits of the jurisdictional question, the government is, in effect, asking this body to decide whether the Court of Appeals has jurisdiction over the petition, rather than allowing the Court of Appeals to decide for itself. Clearly, the Court of Appeals is better positioned to decide this issue of its own jurisdiction. The defense claim for jurisdiction cannot be viewed as speculative or frivolous in light of the fact that we are relying on rules promulgated by the Department of Defense.

e. The government does not bother dealing with the enormous harm that would result if proceedings go forward in the commission, the Court of Appeals accepts jurisdiction, and ultimately agrees (as it should) with the Military Judge. Literally months could pass, dozens of motions would be heard and decided, countless hours would be invested by personnel associated with the case, millions of dollars of expense would be incurred by the U.S. in conducting proceedings in Guantanamo, possibly trial and conviction could take place -- all of which would become a nullity if the Court of Appeals agreed with the Military Judge. Clearly, "the interests of justice" are not served by such a prospect. It is why multiple courts should attempt to exercise jurisdiction over the same case at the same time -- especially when the issue is jurisdictional in nature. This is not, for example, a situation in which the interlocutory appeal deals merely with the admissibility of a piece of evidence (clearly what the drafters of the language in RMC 908(c)(3) had in mind in suggesting that, in some cases, proceedings might go forward in the commission notwithstanding a pending appeal).

f. Finally, the government's *ad hominem* attacks on defense counsel notwithstanding, it is simply impossible, as a practical matter, for the same two detailed counsel to competently represent the accused in appellate proceedings, involving complex and novel questions of constitutional and international law, and at the same time, competently represent the accused in connection with trial proceedings before the commission.

2. For the foregoing reasons, the defense respectfully requests the Military Judge to hold proceedings in abeyance pending disposition of the defense appeal by the Court of Appeals.

VR,

LCDR Kuebler

From: [redacted]
Sent: Friday, October 12, 2007 11:30 AM
To: [redacted]
Cc: [redacted]
Subject: Government Response to Defense Request

Sir,

Please find attached the Government's response to the Defense request to hold proceedings in abeyance.

V/r,

Keith A. Petty
Captain, U.S. Army
Prosecutor
Office of Military Commissions
[redacted]

[redacted]

From: [redacted]
Sent: Wednesday, October 10, 2007 1:53 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Petition for Review filed with USCA for DC Circuit -- request to hold proceedings in abeyance ICO U.S. v. Khadr
Follow Up Flag: Follow up
Flag Status: Red

COL Brownback has directed that the Government consider the matters below before responding concerning the Defense request for abeyance.

v/r
[redacted]
Attorney Advisor
Military Commissions Trial Judiciary
[redacted]

From: [redacted]
Sent: Wednesday, October 10, 2007 12:17 PM
To: [redacted]
Cc: [redacted]
Subject: U.S. v. Khadr -- request for abeyance (additional matters)

Sir,

1. I would like to draw the Military Judge's attention to a fourth consideration in support of the defense request of this date. Mr. Khadr's detailed appellate counsel and detailed counsel for the military commission consist of the same two individuals -- myself and Ms. Snyder. As Mr. Khadr's appellate counsel, we have an obligation to protect his interests in connection with appellate proceedings and (in our view) pursue the appeal right conferred (at a minimum) by the Secretary of Defense under the Rules for Military Commission. For obvious reasons, prosecution of the appellate litigation must necessarily (as it has to date) detract from our ability to prepare for trial or other proceedings before the military commission.

2. Based on their previous statements to the commission, we expect government counsel to oppose and/or move

to dismiss the defense petition for review on the grounds that the Court of Appeals lacks jurisdiction. As a result, it is very likely that defense counsel will be confronted with a government motion (or motions) at some point in the next several days or weeks. This will require a response, which will in turn require (at a minimum) extensive research and briefing on complex questions of federal jurisdiction and agency authority to construe statutes. It will be next to impossible for detailed counsel to competently represent Mr. Khadr in connection with appellate proceedings and, at the same time, competently prepare for proceedings in the military commission, particularly as outlined in the Military Judge's e-mail order of this date. Accordingly, the same considerations that led the Military Judge to grant a continuance until 8 November in order for counsel to evaluate and pursue Mr. Khadr's appellate rights after the 24 September CMCR decision (which led to the Motion for Reconsideration and Petition for Review) militate in favor of holding proceedings in abeyance pending the disposition of the appeal.

VR,

LCDR Kuebler

From: [redacted]
Sent: Wednesday, October 10, 2007 12:14 PM
To: [redacted]
Cc: [redacted]
Subject: RE: Petition for Review filed with USCA for DC Circuit -- request to hold proceedings in abeyance ICO U.S. v. Khadr

Counsel,

COL Brownback has directed that government counsel advise the commission of the government's position, and any support for that position, on the defense request to hold proceedings in abeyance, no later than 1200 hours, 12 October 2007.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Wednesday, October 10, 2007 11:18
To: [redacted]
Cc: [redacted]
Subject: Petition for Review filed with USCA for DC Circuit -- request to hold proceedings in abeyance ICO U.S.

v. Khadr

Sir,

1. Please find attached a copy of a Petition for Review filed with the U.S. Court of Appeals for the District of Columbia Circuit yesterday (Docket no. 07-1405).

2. In light of the petition, the defense respectfully requests the Military Judge to hold further military commission proceedings in abeyance pending disposition of the matter by the U.S. Court of Appeals. This is clearly appropriate for at least three reasons:

a. Notwithstanding contrary language in certain military commission rules (*see, e.g.,* RMC 908(c)(3); Ch. 25-10 of the Reg. for Trial by Military Commission), it would clearly be irregular and unprecedented for multiple courts to exercise jurisdiction over this case at the same time. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”). The petition constitutes a direct appeal from the Court of Military Commission Review on a jurisdictional issue. Certainly, the ordinary practice in courts of the United States would be for proceedings in the trial court to cease while the case is the subject of appellate review. Notwithstanding language in the above-referenced rules, the Military Judge clearly has the authority to grant continuances when necessary, as it would be in this case, "in the interests of justice." *See* RMC 707.

b. If the Military Judge was correct in his 4 June ruling (as the defense believes he was), then by conducting a status determination, the Military Judge will be usurping the Congressionally-prescribed function of a CSRT or other competent tribunal. This places the Military Judge in the position of potentially acting *ultra vires*. As the Military Judge noted in his 4 June ruling, the commission is a court of "limited jurisdiction." For reasons indicated by the Military Judge in his ruling, there is at least a substantial question as to whether the Military Judge has jurisdiction to proceed under these circumstances and the prudent course of action is to await completion of the appellate process before proceeding.

c. As recent e-mail exchanges between the commission and the parties in anticipation of the initial session of the commission demonstrate, the Military Judge was emphatically correct in his 4 June ruling on the impracticability of the military commission determining for itself whether it may lawfully exercise jurisdiction over the accused. It is the view of the defense that the Military Judge's ruling was correct, that the ruling of the CMCR was incorrect, and that with the benefit of additional facts developed since the CMCR ruling, the Court of Appeals will ultimately agree with the Military Judge. The mere fact that one court disagreed, in part, with the Military Judge, should in no way suggest that a superior appellate body will reach the same conclusion. This is especially so in light of the fact that the U.S. Court of Appeals for the D.C. Circuit has a broader mandate than the CMCR to flesh out the the workings of the comprehensive statutory scheme enacted by Congress for status determination, detention, and trial of so-called "unlawful enemy combatants" under the Detainee Treatment Act and the Military Commissions Act. Under the DTA/MCA framework, it is clear that Congress intended for a CSRT or other administrative tribunal (subject to judicial review) to make an initial determination of status, which would then "open the door" to continued detention and/or trial by military commission as an "unlawful enemy combatant." The CMCR decision has the effect of frustrating this scheme by forcing the Military Judge to assume the role of the administrative tribunal. The defense is confident that when the Court of Appeals reviews this issue in the context of a larger set of questions involving the scope and legality of CSRT procedures and subsequent judicial review, that it will agree with the Military Judge on this matter.

3. For the foregoing reasons, the defense respectfully requests the Military Judge to hold further proceedings in abeyance pending disposition of the defense petition by the Court of Appeals. The defense has conferred with the prosecution and the prosecution does not agree to the requested relief.

VR,

LCDR Kuebler

UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	**PROSECUTION RESPONSE** **To Defense Request for Abeyance of Proceedings** October 12, 2007

1. **Timeliness**: The Prosecution response is filed within the timelines required by the Military Judge in his e-mail sent on 10 October 2007 at 1214hrs, and Rule 3(6)(b)(1) of the Military Commission Rules of Court (May 4, 2007).

2. **Relief Sought**: The Prosecution respectfully requests that the Military Judge deny the Defense's request in its entirety and proceed in accordance with the Military Judge's 27 September 2007 Ruling on Defense Request to Vacate or Request a Continuance, which granted a continuance until no later than 1100hrs 8 November 2007.

3. **Facts**: Material to the Defense's current request for an abeyance of proceedings is the fact that *nothing has changed* since the previous motion for continuance. On 25 September 2007 at 2308 hours, the Defense filed a Motion to Vacate, or, Alternatively, to Request a Continuance. On 27 September 2007 the Defense filed a supplement at 1015 hours to that motion and request. In these filings, Defense counsel argued that more time was needed to adequately prepare for a pre-trial jurisdiction and arraignment hearing, while simultaneously preparing for contemplated filings before the United States Court of Military Commission Review (CMCR) and the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). The Defense also noted that they were currently TAD OCONUS, presumably for the purpose of using that travel to support their request for delay. The Defense did not indicate the purpose of that travel prior to

departing, however the Defense later advised the Prosecution that they were attending an ABA conference in London. While the conference was likely informative and beneficial to counsel, it is apparently unrelated to the representation of Omar Khadr at the upcoming hearing, or Defense preparation of filings at the CMCR or D.C. Circuit.

Since then, the Defense has filed both of its contemplated actions – the motion for reconsideration before the CMCR and the petition for review at the D.C. Circuit. On 1 October 2007, the Defense filed a motion with the CMCR to reconsider the ruling. The very next day—even before the Government could respond—the CMCR denied the Defense's motion to reconsider.

On 9 October 2007, the Defense filed a petition for review at the D.C. Circuit. The status of that petition is pending.

4. Law and Argument:

A. The Defense filing of a petition for review at the D.C. Circuit does not divest the military commission of jurisdiction.

The Defense argues that the military commission is divested of jurisdiction because it has petitioned the D.C. Circuit to review the 24 September order of the CMCR. The Defense further states that this is a direct appeal and that under *Griggs*, this is "an event of jurisdictional significance." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). However, the very next line in *Griggs* cites *Ruby v. Secretary of United States Navy*, 365 F.2d 385, 389 (9th Cir. 1966), states, "Notice of appeal from [an] unappealable order does not divest district court of jurisdiction." *Id.* Similarly, the CMCR order was unappealable under the Military Commissions Act because it was not a final judgment.

The Defense has no statutory right to appeal to the U.S. Court of Appeals for the D.C. Circuit in this instance. Under the Military Commissions Act (MCA), the Defense may appeal to

the D.C. Circuit only after "a *final judgment* [has been] rendered by a military commission (as approved by the convening authority) under this chapter." 10 U.S.C. § 950g(a)(1)(A) (emphasis added). In light of the CMCR's remand order in this case, there is no "final judgment" for the D.C. Circuit to review. *See, e.g.*, *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 632-33 (1981) (holding there is no "final judgment" under 28 U.S.C. § 1257 for purposes of appellate jurisdiction when the intermediate appellate court remanded for further proceedings). Nor has any final judgment been approved by the convening authority. *See* 10 U.S.C. § 950b(a). Therefore, the procedural predicate for an appeal to the D.C. Circuit does not exist here and the Military Commission has not been divested of jurisdiction.

The Defense argues that Rule for Military Commissions (RMC) 908(c)(3) and Regulation for Trial by Military Commission (Regulation) Chapter 25-10 are inconsistent, after which Defense relies on *Griggs* and "the ordinary practice of courts in the United States" to support divesting the Military Commission of jurisdiction. *See* Defense Request for Abeyance of Proceedings (Def. Request), e-mail sent 1118 hours, 10 October 2007. Defense fails to cite any authority that supersedes the requirements of § 950g(a)(1)(A) of the MCA. Regardless of whether the Defense relies on RMC 908(c)(3) or "ordinary practice," the jurisdiction on an Article III court – the United States Court of Appeals for the District of Columbia Circuit – may be conferred only by statute, and thus the clear terms of the MCA must control here. *See, e.g.*, *Murphy Exploration & Prod. Co. v. U.S. Dept. of the Interior*, 252 F.3d 473, 478 (D.C. Cir. 2001) ("*Chevron* does not apply to statutes that . . . confer jurisdiction on the federal courts. It is well established that interpreting statutes granting jurisdiction to Article III courts is exclusively the province of the courts.") (internal citations and alteration omitted).

B. The appellate courts are the appropriate authority to stay the military commission proceedings based upon a properly filed petition for review.

In any event, the question whether to stay a commission trial pending an appeal is conferred exclusively upon the appellate courts. RMC 908(c)(3) provides:

> If the decision by the Court of Military Commission Review permits it, the military commission trial *may proceed as to the affected charges and specifications* pending further review by the United States Court of Appeals for the District of Columbia Circuit, *unless either court orders the proceedings stayed.*"

(emphases added). The term "either court" refers to the two courts expressly mentioned in the rule – the CMCR and the D.C. Circuit. Accordingly, the Military Judge should not entertain the request for abeyance.

Moreover, Defense's argument is *refuted* by the very caselaw upon which the Defense attempts to rely. Defense quotes *dicta* from *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) (per curiam), to suggest that the filing of a notice of appeal would divest the Military Judge of jurisdiction. *See* Def. Request, 10 October 2007. The *Griggs* Court held, however, that a "premature notice of appeal" – that is, one filed before the trial court's judgment becomes final – is "not merely defective; it [i]s a nullity." *See* 459 U.S. at 61. As explained above, the Military Judge has not yet entered a final judgment, and, as a result, any notice of appeal at this stage of the proceedings is a "nullity."

C. The purpose of the jurisdiction hearing is not a "status determination" as conceived by the Detainee Treatment Act and the Combatant Status Review Tribunal held in this case.

The Defense argues that "recent e-mail exchanges" demonstrate the "impracticability of the military commission determining" jurisdiction in this case. *See* Def. Request, 11 October 2007. The Defense reasons that the D.C. Circuit has a "broader mandate" than the CMCR to work out the statutory schemes of the Detainee Treatment Act (DTA) and the MCA. That

argument is as wrong as it is irrelevant. The CMCR directed this Court to determine jurisdiction directly in this case, and the Defense's opinion that such a task is "impracticable" can do nothing to change the CMCR's binding judicial order.

Moreover, the Defense simply misunderstands the separate and distinct purpose of the pre-trial jurisdictional hearing in this case by arguing that the Military Judge will be assuming "the role of the administrative tribunal." Def. Request, 11 October 2007. As the CMCR held, the Military Judge must determine here whether Khadr is an "unlawful enemy combatant" under § 948a(1)(A)(i) of the MCA. The CMCR's decision hinged on its determination that the MCA's "unlawful enemy combatant" standard—which applies to those, like Khadr, whom the Government plans to prosecute—*is different from* the DTA's "enemy combatant" standard, which applies to all those whom the Government detains at Guantanamo Bay. The DTA creates a separate administrative scheme (*i.e.*, the CSRT process), replete with its own rules, regulations, modes of proof, and methods of appeal[1]—none of which are implicated here. And regardless of whether the Military Judge determines that Khadr is or is not an "unlawful enemy combatant" for purposes of *prosecution*, nothing that happens in this case will affect the wholly separate administrative determination that Khadr is an "enemy combatant" for purposes of *detention*. The Defense's confused suggestion to the contrary should be rejected.

D. Defense argument that they are "too busy" should not play a role in the timeline of this case.

Defense argues in an e-mail dated 10 October 2007 at 1217 hours, that while LCDR Kuebler and Ms. Snyder are both the detailed appellate counsel and the detailed counsel for the military commission, they will not be able to adequately prepare for trial. In addition, they argue

[1] The appropriate method to challenge CSRT is through appeal to the D.C. Circuit as provided for in Section 1405(e)(2)(A) of the DTA. When the Defense filed his petition for review in the D.C. Circuit in this case, of course, he did *not* file under the DTA. His attempt (albeit a misguided one) to petition for review under the MCA further underscores that the DTA's statutory scheme is not implicated here.

that they will be too busy responding to possible Government motions, which will entail "(at a minimum) extensive research and briefing on complex questions of federal jurisdiction and agency authority." E-mail dated 10 October 2007, 1217 hours.

However, as mentioned above, the Defense is not asking the Military Judge to look at anything other than "the same considerations that led the Military Judge to grant a continuance until 8 November." Def. Request, 10 October 2007. The Defense was well aware at the time of its continuance request that it was considering filing at both the CMCR and the D.C. Circuit. Logically, these filings would require a great deal of research and writing. This is work that can only reasonably have been considered and anticipated by the Defense.

The Government will not speculate as to the Defense team's time management, nor will it intrude and offer advice on such skills. The Government does, however, question the timing of Defense Counsel's significant OCONUS travel unrelated to the representation of the accused before the CMCR, D.C. Circuit, or military commission, while contemporaneously claiming they are unable to prepare for the scheduled military commission hearing.

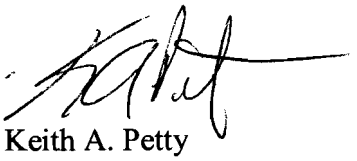
The interests of justice in this case favor holding proceedings as ordered by the Military Judge no later than 8 November 2007. Granting an additional Defense request for delay, rather than being fair and just, would frustrate the ability of the accused, the Government, and the victims to have this case resolved in a timely fashion.

5. Conclusion:

At this stage of the proceedings, there is no statutory right to appeal to the D.C. Circuit in the MCA, thereby removing the Defense's argument that the Military Commission is divested of jurisdiction and the Military Judge should, therefore, hold the proceedings in abeyance. Furthermore, the Defense request, if granted, would not serve the interests of justice, but would

only frustrate the timely adjudication of this case. The Government therefore requests that the Military Judge deny the Defense request in its entirety and hold the 8 November 2007 hearing as scheduled.

By: /s/
Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor



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

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to Lieutenant Commander Kuebler on the 12th day of October 2007.

Keith A. Petty
Prosecutor
Office of Military Commissions

VIA HAND DELIVERY

October 9, 2007

Mark J. Langer, Clerk
United States Court of Appeals for
the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

Dear Mr. Langer,

Enclosed for filing please find an original and four copies of Omar Khadr's Petition For Review of decisions of the United States Court of Military Commission Review. Thank you for your attention to this matter.

Sincerely,

William C. Kuebler, LCDR, JAGC, USN
Rebecca Snyder, Esq.
Office of Military Commissions
Office of the Chief Defense Counsel
[redacted]
Counsel for Petitioner

Enclosures
cc: Service List

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OMAR AHMED KHADR, Petitioner, v. UNITED STATES and UNITED STATES COURT OF MILITARY COMMISSION REVIEW, Respondents.	**PETITION FOR REVIEW** CMCR Docket No. 07-001 D.C. Circuit Docket No. _____

Petition For Review

Omar Ahmed Khadr, a Canadian citizen currently detained at the United States detention facility at Guantánamo Bay, Cuba, hereby petitions this Court, pursuant to 10 U.S.C. § 950g(a)(2)(A), Rule 1205 of the Rules for Military Commissions, and Federal Rule of Appellate Procedure 15(a), for review of the following decisions of the United States Court of Military Commission Review ("CMCR"):

1. The CMCR's decision, entered on September 24, 2007, reversing a military judge's dismissal of all charges against Mr. Khadr for lack of jurisdiction under the Military Commissions Act of 2006 ("MCA") (attached hereto as Exhibit A);

2. The CMCR's decision, entered on September 24, 2007, denying Mr. Khadr's motion to abate the CMCR proceedings due to legal defects in the constitution of the CMCR (attached hereto as Exhibit B); and

3. The CMCR's decision, entered on September 19, 2007, denying Mr. Khadr's motion to dismiss the government's appeal to the CMCR because it was not timely filed and because the CMCR's rules had not been properly promulgated (attached hereto as Exhibit C).

10 U.S.C. § 950g(a) provides this Court with "exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission," so long as all appeals to the CMCR have

been exhausted, and the accused files a petition for review "not later than 20 days after the date on which" he receives a written notice of the final decision of the CMCR. 10 U.S.C. § 950g(a)(1)(A) & (2)(A). Similarly, Rule 1205 of the Rules for Military Commissions (hereinafter "RMC") provides that "[t]he accused may petition for review of [a] decision of the [CMCR] if such petition is filed within 20 days from the time the accused was" notified of the CMCR's decision. RMC 1205 (attached hereto as Exhibit D). All appeals to the CMCR have been exhausted, and this Petition is being filed within 20 days of the date of the earliest CMCR decision under review, September 19, 2007. Accordingly, this Court's jurisdiction is properly invoked.

To Petitioner's knowledge, this is the first time this Court has been called upon to review military commission and CMCR judgments under the MCA. Accordingly, for the Court's convenience, petitioner submits the following history of the case, and a more extended statement of this Court's jurisdiction.

Factual and Procedural History

Petitioner Omar Khadr was captured on the battlefield in Afghanistan in 2002 at the age of 15. Shortly thereafter, he was transferred to the U.S. facility at Guantánamo Bay, where he has remained detained ever since. On September 7, 2004, a three member Combatant Status Review Tribunal ("CSRT") classified Mr. Khadr as an "enemy combatant." In April 2007, the United States charged Mr. Khadr with "war crimes" and referred him to trial pursuant to the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948a *et seq.*). Mr. Khadr is one of only three persons to have been charged under the MCA, and one of only two currently facing trial before a military commission. Each "war crime" charge against Mr. Khadr specifies as its jurisdictional basis that Mr. Khadr is "a person

subject to trial by military commission as an alien *unlawful* enemy combatant," specifically invoking the jurisdictional prerequisite set forth in the MCA. *See* June 2007 Order on Jurisdiction (attached hereto as Exhibit E) (emphasis added); *see also* 10 U.S.C. § 948d(a) ("A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter . . . when committed by an alien *unlawful* enemy combatant.") (emphasis added).

On June 4, 2007, the military judge assigned to preside over Mr. Khadr's military commission trial dismissed all charges against him without prejudice, on the ground that the jurisdictional prerequisite set forth in the MCA had not been met. The judge explained that the MCA "contemplates a two-part system. First it anticipates that there shall be an administrative decision by the CSRT which will establish the status of a person for the purposes of the MCA. The CSRT can find, for MCA purposes, that a person is a lawful enemy combatant or an unlawful enemy combatant. Second, once the CSRT finds that a person is an unlawful enemy combatant, the provisions of the MCA come into play." *See* June 2007 Order on Jurisdiction (Ex. E). Because Mr. Khadr's CSRT established only that he was an "enemy combatant"—not an "*unlawful* enemy combatant"—the judge held that the military commission over which he was presiding lacked jurisdiction to try Mr. Khadr under the MCA. He further ruled that the commission was not the proper authority under the MCA to make the "unlawful enemy combatant" determination, and therefore dismissed all charges against Mr. Khadr.

On July 4, 2007, the Government filed an appeal with the CMCR under Section 950d of the MCA. Shortly thereafter, Mr. Khadr filed motions challenging both the timeliness of the appeal and the constitution of the tribunal (chiefly, the Secretary of Defense's authority to delegate judicial appointment power to his Deputy).

On September 19, 2007 and September 24, 2007, the CMCR issued rulings denying Mr. Khadr's motions. *See* CMCR Ruling on Motion to Dismiss (Ex. C); CMCR Ruling on Motion to Abate (Ex. B). Also on September 24, 2007, the CMCR issued its opinion addressing the Government's appeal, reversing in part the military judge's decision that the military commission lacked jurisdiction to try Mr. Khadr. The CMCR agreed that the determination of "lawful" or "unlawful" enemy combatant was a critical one, and it held that the military judge was correct to find that the CSRT's determination of "enemy combatant" status was insufficient to support military commission jurisdiction under the MCA. *See* CMCR Opinion of the Court and Action on Appeal by the United States at 8-9 (Ex. A). It further held, however, that the military judge himself was empowered under the MCA to receive evidence and assess Mr. Khadr's status as an "unlawful enemy combatant." *Id.* at 18.

Mr. Khadr now petitions this Court for review of that CMCR decision, insofar as it holds that the military judge possessed authority under the MCA to determine whether he is an alien unlawful enemy combatant for purposes of establishing jurisdiction. He also renews his objections to the constitution of the CMCR tribunal as expressed in his motion to dismiss the government's appeal and motion to abate the proceedings.

This Court's Jurisdiction Under the MCA

As noted above, this Court has exclusive jurisdiction under the MCA to "determine the validity of a final judgment rendered by a military commission." 10 U.S.C. §950g(a)(1)(A). The military judge's June 4, 2007 order dismissing all charges against Mr. Khadr for lack of jurisdiction is a "final judgment" rendered by a military commission. *Id.*; *see, e.g.*, *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the

judgment.") (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)); *Tootle v. Sec'y of the Navy,* 446 F.3d 167, 172 (D.C. Cir. 2006). And the prerequisites for jurisdiction under Section 950g—exhaustion of appeals with the CMCR and the filing of a timely petition for review—have both been met. *See id.* § 950g(1)(B) & (2)(A).

The Rules for Military Commissions and the Regulation for Trial by Military Commissions promulgated by the Office of the Secretary of Defense confirm this Court's jurisdiction over Mr. Khadr's appeal. Rule 908 specifies that "[a]fter the Court of Military Commissions Review has decided *any* appeal"—including an appeal, like the one at issue here, filed by the Government under Section 950d of the MCA—"the accused may petition for review by the United States Court of Appeals for the District of Columbia Circuit." RMC 908(c)(3) (emphasis added) (attached hereto as Exhibit F). And, as noted earlier, Rule 1205 similarly provides that "[t]he accused may petition for review of the decision of the [CMCR] if such petition is filed within 20 days from the time the accused was in fact notified of the decision of the [CMCR]." RMC 1205 (Ex. D). Likewise, the Regulation for Trial by Military Commissions notes that under 10 U.S.C. § 950g(a), this Court has exclusive jurisdiction to determine the validity of final judgments rendered by military commissions. *See* Reg. 26-1; *see also* Reg. 25-9a ("[a] copy of each CMCR decision (opinion or order disposing of an appeal or petition) must be served" on the accused); Reg. 25-9e1 (service of CMCR decisions must be accompanied by a form for petitioning this Court and a postage paid envelope addressed to this Court) (regulations attached hereto as Exhibit G).[1]

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[1] Unlike appeals by the United States under 10 U.S.C. § 950d(d), which the MCA expressly leaves to "the discretion of the Court of Appeals," review under § 950g is not discretionary. Even if review were discretionary, however, there would be little doubt that it should be granted here, given the centrally important questions this appeal raises about the proper interpretation of the MCA. Perhaps most significantly, this case raises the fundamental issue of whether a

The Rules and Regulation also make clear that the existence of ongoing proceedings before the military commission does not preclude review by this Court. *See* Reg. 25-10a (Ex. G) ("Further proceedings in CMCR cases need not be delayed, however, solely to permit an accused to petition USCADCC . . . ."); RMC 908(c)(3) (Ex. F) ("If the decision by the [CMCR] permits it, the military commission trial may proceed as to the affected charges and specifications pending further review by the United States Court of Appeals for the District of Columbia Circuit, unless either court orders the proceedings stayed.").

WHEREFORE, Petitioner Omar Khadr respectfully petitions this Court for review of the aforementioned decisions of the U.S. Court of Military Commission Review.

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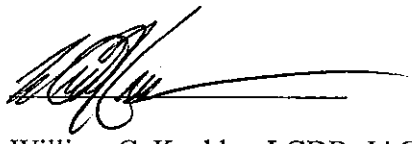
military commission itself can determine that a detainee is an "alien unlawful enemy combatant" subject to military commission trial under the MCA, or whether this determination must be made by a CSRT. This question has wide-ranging practical implications, since not a single detainee at Guantanamo Bay has been held to be an "*unlawful* enemy combatant"—as opposed to an "enemy combatant"—under existing CSRT regulations. Resolution of this question will thus determine whether those detainees are subject, without more, to trial under the MCA. Further, as Petitioner argued to the CMCR, both international and U.S. law prohibit military commissions from themselves making an initial determination of unlawful enemy combatant status. Accordingly, if (as contemplated by the CMCR's decision) trials proceed in which military commissions determine unlawful enemy combatant status for themselves, those trials will violate U.S. and international law. The question at issue in this appeal is thus central to the mechanics and validity of military commission trials. Review of that question is particularly appropriate here because Petitioner is one of only two people facing trial before a military commission—review in this case will thus permit this critical question to be resolved before other detainees are charged and tried under the MCA.

Dated: October 9, 2007

Respectfully submitted,



William C. Kuebler, LCDR, JAGC, USN
Rebecca Snyder, Esq.
Office of Military Commissions
Office of the Chief Defense Counsel
[redacted]
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that on October 9th 2007, two true copies of this Petition for Review were mailed to:

Jeffrey D. Groharing
Department of Defense
Office of the Chief Prosecutor
[redacted]

LeRoy F. Foreman
Clerk of Court, Court of Military Commission Review
One Liberty Center
875 N. Randolph Street
Suite 8000
Arlington, VA 22203

William C. Kuebler, LCDR, JAGC, USN
Rebecca Snyder, Esq.
Office of Military Commissions
Office of the Chief Defense Counsel
[redacted]
Counsel for Petitioner

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

Before
ROLPH, FRANCIS, HOLDEN
Appellate Military Judges

UNITED STATES OF AMERICA
Appellant

v.

OMAR AHMED KHADR
Appellee

CMCR 07-001
Military Commission
Guantanamo Bay, Cuba

Military Judge: Peter E. Brownback, III, JA, U.S. Army.

For Appellant: Francis A. Gilligan (argued); Major Jeffrey D. Groharing, JA, U.S. Army (on brief); Captain Keith A. Petty, JA, U.S. Army (on brief); Lieutenant Clay G. Trivett, Jr., JAGC, U.S. Navy (on brief).

For Appellee: Lieutenant Commander William C. Kuebler, JAGC, U.S. Navy (on brief; argued); Rebecca S. Snyder (on brief); Dennis Edney (on brief); Nathan Whitling (on brief; argued).[1]

Amicus Curiae for Appellee: Frank W. Fountain (on brief); Madeline Morris (Professor of Law, Duke University)(on brief); Stephen Bornick (Special Editorial Associate for Professor Morris)(on brief); Landon Zimmer (Special Editorial Associate for Professor Morris)(on brief); Allison Hester-Hadded (law student, Duke University)(on brief).

September 24, 2007

OPINION OF THE COURT AND ACTION ON APPEAL BY THE UNITED STATES FILED PURSUANT TO 10 U.S.C. § 950d

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[1] Mr. Edney and Mr. Whitling are both admitted to the bar in Canada and, upon motion, were authorized to appear as counsel for Mr. Khadr's appeal to argue *pro hac vice* pursuant to Rule 8(f) of our Rules of Practice.

ROLPH, Deputy Chief Judge:

In this appeal by the Government (hereinafter Appellant) we are called upon to interpret for the first time the jurisdictional provisions contained in *the Military Commissions Act of 2006* (hereinafter M.C.A.)[2] as they relate to the trial by military commission of a Canadian citizen, Omar Ahmed Khadr, Appellee (hereinafter Mr. Khadr). Mr. Khadr was captured on the battlefield in Afghanistan in 2002, is currently detained in Guantanamo Bay, Cuba, and was pending trial upon charges that were referred for trial before a military commission. This interlocutory appeal was taken after the military judge presiding over Mr. Khadr's trial dismissed all charges against him without prejudice on June 4, 2007. The military judge's ruling was based upon his *sua sponte* determination that the military commission lacked personal jurisdiction over Mr. Khadr. Where a court has no personal jurisdiction over an accused appearing before it, it is generally powerless to act. *See, e.g., Ryder v. United States,* 515 U.S. 177, 187 (1995)(Coast Guard Court of Criminal Appeals could not decide appeals because not properly appointed); *Solorio v. United States,* 483 U.S. 435, 442-451 (1987)(describing history of court-martial jurisdiction); *Reid v. Covert,* 354 U.S. 1, 32-36 (1957)(no court-martial jurisdiction over civilians accompanying the forces overseas); *Toth v. Quarles,* 350 U.S. 11, 22-23 (1955)(no court-martial jurisdiction over soldier discharged from service).

The basis for the military judge's ruling was Appellant's failure to properly determine Mr. Khadr's status as an "alien unlawful enemy combatant" before his Combatant Status Review Tribunal (C.S.R.T.), which the judge ruled was an indispensable prerequisite to the military commission's ability to exercise personal jurisdiction under the M.C.A. The military judge further ruled that "the military commission is not the proper authority, under the provisions of the M.C.A., to determine that Mr. Khadr is an unlawful enemy combatant in order to establish initial jurisdiction for this commission to try Mr. Khadr." *See* Military Judge's Order on Jurisdiction of June 4, 2007 at 1-2; Record at 21.

Background

Appellant charged Mr. Khadr with various offenses arising during the period from on or about June 2002 to on or about July 27, 2002. The allegations include murder of a U.S. Soldier in violation of the law of war; attempted murder of U.S. military or coalition forces by making and planting improvised explosive devices (IEDs) in violation of the law of war; conspiracy with Osama bin Laden, Ayman al Zawahiri and other members of al Qaeda, an international terrorist organization, to attack civilians, destroy property, and commit murder – all in violation of the law of war; providing material or resources in support of al Qaeda and international terrorism; and spying, in violation of 10 U.S.C. §§ 950v(b)(15); 950t; 950v(b)(28); 950v(b)(25); and 950v(b)(27) respectively. Each charge and specification alleged against Mr. Khadr asserts the jurisdictional claim that he is "a person subject to trial

[2] Pub. L. No. 109-366, 120 Stat. 2600 (October 17, 2006), codified at 10 U.S.C. §§ 948a-950w.

by military commission as an ***alien unlawful enemy combatant***." *See* Charge Sheet, Charges I-V (Appellate Exhibit (AE) 1 at 4-7) (emphasis added).

The record of trial, pleadings of the parties, and allied documents contain allegations that Mr. Khadr received one-on-one "private al Qaeda basic training" in Afghanistan during June 2002, consisting of instruction in the use of rocket propelled grenades, rifles, pistols, hand grenades, and various other explosives. *See* AE 1 at 6; AE 17. In July 2002, Mr. Khadr is also alleged to have participated in "land mine training," which involved the conversion of landmines to IEDs and their strategic placement as weapons to be deployed against U.S. military and coalition forces. *Id.* On or about July 27, 2002, at a compound near Abu Ykhiel, Afghanistan, Mr. Khadr is alleged to have been a member of a group of al Qaeda members that engaged U.S. military and coalition forces with small arms fire, killing two Afghan Militia Force members, and throwing a hand grenade which killed Sergeant First Class Christopher Speer, U.S. Army. *Id.* Mr. Khadr, though badly wounded in the engagement, was immediately treated on scene by U.S. military medical personnel. He was thereafter taken into custody, and ultimately transported to the U.S. detention facility located at Guantanamo Bay Naval Base, Cuba, where he presently remains.

On September 7, 2004, a three-member C.S.R.T. unanimously determined that Mr. Khadr was properly classified as an "enemy combatant" and an individual who was "a member of, or affiliated with al Qaeda," as defined by a memorandum issued by the Deputy Secretary of Defense on July 7, 2004. *See* Report of C.S.R.T. (AE 11 at 6).

Appellate Jurisdiction and Standards of Review

The military judge's ruling in this case dismissing all charges without prejudice qualifies for appeal by Appellant under 10 U.S.C. § 950d(a)(A) in that it "terminates proceedings of the military commission with respect to a charge or specification." *See* Rule for Military Commission (R.M.C.) 908(a)(1), Manual for Military Commissions (M.M.C.)(2007). Appellant properly gave notice of appeal to the military judge on July 3, 2007,[3] and filed the appeal directly with this Court within the time limits established in our Rules of Practice. *See* Rule 22, Rules of Practice, Court of Military Commission Review (2007). In ruling upon this appeal, we may act only with respect to matters of law. 10 U.S.C. § 950d(c); R.M.C. 908(c)(2).

We have reviewed the military judge's factual determinations applying a highly deferential standard of review mandating that findings of fact not be

[3] The military judge's ruling became final for purposes of the notice provisions of 10 U.S.C. § 950d(a)(2)(b) on June 29, 2007, the day the military judge denied Appellant's Motion for Reconsideration. *See United States v. Ibarra*, 502 U.S. 1, 6-7 (1991); *see also* Court of Military Commission Review Ruling on Appellant's Motion to Dismiss of September 19, 2007.

disturbed unless they are "clearly erroneous." *See Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *United States v. Cabrera-Frattini,* 65 M.J. 241, 245 (C.A.A.F. 2007). Regarding all matters of law, we review the military judge's findings and conclusions *de novo*. *See Schwarzenegger v. Fred Martin Motor Co.,* 374 F.3d 797, 800 (9th Cir. 2001); *Pederson v. Louisiana State Univ.,* 213 F.3d 858, 869 (5th Cir. 2000); *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007).

Combatant Status Generally

The determination of whether an individual captured on the battlefield is a "lawful" or "unlawful" enemy combatant carries with it significant legal consequences (both international and domestic) relating to the treatment owed that individual upon capture and ultimate criminal liability for participating in war-related activities associated with the armed conflict. The Third Geneva Convention Relative to the Treatment of Prisoners of War (GPW III) -- signed in 1949 and entered into force in 1950 following battlefield atrocities occurring during World War II -- sought to carefully define "lawful combatant" for all signatory nations. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, Art. 4.[4] *See also* Hague Convention No. IV Respecting the Laws and Customs of War on Land, October 18, 1907, 36 Stat. 2277, T.S. No. 539 (Hague Regulations).

Article 4, GPW III makes it clear that lawful combatants will generally only include the regular armed forces of a party to the conflict, including "members of militias or volunteer corps forming part of such armed forces." Also included are members of other militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict so long as they fulfill the following conditions:

1) They are under the command of an individual who is responsible for their subordinates;
2) They wear a fixed distinctive sign or symbol recognizable at a distance;
3) They carry their arms openly; and

[4] The United States is a signatory nation to all four Geneva Conventions. The Geneva Conventions are generally viewed as self-executing treaties (i.e., ones which become effective without the necessity of implementing congressional action), form a part of American law, and are binding in federal courts under the Supremacy Clause. *See* U.S. Const. art VI, § 2 ("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 . . . ."). *United States v. Lindh,* 212 F. Supp. 2d 541, 553-54 (E.D. VA. 2002) (citing *United States v. Noriega,* 808 F. Supp. 791, 796 (S.D. Fla. 1990)). The Geneva Conventions stand preeminent among the major treaties on the law of war. *See Hamdan v. Rumsfeld,* 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)(citing "Geneva" 123 times in the opinion). The Geneva Conventions have been acceded to by 194 states. International Committee of the Red Cross, available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions. The United States implemented the Geneva Conventions via 18 U.S.C. § 2441, Pub. L. No. 104-192, 110 Stat. 2104 (1996).

4) They conduct their operations in accordance with the laws and customs of war.

This critical determination of "lawful" or "unlawful" combatant status is far more than simply a matter of semantics. Without any determination of lawful or unlawful status, classification as an "enemy combatant" is sufficient to justify a detaining power's continuing detention of an individual captured in battle or taken into custody in the course of ongoing hostilities. However, under the well recognized body of customary international law relating to armed conflict, and specific provisions of GPW III, lawful combatants enjoy "combatant immunity"[5] for their pre-capture acts of warfare, including the targeting, wounding, or killing of other human beings, provided those actions were performed in the context of ongoing hostilities against lawful military targets, and were not in violation of the law of war. *See Johnson v. Eisentrager,* 339 U.S. 763, 793 (1950)(Black, J. dissenting)("Legitimate 'acts of warfare,' however murderous, do not justify criminal conviction . . . . It is no 'crime' to be a soldier . . . .")(citing *Ex parte Quirin,* 317 U.S. 1, 30-31 (1942)("Mere membership in the armed forces could not under any circumstances create criminal liability . . . ."); *Lindh,* 212 F. Supp. 2d at 553 (citing Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949,* 9 Case W. Res. J. Int'l L. 205, 212 (1977)). Lawful enemy combatants enjoy all the privileges afforded soldiers under the law of war, including combatant immunity and the protections of the Geneva Conventions if wounded or sick, and while being held as prisoners of war (POWs).[6] Additionally, lawful enemy combatants facing judicial proceedings for any of their actions in warfare that violate the law of war, or for post-capture offenses committed while they are POWs, are entitled to be tried by the same courts, and in accordance with the same procedures, that the detaining power would utilize to try members of its own armed forces (i.e., by court-martial for lawful enemy combatants held by the United States). *See* Arts. 84, 87 and 102, GPW III.

Indeed, GPW III codified many existing principles of customary international law and added numerous additional provisions, all aimed at protecting lawful combatants from being punished for their hostile actions prior to capture;[7] ensuring that POWs were treated and cared for humanely upon capture; and seeking to

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[5] Also referred to as "belligerent privilege."

[6] *Lindh,* 212 F. Supp. 2d at 553-54; *see also* U.S. Army Judge Advocate General's Legal Center and School, Dept. of the Army, Operational Law Handbook 16 (2006)(hereinafter Army Op. Law Handbook).

[7] *See e.g.,* GPW III, Article 87 ("[POWs] may not be sentenced by the military authorities and courts of the Detaining Power to any penalties except those provided for in respect of members of the armed force of the said Power who have committed the same acts.") and Article 99 ("No [POW] may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed."). These two Articles, when read together, have been interpreted to "make clear that a belligerent in war cannot prosecute the soldiers of its foes for the soldiers' lawful acts of war." *Lindh,* 212 F. Supp. 2d at 553.

guarantee the general welfare and well-being of POWs during the entire period they remained in captivity. *See* R.C. Hingorani, *Prisoners of War* 9 (1982). Accordingly, technical "crimes" committed by lawful combatants authorized to use force in the context of ongoing hostilities may not be prosecuted unless those offenses are unrelated to the conflict, or violate the law of war or international humanitarian law. *Lindh,* 212 F. Supp. 2d at 553; *See* John Cerone, *Status of Detainees in International Armed Conflict, and Their Protection in the Course of Criminal Proceedings,* The American Society of International Law, Jan. 2002. At the conclusion of the armed conflict, lawful combatants who are held as POWs are entitled to be safely and expeditiously repatriated to their nation of origin.[8]

Unlawful combatants, on the other hand, are not entitled to "combatant immunity" nor any of the protections generally afforded lawful combatants who become POWs. Unlawful combatants remain civilians and may properly be captured, detained by opposing military forces, and treated as criminals under the domestic law of the capturing nation for any and all unlawful combat actions. *Lindh,* 212 F. Supp. 2d at 554 (citing *Ex parte Quirin,* 317 U.S. at 30-31); *see* Army Op. Law Handbook 17.

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

Ex parte Quirin, 317 U.S. at 30. M.C.A. § 948b(f) addresses Common Article 3's application, stating, "A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of [C]ommon Article 3 of the Geneva Conventions."[9] Under the M.C.A., unlawful enemy combatants who

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[8] *See* Articles 118 and 119, GPW III.

[9] Article 3, GPW – an Article common to all four Geneva Conventions – suggests that even unlawful combatants are entitled to be tried in a "regularly constituted court." The Supreme Court in *Hamdan* explained:

> Common Article 3, then, is applicable here and, . . . requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people." 6 U.S.T., at 3320 (Art. 3, ¶ 1(d)). While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources have disclosed its core meaning. The commentary accompanying [Article 66 of the Fourth Geneva Convention] defines "'regularly constituted'" tribunals to include "ordinary military courts" and "definitely exclude[e] all special tribunals." GCIV Commentary 340 (defining the term "properly constituted" in Article 66, which the

engage in hostilities against the United States or its co-belligerents, or materially support such, are subject to trial by military commission for violations of the law of war and other offenses made triable by that statute. *See* §§ 948a(1)(A)(ii) and 948b(a).

The burden of raising the special defense that one is entitled to lawful combatant immunity rests upon the individual asserting the claim. *Lindh,* 212 F. Supp. 2d at 557-58. Once raised before a military commission, the burden then shifts to the prosecution to prove beyond a reasonable doubt that the defense does not exist. R.M.C. 916(b). Determining lawful and unlawful combatant status under existing international treaties, customary international law, case law precedent (both international and domestic), and the M.C.A. is a matter well within the professional capacity of a military judge.

It is against this legal backdrop that we now examine the significance of Mr. Khadr's 2004 C.S.R.T. classification as an "enemy combatant," the subsequent referral of criminal charges against him to a military commission, and the military judge's *sua sponte* dismissal of those charges without prejudice.

Issues on Appeal

Appellant's appeal requires us to address two important issues. First, whether the military judge erred in ruling that Mr. Khadr's September, 2004 C.S.R.T. classification as an "enemy combatant" was insufficient to satisfy the congressionally mandated requirement, established in the M.C.A., that military commission jurisdiction shall exist solely over offenses committed by "alien unlawful enemy combatants," *see* M.C.A. §§ 948c and 948d(a). Second, if we answer the first question negatively, we must determine whether the military judge

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commentary treats as "regularly constituted"); see also *Yamashita,* 327 U.S., at 44, 66 S. Ct. 340, 90 L. Ed. 499 (Rutledge, J., dissenting)(describing military commission as a court "specially constituted for a particular trial"). And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organized in accordance with the laws and procedures already in force in a country." Int'l Comm. of Red Cross, 1 *Customary International Humanitarian* Law 355 (2005); *see also* GCIV Commentary 340 (observing that "ordinary military courts" will "be set up in accordance with the recognized principles governing the administration of justice").

Hamdan, 126 S.Ct. at 2797-98, 165 L. Ed. 2d at 778. Justices Breyer, Kennedy, Souter, and Ginsburg agreed in *Hamdan,* that those military commissions which generally adopt the structure and procedure of courts-martial, and are "conducted[] similarly to courts-martial" are regularly constituted military courts under United States law. *Hamdan,* 126 S. Ct. at 2803-04 (Souter, J., concurring in result). Notably, Justices Thomas, Alito, and Scalia agreed that the military commission at issue in Hamdan was a "regularly constituted tribunal" under Common Article 3, despite being substantially dissimilar from courts-martial. 126 S. Ct. at 2850-52, 165 L. Ed. 2d at 836-38 (Alito, J., dissenting). "If 'special' means anything in contradistinction to 'regular,' it would be in the sense of 'special' as 'relating to a single thing,' and 'regular' as 'uniform in course, practice or occurrence.' Webster's Third New International Dictionary 2186, 1913." 126 S. Ct. at 2852, 165 L. Ed. 2d at 838.

erred in ruling that neither the military commission nor the military judge were empowered under the M.C.A. to receive evidence, and thereafter assess Mr. Khadr's status as an "alien unlawful enemy combatant" for purposes of determining the commission's criminal jurisdiction over him.

The M.C.A. and Mr. Khadr's C.S.R.T. Classification

Section 948d of the M.C.A. defines the jurisdictional limits of military commissions stating:

> (a) JURISDICTION. A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an *alien unlawful enemy combatant* before, on, or after September 11, 2001.
>
> (b) LAWFUL ENEMY COMBATANTS. *Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants.* Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.
>
> (c) DETERMINATION OF UNLAWFUL ENEMY COMBATANT STATUS DISPOSITIVE. A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, *by a Combatant Status Review Tribunal or another competent tribunal* established under the authority of the President or the Secretary of Defense that a person is *an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter.*
>
> (d) PUNISHMENTS. A military commission under this chapter may, under such limitations as the Secretary of Defense may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when authorized under this chapter or the law of war.[10]

(italics added).

The military judge in this case dismissed all charges and specifications (without prejudice) against Mr. Khadr based upon his conclusion that the jurisdictional provisions of M.C.A. § 948d had not been met.[11] The judge correctly

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[10] *See also* R.M.C. 103(a)(24).

[11] R.M.C. 201(b)(3) sets forth the specific requisites for military commission jurisdiction, which include:

> (a) The military commission must be convened by an official empowered to convene it;

noted that the M.C.A. appeared to be clear in limiting jurisdiction for trial by military commission solely to *unlawful enemy combatants,*[12] and excluding from a commission's jurisdiction any *lawful enemy combatants*, who instead must be tried under the provisions of the Uniform Code of Military Justice, 10 U.S.C. §§ 801 *et seq.* [13] We agree with the military judge that Mr. Khadr's 2004 C.S.R.T. classification as an "enemy combatant" failed to meet the M.C.A.'s jurisdictional requirements in that it did not establish that Mr. Khadr was in fact an "*unlawful* enemy combatant" to satisfy the jurisdictional prerequisite for trial by military commission.

Under M.C.A. § 948c, only an "alien unlawful enemy combatant is subject to trial by military commission." The M.C.A., in § 948a(1)(A), defines "unlawful enemy combatant" as follows:

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[14]

Appellant contends Mr. Khadr's designation as an "enemy combatant" by his C.S.R.T. in 2004 was itself sufficient to establish the military commission's jurisdiction and that the military judge erred in ruling otherwise. In its motion asking the military judge to reconsider his dismissal action, Appellant argued that the judge failed to give proper consideration and deference to a White House

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(b) The military commission must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here, "personnel" includes only the military judge and the members.
(c) Each charge before the military commission must be referred to it by a competent authority;
(d) The accused must be a person subject to military commission jurisdiction; and
(e) The offense must be subject to military commission jurisdiction.

[12] *See* M.C.A. § 948d(a). Mr. Khadr's status as an "alien" is not in dispute.

[13] *See* M.C.A. § 948d(b)(lawful combatants who violate the law of war are subject to the provisions of the Uniform Code of Military Justice; courts-martial shall have jurisdiction to try lawful combatants for any offense made punishable under the M.C.A.). *See also* Articles 84, 87 and 102, GPW III (mandating that lawful enemy combatants shall be tried by the same courts and procedures the detaining power would use to try members of its own armed forces).

[14] *See also* R.M.C. 103(a)(24).

memorandum signed by President Bush in February 2002[15] which, in Appellant's view, declared all members of the Taliban and al Qaeda to be "unlawful combatants" under the Geneva Conventions. *See* Prosecution Motion for Reconsideration of June 8, 2007 at 4-6; *see also* Brief on Behalf of Appellant at 5 ¶c. Appellant makes a similar argument regarding a July 2004 memorandum from the Deputy Secretary of Defense (then Mr. Paul Wolfowitz) to the Secretary of the Navy establishing the procedures to be employed for C.S.R.T.'s, and summarily declaring:

> For purposes of this Order, the term "enemy combatant" shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.[16]

According to Appellant, Congress enacted the M.C.A. "fully aware" of the 2002 White House memorandum and the 2004 Wolfowitz memorandum, including the definitional provisions and declarations contained in both. Appellant argues that it was the "clear intent" of Congress to adopt the memoranda's categorical declarations of combatant status regarding members of the Taliban and al Qaeda, and that C.S.R.T. determinations of "enemy combatant" status made prior to the adoption of the M.C.A. are sufficient to establish military commission jurisdiction. *See* Brief on Behalf of Appellant at 11-14. To buttress these assertions, Appellant has directed us to R.M.C. 202(b), which discusses *in personam* military commission jurisdiction and declares, "[a] finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a [C.S.R.T.] or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by a military commission under the M.C.A." Appellant also highlights the following statement contained in the nonbinding Discussion to R.M.C. 202 regarding C.S.R.T. determinations:

> At the time of the enactment of the M.C.A., C.S.R.T. regulations provided that an individual should be deemed to be an "enemy combatant" if he "was part of or supporting al Qaeda or the Taliban, or associated forces engaged in armed conflict against the United States or its coalition partners." The United States previously

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[15] *See* White House Memorandum, Humane Treatment of al Qaeda and Taliban Detainees 2 (February 7, 2002) available at http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf (hereinafter White House memorandum) (AE 13).

[16] *See* Deputy Secretary of Defense Memorandum, Order Establishing C.S.R.T. 1 (July 7, 2004), available at http://www.globalsecurity.org/security/library/policy/dod/d20040707review.pdf. (hereinafter Wolfowitz memorandum) (AE 14).

determined that members of al Qaeda and the Taliban are unlawful combatants under the Geneva Conventions.

From the President's 2002 White House memorandum, the 2004 Wolfowitz memorandum, and this nonbinding Discussion to R.M.C. 202, we are now asked to categorically equate the administration's prior pronouncements regarding members of the Taliban and al Qaeda, and use of the term "enemy combatant" throughout the C.S.R.T. process, with "unlawful enemy combatant" as defined in the M.C.A., and attribute that extrapolation to the "clear intent" of Congress. In this regard, Appellant invites us to interpret the parenthetical language contained in M.C.A. § 948a(1)(A)(i) -- "including a person who is part of the Taliban, al Qaeda, or associated forces" -- as evidence that "Congress statutorily ratified the President's prior determination" and that "[t]his crucial parenthetical established, as a matter of statute, that a member of al Qaeda or the Taliban – without more – is an 'unlawful enemy combatant' who can be tried by military commission." Supplemental Brief on Behalf of Appellant at 5. In light of the plain language of the M.C.A., and applying common logic and reasoning, we decline to accept the Appellant's position. We believe the Congress, well aware of the fact that "trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure," *see Hamdan,* 126 S.Ct. at 2759, 165 L. Ed. 2d at 738-39 (citing *Ex parte Quirin,* 317 U.S. at 19), was abundantly clear in precisely establishing the jurisdictional prerequisites it intended to mandate prior to any criminal proceeding before such a commission could occur.

As with all matters of statutory interpretation, we look first and foremost to the language contained in the statute itself. *See Duncan v. Walker,* 533 U.S. 167, 172 (2001); *Williams v. Taylor,* 529 U.S. 420, 431 (2000). In doing so, we give the words contained in the text their ordinary meaning and interpret the statute in a manner that does not render words or phrases superfluous, unless no other reasonable interpretation can be made.[17] It is unequivocally clear to us from the plain language of the M.C.A. that Congress intended trials by military commission to be utilized solely and exclusively to try only "alien unlawful enemy combatants." The M.C.A.'s jurisdictional provisions (§§ 948c and 948d) and definitions section (§ 948a(1)(A)(i)) make this intent perfectly clear. So also does the M.C.A.'s express admonition in § 948d(b) that military commissions "shall not have jurisdiction to try a lawful enemy combatant." Congress further stated that a C.S.R.T.'s (or other competent tribunal's) determination that a person is an "unlawful enemy combatant" would be dispositive for purposes of establishing jurisdiction for trial by military commission. *See* M.C.A. § 948d(c).[18] No such statement is made regarding a prior

[17] *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant")(internal quotation marks and citations omitted); *Caminetti v. United States,* 242 U.S. 470, 453 (1917)(if a statute's language is plain and clear, "the sole function of the courts is to enforce it according to its terms").

[18] Though Congress intended to create a "safe harbor" for C.S.R.T. determinations made prior to and after the M.C.A.'s enactment, this provision cannot be used to transform an "enemy

designation of a detainee as simply an "enemy combatant" and, in our opinion, such designation is not useful in resolving this ultimate issue of criminal jurisdiction under the M.C.A.

Congress was undoubtedly aware of the White House (2002) and Wolfowitz (2004) memoranda when they wrote and enacted the M.C.A. in 2006. This is yet another case where "Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches." *Hamdan,* 126 S.Ct. at 2799, 165 L. Ed. 2d at 781 (Kennedy J., concurring). Had Congress intended prior designations of detainees as mere "enemy combatants" to be sufficient to establish military commission jurisdiction, it was fully capable of saying this in the legislation. It did not. Indeed, neither the White House nor Wolfowitz memoranda are ever referenced in the M.C.A. In our opinion, Congress, clearly aware of the previously troubled military commission process -- and armed with affirmative guidance from the Supreme Court provided in the June, 2006 decision in *Hamdan v. Rumsfeld* -- sought to enact new, clear, and unequivocal legislation to unambiguously guide and successfully implement trials by military commissions.[19]

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combatant" designation made for one purpose into a declaration of "unlawful enemy combatant" status for another. From the M.C.A.'s language, this "safe harbor" exists only for previously made "*unlawful* enemy combatant" designations (italics added). Congress intended that properly made individual C.S.R.T. determinations of "unlawful enemy combatant" status established by a preponderance of the evidence should be afforded great deference by the military commission. *See* R.M.C. 905(c)(1), 2(B). For purposes of resolving this Government appeal, we need not determine whether this "dispositive jurisdiction" provision deprives a military commission accused of a critical "judicial guarantee[ ] . . . recognized as indispensable by civilized people" under Common Article 3 of the Geneva Conventions (i.e., the right to affirmatively challenge the commission's *in personam* jurisdiction over him).

[19] The Supreme Court determined that the military commissions deviated substantially from regular court-martial practice without an adequate demonstration that procedures more similar to courts-martial were not practicable. *Hamdan,* 126 S. Ct. at 2792-93, 165 L. Ed. 2d 773-74. Article 36, UCMJ, 10 U.S.C. § 836 required either uniformity or justification for variation from UCMJ procedures, rendering those military commissions variations illegal. *Id.* The Court noted, "Prior to enactment of Article 36(b), [UCMJ] it may well have been the case that a deviation from the rules governing courts-martial would not have rendered the military commission "illegal." *Hamdan,* 126 S. Ct. at 2793 n. 54, 165 L. Ed. 2d 774 n. 54 (citations omitted). The M.C.A. 948b(d) explicitly ended the applicability of Article 36, UCMJ, to military commission proceedings stating:

> (d) INAPPLICABILITY OF CERTAIN PROVISIONS.—
> (1) The following provisions of this title shall not apply to trial by military commission under this chapter:
> (A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts-martial relating to speedy trial.
> (B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsory self-incrimination.
> (C) Section 832 (article 32 of the Uniform Code of Military Justice), relating to pretrial investigation.

We find no support for Appellant's claim that Congress, through the M.C.A., created a "comprehensive system" which sought to embrace and adopt all prior C.S.R.T. determinations that resulted in "enemy combatant" status assignments, and summarily turn those designations into findings that persons so labeled could also properly be considered "unlawful enemy combatants." Similarly, we find no support for Appellant's position regarding the parenthetical language contained in § 948a(1)(A)(i) of the M.C.A. -- "including a person who is part of the Taliban, al Qaeda, or associated forces." We do not read this language as declaring that a member of the Taliban, al Qaeda, or associated forces is *per se* an "unlawful enemy combatant" for purposes of exercising criminal jurisdiction before a military commission. We read the parenthetical comment as simply elaborating upon the sentence immediately preceding it. That is, that a member of the Taliban, al Qaeda, or associated forces *who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents* will also qualify as an "unlawful enemy combatant" under the M.C.A. (emphasis added). This interpretation is consistent with § 948b of the M.C.A., which describes the general purpose of military commissions as existing "to try alien unlawful enemy combatants *engaged in hostilities against the United States* for violations of the law of war and other offenses triable by military commission." (italics added). Critical to this analysis is the understanding that -- unlike the White House and Wolfowitz memoranda, both of which declared "enemy combatant" status solely for purposes of continued detention of personnel captured during hostilities and applicability of the Geneva Conventions -- Congress in the M.C.A. was carefully and deliberately defining status for the express purpose of specifying the *in personam* criminal jurisdiction of military commission trials. In defining what was clearly intended to be limited jurisdiction, Congress also prescribed serious criminal sanctions for those members of this select group who were ultimately convicted by military commissions.[20]

Contrary to the claims in Appellant's briefs, the 2002 White House memorandum never affirmatively declared members of al Qaeda to be "unlawful enemy combatants." In the memorandum, the President simply stated, "I also accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva." White House memorandum at 1, ¶ 2a. The memorandum later states that "because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees . . . do not qualify as prisoners of war." *Id.* at 2, ¶ 2d. It is reasonable to assume that Congress would seek to affirmatively declare the circumstances under which individual members of al Qaeda could become "unlawful

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(2) Other provisions of chapter 47 of this title shall apply to trial by military commission under this chapter only to the extent provided by this chapter.

[20] *See* § 948d(d) (a military commission may adjudge any penalty up to and including death, when authorized under the M.C.A. or the law of war).

enemy combatants" for purposes of exacting criminal liability under the M.C.A.. Limiting criminal responsibility solely to an individual (including a member of al Qaeda or the Taliban, or associated forces) who actually "engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents" appears to be the clear intent of Congress, and requires more than mere membership in an organization for criminal responsibility to attach. [21]

Regarding the Taliban, the 2002 White House memorandum pronounced "the provisions of Geneva will apply to our present conflict with the Taliban." *Id.* at ¶ 2b. However, it then declared that "the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva." *Id.* at ¶ 2d. This decision was based upon the Taliban's failure to comply with fundamental law of war requirements.[22] Again, Congress, clearly aware of this language, appears to have decided that only a Taliban member who actually "engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents" should be subject to trial by military commission. To accept Appellant's interpretation would allow criminal jurisdiction at a military commission to attach to members of the Taliban or al Qaeda who had never engaged in or supported hostilities.

Finally, the 2002 White House memorandum concluded that Common Article 3 of the Geneva Conventions "does not apply to either al Qaeda or Taliban detainees." *Id.* at ¶ 2c. The Supreme Court subsequently determined that legal conclusion was erroneous. *See Hamdan,* 126 S.Ct. at 2795-96, 165 L. Ed. 2d 776-78.[23] Congress, clearly aware of the *Hamdan* decision when it drafted the M.C.A.,

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[21] Summary determinations of a group's unlawful combatant status would appear to violate the Supreme Court's ruling in *Hamdi v. Rumsfeld,* 541 U.S. 507, 533 (2004), which recognized the fundamental right to notice and an opportunity to be heard on matters affecting a detainee's "enemy combatant" status determination. In *Hamdi,* Justice Souter suggested that U.S. Army regulations governing combatant status determinations, which were premised upon Article 5 of GPW III, would appear to preclude any "categorical pronouncement" regarding an individual's combatant status. *Id.* at 550 (Souter, J., concurring); *see also Rasul v. Bush,* 542 U.S. 466 (2004); § 948d(c) M.C.A. (requiring that "unlawful enemy combatant" status -- in order to be "dispositive" of jurisdiction -- be established by "a C.S.R.T. or another competent tribunal"); *see* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, § 1005. Appellant appears to concede the necessity of individualized combatant status determinations. *See* Reply Brief on Behalf of Appellant at 16.

[22] *See* Press Release, White House Office of the Press Sec'y, White House Press Secretary Announcement of President Bush's Determination re Legal Status of Taliban and al Qaeda Detainees (February 7, 2002), available at http://www.state.gov/s/l/38727.htm ("The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.").

[23] The Supreme Court in *Hamdan* found that Common Article 3 of the Geneva Conventions was applicable to the conflict with al Qaeda because it was a conflict not of an international character occurring in the territory of one of the High Contracting Parties." *Hamdan,* 126 S.Ct. at 2795, 165

appears to have embraced the minimal safeguards guaranteed by Common Article 3 requiring that even "unlawful enemy combatants" be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See* § 948b(f), M.C.A. (quoting Common Article 3 -- "A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of Common Article 3 of the Geneva Conventions"); *see also* Art. III, GPW III, ¶ 1(d). No serious legal authority would contest the notion that one of the most indispensable and important judicial guarantees among civilized nations honoring a tradition of due process and fundamental fairness is the right to adequate notice and an opportunity to be heard in regard to allegations which might result in criminal sanctions.[24] The M.C.A. did not exist until October 2006. Mr. Khadr could not have known at the time of his C.S.R.T. in 2004 that a determination of "enemy combatant" status pursuant to declarations contained in the 2002 White House memorandum, or definitions contained in the 2004 Wolfowitz memorandum, could dispositively qualify him two years after the fact for potential criminal liability before a military commission as an "unlawful enemy combatant." We need not speculate how Mr. Khadr's personal participation in his 2004 C.S.R.T. evaluation may have been impacted had he been on notice of the potential criminal liability the C.S.R.T.'s findings could impose upon him. Such lack of notice offends our most basic and fundamental notions of due process; therefore, it also violates Common Article 3.

The declared purpose of the C.S.R.T. process used to review the status of hundreds of foreign national detainees captured in Iraq and Afghanistan and currently held under Defense Department control at Guantanamo Bay Naval Base, Cuba -- including Mr. Khadr -- was solely to afford detainees "the opportunity to contest designation as an enemy combatant." Wolfowitz memorandum at 1. The Wolfowitz memorandum never discusses addressing the issue of "lawful" or "unlawful" enemy combatant status; nor does the memorandum from the Secretary of

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L. Ed. 2d 776 (quoting Common Article 3). Among the minimal protections provided by Common Article 3 is the prohibition against "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 6 U.S.T. at 3320 (Art. 3 at P1(d)); *Hamdan,* 126 S. Ct. at 2797, 165 L. Ed. 2d at 779 (Stevens, J., concurring). The plurality opinion in *Hamdan* postulated that a regularly constituted court "must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law." *Id.*; *see also* Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations,* Am. Jour. Int'l L. 58 (2006).

[24] Article 75 of Protocol I to the Geneva Conventions of 1949 articulates many of the fundamental guarantees "which are recognized as indispensable by civilized peoples." *See* Protocol I, Art. 75(4)(a)-(j). Although the United States has declined to ratify Protocol I as a whole, Article 75 has been accepted by our government "as an articulation of safeguards to which all persons in the hands of an enemy are entitled." *Hamdan,* at 2797, 165 L. Ed. 2d at 779 (quoting Taft, *The Law of Armed Conflict After 9/11; Some Salient Features,* 28 Yale J. Int'l L. 319, 322 (2003)(Stevens, J., concurring). Among the many rights set forth in Article 75 are notice and "opportunity to be heard" provisions. *See* Protocol I, Art. 75(4)(a) and (g).

the Navy implementing the C.S.R.T. process.[25] As far as we can discern, the C.S.R.T.s were never tasked with making that determination. Instead, they conducted non-adversarial proceedings aimed at deciding, by a preponderance of the evidence, whether each detainee met the criteria for designation as an "enemy combatant" under the definition in the Wolfowitz memorandum[26] to permit continued detention at Guantanamo Bay. *Id.* at 2. In doing so, Mr. Khadr's 2004 C.S.R.T. employed a less exacting standard than that contained in the M.C.A. for establishing "unlawful enemy combatant" status. A detainee could be classified as an "enemy combatant" under the C.S.R.T. definition simply by being a "part of" the Taliban or al Qaeda, without ever having engaged in or supported hostilities against the United States or its coalition partners. *Id.* While such a classification would certainly be appropriate for authorizing continued detention during ongoing hostilities, it does not address in any way the "lawful" or "unlawful" nature of the detained combatant's belligerency under the M.C.A. Congress never stated that mere membership in or affiliation with the Taliban, al Qaeda, or associated forces was a sufficient basis for declaring someone to be an "unlawful enemy combatant" for purposes of exercising criminal jurisdiction over that person.[27] In the M.C.A., military commission jurisdiction is limited solely to those who actually "*engaged* in hostilities or who . . . *purposefully and materially* supported hostilities. . . ." *See* § 948a(1)(A)(i)(emphasis added). While Mr. Khadr's C.S.R.T. may have had more than sufficient evidence before it to properly classify him as an "alien unlawful enemy combatant," it was not charged with making that determination, and could not have applied the definition established by Congress, as it did not come into existence until October 2006 -- two years later.

We will apply the clear and unambiguous jurisdictional language Congress provided in the M.C.A. Doing so, we affirm the military judge's conclusion that Mr. Khadr's C.S.R.T. classification in 2004 as an "enemy combatant" was insufficient to establish the military commission's criminal jurisdiction over him.

The Military Commission's Authority to Determine "Unlawful Enemy Combatant" Status.

We next examine the military judge's determination that "the military commission is not the proper authority, under the provisions of the M.C.A., to determine that Mr. Khadr is an unlawful enemy combatant in order to establish

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[25] *See* Secretary of the Navy memorandum of July 29, 2004 ("Implementation of Combatant Status Review Tribunal procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba"), AE 21 at 1.

[26] *Id.* at Enclosure (1), ¶ B (An "enemy combatant" for purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.").

[27] *See* Protocol I, Art. 4(b)("no one shall be convicted of an offense except on the basis of individual penal responsibility").

initial jurisdiction for this commission to try Mr. Khadr." *See* Military Judge's Order on Jurisdiction of June 4 2007 at 1-2; Record at 21. A brief chronology of the procedural evolution of this military commission illuminates the judge's ultimate ruling:

Date	**Event**
June-July 2002	Mr. Khadr's alleged offenses take place.
July 27, 2002	Mr. Khadr is captured in Afghanistan following being wounded in a firefight.
September 7, 2004	Mr. Khadr's C.S.R.T. proceeding is held. He is determined to be an "enemy combatant" and "a member of, or affiliated with al Qaeda."
September 10, 2004	Legal Sufficiency Review of Mr. Khadr's C.S.R.T. proceeding concludes he is properly classified as an "enemy combatant."
April 5, 2007	Charges are sworn against Mr. Khadr.
April 24, 2007	Charges are referred non-capital for trial before a military commission and served upon Mr. Khadr.
June 3, 2007	Military judge conducts an R.M.C. 802[28] conference with counsel. Military judge raises jurisdictional concerns based on Mr. Khadr's C.S.R.T. determination.
June 4, 2007	Mr. Khadr's military commission meets at Guantanamo Bay, Cuba. The military judge *sua sponte* raises issue of *in personam* jurisdiction and ultimately dismisses charges without prejudice for lack thereof.
June 8, 2007	Appellant submits a Motion for Reconsideration to the military judge.

[28] R.M.C. 802 authorizes the military judge to conduct pretrial conferences with the parties to "consider such matters as will promote a fair and expeditious trial."

June 29, 2007	Military judge issues a "Disposition" of Mr. Khadr's Motion for Reconsideration declining to reconsider his ruling.
July 3, 2007	Appellant provides written notice to the military judge of intent to appeal ruling to Court of Military Commission Review.
July 4, 2007	Appellant files interlocutory appeal with Court of Military Commission Review.

After ruling that Mr. Khadr's C.S.R.T. classification as an "enemy combatant" was insufficient to establish the military commission's jurisdiction over him, the military judge went on to conclude that he was not empowered to independently decide the matter of *in personam* jurisdiction because "the M.C.A. requires [that] determination be made in advance for there to be jurisdiction to refer charges against the accused. This is what Congress directed, and the Military Judge lacks authority to ignore this mandate." Disposition of Prosecution Motion for Reconsideration (AE 23) at 4, ¶ (3)(a). After affirmatively concluding that neither he nor the military commission was authorized to render a determination on Mr. Khadr's "unlawful enemy combatant" status,[29] and that such a determination had to be made as a prerequisite to referral, the military judge faulted Appellant for not presenting proof at the military commission hearing of Mr. Khadr's unlawful enemy combatant status, or requesting a continuance to more thoroughly brief the issue. *Id.* at ¶¶ 3a(3) & 3b(1)-(3). In his ruling, he also categorically rejected "the implication that the prosecution was not allowed to present argument or evidence on jurisdiction." *Id.* at ¶ 3b. He then decided that the Military Commission did not have jurisdiction." *Id.* at ¶ 4a.[30]

We hold the military judge erred in two respects: first, in not affording Appellant the opportunity to present evidence in support of its position on the jurisdictional issue before the military commission; and second, in concluding that a C.S.R.T. (or another competent tribunal) determination of "unlawful enemy combatant" status was a prerequisite to referral of charges to a military commission, and that the military commission lacked the power to independently consider and decide this important jurisdictional matter under the M.C.A.

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[29] The military judge expressly stated in his written disposition of the prosecution's Motion for Reconsideration that, "In this case, the prosecution was alerted [by the military judge] well ahead of time that it was going to be required to state in open court that there was a C.S.R.T. determination that the accused was an alien *unlawful* enemy combatant. Such a determination was not presented." *Id.* at ¶ 3.

[30] *See also id.* at ¶ f(7) where the judge concluded, "The Military Judge does not find that the Commission is a competent tribunal to establish initial jurisdiction."

a. Admission of Evidence on the Motion to Dismiss.

We review a military judge's decision in regard to admitting or excluding evidence utilizing an "abuse of discretion" standard. *United States v. Billings,* 61 M.J. 163, 166 (C.A.A.F. 2005); *see also General Electric Co. v. Joiner,* 522 U.S. 136, 139 (1997). "The abuse of discretion standard of review recognizes that a judge has a range of choices [in such matters] and will not be reversed so long as the decision remains within that range." *United States v. Gore,* 60 M.J. 178, 187 (C.A.A.F. 2004)(citing *United States v. Wallace*, 964 F.2d 1214, 1217 n.3 (D.C. Cir. 1992)); *United States v. McCollum,* 58 M.J. 323, 335 (C.A.A.F. 2003). Applying this standard is also appropriate in reviewing a judge's decisions regarding evidence production during a motion hearing or at trial.

Both the record of trial and the military judge's actions and rulings in this case demonstrate that the prosecution was not afforded the opportunity to present evidence to establish the military commission's *in personam* jurisdiction over Mr. Khadr. Although the assistant prosecutor argued the military commission should interpret Mr. Khadr's 2004 C.S.R.T. "enemy combatant" classification as satisfying the M.C.A's jurisdictional language, he also articulated a clear alternative position on the record. *See* Record at 11-13.

> This court is competent to make such a determination [on *in personam* jurisdiction], and the government will prove the jurisdictional element at trial by a preponderance of the evidence. In the event, Your Honor, that you're not willing to go forward absent a finding of jurisdiction by a preponderance of the evidence, the government is willing to prove jurisdiction today.

Record at 12.[31] The assistant prosecutor then specifically listed the evidence the Government would present in support of Mr. Khadr's "unlawful enemy combatant" status, which, *inter alia,* included a videotape of Mr. Khadr "engaged in unlawful combat activities including wearing civilian attire and making and planting roadside bombs," admissions made by Mr. Khadr, and other statements that implicated him in conducting such unlawful activities. Record at 12.[32] The military judge did not allow the government to present their evidence and instead inquired whether "anyone thought about going back and doing new [combatant status] review tribunals." Record at 17. Then, after a very brief recess, the military judge

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[31] *See also* Record at 15, ". . . the government would be willing to prove before the military commission that he is, in fact, an unlawful enemy combatant. And if the court is not willing to move forward without a jurisdictional determination, then we are willing to produce evidence proving his status today."

[32] Mil. Comm. R. Evidence 104(a) makes it clear that the military judge, when deciding preliminary questions relating to determining a military commission's jurisdiction, is not bound by the rules of evidence, except those with respect to privileges. *Accord* MANUAL FOR COURTS-MARTIAL, UNITED STATES, Mil. R. Evid. 104(a)

immediately announced his ruling on his own *sua sponte* motion, and dismissed the charges without prejudice. Record at 22.

We disagree with the military judge's statement in his ruling on the Motion for Reconsideration "that the prosecution did not make a formal offer of proof concerning any of the evidence which it now proposes be used." Disposition of Prosecution Motion for Reconsideration (AE 23) at 3, ¶ 3b(1). The record demonstrates Appellant offered and was ready to present evidence to affirmatively establish the military commission's jurisdiction over Mr. Khadr, but was summarily denied that opportunity. The record does not support the assertion that the military judge afforded the prosecution an opportunity to present evidence on the jurisdiction and that they failed to do so. Asking counsel whether they have "anything else to say" in oral argument upon a pending motion is not the equivalent of an invitation or offer to present evidence. *Id.* at ¶ 3b(3); *see e.g.,* Record at 15 – 16. Indeed, oral argument upon a motion should rarely take place at all prior to evidence regarding the factual matters in dispute first being adduced at the motion hearing.[33] Finally, if there was any genuine confusion on this matter at the initial session of Mr. Khadr's military commission, Appellant's subsequent Motion for Reconsideration made it clear the prosecution "was and remains fully prepared to present evidence that would clearly establish jurisdiction over the accused." Prosecution Motion for Reconsideration of June 8, 2007 at 7. For these reasons, and those addressed in the next section of this opinion, we find the military judge abused his discretion in deciding this critical jurisdictional matter without first fully considering both the admissibility and merits of evidence Appellant offered to present on this issue.

b. Ruling Concerning the Military Commission's Authority to Determine Jurisdiction.

We also conclude that the military judge erred in ruling he lacked authority under the M.C.A. to determine whether Mr. Khadr is an "unlawful enemy combatant" for purposes of establishing the military commission's initial jurisdiction to try him. *See* Military Judge's "Order on Jurisdiction" of June 4, 2007 at 1-2; Record at 21. The unambiguous language of the M.C.A., in conjunction with a clear and compelling line of federal precedent on the issue of establishing jurisdiction in federal courts, convince us the military judge possessed the independent authority to decide this critical jurisdictional prerequisite. "[A] federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz,* 536 U.S. 622, 627 (2002). A military commission is no different. *See* R.M.C. 201(b)(3)("A military commission always has jurisdiction to determine whether it has jurisdiction.").

The military judge expressly acknowledged in his ruling upon the Motion for Reconsideration, "there is no express statutory directive that the government must

[33] Arguments of counsel in motion hearings or at trial are not evidence. Instead, counsel may only properly argue factual issues based upon previously admitted evidence at trial or an agreed upon stipulation of fact.

establish jurisdiction before it is allowed to proceed with a Military Commission." *See* Disposition of Prosecution Motion for Reconsideration at 6, ¶ 4e(3). Nevertheless, the military judge concluded there were "clear and unambiguous indicia that Congress intended . . . initial jurisdiction be established before the mechanism set up by the M.C.A. was used in the case of a given person[.]" *Id.* He concluded the only avenue for establishing initial jurisdiction was through a prior determination of "unlawful enemy combatant status by a C.S.R.T. (or other competent tribunal)." *Id.* at 7, ¶ 4e(3)(c). While we agree with the military judge's view that Congress contemplated an initial assessment of an accused's "unlawful enemy combatant" status prior to referral of charges to a military commission, we disagree with his conclusion that the only avenue for the assessment is that delineated in M.C.A. § 948a(1)A(ii). *See* M.C.A. § 948a-d.

As previously noted, any alien unlawful enemy combatant engaged in hostilities against the United States or its co-belligerents is subject to trial by military commission for violations of the law of war and other offenses triable by military commission. *See* M.C.A. § 948a-d; R.M.C. 201(b)(1). This jurisdiction attaches upon the formal swearing of charges against an accused, after an individual subject to the Uniform Code of Military Justice avers under formal oath that the charges are "true in fact." *See* R.M.C. 202(c) and 307(b). Charges may then be referred for trial by military commission under R.M.C. 601 as long as "reasonable grounds [exist] to believe that an offense triable by a military commission has been committed and that the accused committed it." R.M.C. 601(d). The only relevant limitation upon referral of charges is the requirement in R.M.C. 406(b) that, *inter alia,* prior to referral, the charge(s) must be referred to the convening authority's legal officer for pretrial advice, and that individual must state his/her conclusion as to "whether a military commission would have jurisdiction over the accused and the offense." *See* R.M.C. 406(b)(3). All of these steps occurred in this case, and, as previously stated, each offense referred for trial against Mr. Khadr clearly alleges the express jurisdictional language used in the M.C.A., that he is "a person subject to trial by military commission as an *alien unlawful enemy combatant.*" AE 1 at 4-7 (emphasis added). We find that this facial compliance by the Government with all the pre-referral criteria contained in the Rules for Military Commissions, combined with an unambiguous allegation in the pleadings that Mr. Khadr is "a person subject to trial by military commission as an alien unlawful enemy combatant," entitled the military commission to initially and properly exercise *prima facie* personal jurisdiction over the accused until such time as that jurisdiction was challenged by a motion to dismiss for lack thereof, or proof of jurisdiction was lacking on the merits.

In our opinion, the M.C.A. is clear and deliberate in its creation of a bifurcated methodology for establishing an accused's "unlawful enemy combatant" status so as to permit that individual's trial before a military commission. These two methods are laid out in M.C.A. § 948a(1)A where an "unlawful enemy combatant" is defined as:

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

(emphasis added). The disjunctive "or" between subsections (i) and (ii) clearly sets forth alternative approaches for establishing military commission jurisdiction. *See In re Espy,* 80 F.3d 501, 505 (D.C. Cir. 1996)("'[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings,' and a statute written in the disjunctive is generally construed as 'setting out separate and distinct alternatives.'")(quoting *Reiter v. Sonotone Corporation,* 442 U.S. 330, 339 (1979)). The military judge did not apply the disjunctive separation of these two provisions, and erroneously interpreted the distinct provisions as if written in the conjunctive; that is, as if joined by the word "and" rather than "or."[34] Such an interpretation would render subsection (i) nothing more than a definition in aid of a C.S.R.T. (or other competent tribunal) determination of combatant status under subsection (ii), and is contradictory to the statute's clear structure, wording, and overall intent.

Upon challenge, the first method by which the M.C.A. contemplates jurisdiction being established is by evidence being presented before the military judge factually establishing that an accused meets the definition of "unlawful enemy combatant" as contained in subsection (i). *In personam* criminal jurisdiction over a criminal accused is generally a question of law to be decided by the military judge, and is usually resolved only after presentation of evidence supporting jurisdiction and entry of corresponding findings of fact. *See United States v. Melanson,* 53 M.J. 1, 2 (C.A.A.F. 2000)("When an accused contests personal jurisdiction on appeal, we review that question of law *de novo*, accepting the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record."); *United States v. Ernest,* 32 M.J. 135, 136-37 (C.M.A. 1991)(twenty-four findings of fact entered by the trial court in determining whether to grant motion to dismiss for lack of personal jurisdiction); *United States v. Cline,* 26 M.J. 1005, 1007 (A.F.C.M.R. 1988)(returning record to trial court to more fully develop and analyze factual matters serving as basis for assertion of personal jurisdiction); *see also United States v. Anderson,* 472 F.3d 662, 666-67 (9th Cir. 2006)(determining personal jurisdiction in light of alleged violation of extradition treaty). There is a

[34] The military judge ruled, "A strict reading of the MCA would appear to require that, until such time as a CSRT (or other competent tribunal) makes a finding that a person is an unlawful enemy combatant, the provisions of the M.C.A. do not come into play and such person may not be charged, charges may not be referred to a military commission for trial, and the military commission has no jurisdiction to try him." Order on Jurisdiction of 04 Jun 2007 at 1, ¶ 7; *see also* Disposition of Prosecution Motion for Reconsideration of 29 Jun 2007 at 4, ¶ 4(d)(3)(a-b).

long and well-developed tradition in U.S. federal courts and, specifically, throughout military court-martial jurisprudence of military judges deciding matters of personal jurisdiction. *See e.g., Solorio,* 483 U.S. 439, 450-51 (listing military cases where personal jurisdiction litigated); J. Horbaly, *Court-Martial Jurisdiction* 375-534 (1986)(unpublished dissertation, Yale Law School)(listing numerous cases involving court-martial litigation to determine jurisdiction); Department of the Army Pamphlet 27-173, *Legal Services Trial Procedure* 40-112 (Dec. 31, 2002). Congress, clearly aware of historical court-martial practice, and desiring that military commissions mirror this firmly rooted practice to the maximum extent practicable,[35] would not have deprived military commissions of the ability to independently decide personal jurisdiction absent an express statement of such intent. No such statement is contained anywhere in the M.C.A.

The military judge's reliance on M.C.A. § 948a(1)(A)(ii) for the proposition that a military commission itself cannot determine personal jurisdiction is misplaced. This provision supports Appellant's position rather than detracts from it. Although Congress assigned a jurisdictional "safe harbor" for prior C.S.R.T. (or other competent tribunal) determinations of "unlawful enemy combatant" status by statutorily deeming them "dispositive" of jurisdiction, it did not in any way preclude Appellant from proving jurisdiction before the military commission in the absence of such a determination. Indeed, the existence of a statutorily recognized path to achieve a "dispositive" determination of jurisdiction suggests that pretrial procedures and pleadings alleging jurisdiction should simply be viewed as "nondispositive."[36] Subsection (ii) does not eliminate traditional methods of proving jurisdiction before the commission itself. We agree with Appellant's suggestion that Congress, through subsection (ii), merely carved out an exception to the military commission's authority to itself determine jurisdictional matters. *See* Supplemental Brief on Behalf of Appellant at 12. As Appellant notes, subsection (ii) makes it clear that the military judge is not at liberty to revisit a C.S.R.T.'s (or other competent tribunal's) finding of "unlawful enemy combatant" status *when there is*

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[35] *See* M.C.A. § 949a(a)(mandating that military commission procedures shall, to the extent practicable, "apply the principles of law and the rules of evidence in trial by general courts-martial."); *see also* M.C.A. § 948b(c)(stating that the procedures for military commissions "are based upon the procedures for trial by general courts-martial under . . . the Uniform Code of Military Justice.")

[36] M.C.A. § 948a(1)(A)(ii) appears simply to acknowledge the standards and definitions, enhanced procedural safeguards, and other general rights afforded a detainee through the C.S.R.T. process after passage of the *Detainee Treatment Act of 2005*. Of course, that Act was not in existence on the date Mr. Khadr's C.S.R.T. was conducted. Also, only C.S.R.T. (or other competent tribunal) determinations of "unlawful enemy combatant" status are considered dispositive of a military commission's personal jurisdiction over an accused detainee. No such determination has ever been rendered in this case. As mentioned earlier, the C.S.R.T. which considered Mr. Khadr's status classified him only as an "enemy combatant." Having rendered no determination of Mr. Khadr's "lawful" or "unlawful" status, the C.S.R.T. finding of "enemy combatant" status is not entitled to enter Congress' statutory "safe harbor." An "enemy combatant" finding is necessary for deciding whether to impose continuing detention upon an individual, but it is not dispositive for purposes of establishing military commission jurisdiction.

such a finding. See Appellant's Supplemental Brief in Response to Court's Request at Oral Argument at 7. However, nothing in the M.C.A. *requires* such a finding in order to establish military commission jurisdiction. Had they so intended, Congress could have clearly stated in the M.C.A. that the only way to establish military commission jurisdiction is through a prior C.S.R.T. (or other competent tribunal) determination of "unlawful enemy combatant" status. It did not. Accordingly, we may properly find -- as clearly indicated in the language of M.C.A. §§ 949a(a) and 948b(c) -- that Congress intended for military commissions to "apply the principles of law" and "the procedures for trial [routinely utilized] by general courts-martial . . . ." This would include the common procedures used before general courts-martial permitting military judges to hear evidence and decide factual and legal matters concerning the court's own jurisdiction over the accused appearing before it.

This view is supported in the Rules for Military Commissions, which provide exactly such procedures. R.M.C. 907(b) allows an accused to raise a "Motion to Dismiss for Lack of Jurisdiction," and recognizes lack of jurisdiction as a nonwaivable ground for dismissal of charges at any stage of the proceedings. R.M.C. 905c(2)(B) assigns the burden of persuasion to the prosecution on a motion to dismiss for lack of jurisdiction; R.M.C. 905c(1) sets that burden on any factual issue necessary to resolve the motion as "a preponderance of the evidence." Clearly, these rules contemplate potential litigation of personal jurisdictional issues by the military commission, and provide the procedures necessary to address such a challenge.[37] If the only avenue to achieve military commission jurisdiction was through a previously rendered C.S.R.T. (or other competent tribunal) determination of "unlawful enemy combatant" status, all of these rules would be superfluous, as "dispositive" jurisdiction would have attached before the fact.

The text, structure, and history of the M.C.A. demonstrate clearly that a military judge presiding over a military commission may determine both the factual issue of an accused's "unlawful enemy combatant status" and the corresponding legal issue of the military commission's *in personam* jurisdiction. A contrary interpretation would ignore the bifurcated structure of M.C.A. § 948(1)(A) and the long-standing history of military judges in general courts-martial finding jurisdictional facts by a preponderance of the evidence, and resolving pretrial motions to dismiss for lack of jurisdiction. The M.C.A. identifies two potential jurisdiction-establishing methodologies based upon an allegation of "unlawful enemy combatant" status. The first, reflected in § 948a(1)(A)(i), involves the clear delineation of the jurisdictional standard to be applied by a military commission in determining its own jurisdiction. The second, contained in § 948a(1)(A)(ii), involves a non-judicial related jurisdictional determination that is to be afforded "dispositive" deference by the military commission. Either method will allow the

[37] *See* R.M.C. 202(b), Discussion ("The M.C.A. does not require that an individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a military commission proceeding. If, however, the accused has not received such a determination, he may challenge the personal jurisdiction of the commission through a motion to dismiss.").

military commission's exercise of jurisdiction where "unlawful enemy combatant" status has been established by a preponderance of the evidence. This interpretation is consistent with the requirements of both the M.C.A. and with international law.[38] *See Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804)(acts of Congress will generally be construed in a manner so as not to violate international law, as we presume that Congress ordinarily seeks to comply with international law when legislating).

Because we find the military judge had the power and authority under subsection (i) of § 948a(1)(A) of the M.C.A. to hear evidence concerning, and to ultimately decide, Mr. Khadr's "unlawful enemy combatant" status, we need not address whether or not a military commission is "another competent tribunal" under subsection (ii) to make that decision.

Conclusion

The military judge's ruling he lacked authority to hear evidence on, and ultimately decide, the matter of Mr. Khadr's "unlawful enemy combatant status" under the provisions of the M.C.A. is reversed. The record of trial is returned to the military judge, who shall, consistent with this opinion, conduct all proceedings necessary to determine the military commission's jurisdiction over Mr. Khadr.

Judge FRANCIS and Judge HOLDEN concur.

FOR THE COURT:

SEP 2 4 2007

LEROY F. FOREMAN
Clerk of Court

[38] *See e.g.*, Article 45(2) of Protocol I to the Geneva Conventions. That Article suggests that a detained individual who is not being held as a POW has the right to assert an entitlement to POW status before a judicial tribunal, and that judicial adjudication of combatant status shall occur before trial for any alleged substantive offense. Following the M.C.A. procedures, as we interpret them here, would allow an accused to assert a claim of POW (i.e., lawful combatant) status at a pretrial motion session before the military judge. This pretrial determination of status would be fully in accord with Article 45(2) of Protocol I.

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES OF AMERICA	)	**CMCR CASE NO. 07-001**
v.	)	
OMAR AHMED KHADR	)	**RULING ON MOTION TO ABATE**
	)	**SEPTEMBER 24, 2007**

On July 19, 2007, Appellee filed a Motion to Abate Proceedings alleging: (1) invalid appointment of the appellate judges in the instant case and (2) invalid assignments of both the case and appellate panel members. Both parties briefed the issues raised by the Motion and it was one of several matters addressed during oral argument to this Court on August 24, 2007.

FACTS

The facts regarding the appointment and assignment of the judges hearing the instant case are not in dispute.

On December 1, 2006, Secretary of Defense Rumsfeld appointed former Attorney General Griffin Bell as a judge on the United States Court of Military Commission Review. Attachment A to Appellee's Motion of July 19, 2007.

On May 8, 2007, Deputy Secretary of Defense Gordon England appointed Captain John Rolph, Chief Judge of the Navy-Marine Corps Court of Criminal Appeals, and fifteen other active duty appellate judges from the various Armed Services to serve as judges on the Court of Military Commission Review. Attachment B to Appellee's Motion of July 19, 2007.

On June 15, 2007, Deputy Secretary of Defense England created the position of Deputy Chief Judge of the United States Court of Military Commission Review, "to provide continuity of operations." Attachment D to Appellee's Motion of July 19, 2007. The Deputy Chief Judge was authorized "full discretion to exercise all authority vested in the Chief Judge, except as otherwise directed by the Chief

Judge." *Id.* Former Attorney General Griffin Bell was appointed Chief Judge and Captain John Rolph was appointed Deputy Chief Judge in that same Action Memo. *Id.*

On July 11, 2007, Deputy Chief Judge Rolph assigned the judges on the Court to various panels and assigned this case to Panel One, of which he is a member. Appendix A to this Order. Subsequently, on August 20, 2007, Chief Judge Bell ratified the panel assignment of the judges in the instant case and the assignment of this case to that panel. Appendix B to this Order. This ratification predated oral argument in this case by four days and this decision by more than one month.

LAW

"The Secretary of Defense shall establish a Court of Military Commission Review . . . and . . . shall assign appellate military judges to [the] Court." Military Commissions Act, 10 U.S.C. §§ 950f(a) and (b).

"The Secretary shall appoint appellate military judges to the Court of Military Commission Review pursuant to 10 U.S.C. § 950f." Rule for Military Commissions 1201(b)(1).

"Unless specifically prohibited by law, the Secretary [of Defense] may, without being relieved of his responsibility, perform any of his functions or duties. or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate." 10 U.S.C. § 113(d).

"The Deputy Secretary shall perform such duties and exercise such powers as the Secretary of Defense may prescribe. . . . The Deputy Secretary takes precedence in the Department of Defense immediately after the Secretary." 10 U.S.C. § 132(b) and (c).

"[E]xcept as expressly prohibited by law, Deputy Secretary of Defense Gordon England has full power and authority to act for the Secretary of Defense and to exercise the powers of the Secretary of Defense upon any and all matters concerning which the Secretary of Defense is authorized to act pursuant to law." DoD Directive 5105.2, *Deputy Secretary of Defense*, [hereinafter "delegation memo"] (February 26, 2007), para. 1.2

"The Deputy Secretary of Defense is authorized to make specific [further] delegations as required." *Id.* at para. 1.3.

DISCUSSION

Appellee avers legal defects in the delegation of the Secretary of Defense's authority to appoint judges to this court and the Deputy Secretary of Defense's exercise of that same power.

The plain language of 10 U.S.C. § 113(d) provides the Secretary of Defense broad authority to delegate his powers as he sees fit, subject only to the limitation that he may not do so when it is "*specifically prohibited by law*." (emphasis added). We apply the ordinary meaning of the terms "specific" and "prohibit" in analyzing this provision and find no "explicit or definite"[1] provision of law that "forbid[s]"[2] the Secretary of Defense from delegating authority to appoint appellate judges to this court. Similarly, we apply the plain meaning of the term "express" in finding no "clearly indicated[,] explicit"[3] provision of law "*express[ly] prohibit[ing]*" the Deputy Secretary from making judicial appointments to this Court pursuant to delegation from the Secretary (emphasis added). An example of a relevant specific prohibition is contained in Rule for Military Commissions [R.M.C.] 504(b): "A military commission may be convened by the Secretary of Defense or persons occupying positions designated as a convening authority by the Secretary of Defense. *The power to convene military commissions* <u>*may not be delegated*</u>"[4] (emphasis added). No such restriction is contained in the Military Commissions Act or R.M.C. 1201(b)(1) regarding appointment of appellate judges to this Court.

We decline to take the logical leap urged by appellee in briefs and oral argument to find a "negative inference" to be the equivalent of an "express" or "specific" prohibition so as to preclude lawful delegation and exercise of Secretarial power pursuant to federal statute. Appellee, citing various cases, urges us to disregard the letter of 10 U.S.C. §§ 113(d) and 132(b) – as implemented by the Secretary's delegation memo – in favor of a supposed intention under the principle of *expressio unius est exclusio alterius.*[5] However, those cases are distinguishable on their facts and unpersuasive. The correct rule of construction on these facts is *a*

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[1] *Random House College Dictionary* 1262 (Rev. ed. 1982)

[2] *Id.* at 1058.

[3] *Id.* at 467.

[4] The Rule for Courts-Martial [R.C.M.] upon which R.M.C 504(b) is based is equally plain it its "express" or "specific" prohibition: "The power to convene courts-martial *may not be delegated.*" (emphasis added). R.C.M. 504(b)(4).

[5] *Chevron v. Echazabal*, 536 U.S. 73, 80-81 (2002) (citations omitted) (meaning "expressing one item of [an] associated group or series excludes another left unmentioned").

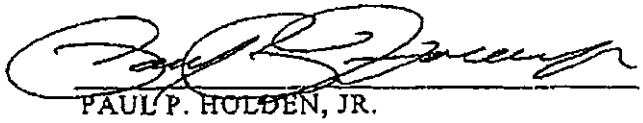
verbis legis non est recendendum.[6] In the instant case, Congress empowered the Secretary of Defense to delegate the authority to appoint judges to this court unless a positive statement of law forbids him from doing so. No such law exists. Similarly, as no law explicitly forbids the Deputy Secretary of Defense from exercising such authority, Deputy Secretary England had full power and authority to appoint the appellate military judges to this Court.

Chief Judge Bell's ratification of the assignment of the military judges to the instant panel and assignment of this case to the same moots the latter portion of appellant's motion.[7]

Appellee has made no showing or assertion of substantial prejudice from the appointment of the judges in the instant case or assignment of this case to this panel, nor does the record support a finding of prejudice.

ORDER

After review and consideration of the parties' filings and oral arguments, and the record of trial by military commission, Appellee's Motion to Abate is **DENIED**.



PAUL P. HOLDEN, JR.
Judge

Deputy Chief Judge Rolph did not participate in ruling on this motion.

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[6] "The words of a statute must not be departed from." Black's Law Dictionary 136 (Sixth ed. 1990). Appellee further urges us to attach legal significance to the difference in "specific" and "express" prohibitions referenced in 10 U.S.C. § 113(d) and the delegation memo, respectively. We decline to do so. The terms are synonymous for the purposes of analyzing this issue. "This is the ultimate distinction without a difference." *Rapanos v. United States*, 126 S. Ct. 2208, 2230 (2006).

[7] In our September 19, 2005 decision denying the Motion to Dismiss in this case, we found Deputy Chief Judge Rolph was properly appointed to that position and properly promulgated the Court's Rules of Practice in that capacity. We incorporate the rationale and ruling from that decision into this Order and find the Deputy Chief Judge's panel and case assignments in this case were properly made.

APPENDIX A

COURT OF MILITARY COMMISSION REVIEW

UNITED STATES	)	
	)	
	)	Case Assignment
v.	)	CMCR Case No. 07-001
	)	Date: July 11, 2007
Omar Ahmed Khadr	)	

By direction of the Acting Chief Judge, the above-captioned case is assigned to Panel 1 (Rolph, Francis, and Holden) for decision.

FOR THE COURT:

LEROY F. FOREMAN
Clerk of Court

APPENDIX A

APPENDIX B

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CMCR CASE NO. 07-001**
	)	***PANEL ASSIGNMENT***
	)	**DATE:** AUG 2 0 2007
OMAR AHMED KHADR	)	

The following Judges are assigned to Panel One:

Presiding Judge: **CAPT John W. Roiph, JAGC, USN**
Judge: **COL David R. Francis, JA, USAF**
Judge: **COL Paul P. Holden, Jr., JA, USA**

The above-captioned case is assigned to Panel One.

GRIFFIN B. BELL
Chief Judge

APPENDIX B

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES OF AMERICA	)	**CMCR CASE NO. 07-001**
	)	
	)	
v.	)	
	)	
	)	
	)	**RULING ON MOTION TO DISMISS**
	)	
OMAR AHMED KHADR	)	
	)	**DATE: SEPTEMBER 19, 2007**
	)	

On August 7, 2007, Appellee filed a Motion to Dismiss all or a portion of the government's appeal because: (1) the appeal was not timely filed with this Court; and (2) the Court's Rules of Practice were not properly promulgated and therefore did not exist when the appeal was filed. Both parties extensively briefed the issues raised by the Motion and it was one of several matters addressed during oral argument to this Court on August 24, 2007.

PROCEDURAL HISTORY

On June 4, 2007, the military judge in the above-styled case dismissed without prejudice the charges then pending against Appellee.

On June 8, 2007, the prosecution filed a motion with the military judge, asking that he reconsider his June 4, 2007 ruling. The motion inferred a prosecution belief that the time within which to file a government appeal of the military judge's June 4, 2007 ruling would not begin to run until the judge acted on the motion for reconsideration. However, out of an "abundance of caution", the motion for reconsideration asked that the time period for filing an appeal "be tolled pending a decision on [the motion for reconsideration]". By order issued June 8, 2007, the military judge, without ruling on the motion for reconsideration, specifically denied the prosecution request to toll the appeal period pending his decision on the underlying motion.

On June 29, 2007, the military judge issued an order denying the motion for reconsideration. He appended a copy of his order to the record of trial before authenticating the record on that same date. The order provided two primary

reasons for denial. First, the military judge found the prosecution motion failed to meet the threshold requirements for a valid request for reconsideration, in that it presented no new facts or new law. Based on that failure, the military judge, while "elect[ing] to clarify and make clearer the rationale for [his] 4 June 2007 ruling", specifically "decline[d] the opportunity to reconsider". Second, the military judge denied the motion for reconsideration on the merits of the underlying jurisdictional issue. Based on the language used, it is evident the military judge's ruling on the merits was intended to be provisional, issued in the interest of judicial economy in the event a higher court found his refusal to reconsider erroneous. The military judge authenticated the record of trial that same date, after first appending his order denying the motion for reconsideration.

On July 3, 2007, the prosecution filed a Certificate of Notice of Appeal, notifying the military judge the government was appealing his dismissal of the case.

On July 4, 2007, the prosecution filed an interlocutory appeal with this Court, challenging the military judge's dismissal of the case below.

TIMELINESS OF APPEAL

The Military Commissions Act (hereinafter referred to as the "M.C.A." or "Act") requires that notice of a government interlocutory appeal of an adverse order or ruling by a military judge be filed with the judge "within five days after the date of such order or ruling." 10 U.S.C. § 950d(b). This statutory requirement is reiterated in the Manual for Military Commissions (January 18, 2007) and in the Regulation for Trial by Military Commissions (April 27, 2007), both of which were promulgated by the Department of Defense to implement the M.C.A. Rule for Military Commissions (R.M.C.) 908(b)(2); Regulation for Trial by Military Commissions, ¶ 25-5b.

Applying these statutory and regulatory provisions, and relying on the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. ___, 127 S. Ct. 2360 (2007), the military judge determined, and Appellee asserts, that the five-day statutory appeal period cannot be extended by the military judge. Accordingly, Appellee argues that, to be timely, any appeal by the United States of the judge's June 4, 2007 dismissal order must have been filed within five days of that date.

Neither the military judge nor any higher court, including this one, can extend the five-day statutory limitation established by the M.C.A. for filing a government interlocutory appeal from a final order or ruling by a military judge. The Supreme Court "has long held that the taking of an appeal within the time prescribed is 'mandatory and jurisdictional'". *Bowles*, 551 U.S. at ___, 127 S. Ct. at 2363-2364 (citations omitted). The Supreme Court enforces such time limits by refusing to accept appeals and writs itself, and upon lower courts through appropriate orders. *Id.* However, the issue presented by the circumstances of the case *sub judice* is not

whether the time period within which to appeal can be extended. The issue here is when that appeal period starts to run if the government has submitted a motion for reconsideration of the underlying order or ruling.

The M.C.A. does not address the impact of a motion for reconsideration on the time limitation for the United States to appeal. In the absence of an explicit statutory direction to depart from the ordinary judicial treatment of a request for reconsideration at the trial level, we will follow the Supreme Court's decision in *United States v. Ibarra*, 502 U.S. 1 (1991). *Ibarra* held that a timely motion renders the underlying order or ruling "nonfinal for purposes of appeal as long as the petition is pending." 502 U.S. at 4 (quoting from *United States v. Dieter*, 429 U.S. 6, 8 (1976)). Treating orders as nonfinal for purposes of review during the pendency of a motion for reconsideration promotes judicial economy because "there is always a possibility that the order complained of will be modified in a way which renders [appellate] review unnecessary." *Stone v. INS*, 514 U.S. 386, 392 (1995) (citation omitted). We decline to adopt Appellee's suggestion for application of a different rule to M.C.A. proceedings.[1]

The provisions of the Manual for Military Commissions concerning rulings by the military judge are consistent with the principle enunciated in Ibarra. R.M.C. 801(e)(1)(A) indicates that a military judge's ruling on a question of law or interlocutory matter is "final." However, the very next section states that, with one exception not here applicable, the judge may change his ruling "at any time during the trial." R.M.C. 801(e)(1)(B). Similarly, R.M.C. 905(f) provides that "[o]n request of any party or sua sponte, the military judge may, prior to authentication of the record of trial, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge." For these provisions to have any meaningful effect, the underlying order logically must be deemed "nonfinal" for purposes of appeal while a timely reconsideration request is pending. To hold otherwise would force the United States to appeal an order even though the judge who issued it was still in the process of reconsidering or risk losing its right to appeal altogether. That type of Hobbesian choice, and the resulting inefficiencies to the judicial process, is the very problem sought to be avoided by the ruling in *Ibarra*. 502 U.S. at 4.

In this case, the government's motion for reconsideration of the military judge's dismissal order was filed on June 8, 2007, only four days after the order was entered and well before the military judge's authentication of the record on June 29, 2007. As a result, the judge's original dismissal order was not "final" until he

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[1] We are not persuaded by Appellee's argument that the Supreme Court's ruling in *Ibarra* addressed a "regulatory" versus a "statutory" appeal limitation and is therefore not controlling. Although the appeal period there at issue was also contained in Fed. R. Appellate Procedure 4(b), it was based on the identical time limitation specifically established by 18 U.S.C. § 3731, and was thus statutorily based. Contrary to the Appellee's assertion, Congress' inclusion of a provision in that statute indicating that "[t]he provisions of this section shall be liberally construed to effectuate its purposes", does not make the appeal period set forth therein any less binding than the appeal period at issue in the current case.

ruled on the motion for reconsideration on June 29, 2007, which in turn started the five-day clock for filing a government appeal. Since the government's appeal was filed July 4, 2007, it met the five-day statutory deadline.

We find no merit in Appellee's argument that, because the military judge, in his June 29, 2007 ruling, specifically refused to reconsider his June 4, 2007 ruling, the start of the time within which to submit a government appeal reverted back to that earlier date. Whether the military judge refused to reconsider his original ruling or reconsidered and declined to change it, the impact on the government was the same -- it was in limbo until the judge ruled on its motion and could not know until the June 29, 2007 ruling was issued whether there was anything to appeal.

We also attach no legal significance to the military judge's order of June 8, 2007 specifically denying the prosecution request to "toll" the appeal period pending his decision on the underlying motion. First, as the Supreme Court made clear in *Ibarra*, filing a timely motion for reconsideration does not "toll" the running of the statutory appeal period, but simply renders the underlying order nonfinal until the court rules on the motion. The distinction is an important one, because it impacts the amount of time available to appeal after action on the motion for reconsideration is taken. *Ibarra*, 502 U.S. at 3. Second, as evident from the result in *Ibarra*, operation of the legal principle enunciated in that case does not depend on whether the government, in connection with a motion for reconsideration, has requested "tolling" of an appeal period, or on the military judge's decision to grant or deny such a request. Rather, the underlying order is rendered nonfinal by operation of law while a timely motion for reconsideration is pending.

VALIDITY OF COURT RULES

In addition to requiring that any government appeal be filed within five days of a final adverse order or ruling, the M.C.A. provides that such appeals "shall be forwarded, by means specified in regulations prescribed [by] the Secretary of Defense, directly to the Court of Military Commission Review." 10 U.S.C. § 950d(c). This requirement is carried forward into the Department of Defense implementing regulations through R.M.C. 908(b)(3) & (11) and Regulation for Trial by Military Commissions, ¶ 25-5c. The same implementing regulations specify how the procedures for appellate review used by the Court of Military Commission Review are to be created. Specifically, R.M.C. 1201(b)(4) provides, "In consultation with the other appellate military judges of the Court of Military Commission Review, and subject to the review and approval of the Secretary, the Chief Judge shall prescribe procedures for appellate review by the Court of Military Commission Review." Regulation for Trial by Military Commissions, ¶ 25-3, similarly states, "The Chief Judge of the CMCR [Court of Military Commission Review], in consultation with other members of the CMCR, shall issue operating guidelines for the CMCR consistent with the [Military Commissions Act, the Manual for Military Commissions] and this Regulation."

Appellee asserts that the rules of appellate procedure (hereinafter Court Rules or Rules of Practice) adopted by this Court at the time of Appellant's appeal were not properly promulgated and were therefore invalid. Further, because those Court Rules were invalid, Appellant's appeal, filed under those rules, cannot have been filed in accordance with "regulations prescribed [by] the Secretary of Defense" as prescribed in the statute. Appellee argues the appeal itself is therefore invalid and must be dismissed.

The basic issue presented is whether a perceived flaw in the adoption of internal rules of appellate procedure by a newly created appellate court precludes exercise of a statutory right of appeal from a lower court decision. We conclude it does not, drawing guidance from Supreme Court precedents in cases addressing changes to existing court rules. The Supreme Court, in a variety of contexts, has consistently held that procedural rules adopted for the orderly transaction of court business are not jurisdictional in nature. *See, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004); *Schacht v. United States*, 398 U.S. 58, 64 (1970); *Am. Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970). As a result, discretionary changes to such rules are "not reviewable except upon a showing of substantial prejudice to the complaining party." *Am. Farm Lines, Id.* Applying this same rationale to the circumstances of this case, we find no merit in Appellee's assertion that errors in the procedure used to formulate this Court's Rules of Practice, if they occurred, preclude consideration of Appellant's appeal.

In reaching this holding, we recognize that statutory restrictions take precedence over discretionary procedural rules prescribed by a court for the orderly transaction of business. *Hibbs v. Winn*, 542 U.S. 88, 99 (2004). However, nothing within the body of this Court's Rules of Practice conflicts with the requirements imposed by the M.C.A. Moreover, the M.C.A.'s general statutory requirement for this Court to adopt rules of appellate procedure in accordance with regulations promulgated by the Department of Defense cannot override the substantive rights and obligations afforded the parties by the same statute. Appellee does not suggest, nor would it be reasonable to do so, that an accused convicted and sentenced by a Military Commission could be deprived of the statutory right of appeal guaranteed him by 10 U.S.C. § 950c because of delays or perceived errors in the establishment of the court designated to hear his appeal or in the creation of such court's procedural rules of practice. In such a situation, the substantive rights afforded by the statute would clearly take precedence. The same holds true for the statutory right of appeal afforded the United States under 10 U.S.C. § 950d.

Appellee has made no showing, or even assertion, of substantial prejudice from the operation of any of this Court's Rules of Practice, nor does the record support a finding of prejudice. Most of the Rules of Practice are purely procedural in nature, addressing items such as the length and format of appellate briefs, the procedures for oral argument, or the admission and conduct of counsel. Any

substantive provisions, such as Rule 2, addressing jurisdiction of the Court, or Rule 13, addressing waiver or withdrawal of appellate review, simply restate the requirements of the M.C.A., the Manual for Military Commissions, or the Regulations for Trial by Military Commission. Moreover, as an additional measure to ensure compliance with the M.C.A. and promulgating regulations, Rule 1(b) provides that in the event of a conflict between the Rules of Practice and the statute or the Manual for Military Commissions, the statute and Manual control. Finally, Rule 1(c) permits a party to seek suspension of any of the rules upon a showing of good cause. If Appellee believed that any particular Rule of Practice imposed a prejudicial hardship under the circumstances of this case, he could have requested suspension of that rule. We have received no such request.

Beyond the above, we in any event find no actual defect in the promulgation of this Court's Rules of Practice. Appellee raises three main assertions in support of his argument that the process used in establishing this Court's Rules of Practice was flawed: 1) the rules were issued without the required review and approval by the Secretary of Defense; 2) the Rules were promulgated by the Deputy Chief Judge, who was not authorized to do so; and 3) nothing establishes that the Deputy Chief Judge conducted the required consultation with this Court's other Judges before purporting to approve and promulgate the rules. We address each argument in turn.

Secretarial Review and Approval

On December 1, 2006, Secretary of Defense Rumsfeld appointed former Attorney General Griffin Bell as a judge on the United States Court of Military Commission Review. Attachment A to Appellee's Motion of July 19, 2007. On May 8, 2007, Deputy Secretary of Defense England appointed Captain John Rolph, Chief Judge of the Navy-Marine Corps Court of Criminal Appeals, as a judge on the United States Court of Military Commission Review. Attachment B to Appellee's Motion of July 19, 2007.

On June 15, 2007, Deputy Secretary of Defense England created the position of Deputy Chief Judge of the United States Court of Military Commission Review, "to provide continuity of operations." Attachment D to Appellee's Motion of July 19, 2007. The Deputy Chief Judge was authorized "full discretion to exercise all authority vested in the Chief Judge, except as otherwise directed by the Chief Judge. *Id.* Former Attorney General Griffin Bell was appointed Chief Judge and Captain John Rolph was appointed Deputy Chief Judge in that same Action Memo. *Id.*

Deputy Chief Judge Rolph completed coordination of the Court's Rules of Practice with the other United States Court of Military Commission Judges, and issued a notice promulgating this Court's Rules of Practice on June 28, 2007, with an effective date of June 27, 2007. *See* Appellant's Opposition to Appellee's Motion to Dismiss, August 13, 2007, and this Court's Ruling on Motions to Attach and Disclosure, August 14, 2007. On June 29, 2007, the Court's Rules were sent to

the Department of Defense Office of General Counsel to be transmitted to the Secretary of Defense. On August 9, 2007, the Deputy Secretary of Defense approved the Court's Rules of Practice. *See* Appellant's Motion to Attach, August 13, 2007, and this Court's Ruling on Motions to Attach and Disclosure, August 14, 2007.

Judge Bell became available to act as Chief Judge on August 17, 2007. On August 20, 2007, he ratified the same Rules of Practice for the United States Court of Military Commission Review that Deputy Chief Judge Rolph promulgated and prescribed on June 28, 2007. Chief Judge Bell stated, "These Rules shall apply to all matters and cases that may currently be docketed with (or pending before) the Court, and to all matters and cases that may come before the Court after this date of promulgation." On August 20, 2007, Chief Judge Bell sent those Rules for review and approval of the Secretary of Defense. Appellee subsequently filed documents with the Court, and oral argument occurred on August 24, 2007. Appellee has not requested an exception to the Rules as permitted under Rule 1(c), or proposed any changes to the Rules.

Appellee argues that the Deputy Secretary of Defense's action was ineffective, in that the M.C.A. and R.M.C. 1201(b)(4) required Secretary of Defense approval of the Rules. He further asserts that the Deputy Secretary's action was in any event too late, as it was not in place at the time Appellant's appeal was filed on July 4, 2007.

10 U.S.C. § 113 legislates the duties and responsibilities of the Secretary of Defense. Subsection (d) of that statute provides that "[u]nless specifically prohibited by law, the Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the Department of Defense as he may designate." Acting pursuant to this authority, the Secretary of Defense has delegated to the Deputy Secretary of Defense the "full power and authority to act for the Secretary of Defense and to exercise the powers of the Secretary of Defense upon any and all matters concerning which the Secretary of Defense is authorized to act", except as "expressly prohibited by law." Department of Defense Directive 5105.02, *Deputy Secretary of Defense*, (February 26, 2007), ¶ 1.2. The Deputy Secretary of Defense is authorized to make specific further delegations as necessary, *Id.* at ¶ 1.2, such as to the Chief Judge and Deputy Chief Judge of this Court. Nothing in the M.C.A., the Manual for Military Commissions, or the Regulation for Trial by Military Commissions specifically or expressly limits the authority of the Deputy Secretary of Defense to exercise that delegated authority with respect to matters affecting military commissions.[2] Accordingly, the Deputy Secretary had full power and authority to review and approve the Court's Rules of Practice.

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[2] Contrary to the Appellee's assertion at oral argument, we find no meaningful distinction between "expressly" and "specifically" for purposes of this issue. Both terms preclude limitation of the Deputy Secretary of Defense's delegated power through the "inferences" drawn by the Appellee from the language of the M.C.A. -- none of which this Court gleans from its reading of the Act.

The fact that the Deputy Secretary of Defense did not complete his review and approval until August 9, 2007, well after Appellant's July 4, 2007 appeal was filed, is of no legal significance. Although R.M.C. 1201(b)(4) indicates that the Court's rules are "subject to review and approval", the words "subject to" do not necessarily mean "prior to operation of" such rules. Nothing in the M.C.A., the Manual for Military Commissions, or the Regulation for Trial by Military Commissions specifies that the required review and approval must occur before an appeal is filed, or even before the rules themselves can go into effect. Indeed, because the right to appeal afforded the United States under 10 U.S.C. § 950d, like the right of appeal afforded Appellee by 10 U.S.C. § 950c, is statutorily based, requiring approved procedural rules of this Court to be in place as a condition of an effective appeal would do violence to that statutory right and be legally untenable.

Role of Deputy Chief Judge

Appellee argues that Deputy Chief Judge Rolph had no authority to promulgate the Court's Rules of Practice because: 1) he was improperly appointed to the Court by the Deputy Secretary of Defense, who had no authority to do so; 2) the position of "Deputy Chief Judge" did not properly exist; and 3) authority to promulgate Court rules of procedure rests with the Chief Judge.

Based on the Secretary of Defense's delegation of authority to the Deputy Secretary of Defense discussed above, and as further detailed in this Court's separate ruling on Appellee's Motion to Abate, we find the Deputy Secretary of Defense has authority to appoint judges to the Court of Military Commission Review. Accordingly, Deputy Chief Judge Rolph was properly appointed to the Court.

We find no legal defect in the designation of Judge Rolph as "Deputy Chief Judge". The M.C.A. requires the Secretary of Defense to establish a Court of Military Commission Review, but sets only very broad guidelines as to the composition of the Court and its operation. 10 U.S.C. § 950f. Beyond those broad guidelines, details of the Court's structure and operation are left to the discretion of the Secretary. Further, the statute itself makes no mention of the position of Chief Judge. That designation appears only in the Manual for Military Commissions and the Regulation for Trial by Military Commission. Neither publication expressly precludes the additional appointment of a Deputy Chief Judge. Moreover, given the responsibilities of this Court, appointment of a Deputy Chief Judge to assist in the efficient operation of the Court is both reasonable and prudent. Such action was well within the authority of the Deputy Secretary of Defense, acting pursuant to his delegation from the Secretary of Defense.

We also find no error in the action taken by the Deputy Chief Judge, rather than the Chief Judge, to promulgate the initial iteration of this Court's Rules of Practice. As Appellee notes, both the Manual for Military Commissions and the

Regulation for Trial by Military Commissions specify that the Chief Judge will promulgate the Court's rules. However, that requirement is purely regulatory, and is not set forth in the statute itself. As a result, it was and is subject to deviation by the same authority which created the requirement, i.e., either the Secretary of Defense or the Deputy Secretary of Defense, acting under the authority delegated to him by the Secretary. The action appointing Judge Rolph as Deputy Chief Judge gave him "full discretion to exercise all authority vested in the Chief Judge, except as otherwise directed by the Chief Judge." Attachment D to Appellee's Motion of July 19, 2007. That broad authority clearly was sufficient to encompass the task of promulgating this Court's initial Rules of Practice. Further, the Action Memorandum endorsed by the Deputy Secretary of Defense approving the Court's Rules of Practice clearly indicated on its face that the rules had been promulgated by Judge Rolph in his position as Deputy Chief Judge. The Deputy Secretary of Defense's endorsement of that action thus implicitly approved the deviation from the regulatory requirement that such rules be established by the Chief Judge. This minor deviation from the requirements of the regulations implementing the M.C.A. does not in our view constitute a "change" to those regulations within the meaning of 10 U.S.C. § 949a(d), which would otherwise trigger a requirement for Congressional notification.[3] Finally, we note that the Chief Judge, by memorandum of August 20, 2007, specifically ratified the Rules of Practice previously promulgated by the Deputy Chief Judge, thereby effectively mooting this issue. *See* Memorandum from Chief Judge to Secretary of Defense re: Ratification of Rules of Practice for United States Court of Military Commission review, available for review at http://www.defenselink.mil/news/courtofmilitarycommissionreview.html.

Consultation Requirement

Subsequent to the date of the Appellee's Motion to Dismiss, in response to a separate Appellee Motion for Judicial Disclosure, the Court issued notice to the parties that prior to Deputy Chief Judge Rolph's promulgation of the Rules of Practice, consultation with the other Judges occurred through e-mail exchanges, telephone conversations, and in-person discussion. *See* Ruling on Motions to Attach and Disclosure, August 14, 2007. Such consultations satisfy the requirements of R.M.C. 1201(b)(4) and the Regulation for Trial by Military Commission, ¶ 25-3.

[3] The Court has not inquired, and the parties have not provided evidence, as to Department of Defense notification to Congress concerning the Rules of Practice or other documentation concerning the Court's establishment.

ORDERED

After review and consideration of Appellee's Motion to Dismiss, Appellant's Opposition, Appellee's Response to Appellant's Opposition, the Record of Trial by Military Commission and oral argument of the parties, Appellee's Motion to Dismiss is **DENIED.**

DAVID R. FRANCIS
Judge

Deputy Chief Judge Rolph did not participate in ruling on this motion.

Rule 1205. Further review

(a) *Petition to the United States Court of Appeals for the District of Columbia Circuit.* The accused may petition for review of the decision of the Court of Military Commission Review if such petition is filed within 20 days from the time the accused was in fact notified of the decision of the Court of Military Commission Review.
(b) *Review by the Supreme Court.* Under 28 U.S.C. § 1257 and 10 U.S.C. § 950(d), decisions of the United States Court of Appeals for the District of Columbia Circuit may be reviewed by the Supreme Court by writ of certiorari.

UNITED STATES OF AMERICA	}	**Order on Jurisdiction**
v	}	
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khahi"	}	**04 June 2007**

1. A military commission is a court of limited jurisdiction. The jurisdiction is set by statute – the Military Commissions Act of 2006 (MCA).

2. Section 948d establishes the jurisdiction of a military commission. 948d(a) states:

(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter...when committed by an alien unlawful enemy combatant.

3. Section 948d(b) specifically states that military commissions "shall not have jurisdiction over lawful enemy combatants."

4. Thus, in the MCA, Congress denominates for the purpose of establishing jurisdiction two categories of enemy combatants – lawful and unlawful. A military commission only has jurisdiction to try an unlawful enemy combatant.

5. Further, in Section 948d(c), Congress stated that a finding by a Combatant Status Review Tribunal (CSRT) that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction by military commissions.

6. In considering Section 948d, it is clear that the MCA contemplates a two-part system. First, it anticipates that there shall be an administrative decision by the CSRT which will establish the status of a person for purposes of the MCA. The CSRT can find, for MCA purposes, that a person is a lawful enemy combatant or an unlawful enemy combatant.

7. Second, once the CSRT finds that a person is an unlawful enemy combatant, the provisions of the MCA come into play. Such person may have charges sworn against him, those charges may be referred to a military commission for trial, and a military commission may try him. A strict reading of the MCA would appear to require that, until such time as a CSRT (or other competent tribunal) makes a finding that a person is an unlawful enemy combatant, the provisions of the MCA do not come into play and such person may not be charged, charges may not be referred to a military commission for trial, and the military commission has no jurisdiction to try him.

8. There is, of course, the counter-argument. The military commission itself is a competent tribunal (948d(c)) to determine if a person brought before it is an unlawful enemy combatant. While appealing, this argument has two major flaws:

a. First, in order to make the determination, the military judge would have to conduct a mini-trial to decide if the person is an unlawful enemy combatant. Or would s/he? Perhaps, since this determination might require factual determinations, the panel would have to make it. Congress provided in the MCA for many scenarios – none of them anticipated that the military commission would make the lawful/unlawful enemy combatant determination for initial jurisdictional purposes.

b. Second, and I'm paraphrasing from Justice Stevens, "A person has a right to be tried only by a court which he knows has jurisdiction over him." If the military commission were to make the determination of initial jurisdiction, a person could be facing trial for months, without knowing if the court, in fact and in law, had jurisdiction.

9. Persons familiar with the court-martial system might state that jurisdiction is always assumed by the court-martial and it is attacked only by motion. That is true, but a court-martial is a different creature than a military commission. A soldier is in court in uniform with her first sergeant and company commander (who most likely preferred the charges) sitting in the courtroom. DD Form 458, the Charge Sheet, contains the following information in Block I – Personal Data: Name of accused, SSN, Grade or Rank, Pay Grade, Unit or Organization, Initial Date and Term of Current Service, Pay Per Month, Nature of Restraint of Accused, and Date(s) Imposed. So when a military judge at Fort Bragg looks at the Charge Sheet and the accused (Who is in uniform.), she knows that Private First Class William B. Jones is a member of Bravo Company, 3rd Battalion (Airborne), 325th Parachute Infantry Regiment, 82nd Airborne Division, Fort Bragg, North Carolina. She knows how much he is being paid, if he has been restrained, when he came on active duty this tour, and by comparing the unit to the name of the accuser in Block III – Preferral – she can see if it was PFC Jones' company commander who preferred the charges.

10. Contrast this with the information on MC Form 458 in this case. The military judge is told that the name of the accused is Omar Ahmed Khadr. Three aliases are given. And, the last four of an unidentified acronym, the ISN, are given. There is nothing on the face of the charge sheet to establish or support jurisdiction over Mr. Khadr, except for a bare allegation in the wording of the Specifications of the Charges.

11. The military judge is not ruling that no facts could be properly established concerning Mr. Khadr which might fit the definition of an unlawful enemy combatant in Section 948a(a) of the MCA. The military judge is ruling that the military commission is not the proper authority, under the provisions of the MCA, to determine that Mr. Khadr is an unlawful enemy combatant in order to establish initial jurisdiction for this commission to try Mr. Khadr.

Rules for Military Commissions

Rule 908(c)(3).

(3) *Action following decision of Court of Military Commission Review.* After the Court of Military Commission Review has decided any appeal, the accused may petition for review by the United States Court of Appeals for the District of Columbia Circuit or the United States may appeal an adverse ruling to the United States Court of Appeals for the District of Columbia Circuit. The parties shall be notified of the decision of the Court of Military Commission Review promptly. If the decision is adverse to the accused, the accused shall be notified of the decision and of the right to petition the United States Court of Appeals for the District of Columbia Circuit for review within 20 days in accordance with R.M.C. 1205. If the accused is notified orally on the record, trial counsel shall forward by expeditious means a certificate that the accused was so notified to the Secretary of Defense, who shall forward a copy to the clerk of the Court of Military Commission Review when required by the Court. If the decision by the Court of Military Commission Review permits it, the military commission trial may proceed as to the affected charges and specifications pending further review by the United States Court of Appeals for the District of Columbia Circuit, unless either court orders the proceedings stayed. Unless the case is reviewed by the United States Court of Appeals for the District of Columbia Circuit, it shall be returned to the military judge or the convening authority for appropriate action in accordance with the decision of the Court. If the case is reviewed by the United States Court of Appeals for the District of Columbia Circuit, R.M.C. 1205 shall apply.

COURT OF MILITARY COMMISSION REVIEW

25-9. SERVING CMCR DECISIONS ON THE ACCUSED

a. A copy of each CMCR decision (opinion or order disposing of an appeal or petition) must be served as expeditiously as possible on each accused and counsel for the accused and a record maintained of the date and manner of service.

e. The CMCR decision will be served on the accused in person whenever possible.
1. In addition to the decision, unless the decision sets aside all findings of guilty, the sentence and dismisses the charges, the accused will be given a completed copy of MC Form 4917, five copies of MC Form 4918 on which the accused's name and the CMCR docket number will be entered, and a postage paid envelope addressed to United States Court of Appeals for the District of Columbia Circuit.

25-10. CASES REMANDED BY CMCR AND UNITED STATES COURT OF APPEALS

a. When a decision of the CMCR, the United States Court of Appeals, or the United States Supreme Court directs or authorizes further proceedings, such as a rehearing, a limited hearing, or a new action by the convening authority, the accused shall be located and furnished a copy of the decision. Further proceedings in CMCR cases need not be delayed, however, solely to permit an accused to petition USCADCC or the United States Supreme Court for a grant of review or otherwise appeal the matter.

REVIEW BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED STATES SUPREME COURT

26-1. GENERAL

Pursuant to 10 U.S.C. § 950g(a), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of the final judgment rendered by a military commission.

[redacted]

From: [redacted]
Sent: Wednesday, October 17, 2007 4:45 PM
To: [redacted]
Subject: FW: Motion for a Protective Order - Witnesses and Intelligence Personnel

Attachments: Motion for Protective Order - Witnesses and Intelligence Personnel.pdf; (attachment 2).pdf; (attachment 3).pdf; (attachment 4).pdf; (attachment 5).pdf; (attachment 6).pdf; (attachment 7).pdf; (attachment 8).pdf; (attachment 9).pdf; (attachment 11).pdf; (attachment 12).pdf; (attachment 13).pdf; (attachment 16).pdf; (attachment 18).pdf; (attachment 19).pdf; Protective Order - Witnesses and Intelligence Personnel (attachment 17).doc

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From: [redacted]
Sent: Tuesday, May 29, 2007 12:20
To: [redacted]
Cc: [redacted]
Subject: Motion for a Protective Order - Witnesses and Intelligence Personnel

[redacted]

Sir,

A Prosecution motion requesting that the Military Judge issue a Protective Order is attached.

Motion for Protective Order - ..

The Prosecution requests the Defense confirm receipt.

The Prosecution offers the following attachments in support of the motion:

(attachment 2).pdf (39 KB)
(attachment 3).pdf (32 KB)
(attachment 4).pdf (24 KB)
(attachment 5).pdf (25 KB)
(attachment 6).pdf (51 KB)
(attachment 7).pdf (30 KB)
(attachment 8).pdf (21 KB)
(attachment 9).pdf (14 KB)
(attachment 11).pdf (237 KB)
(attachment 12).pdf (306 KB)
(attachment 13).pdf (373 KB)
(attachment 16).pdf (160 KB)
(attachment 18).pdf (34 KB)
(attachment 19).pdf (234 KB)

Protective Order - Witnesses a...

Attachments (1), (10), (14), and (15) listed in the motion are too large to attach via email. Please provide instructions on

how you would like these delivered. I will bring copies to GTMO unless directed otherwise.

Please note several of the attachments contain protected information and should not be released without appropriate redactions. This email is marked FOUO/LES because of the attached FOUO/LES documents. When separated from the attachments the motion and this email are not considered FOUO/LES.

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions

From:
Sent: Friday, June 01, 2007 4:08 PM
To: '
Cc:

Subject: RE: Motion for a Protective Order - Witnesses and Intelligence Personnel

Sir,

Prosecution attachment 15 from the above-referenced motion is attached. Please note the attachment is an internet article as opposed to the CNN web posting described in the motion. The Prosecution was unable to reaccess the web posting, however the information in each article is consistent.

I am bringing copies of attachments 1, 10, and 14 with me to GTMO.

V/R,

Major Groharing

<<...>>

From:
Sent: Tuesday, May 29, 2007 12:20 PM
To:
Cc:

Subject: Motion for a Protective Order - Witnesses and Intelligence Personnel

[redacted]

Sir,

A Prosecution motion requesting that the Military Judge issue a Protective Order is attached.

<< File: Motion for Protective Order - Witnesses and Intelligence Personnel.pdf >>

The Prosecution requests the Defense confirm receipt.

The Prosecution offers the following attachments in support of the motion:

<< File: (attachment 2).pdf >> << File: (attachment 3).pdf >> << File: (attachment 4).pdf >> << File: (attachment 5).pdf >> << File: (attachment 6).pdf >> << File: (attachment 7).pdf >> << File: (attachment 8).pdf >> << File: (attachment 9).pdf >> << File: (attachment 11).pdf >> << File: (attachment 12).pdf >> << File: (attachment 13).pdf >> << File: (attachment 16).pdf >> << File: (attachment 18).pdf >> << File: (attachment 19).pdf >>

<< File: Protective Order - Witnesses and Intelligence Personnel (attachment 17).doc >>

Attachments (1), (10), (14), and (15) listed in the motion are too large to attach via email. Please provide instructions on how you would like these delivered. I will bring copies to GTMO unless directed otherwise.

Please note several of the attachments contain protected information and should not be released without appropriate redactions. This email is marked FOUO/LES because of the attached FOUO/LES documents. When separated from the attachments the motion and this email are not considered FOUO/LES.

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions

[redacted]

[redacted]

UNITED STATES OF AMERICA	)	
	)	
	)	Prosecution Motion
	)	For Appropriate Relief
	)	
v.	)	**Request for Protective Order to Protect**
	)	**Identities of Witnesses and Intelligence**
	)	**Personnel**
OMAR AHMED KHADR	)	
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	
a/k/a "Ahmed Muhammed Khali"	)	**29 May 2007**

1. **Timeliness**. This motion is filed in accordance with the timelines specified by RMC 905(b)(4) and the Military Commissions Trial Judiciary Rules of Court issued on 4 May 2007.

2. **Relief**. The Prosecution requests that the Military Judge issue the attached Protective Order.

3. **Overview**. The Prosecution seeks this Protective Order in order to protect the identities or other identifying information of all individuals mentioned in materials provided to the Defense by the Prosecution. In addition, this Order also applies to any identifying information obtained by the Defense during their independent discovery efforts. This Protective Order serves interest of justice and is necessary to protect the identities of witnesses and intelligence personnel from disclosure to the accused, his family members, and the general public. The compromise of any identity or the revelation of any personal information while engaged in an ongoing war against al Qaeda, could compromise the ability of witnesses and intelligence personnel to continue their service in furtherance of the prosecution of that war and place their lives and the lives of their families in jeopardy.

4. **Burden of proof**. The Prosecution must establish by a preponderance of the evidence that the issuance of the protective order is in the interest of justice.[1]

5. **Facts**.

a. Al Qaeda ("the base") was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

b. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan and paid numerous visits to and at times lived at Usama bin Laden's compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and personally met many senior al Qaeda leaders including Usama bin Laden, Ayman al Zawahiri,

[1] See Rule for Military Commission § 701(f)(8) and §701(l)(2).

Muhammad Atef, and Saif al Adel. The accused also visited various al Qaeda training camps and guest houses.[2]

c. Usama bin Laden is recognized as the emir (prince or leader) of al Qaeda.

d. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.

e. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

f. In August 1996, Usama bin Laden issued a public "Declaration of Jihad Against the Americans," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.

g. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a fatwa (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money." In a later audio-taped statement attributed to al Qaida leader Ayman al Zawahari, he stated that the United States and its allies will pay "a very high price" if detainees being held at Guantanamo Bay, Cuba are tried in military tribunals and face the death penalty.[3]

h. On or about May 29, 1998, Usama bin laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God." Since 1989 members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS Cole in October 2000; and the attacks on the United States on September 11, 2001, when members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy.[4]

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[2] See Criminal Investigation Task Force Report of Investigative Activity ("CITF Form 40") Subject Interview of accused, 28 Oct 2002. (Attachment 2)

[3] CNN Web posting of August 4, 2003. (Attachment 15)

[4] *See The 9/11 Commission Report,* FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, pgs. 4-14 (2004).

i. Following al Qaeda's attacks on September 11, 2001, and in furtherance of its goals, members and associates of al Qaeda have violently opposed and attacked the United States or its Coalition forces, United States Government and civilian employees, and citizens of various countries in locations throughout the world, including, but not limited to, Afghanistan.

j. After al Qaeda's terrorist attacks on September 11, 2001, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives.[5]

k. Following this training the accused trained for an additional month on landmines and soon thereafter joined a group of al Qaeda operatives with whom he converted landmines into improvised explosive devices (IEDs) capable of remote detonation.

l. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

In or about July 2002, Khadr planted improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

m. On or about July 27, 2002, U.S. forces captured the accused after a firefight at a compound near Khowst, Afghanistan.[6]

n. Prior to the commencement of the firefight, U.S. forces approached the compound and asked the accused and the other occupants to surrender.[7]

o. The accused and three other individuals decided not to surrender and "vowed to die fighting."[8]

p. After vowing to die fighting, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound.[9]

q. Following the firefight, when U.S. forces were clearing the compound, the accused threw a grenade that killed Sergeant First Class Christopher Speer.[10] American forces then shot and wounded the accused, and after his capture, American medics administered life saving medical treatment to him.[11]

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[5] See attached CITF Form 40 Subject Interview of accused, 04 Dec 2002. (Attachment 3)
[6] See Attachment 4.
[7] CITF Form 40 Subject Interview of accused, 03 Dec 2002. (Attachment 5)
[8] Id.
[9] Id.
[10] Agent's Investigation Report ("AIR"), ROI No. T-157, Interview of accused, 17 Sept 2002. (Attachment 6)
[11] See Attachment 4.

r. During an exploitation of the site where the accused was captured, U.S. forces discovered a videotape showing the accused and other al Qaeda operatives constructing and planting improvised explosive devises while wearing civilian attire.[12]

s. During an interview by an agent from the Department of Defense Criminal Investigation Task Force (CITF) on 5 Nov 2002, the accused described what he and the other al Qaeda operatives were doing in the video.[13]

t. When asked on 17 September 2002 why he helped the men construct the explosives the accused responded "to kill U.S. forces."[14]

u. The accused related during the same interview that he had been told the U.S. wanted to go to war against Islam. That is why he assisted in the building and later deploying of the explosives, and later threw a grenade at the American.[15]

v. During an interrogation on 4 December 2002, the accused agreed his efforts in land mine missions were of a terrorist nature and that he is a terrorist trained by al Qaeda.[16]

w. The accused further related that he had been told about a $1500 reward being placed on the head of each American killed, and when asked how he felt about the reward system he replied "I wanted to kill a lot of American[s] to get lots of money."[17] During a 16 December 2002 interview, the accused stated that a "jihad" is occurring in Afghanistan and if non-believers enter a Muslim country then every Muslim in the world should fight the non-believers.[18]

x. The accused stated in a 5 Nov 2002 interview that when he was at Bagram and he would get "pissed off" with the guards, he would recall his killing of the U.S. soldier, and it would make him feel good.[19]

y. The accused's family members have significant connections to known terrorists and have openly supported terrorist acts against the United States. In 2004, the accused's family members were interviewed for a PBS Frontline program entitled "Son of al Qaeda." During the interviews, the accused's mother (Maha Elsamnah), sister (Zaynab Khadr) and brothers (Abdullah and Abdurahman Khadr) were interviewed and made numerous comments about their family's long-time association with al Qaeda.[20]

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[12] See Attachment (1) (Video of accused manufacturing and emplacing Improvised Explosive Devices, seized from site of accused's capture in a compound in the village of Ayub Kheil, near Khowst, Afghanistan) and also AIR Interview of accused, 05 Nov 2002. (Attachment 7)
[13] See AIR Interview of accused, 05 Nov 2002. (Attachment 7)
[14] AIR Interview of accused, 17 Sept 2002. (Attachment 6)
[15] Id.
[16] CITF Form 40 Interview of accused, 04 Dec 2002. (Attachment 3)
[17] CITF Form 40 Interview of the accused on 6 Dec 2002. (Attachment 8)
[18] CITF Form 40 Interview of the accused on 16 Dec 2002. (Attachment 9)
[19] See attached AIR Interview of accused, 5 Nov 2002. (Attachment 7)
[20] See "Son of al Qaeda" video and transcripts of interviews (Attachments 10-13)

z. The accused was designated as an unlawful enemy combatant as a result of a Combatant Status Review Tribunal conducted on 7 September 2004.

aa. In accordance with his Military Order, the President designated the accused in this case for trial by military commission on 30 July 2005. On 4 November 2005 the Appointing Authority approved the charges against the accused, and subsequently referred them for trial by military commission. Following referral of charges, and after receiving input from both the Prosecution and Defense, the Presiding Officer issued Protective Order #1, protecting the identities of all witnesses in the case of U.S. v. Khadr. The Prosecution then provided discovery of required materials, subject to the restrictions in Protective Order #1 and two additional protective orders.

bb. On 5 April 2007, pursuant to the Military Commissions Act and Manual for Military Commissions, charges of Murder in Violation of the Law of War, Attempted Murder in Violation of the Law of War, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. Those charges were referred for trial by military commission on 24 April 2007.

6. Discussion.

a. Disclosure of witness identities in this case could place their lives and the lives of their families in jeopardy.

(1) The United States and our allies remain at war with al Qaeda and associated terrorist organizations. In late April 2007, Abu Layth al Libi released a videotape describing al Qaeda's ongoing efforts in Afghanistan, where he proclaimed "we are today experiencing mountains of realistic, palpable hopes, while our enemy is experiencing mountains of weakness, fear and apprehension. As soon as the mujahideen appear, he flees from them."[21] Significantly, Abu Layth al Libi is also shown in Attachment 1 constructing IEDs with the accused and the accused, who has admitted to working with Abu Layth al Libi to target Americans in Afghanistan.[22]

(2) Al Qaeda is a ruthless terrorist organization, committed to killing United States citizens, military or civilian, wherever found. In this case, the majority of the witnesses in question are responsible for capturing the accused, including shooting him in the process. Members of al Qaeda and sympathizers would most certainly see Government witnesses and U.S. Government intelligence agents as viable targets for future attacks. In an audio-taped statement attributed to al Qaeda leader Ayman al Zawahari, he stated that the United States and its allies will pay "a very high price" if detainees being held at Guantanamo Bay, Cuba are tried by military tribunals and face the death penalty.[23] It is certainly conceivable, if not likely, that al Qaeda or other al Qaeda sympathizers would attempt to target witnesses and intelligence personnel, or their family members, in order to intimidate other witnesses from coming forward or otherwise assisting the government, or to exact revenge for testifying against a member of al

[21] See Attachment 14, As-Sahab video.
[22] See CITF Form 40 dated 28 October 2002. (Attachment 2)
[23] (CNN Web posting of August 4, 2003) (Attachment 15)

Qaeda. We should not assist terrorists in this endeavor by releasing the identities of any personnel to the accused or others who wish to do them harm, when there is no need for the accused to have access to such information.

(3) The accused was captured after a firefight with United States forces in Afghanistan where he is alleged to have killed a U.S. service member.[24] Prior to his capture he was working with an al Qaeda cell, constructing IEDs in order to target U.S. forces.[25] In addition to the general threat to potential witnesses posed by al Qaeda, in the event the accused is ever released from GTMO, he is certainly capable of exacting revenge on his captors. He has admitted being an al Qaeda trained terrorist.[26] In an interview on 16 December 2002, the accused stated that a "Jihad" is occurring in Afghanistan and if "non-believers" enter a Muslim country then every Muslim in the world should fight the non-believers.[27] He also stated that after 11 September 2001 he was told about $1500 rewards being placed on each American killed and when asked how he felt about the reward system replied "I wanted to kill a lot of Americans to get lots of money."[28]

(4) The accused stated in a 5 November 2002 interview that when he was at Bagram and he would get "pissed off" with the guards, he would recall his killing of the U.S. soldier, and it would make him feel good.[29] Additionally, during a 3 December 2002 interview, the accused told a CITF agent that prior to his capture U.S. forces had surrounded the safe house and a U.S. service member ordered the accused and other occupants of the compound to surrender. Rather than surrender, the accused and the other three "vowed to die fighting."[30] The accused's past conduct and statements provide compelling justification for withholding the names and other personal information of certain witnesses and intelligence personnel.

(5) The accused's family members also have significant connections to known terrorists and have openly supported terrorist acts against the United States. The accused's eldest brother Abdullah has been indicted in the U.S. District Court for the District of Massachusetts for Conspiracy to Murder United States Nationals Outside the United States, Conspiracy to Use a Weapon of Mass Destruction, Possession of a Destructive Device in Furtherance of a Crime of Violence, and Conspiracy to Possess a Destructive Device in Furtherance of a Crime of Violence.[31] Abdullah Khadr is currently detained in Canada and is pending extradition to the United States. In 2004, the accused's family members were interviewed for a PBS Frontline program entitled "Son of al Qaeda." During the interviews, the accused's mother (Maha Elsamnah) and sister (Zaynab Khadr) made numerous comments including:

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[24] See Attachment 4.
[25] See Attachment (1) (Video of accused manufacturing and emplacing Improvised Explosive Devices, seized from site of accused's capture in a compound in the village of Ayub Kheil, near Khowst, Afghanistan) and also AIR Interview of accused, 05 Nov 2002. (Attachment 7)
[26] See CITF Form 40 Subject Interview of accused, 04 Dec 2002. (Attachment 3)
[27] See CITF Form 40 Subject Interview of accused, 16 Dec 2002. (Attachment 9)
[28] See CITF Form 40 Subject Interview of accused, 06 Dec 2002. (Attachment 8)
[29] See AIR Interview of accused, 5 Nov 2002. (Attachment 7)
[30] See CITF Form 40 Subject Interview of accused, 03 Dec 2002. (Attachment 5)
[31] See attachment (16), Federal Indictment ICO U.S. v. Abdullah Ahmed Khadr, a/k/a Abu Bakr

a) "I mean Osama (Osama bin Ladin) was living in an area where we were working in Jalalabad, or in Kandahar when we were doing some project. We would meet sometime in social gathering and Eid, prayer, weddings, or whatever, but we were never al Qaeda. Although we respect their case, we respect whatever, we have our kind of work, our programs. We will associate sometime, but we were never al Qaeda."[32]

b) In response to questions regarding Osama bin Laden's shift from the conflict with the Russians to a declaration of war against the Americans, Zaynab Khadr replied "By the way, you know he never, never changed his angle. He did not declare war on the Russians and eventually declare war on the Americans. We fought the Russians because they invaded Muslim land, and when they were kicked out, we had nothing to fight them for. So they were finished. And then the Americans started entering Muslim land, so it was just their turn. We are not fighting them because we like war. Us Muslims, we are not war people, but we do not like our rights to be taken. And he started it being very nice, we really ask the American very politely to leave our country. You say you came for the Gulf War, the Gulf War is finished. Why are you staying? It is our right, this is our country to tell you that you were welcome then, you are not welcome now. We would like you to pack and leave. And the Americans won't leave. So if you go back to how it all started, he did ask very nicely, and the people with him did ask, they said we are not enemies of the kingdom, we are not enemies of the army, we are not enemies of the government. All we are asking is that this is our land, and we would like these people to be out."[33]

c) "To be honest with you, we hate the Americans moving around in our country."[34]

d) "But he told them that when you chose not to leave Saudi and the Gulf you are making every single American a target. Because he said we as people have feelings as well, this is our land, you're taking it, and one day, somebody is going to rebel."[35]

e) "Because he [Osama bin Ladin] always used to say, whenever you heard it that there are people outside who are working and just pray that they are protected, that no harm should befall them. And we would always say, "When? What is going to happen?" And he'd always say, "I don't know. I know something is happening, but I don't know what and I don't know where."[36]

f) In response to questions regarding the attacks on the World Trade Center, Maha Elsamnah and Zaynab Khadr responded:

(1) "You know shedding blood, and killing is very painful. I don't know your people, but assume it was your son or your wife who had been slaughtered right in front of you, would you feel proud? You feel angry. You feel like you want to take revenge. You

[32] Transcript of interview of Maha Elsamnah and Zaynab Khadr, comments of Maha Elsamnah, Page 6. (Attachment 13)
[33] Id at 10. (Emphasis added.)
[34] Id. at 11. Comments of Maha Elsamnah.
[35] Id at 11. Comments of Zaynab Khadr.
[36] Id. Comments of Zaynab Khadr.

know, I know maybe in the West, people are very cool, they take it very coldly if a child is raped, or being killed. In Afghanistan in the tribal areas, people are full of respect for revenge. The will take revenge even if it's their cousin. They will take revenge."[37]

(2) "We've been brushed for a long time, can't you see, and there is a lot of unjust--"[38]

(3) "At the same time, when you're seeing your people being killed and killed and killed, everyday, everyday, everyday, and then you see whoever is doing this, or someone who has anything to do with him being killed, you don't want to feel happy. But you just sort of think, "They deserve it. They've been doing it for such a long time, why shouldn't they feel it once in a while."[39]

g) When asked specifically regarding her reaction to Sept 11th, Maha Elsamnah replied "To be honest with you, since I am Palestinian and I know the Americans are helping the Israelis so much, I said, "Let them have it. It's time that they feel… Not the innocent people in the building, but I want to hurt that person, whoever gave the order to the Israeli to kill the Palestinian. But you know, innocent people pay the price."[40]

h) In response to a question regarding suicide bombers, Zaynab Khadr replied "It's not: He's in a battle he gets killed. It's: The minute I press this button or the minute I hit that building, I'm dead. And I know, and I'm doing it. You must be very brave. You must be very, very, very brave. I mean I don't have the guts to do that yet."[41]

i) Despite Maha Elsamnah and Zaynab Khadr's assertions otherwise, during an interview with PBS, the accused's brother Abdurahman stated "We are an al Qaeda family." When interviewed for the same Frontline documentary, Abdurahman Khadr detailed the Khadr family's long-time relationship with Osama bin Laden and al Qaeda.

j) These statements from the accused's family members further support the need to protect the identities of witnesses in this case. The Khadr family clearly has significant ties to terrorists, including Osama bin Ladin, and they remain very sympathetic to the radical fundamental Islamist cause. Their comments regarding Americans, particularly those that justify the al Qaeda attacks on September 11th, praising suicide bombers, and that highlight the significance of revenge in their culture suggest significant potential to exact revenge upon Omar Khadr's captors and others responsible for his incarceration at Guantanamo Bay. With the exception of Abdullah, the members of the Khadr family are living freely in Canada and could

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[37] Id. Comments of Maha Elsamnah. (Emphasis added.)
[38] Id.
[39] Id. Comments of Zaynab Khadr (Emphasis added.)
[40] Id. Comments of Maha Elsamnah.
[41] Id. Comments of Zaynab Khadr (Emphasis added.)

plan or conduct an attack on government witnesses in the United States or abroad.[42] Even if they are unable to personally take action, it is certainly possible that they would attempt to use their terrorist connections to retaliate against individuals testifying against the accused. The interest in releasing personal information regarding witnesses in this case is thus far outweighed by the significant dangers presented by the accused, his family members, or other al Qaeda terrorists or sympathizers who obtain this information.

b. Disclosure of identities of witnesses and intelligence personnel could compromise their ability to continue their service in furtherance of the prosecution of the ongoing war with al Qaeda.

(1) It is clearly of great import that these military commissions proceed in a forum that sufficiently conceals the identity of witnesses and intelligence personnel and their family members to ensure their safety and to allow these individuals to continue to engage in the international war on terror. The Disclosure of identities of witnesses and intelligence personnel would make it easier for members of al Qaeda or those sympathetic to al Qaeda to target these individuals inside or outside of the United States. Many of the witnesses in this case are military members who will likely be ordered to serve in overseas locations, making them more vulnerable to a terrorist attack. Disclosure of their identities could put them at increased risk when later stationed in foreign countries or while stationed in the United States and could impact their ability to perform their duties as required in support of the war on terror.

(2) Additionally, potential witnesses in military commission cases have previously expressed reservations with participation in the military commission process because of fear of retaliation from al Qaeda. If witnesses cannot be assured that the U.S. Government will take appropriate actions to protect them and their families, it will have a detrimental impact on seeing that justice is served in cases to be tried before military commissions.

c. Withholding identities of certain witnesses and intelligence personnel from the accused will not prejudice the accused or impact his ability to confront the witnesses and evidence against him.

(1) The Manual for Military Commissions grants the military judge the authority to issue protective orders if required in the interests of justice.[43] While the accused does not have a Sixth Amendment right under the U.S. Constitution,[44] similar protections have been used in U.S. Courts and have withstood Constitutional challenges based on the Confrontation Clause of the Sixth Amendment. In *United States v. Lonetree*, 35 M.J. 396 (CMA 1992), the U.S. Court of Military Appeals, in a decision by Judge Sentell of the U.S. Court of Appeals for the D.C. Circuit, upheld a trial court order prohibiting the Defense from learning the true name of an intelligence officer or conducting cross-examination into the officer's background when the

[42] Prior to filing this motion, the Prosecution was unable to determine whether members of the Khadr family are currently on the no-fly list or have restrictions on their travel to the United States or other countries.
[43] See 10 R.M.C. 701(f)(8) & R.M.C 701(l)(2).
[44] See *Boumediene et al. v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), a case in which the accused is a party, where the D.C. Circuit held that recognized precedent foreclosed the opportunity for detainees to raise or invoke Constitutional rights or provisions. *Id.* at 992, *citing Pauling v. McElroy*, 278 F.2d 252, 254, *n.3* (D.C. Cir. 1960).

officer testified on the Government's behalf in an espionage case. The court concluded that "the real world setting and environment of John Doe at the time of this trial and of all events about which he testified is better reflected in his pseudonym and in his identification as an intelligence agent than in anything connected with his 'true identity.'" *Lonetree*, 35 M.J. at 310.

(2) Alias testimony has also been approved in a variety of contexts. See *United States v. Abu Marzook*, 412 F. Supp. 2d 913, 923 (N.D. Ill. 2006) (allowing Israeli intelligence agents to testify using a pseudonym because, inter alia, in Israel it is a criminal violation to disclose the true identity of such an agent because of the sensitive and dangerous nature of the agent's work and noting that "under Israeli law, the true identities of these agents—including their names, identifying information, and physical characteristics—are classified"); *Brown v. Kuhlman,* 142 F.3d 529, 532 n.3 (2nd Cir. 1998) (noting undercover detective who testified in closed courtroom based on his safety and investigations was permitted to testify by using his badge number as opposed to true name and, on appeal, was referred to by pseudonym "Richard Roe"); *United States v. Watson*, 599 F.2d 1149, 1157 (2nd Cir. 1979) (affirming trial court's prohibition against cross examination into a witness's recent activities, employment, whether he was supporting his family and the cost of his automobile where the witness was in the Witness Protection Program and the Government showed that attempts had been made on his life and that disclosure of his occupation would endanger his life); *United States v. Abu Ali*, 395 F. Supp. 2d 338, 344 (E.D. Va. 2005) (noting the use of pseudonyms in the video-conference testimony of Saudi Arabian intelligence officers who testified during the suppression hearing of a defendant accused of terrorist activities who attempted to suppress his confession as a product of torture); *United States v. Dumeisi,* No. 03 CR 664, Court Orders (N.D.Ill.Jan.2, 2004 and Jan. 6, 2004) (Conlon, J.) (allowing former Iraqi intelligence officer witness to testify using pseudonym and in light disguise, and stating that he shall not be questioned about his current and former addresses; media reports and courtroom sketches shall not describe witness' appearance).

(3) A primary concern expressed by courts considering whether to allow witnesses to testify using a pseudonym is whether the use of a pseudonym prevents a defendant from placing a witness in the proper context to assess his or her credibility. In *Smith v. Illinois*, 390 U.S. 129, 131 (1968), the Supreme Court noted that the defendant should be permitted to place the witness "in his proper setting and put the weight of his testimony and credibility to the test." Id. at 132 (quoting *Alford v. United States*, 282 U.S. 687 (1931)). In *Smith,* for example, identifying the witness was necessary to show that he had a possible criminal history, an issue that goes to the credibility and reliability of the witness. In later cases, the threshold issue has been that of placing the witness in his proper setting. If a defendant is able to accomplish this without using the identifying information of the witness in court, then courts have been willing to consider preventing disclosure of that identifying information in open court. While there is no strict definition of what this entails, the cases make clear that so long as the relevant background information is available at trial (such as where he works, what incentives he has to testify, and his criminal history), such that a jury can evaluate his testimony and credibility, this standard is met. See e.g., *United States v. Lonetree*, 35 M.J. 396, 410 (preventing the defendant from discovering the real name of the government agent witness when, inter alia, the witness had already been placed in the proper setting by revealing that he was a government agent).

(4) In the instant case, the accused will be able to place all witnesses in their proper

setting at trial. The accused and the jury will know how the witnesses are employed (most, if not all of the witnesses in question are current or former U.S. Armed Forces personnel responsible for the accused's capture, or intelligence personnel who have questioned the accused while in custody). The accused and the members will know generally about the witnesses' educational backgrounds and any other relevant factors impacting the credibility of the witnesses' testimony. Providing the witnesses' true identities will add nothing to their testimony.

(5) The instant case is easily distinguishable from cases such as *Smith* and other cases in which courts have held that it was improper for a witness to testify using a pseudonym. In neither *Smith* nor *Alford* did the prosecution present affirmative justifications for withholding the witness identifying information. In this case, by contrast, the Government has established a compelling need to withhold witness identities from the accused and limit inquiries at trial that might reveal the witnesses' identities. Such inquiries would jeopardize the witnesses' safety and the safety of others associated with the witnesses as well as possibly impacting a witnesses ability to continue to serve in a useful capacity for the United States Government. The questioning that may be permitted in this case will fulfill the interests protected by both *Smith* and *Alford*; that is, the accused's opportunity to test the witnesses' credibility and to place them in the proper setting. See *Smith*, 390 U.S. at 132.

(6) The Military Commission Act of 2006 (hereinafter M.C.A.) provides the accused with the right to cross-examine the witnesses who testify against him, and to examine and respond to evidence admitted against him on the issue of guilt or innocence and for sentencing.[45] Additionally, the M.C.A. provides that the Defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations provided by the Secretary of Defense.[46] The requested relief does not impinge on any rights of the accused granted by the M.C.A. The accused will have the ability to place each witness in the proper setting and context, and will be allowed to examine the witnesses fully regarding their testimony.

7. **Oral argument**. The Prosecution requests oral argument.

8. **Witnesses**.

a. Special Agent [redacted], Department of Defense Criminal Investigative Task Force. Special Agent [redacted] will sponsor admission of the attached CITF Form 40s and AIRs reflecting statements of the accused. He will testify regarding CITF interview procedures and how those interviews are maintained in criminal investigations. The Prosecution offers the CITF Form 40s and AIRs for the limited purpose of this motion. Special Agent [redacted] supervised the reproduction of DVD copies of Attachment (1) and will sponsor the admission of the video.

9. **Certificate of conference**. The Prosecution informed the Defense of the proposed Protective Orders on 2 May 2007 and subsequently attempted to contact the Defense via email and phone to obtain the Defense concurrence on the proposed Protective Orders. Major Groharing discussed

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[45] See 10 U.S.C. § 949a(b)(1)(A).
[46] See 10 U.S.C. § 949j(a).

the issue with Lieutenant Commander Kuebler on 23 May 2007, and Lieutenant Commander Kuebler agreed to contact the Prosecution the following day after he was able to discuss with Lieutenant Colonel Vokey. The Prosecution did not receive any communication from the Defense until Sunday 27 May 2007, at which time Lieutenant Commander Kuebler advised that he was now unable to negotiate on behalf of the accused.[47] The Prosecution recognizes this issue might be resolved in advance of the 4 June 2007 session; however, requests to litigate the issue at the next session if necessary.

10. **Additional information**. None.

11. **Attachments**.

a. The Prosecution offers the following attachments in support of this motion:

(1) DVD copy of video of accused manufacturing and emplacing Improvised Explosive Devices, seized from site of accused's capture in a compound in the village of Ayub Kheil, near Khowst, Afghanistan.

(2) CITF Form 40 Subject Interview of the accused, 28 Oct 2002.

(3) CITF Form 40 Subject Interview of accused, 04 Dec 2002.

(4) CITF Form 40 Subject Interview of Major ____, 20 Apr 2004.[48]

(5) CITF Form 40 Subject Interview of accused, 03 Dec 2002.

(6) Agent's Investigation Report ("AIR"), Interview of accused, 17 Sept 2002.

(7) AIR Interview of accused, 05 Nov 2002.

(8) CITF Form 40 Interview of the accused on 6 Dec 2002.

(9) CITF Form 40 Interview of the accused on 16 Dec 2002.

(10) "Son of al Qaeda" video

(11) Transcript of "Son of al Qaeda" program.

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[47] The Prosecution does not suggest that Defense Counsel has acted improperly by failing to timely respond during this period. In the 27 May 2007 email, Lieutenant Commander Kuebler advised that he attempted to send an email on Friday 25 May 2007. Despite not having received that communication, the Prosecution recognizes that Lieutenant Colonel Vokey has been TAD OCONUS during this period and that Lieutenant Commander Kuebler has been at Guantanamo Bay, causing difficulties in communication between counsel. The Prosecution remains available to discuss the issue with Defense prior to the June 4, 2007 session.

[48] The subject of the interview is intentionally withheld. It appears in the attachment. Please note that that document should not be released without redacting protected information.

(12) Transcript of Abdurahman Khadr from "Son of al Qaeda" video.

(13) Transcript of Maha Elsamnah and Zaynab Khadr from "Son of Al Qaeda" video.

(14) As-Sahab video clip showing video of Abu Layth al-Libi.

(15) CNN Web posting of August 4, 2003.

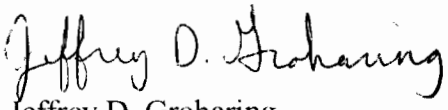
(16) Federal Indictment ICO *U.S. v. Abdullah Ahmed Khadr, a/k/a Abu Bakr*

(17) Proposed Protective Order

(18) Protective Order #1, issued in previous military commission proceedings

(19) Protective Order #2, issued in previous military commission proceedings

12. **Submitted by**:



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TRANSCRIPT

Son of Al Qaeda

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CORRESPONDENT
Terence McKenna

ANNOUNCER: Tonight on ***FRONTLINE***: He grew up in Afghanistan with the children of Osama bin Laden.

ABDURAHMAN KHADR: He had issues with his kids. The kids aren't listening. The kids aren't doing this and that. He's a father and he's a person.

ANNOUNCER: He was trained to be a terrorist.

ABDURAHMAN KHADR: Three times, my father himself tried to get me to become a suicide bomber. He was, like, You know, you be our pride. In this family, you be our pride.

ANNOUNCER: But he was different.

ABDURAHMAN KHADR: I don't believe in blowing myself up, killing innocent people. I just don't believe in that.

ANNOUNCER: And after September 11th, he turned against bin Laden and became an informant for the CIA.

ABDURAHMAN KHADR: They said, "You'll go to Cuba. You'll be working for us there, talking to other detainees and telling us what they tell you and stuff."

ANNOUNCER: Tonight-

TERENCE McKENNA, *FRONTLINE* Correspondent: Is it possible that you gave them any information which ended up-

ANNOUNCER: -correspondent Terence McKenna tells the inside story of this *Son of al Qaeda*.

ABDURAHMAN KHADR: My dad told me, "If you ever betrayed Islam or if you ever sell out on us, I will be the one to kill you."

TERENCE McKENNA, *FRONTLINE* Correspondent: *[voice-over]* After September 11th, 2001, Osama bin Laden and other senior figures in al Qaeda left the city of Jalalabad, Afghanistan, and fled south to the tribal areas that straddle the Pakistan-Afghan border. For years, these areas have been self-governing and self-policing, and the tribal leaders here were happy to give sanctuary to al Qaeda members and their families in exchange for cash.

There have been sporadic military offensives to look for them ever since. One such operation by the Pakistan army took place on October 2nd, 2003. Senior al Qaeda members were reported to be holed up in a house in the province of Waziristan on the Pakistan side of the border. The Pakistan army surrounded the house and demanded a surrender. An intense firefight broke out. Two Pakistani soldiers were killed.

PAKISTANI OFFICER: They are putting up stiff resistance, and the fight is still going on.

TERENCE McKENNA: The battle raged on for hours, but finally, a Pakistani helicopter gunship shelled the house. Eighteen prisoners were taken and eight bodies were pulled out of the rubble. The Pakistanis were disappointed not to find Osama bin Laden, but they did find the body of another man long identified as a senior leader of al Qaeda, a 57-year-old Canadian citizen named Ahmed Said Khadr, who was born in Egypt.

The story of this mysterious figure provides a window into the inner workings of al Qaeda and a rare look at some of the secret aspects of America's war on terror.

The new information comes from the 21-year-old son of Ahmed Said Khadr. His name is Abdurahman. He recently returned to Toronto after a stay at the U.S. military prison in Guantanamo, Cuba. He calls himself "the black sheep of the Khadr family" and says he is now prepared to tell his family's full story for the first time.

ABDURAHMAN KHADR: I want to show people that I'm a person that lived all my life as Ahmed Said Khadr's son, a person that, you know, was raised to become an al Qaeda, was raised to become a suicide bomber, was raised to become a bad person, and I came out to- you know, I decided on my own that I do not want to be that, and I do want to be a Muslim that's so loose, that so want to be Western. I want to be a good, strong, civilized, peaceful Muslim.

TERENCE McKENNA: Abdurahman's father was trained as an engineer in Egypt. He emigrated to Canada in 1977, where he met and married Maha, a Palestinian Canadian who grew up in Ottawa. They eventually had six children. In 1993, when Abdurahman was 11, his family moved from Canada to Afghanistan, where his father ran a charity organization devoted to the feeding and schooling of Afghan orphans. By the late 1990s, however, allegations emerged that Ahmed Said Khadr was also involved in al Qaeda. The family has always denied it until now.

ABDURAHMAN KHADR: Until now, everybody says that we're al Qaeda-connected family, but when I say this, just by me saying it, I just admitted that we are an al Qaeda family, you know? We had connections to al Qaeda. My family in Pakistan, they will never admit this at all. Why? Because they're totally- you know, they are what they are, and they deny it. They'll never admit this.

TERENCE McKENNA: When we tracked down the rest of Abdurahman's family in Islamabad, Pakistan, we found a slightly different story. Abdurahman's mother and sisters are still Canadian citizens, but they have lived most of their lives in a completely different world.

MAHA ELSAMNAH KHADR, Abdurahman's Mother: We believe that death come when God have planned it before he created the humanity.

TERENCE McKENNA: His mother, Maha, on the left, and sister, Zaynab, deny that the family was ever officially part of al Qaeda, but readily admit they are sympathetic to the bin Laden organization. Maha is proud that her husband died fighting for Islam. She considers him a Shaheed, a martyr.

MAHA ELSAMNAH KHADR: So I just accept it. It hurt-

ZAYNAB KHADR, Abdurahman's Sister: And we believe that dying by the hand of your enemy because you believe in the-

MAHA ELSAMNAH KHADR: Because you *[unintelligible]*

ZAYNAB KHADR: -because you're doing it in the way of God, of Allah, that it's the best way to die. And my father had always wished that he would be killed, he wouldn't just die in his bed, that he'd be killed for the sake of Allah. I remember when we were very young, he used to say, "If you guys love me, *[unintelligible]* for me that- pray for me that I get Shahaded, which is being killed-

TERENCE McKENNA: *[on camera]* Become a martyr.

ZAYNAB KHADR: Yes.

TERENCE McKENNA: *[voice-over]* A few miles away from Islamabad, in the military hospital at Rawalpindi, was Abdurahman's 14-year-old brother, Karim, who was shot in the spine in the same battle that killed his father. He was a prisoner and paralyzed from the waist down. Abdurahman's 17-year-old brother, Omar, was shot three times in a firefight with American troops two years ago in Afghanistan and lost the sight of one eye. He is now in the U.S. military prison in Guantanamo, accused of killing an American soldier with a grenade.

[on camera] You son, Omar, in Guantanamo, is accused of killing an American soldier, a medic, with a hand grenade. If that is true, are you proud of him?

MAHA ELSAMNAH KHADR: Of course, he defended himself. He just did not give any- you know, I- I thought they were really simple kids, but it turned to be they are not so simple.

ZAYNAB KHADR: If you were in that situation, what would you have done? I'd like to ask everybody that, actually.

MAHA ELSAMNAH KHADR: I hope you don't say, "I would bow down" or "No, no, no, please"-

ZAYNAB KHADR: *[unintelligible]* put my hands in the air. Excuse me. I- he was bombard for four hours. Three of his friends who were with him had been killed. He is the only sole survivor. What did you expect him to do? Why is it- why does nobody say, "You killed three of his friends"? What does everybody say he killed an American soldier? Well, big deal.

TERENCE McKENNA: *[voice-over]* We also found Abdurahman's 22-year-old brother, Abdullah, hiding in Islamabad. He agreed to an interview only if we concealed his face because he is still considered a wanted al Qaeda fugitive in Pakistan.

[on camera] Did your father ever talk to you about the desirability of becoming a martyr for Islam?

ABDULLAH KHADR, Abdurahman's Brother: Dying- dying for Islam is hope for every

Muslim, to die for Islam, every Muslim's dream of being a Shaheed to Islam.

TERENCE McKENNA: A martyr.

ABDULLAH KHADR: Yeah. Like you die for your religion. Everybody dreams of this. Even a Christian would like to die for his religion.

TERENCE McKENNA: *[voice-over]* How is it that a Canadian family ended up in the inner circle of al Qaeda? It all goes back to the Afghanistan war in the 1980s, when Muslims from around the world volunteered to go to Afghanistan to fight a jihad, a holy war, against the Soviet invaders. Ahmed Said Khadr from Canada was one of those volunteers, and that's when he became a close friend of the most famous of the foreign fighters in that war, the wealthy Saudi Osama bin Laden.

ABDURAHMAN KHADR: They're friends. They're old friends. They're one of the- my father is one of those really old people. And it's, like, have buddy- you know, you're having buddies from your school and stuff. So they're old friends.

AHMED SAID KHADR, Abdurahman's Father: I'm Canadian.

TERENCE McKENNA: Abdurahman's father gained prominence in 1995 when he was arrested in Pakistan and accused of complicity in a terrorist bombing of the Egyptian embassy in Islamabad, a bombing which killed 15 people.

AHMED SAID KHADR: I am 100 percent innocent person.

TERENCE McKENNA: He went on a hunger strike and was interviewed by reporters in an Islamabad hospital. After an intervention on his behalf by the Canadian government, Ahmed Said Khadr was released from prison in the spring of 1996. That is when he moved his family into a large compound of houses near Jalalabad, Afghanistan. And it was there that young Abdurahman Khadr met Osama bin Laden for the first time. He says he recognized him from a picture he had seen in an American magazine.

ABDURAHMAN KHADR: A magazine. And i had seen this person that was the- America's most wanted, and then the next thing I know, he's in front of me, you know? So I'm- I'm amazed. I'm, like, "Wow. This person, he's big," you know? But I would say he's- he's a normal human being. He has issues with his wife and he has issues with his kids, financial issues, you know, the kids aren't listening, the kids aren't doing this and that. So comes really down to he's a- you know, he's a father and he's a person.

ZAYNAB KHADR: It was very important for him to sit with his kids every day at least for two hours in the morning after their Fajr prayer, morning prayer. They'd sit and read a book, at least. It didn't have to be something religious. He was- he loved poetry very much. So he tried to encourage them to read, memorize or write poetry.

MAHA ELSAMNAH KHADR: And he loves sports and- how-

ZAYNAB KHADR: Yeah, he loved playing volleyball and he loved horse riding. And he'd do it- I mean, amongst people, he was not Osama bin Laden, he was just Osama-

MAHA ELSAMNAH KHADR: Just the first-

ZAYNAB KHADR: He was just a sheikh, just- and kids played around him. Kids would go shake his hand. He played volleyball with them or just horse race with them. Just- he was just a *[unintelligible]* person. When they'd go shooting, he'd go with them. And if he missed his shot, they'd laugh at him and stuff like that.

TERENCE McKENNA: These are three of Osama bin Laden's youngest children. There is Hamza, who likes to recite poetry, Khalid and Laden. Mohammed is an older son from an earlier marriage.

ABDURAHMAN KHADR: Osama has three wives. I think he has four, but I don't know so much about the fourth wife. I know that he has three wives. From one wife, the first one, he has mostly all of his children, which I think are seven or eight. And then the second wife, there is, like, two or three. And the third wife, there is two or three from her, too. They- they lived all in the same house, his family.

[www.pbs.org: Life in bin Laden's compound]

TERENCE McKENNA: This severely bomb-damaged compound near Jalalabad is where Osama bin Laden lived with his numerous wives and children and the families of his close friends, including the Khadr family. During the years of the Afghanistan war against the Soviets in the 1980s, Osama bin Laden learned to live simply, in caves. Later, in the 1990s, as he transferred his hatred from the Soviets to the Americans, he banned all American products and even modern conveniences in his presence.

ABDURAHMAN KHADR: He was against any American products. And I can tell you this. He was against using ice, and he actually forbidded it on the people that lived around him. Even if the people smuggled it in, but he had forbidded it. He had forbidded electricity, even later he knew that they needed it. But he didn't want them in any way to be spoiled because with some thing, that's how it starts, he says.

ZAYNAB KHADR: He didn't allow them to drink cold water, not because he didn't believe in using- in modern- because he wanted them to be prepared that one day, there's no cold water, they'd be able to survive and it wouldn't be so difficult for them. But-

MAHA ELSAMNAH KHADR: He did not like soft drinks, like Coca-

ZAYNAB KHADR: He didn't like to buy these American soft drinks, Coke and Pepsi and all that. But his kids sometimes would buy them. And he liked them to live more natural life.

ABDURAHMAN KHADR: His idea is, "I can live anywhere. I'll live anywhere. The important thing is my cause, it's not me or where I live." And that's why he lived in a mud hut. I can tell you that. He lived in a mud house, he and his family.

ABDULLAH KHADR: He never jokes. Very quiet person, very polite. He can be a saint, something like a saint.

TERENCE McKENNA: *[on camera]* You- you see him as a saint?

ABDULLAH KHADR: I see him as a very peaceful man.

TERENCE McKENNA: *[voice-over]* Abdurahman says that in the beginning, his relationship with the bin Laden family centered on horses. He loved horses, and so did the bin Laden children.

ABDURAHMAN KHADR: Their father had promised them that he would get them a horse if they memorized the Quran. So they were so anxious to finish memorizing it so they can get a horse, which shows you that they're normal children, too, you know? So yeah, and me, too, you know? Me- actually, because, you know, my father got me- I had insisted that he get me a horse, too, so he got me a horse, too. So our, you know, friendship between me and his kids was mostly the horses.

TERENCE McKENNA: The young boys in the bin Laden compound were signed up for

military training camps. Abdurahman and his older brother, Abdullah, were sent off to the al Qaeda camp at Khalden, Afghanistan. Training sessions continued on and off for years.

ABDURAHMAN KHADR: OK, the first time I went to training, I was 11-and-a-half years old. I was 11-and-a-half. I remember that. My brother was 12. And we went to Khalden. Since '92 until 2003, I've been to Khalden, like, five times. I took assault rifle course, explosive-making course, snipers, pistols and Pet CC, which is a course that includes all of these.

ABDULLAH KHADR: Anyone who wants to get trained can get trained in Afghanistan. Afghanistan, if you want to fire a Kalashnikov, it is like going- learning hockey. Anybody can do it. A 10-year-old boy can fire a Kalashnikov in Afghanistan. So it's not a big deal.

ABDURAHMAN KHADR: I am famous in these camps. I got the most punishments in these camps. I was always trouble- you know, not doing my homework, you know, running off, speaking to the Afghans, being given punishment and not finishing off the punishment, you know? So I've always had that rebelliousness in me. There was trouble for them because everybody, you know, in these camps are very strict. They're military camps, you know? They didn't like me, but because of my father, they kept me.

MAHA ELSAMNAH KHADR: Yeah, for Abdurahman, it was mainly to teach him discipline and to keep him off the road- for Abdurahman. And he was almost kicked out. Maybe he told you that. Nobody ever accepted because he never listened and he never followed the rules and regulation. He never wakes up on time. He never memorizes Quran.

ZAYNAB KHADR: And my father would get him in the car, say "Abdurahman, we're going back," and then take him back. In a couple of days, he'd be back. It was just back and forth all the time.

MAHA ELSAMNAH KHADR: He could never be-

ZAYNAB KHADR: He tried to put him in school, he'd run away. He put him all the way in Karachi in a Quran school. He came back on a bus.

MAHA ELSAMNAH KHADR: Tried to get him a job in Kabul again. He's never on time.

TERENCE McKENNA: The rebellious behavior of Abdurahman became increasingly distressing for his father. There were intense arguments between father and son about Osama bin Laden.

ABDURAHMAN KHADR: "Why do you not act like the rest of the kids, so Osama can- you know, can, you know, always mention you and you could be commander of a training camp or you can be something," you know? "Why are you different," you know? And I would tell him, "You know what? Being Osama is not going to heaven, OK, and being Osama is not being, you know, like a movie star," you know? "It's not the top of the world, OK?"

TERENCE McKENNA: In the madrassas, the religious schools, young men were trained to be devout Muslims. Many boys in al Qaeda received instruction from radical Islamic scholars who told them that suicide bombing was sanctioned by Islam.

ABDURAHMAN KHADR: Three times my father himself tried to get me to become a suicide bomber. He sat me down with the al Qaeda scholar. He sat me down with the- you know, the person to train people to become suicide bombers. He sat me down with these two people and tried to convince me to become a suicide bomber. He's, like, you know, "You'd be our pride. In this family, you'd be our pride," you know, "if you do this." But I was totally against it. I was, like, "I believe in fighting, you know, someone on the ground and he shoots me and I shoot him," you know? But I don't believe in blowing myself up, killing innocent people. I don't- I just don't

believe in that.

TERENCE McKENNA: *[on camera]* How do you look back at your father doing that to you?

ABDURAHMAN KHADR: Well, I just see that he really believed in it, and he wanted me to believe in it, too.

TERENCE McKENNA: *[voice-over]* This is rare video footage of Abdurahman Khadr at age 17. He had become a wild teenager- smoking, drinking and chasing girls. He was recklessly antagonistic towards al Qaeda and the Taliban regime. His father was ready to disown him.

ABDURAHMAN KHADR: My father always considered me the cancer in their body, and that's why he kicked me out of the house more than once. He said, "You are like the cancer in this- in this house, and I have to cut you out right now or you're going to infect the rest of the family. You are the one that smokes, drinks, wants to- wants to, you know, work his own mind. And you're going to make your brothers like this, so I don't want to keep you because I want your brothers to be good Muslims and all."

TERENCE McKENNA: Abdurahman says that he tried to run away from his family and al Qaeda numerous times. He would disappear with friends in Pakistan for weeks on end. His father became suspicious that he might betray the bin Laden organization.

ABDURAHMAN KHADR: Well, my dad told me, "If you ever betrayed Islam or if you ever sell out on us for anyone else, I will be the one to kill you. If you do something wrong, in Islam law, you're supposed to be killed. Before anyone else, I'll kill you."

TERENCE McKENNA: Osama bin Laden formally declared his war against the United States in February, 1998. He announced a fatwa, a religious decree, authorizing the killing of American civilians. Six months later, in August, came the simultaneous bombings of the U.S. embassies in Kenya and Tanzania. On that day, Abdurahman says, he was in an al Qaeda guest house in Afghanistan when the news of the bombings came in.

ABDURAHMAN KHADR: The leader of the guest house went outside and brought juice for, like, everybody, jugs and jugs of juice. He was just giving it out. "Celebrate, everybody." And people were even making jokes that we should do this more often, you know, we'd get free juice.

TERENCE McKENNA: As Abdurahman watched the video reports of the African embassy bombings, he says he did not feel like celebrating. When he heard that the bombing killed over 220 people, 12 of them American, and injured over 5,000, he began to have severe doubts about al Qaeda's methods.

ABDURAHMAN KHADR: I thought it was horrible. True, the other people thought it was OK because the other people that were killed, lots of them Africans, were around the embassy. I was, "No, it was Muslims. Those Africans, or whatever they were- they weren't even Muslims. They were innocent people." I didn't have- I don't- I didn't think they had any right to kill all those people.

MAHA ELSAMNAH KHADR: We've been crushed for a long time. Can't you see any-

TERENCE McKENNA: Abdurahman's mother and sister saw things differently. They say that Osama bin Laden attacked the U.S. embassies for a good reason.

ZAYNAB KHADR: First of all, we thought, "Why Kenya and Tanzania?" And then they said, "Well, it's the biggest CIA" whatever-

MAHA ELSAMNAH KHADR: Military action- *[unintelligible]*

ZAYNAB KHADR: -in the Middle East, mainly.

MAHA ELSAMNAH KHADR: To be honest with you, we hate the Americans goofing around in our country and *[unintelligible]*

ZAYNAB KHADR: And he said- before he did that, when he asked so many times for the Americans- he said, "Look, every American will become a target."

TERENCE McKENNA: On August 20th, 1998, two weeks after the African embassy bombings, the U.S. government retaliated. Cruise missiles were launched from U.S. warships in the Arabian Sea. One of the targets was the bin Laden training camp near Khost, Afghanistan. Abdurahman says he was in the camp when the cruise missiles arrived.

ABDURAHMAN KHADR: I noticed something in the sky. There was something that was like lightning, and you know, flashing. So I just watched it. And there was, like- there was, like, three, four camps around the area. I was in the Farouk, which was, like, second to the Americans, to hit second. Jihad Wel was the one they thought Osama was in, so they started bombing it.

You know, there was just explosives going around everywhere. After everything was done, I was the one that drove the injured people because there was, like, almost five, six injured people. I drove them back to Khost, took them to the hospital.

TERENCE McKENNA: The 1998 cruise missile attacks temporarily brought Abdurahman Khadr back into the fold of al Qaeda true believers.

ABDURAHMAN KHADR: That was the day- I really hated Americans that day, when we were bombed. All these people were killed. And we were up on the mountain with guns, and we were just waiting for American soldiers to come down the mountain. I was, like, just waiting for them. We're going to shoot as much of them as we can, you know? We've been bombed, and we felt that, you know, we- you know, we wanted them to come because they wanted to have an American to kill, or an American to kill them, because kill an American, good thing. Get killed by an American, you're a Shaheed, you know, a martyr in Islam.

TERENCE McKENNA: In the year 2000, al Qaeda's war against the United States intensified. First came the suicide bombing of the USS Cole, which killed 17 American sailors. Then in 2001, those close to Osama bin Laden began to hear that big plans were in preparation for a major al Qaeda attack against the Americans.

ZAYNAB KHADR: He always used to say, "There are people outside who are working and just"-

MAHA ELSAMNAH KHADR: Make *[unintelligible]* for them. Pray for-

ZAYNAB KHADR: Yeah, "Pray that they are protected, that no harm should befall them." But we'd always say, "When? What is going to happen?" And he'd always say, "I don't know. I know something is happening, but I don't know what and I don't know where."

TERENCE McKENNA: Al Qaeda's elaborate plans were finally revealed on September 11th.

ABDULLAH KHADR: The thing itself was very amazing. It was very wild to see a person seeing a building in front of him, and he's going 900 kilometers per hour straight in the building.

TERENCE McKENNA: *[on camera]* So you felt admiration for the people who did this.

ABDULLAH KHADR: Yes, because they did some things that stunned the entire world. Everybody, for entire- like, for months was only talking about that.

ABDURAHMAN KHADR: When I saw the video, I was, like, looking at it and all, and everybody was smiling, laughing, and I was just looking at it, you know? And I saw this person jumping out of the building. And I didn't think it was funny, you know? I didn't think it was smart. I was, like, more thinking about it. What was going through that person's mind when he did it, you know?

And so my father was, like, "What's your problem?" I said, "I don't know. This was not right," you know? "I don't think this was right, and this is going to cause a lot of trouble." He's, like, "Well, you know, we hit America." I was, like, "Well, you hit so much people that were in that building that didn't have anything to do- "Well, they pay taxes, and taxes get guns and the guns kill Muslims. We're hitting the American economy, and there is collateral damage." I just didn't understand it. They explained it in a hundred ways, I couldn't understand it.

TERENCE McKENNA: How did you react to the September 11th attacks when you saw them?

MAHA ELSAMNAH KHADR: To be honest with you, since I am Palestinian and I know the Americans are helping the Israelis so much, I said, "Let them have it. It's time- it's time that they"- I don't want you to think I- maybe I am- maybe I am-

ZAYNAB KHADR: Not the people themselves. You don't want to feel happy, but you just sort of think, "Well, they deserve it. They've been doing it for such a long time, why shouldn't they feel it once in a while?"

TERENCE McKENNA: *[voice-over]* All the al Qaeda people around Osama bin Laden in Afghanistan knew that the September 11th attacks meant that American bombs were on the way and that American soldiers would likely follow. In al Qaeda households all over the country, possessions were packed up. Families prepared to flee.

As the Khadr family prepared to hide out in the hills along the Pakistan-Afghan border, Abdurahman made a fateful decision. He would try to get away from his family and get back to Canada.

ABDURAHMAN KHADR: If you go back to your family, what are you going to get? All you're going to get is running up and down hills, valleys, staying in mud huts, running for the rest of your life until you get shot. And I didn't want that anymore. I was sick of it. I was- I had had enough of it. I just wanted it to stop.

TERENCE McKENNA: Two months after the World Trade Center attack, Abdurahman was in Kabul. The Taliban were fleeing the capital, which was being taken over by the Northern Alliance, backed by the United States and Britain. In the chaos, Abdurahman became separated from his family. At that time in Kabul, any Arab was suspected of affiliation with Osama bin Laden. The Americans were offering a bounty for al Qaeda members. Arabic-looking foreigners were being rounded up. Abdurahman Khadr was arrested and released several times but ended up in an Afghan prison. After six weeks, he was handed over to the American forces.

ABDURAHMAN KHADR: When the Americans started interrogating me, that's when I realized that there is no way out of this except to, like, you know, tell them, you know, OK I'll cooperate with them because this is, this was their only way. They said, you know, "You work with us, or you know what? We can keep you here. We can take you to Cuba. We can do anything with you. Right now, no one in the world cares about this."

TERENCE McKENNA: Abdurahman says that he was interrogated extensively by two American agents, one from the FBI and one from the CIA. He says that they became much more interested in him when they realized how close he had been to the very center of al Qaeda.

ABDURAHMAN KHADR: In a week or two, they started trusting me more. And you know, then they asked me, "Would you like to work for us? Would you like to go with the troops that are in Afghanistan to the front lines and work for us there," and you know, to- you know, "tell us who the people we capture are." And you know, at the very beginning, it was my first time in, like, this situation, and I was scared of jail. And I said, "You know what? I'll do anything."

TERENCE McKENNA: For several months, Abdurahman says he traveled regularly around Kabul with American investigators are visitors.

ABDURAHMAN KHADR: There was this tour. They called it Abdurahman tour. I was famous for that. I took, like, the people from the- people from the CIA, the FBI, the military. We'd go around in a car in Kabul. I'd show them the houses of al Qaeda people, the guest houses, the safe houses, where houses were. You know, this was the guest house they used before, this was the guest house they used later. This is the safe house they used after September 11, you know, just show them the houses. So there was that tour. And otherwise, I just told them what I knew.

TERENCE McKENNA: Abdurahman says he lived for nine months in a CIA safe house near the American embassy in Kabul. In the summer of 2002, he says, he received a financial offer from the CIA.

ABDURAHMAN KHADR: They brought me a paper. They said, "$5,000 bonus for you being very cooperative. And from now on just by, you know, working with us, just answering our questions, you get paid $3,000 a month until you stop working for us." The paper said I would get paid until someone found out about this. Now, the account was under my name. It was a CIA account somewhere. I don't know where. But the money went to my account. And whenever I want my money, I can ask for it.

TERENCE McKENNA: *[on camera]* Did the paper say that- say Central Intelligence Agency? Did it say who you'd deal with?

ABDURAHMAN KHADR: Yes. You'd be working for the CIA.

TERENCE McKENNA: *[voice-over]* During the months that Abdurahman was in the CIA safe house, suspected al Qaeda members were being rounded up all over Afghanistan. Hundreds of the prisoners were put on planes and flown to Cuba, to Camp X-Ray at the U.S. Naval base at Guantanamo. The world could see that the prisoners were being treated harshly, but Abdurahman says he didn't know any of that when the CIA proposed a new plan to him. They would plant him as one of their spies in the prison population and he would funnel information to them. He says the plan was explained to him by his favorite CIA agent.

ABDURAHMAN KHADR: She said, "Well, you'll go to Cuba. You'll be working for us there, talking to other detainees, you know, meeting other detainees and stuff, and telling us what they tell you and stuff." I said, you know, "How much- how long is it going to be?" She told me it would probably be from three to six months. I said, Well, you know, faster. So I said OK.

TERENCE McKENNA: Abdurahman says he was told that he would have to be treated like any other prisoner on the way to Guantanamo to avoid suspicion. He was taken to the Bagram air base near Kabul, where the Americans had built a processing center for suspected al Qaeda captives. Here he began what he calls the longest and most painful ordeal of his life. He had no idea what he was getting into.

ABDURAHMAN KHADR: They took off my clothes and everything. And they started taking pictures of me, pictures, like, of my face and then pictures of my- my private parts, like my- my back, you know, my- my penis, my- you know, just taking pictures of every part of my body.

And they-- you know, they check your- your- you know, your anus. They put their fingers inside to check it out. You know, all of that is humiliation to any person, you know? They put me in the orange suit, and then they took me into a room and they put me on the ground- again, hands, legs, everything cuffed, and my face covered. And I was kept on the concrete with nothing but that orange suit for 24 hours.

So I stayed in Bagram for 10 days, and you could not move. You could not move your back, so you couldn't bend or straight. There's one position, you stay in it. If you move, they hit you or they push you. So they tell you not to move. After that, they put us in a truck for an hour or two, the same position. Then they took us out of that to the plane. They tied us up in the plane, cuffed us up and everything in the plane.

TERENCE McKENNA: After 10 days of captivity in Bagram, that plane trip to Cuba would last more than 15 hours. By the time the aircraft landed, Abdurahman says, he was a broken man.

ABDURAHMAN KHADR: There was points, you know, I just- in my heart, I just wished to God, I wished to God that one of these MPs would go crazy and then shoot me, just get up and shoot me. I was so depressed. I was so sick of anything. It was the only time in my life that I really wished for a bullet. You know, I was, like, "Please, God, do something, but just take away my life," you know?

TERENCE McKENNA: Like all other prisoners, Abdurahman spent his first month in Guantanamo in complete isolation. He says he was occasionally told by his jailers that they knew he was on a CIA mission. It was barely enough to restore his hope. And then he was moved into the prison's general population.

ABDURAHMAN KHADR: Their hopes was, when they take me into Cuba, they could put me next to anyone that was stubborn and that wouldn't talk, and you know, I would talk him into it. Well, it's not that easy, first thing, because lots of people won't talk to anyone because everybody in Cuba is scared of the person next to him.

TERENCE McKENNA: By this time, Camp X-Ray had been replaced by the newly constructed Camp Delta, which was designed to be more comfortable and secure. At one point, Abdurahman heard that his younger brother, Omar, was just 50 feet away in a neighboring yard. They could yell to each other in Arabic.

ABDURAHMAN KHADR: So I asked him, "How are you? How is everything?" And he told me, you know, "Just stay with the original story. We have an organization and all." I said, "How is your health?" And he said, "It's OK. I'm just losing my left and eye and all. They don't want to operate on it."

TERENCE McKENNA: *[on camera]* Omar said to you, "Stick to the original story." What does that mean?

ABDURAHMAN KHADR: Original story, we have an organization. We don't have anything to do with al Qaeda. We don't have anything to do with al Qaeda members and all. We just stick with that story.

[www.pbs.org: More on Guantanamo]

TERENCE McKENNA: *[voice-over]* The U.S. Army conducted public relations tours to exhibit the cells at Camp Delta. Each prisoner was provided with a Quran and a Turkish toilet. Despite the more comfortable conditions, suicide attempts by the prisoners became a common occurrence. Abdurahman says that he once came close to that himself and demanded to be removed from the prison population.

ABDURAHMAN KHADR: After three months of being in the general population, I just couldn't take it anymore. I said, "You know what? You have to move me out of here now."

TERENCE McKENNA: Abdurahman says that by mid-2003, the CIA realized that their plan was not working out very well. They agreed to remove him from the prison population, even though he was now talking to other prisoners, and transfer him to more luxurious quarters.

ABDURAHMAN KHADR: Normal rooms split into half. Half of it is a bedroom and the bathroom, and the other half is a living room and a kitchen and TV. And they moved me into this room. I was kept in this room for five months. During that period, they had people- psychiatrists come to see me, doctors, other- a lot of people from the CIA.

TERENCE McKENNA: Abdurahman says that once he was released from the detention area, the CIA and the military people he dealt with were very nice to him. He says that one day, they even took him down to the beach, where no other inmate was ever allowed, for a swim and a barbecue. He says he told them it had been a huge mistake for the U.S. military to offer large cash rewards for the capture of al Qaeda suspects because the vast majority of the inmates in Guantanamo didn't belong there.

ABDURAHMAN KHADR: There's only, like, a 10 percent of the people that are really dangerous, that should be there. And the rest are people that, you know, don't have anything to do with it, don't even- you know, don't even understand what they're doing here.

One story, the famous story, I remember- two, actually. One is the father that was brought by his own son. The son gave him a gun and took him up to an American base and gave him up there and took $5,000 for him. That's one story. The second story is of a drug user, a person that, you know, was sitting next to me, not worried about being in jail, not worried about what's going to happen to his family, not worried about what he's going to get. All he's worried about and every time he asks the MPs to come around, asking them for a smoke, asking them for some hashish, for- you know, for marijuana, something like that, you know? Not even- he doesn't even know what he's doing here. Truly a drug addict, not al Qaeda at all.

TERENCE McKENNA: Abdurahman says that he spent five months in his Guantanamo guest quarters near the prison. He says the CIA considered moving him to several international destinations to gather information about Islamic radicals. Finally, the focus shifted to al Qaeda activity in Iraq. By that time, the U.S. had occupied Iraq for six months and desperately needed more intelligence about the insurgents.

Last September, Abdurahman says, the CIA provided him with a training course in undercover work, a course given by one of the most experienced trainers in the CIA.

ABDURAHMAN KHADR: He lived in Morocco and Algeria, so he spoke Arabic. He liked Arab culture. We started training with the normal things, mostly how to, like, do a dead drop or to- like, where you go and you check out a restaurant or a location to meet someone, if you're, like, an agent, to meet your officer, or if you're an officer and want to check out a place to meet an agent, so how you'd go. You go inside, you check the tables, you check the streets outside, you check, you know, the exits, the bathrooms, the location, the table exactly where you're going to sit, what the weather is going to be that time when you go to meet this person. Then the cultures of that area, people, do they shake hands, do they talk, are they nice, are they rude, do they like jokes? So to find out everything about this place you're going to. And you go to a meeting at one time, and then you just- you know, you drop that place and go to the next place.

TERENCE McKENNA: Abdurahman says that at the end of the training course, he was told that he would be leaving Guantanamo soon. He says that his CIA handlers gave him a tour of the base, that he was issued a guest pass and checked in and out through the visitors' gate. Then he

was told that his next stop would be Bosnia. He says the CIA gave him a false passport.

ABDURAHMAN KHADR: They made me a Moroccan secondhand passport, a forged passport. And they said, "When you go to Bosnia, when you get in the pipeline, you just use this passport. You say, you know, 'I got this passport when I was coming. I got it in Turkey, and I paid $200 for it, and I want to use it to get back into- to, like, Iraq.' "

TERENCE McKENNA: Abdurahman says that on the day he left Guantanamo, CIA officers took him for a tour of the harbor by speedboat. Then, he says, he was taken to the airstrip and that a CIA agent put him on a small jet aircraft.

ABDURAHMAN KHADR: I asked him what was it, and he said it was a Gulfstream IV. So he told me, "Just take your bag. Go inside."

TERENCE McKENNA: *[on camera]* How many people were on board?

ABDURAHMAN KHADR: On board were four security people, was the higher-up, the person- the CIA one, and there was an officer and the pilots, two pilots, I think, or three pilots.

TERENCE McKENNA: *[voice-over]* Abdurahman says that he spent nearly 14 hours on the CIA jet. After a refueling stop in the Azores in the mid-Atlantic, he landed at an American base not far from Sarajevo. Bosnia is well known in intelligence circles as a major center of al Qaeda activity. Many former fighters from the Afghanistan war and other conflicts have settled here. The Americans believe that Bosnia had become the pipeline for al Qaeda volunteers who wanted to join up with the resistance in Iraq.

Abdurahman says that the CIA asked him to blend in with the transient Muslim population in Sarajevo.

ABDURAHMAN KHADR: You meet people. You sit with them and you- you watch them. You see how much people are working with them, what they're doing, they're buying weapons, they're selling weapons, they're recruiting people. You know, information, just any information at all.

TERENCE McKENNA: Abdurahman says the CIA asked him to go down to one of the largest mosques in Sarajevo, the King Fahd mosque, which they believed was a beehive of al Qaeda activity. He became friendly with a suspected recruiter for al Qaeda operations in Iraq.

ABDURAHMAN KHADR: I took his name and all and gave it to them, and they said, "Well, this is a very good contact." They were very happy that I made this contact. They told me just to stay in touch with him and go slowly on him, and then in due time, a week or two, tell him that you want to go to Iraq, you know, that you changed your mind about going back to Canada, you want to go to Iraq.

TERENCE McKENNA: *[on camera]* If al Qaeda people in Bosnia found out about you, what do you think would have happened?

ABDURAHMAN KHADR: They would have shot me.

TERENCE McKENNA: Was this not at the back of your mind?

ABDURAHMAN KHADR: It was always in the back of my mind, and that's what I always told the CIA. "You know what? You're bribing me money, and you think it's a lot, but you know, there is that risk that I'll get shot," you know? "So don't think you're doing me a big favor by giving me that money. I'm doing you a big favor by working for you because if I have a million dollar and I'm dead, I can't use those million dollar."

TERENCE McKENNA: *[voice-over]* Abdurahman was in Bosnia in the fall of 2003, when news arrived of the military attack in Pakistan which killed his father.

ABDURAHMAN KHADR: My reaction was, as my father, I love him and I will always love him as my father, but not as what he did. But you know, I've gone through so much that when they told me about it, I didn't even- you know, there was no reaction. There was no emotion. I don't know why because I've seen so much people get killed in front of me in Afghanistan, so I've been through so much with- you know, I reacted with lots of people that totally no emotions were left.

TERENCE McKENNA: *[on camera]* Is it possible that you gave them any information which ended up in your father being killed?

ABDURAHMAN KHADR: No.

TERENCE McKENNA: Why do you say that?

ABDURAHMAN KHADR: I didn't know anything about my father. For two year, I didn't talk to him. I didn't communicate with him at all. So how could I know anything about him or where he was staying?

TERENCE McKENNA: *[voice-over]* After his first week in Bosnia, Abdurahman says that the CIA asked him to actually go into Iraq with al Qaeda forces so that he could provide information to the American military. They told him it would be dangerous.

ABDURAHMAN KHADR: They really trusted that I would do this for them. But really, when- later, they suggested that, "You're going to be in a gun fight. You're going to be in the middle of the storm. Do you understand what you're going through?" And that's when I thought, "You know what? Stop this. This is a good time to stop."

TERENCE McKENNA: Once he decided to get away from the CIA, Abdurahman made a call to Toronto, to his grandmother.

GRANDMOTHER: I said, "Is this Abdurahman?" He said yes. "Where are you?" And he said, "I'm"-

TERENCE McKENNA: He told her that he desperately wanted to come back to Canada. He told her to tell the media that the Canadian government was not helping him.

GRANDMOTHER: They said, "Go. Anyway, we don't care about you."

TERENCE McKENNA: Abdurahman felt that going public with his story would force the Canadian government to allow him to return to Toronto. After the news about him broke in Canada, Abdurahman says that he was brought to a CIA safe house in Sarajevo. He says the Americans agreed to let him go back to Canada, and he promised he would not tell anyone of his relationship with the agency. He says the CIA never paid him the promised monthly salary, that they took away his false Moroccan passport and then dropped him off at the Canadian embassy.

When he arrived back in Canada in November, he was met by his grandmother. Shortly afterwards, he held a press conference and told lies about what happened after his release from Guantanamo.

ABDURAHMAN KHADR: OK, from Afghanistan - I was released there - the American authorities-

TERENCE McKENNA: He stuck to the story he says was dictated to him by the CIA.

ABDURAHMAN KHADR: I don't have any connections to al Qaeda or to any of those people.

TERENCE McKENNA: A month later, he began telling us the full story.

[on camera] Why are you telling this story now?

ABDURAHMAN KHADR: Why am I telling this story right now? Because I do not want to keep this in my heart anymore. I cannot keep it in my heart anymore. I got to tell the people I- you know, I lied to them in the beginning, and I want this to go out. I want- I want the people to learn that I lied for a reason and I'm sorry to have lied then, and I want to tell them the real story, what really happened.

[www.pbs.org: Read the extended transcript]

TERENCE McKENNA: *[voice-over]* ***FRONTLINE*** officially asked the CIA to confirm or deny Abdurahman Khadr's story. The agency declined to comment.

Abdurahman had mentioned that he was twice subjected to polygraphs - lie-detector tests - by the CIA. We asked him if he would submit to another series of polygraph tests for us, and he immediately accepted.

POLYGRAPHER: Regarding your activities with the U.S. intelligence, do you intend to answer truthfully each question about that?

ABDURAHMAN KHADR: Yes.

TERENCE McKENNA: The professional examiner asked him about working for American intelligence in Guantanamo, being paid for it and being flown on a small jet to Bosnia for his mission there. On all major aspects of his story, he passed the polygraph.

In Toronto this winter, as thousands of Muslims gathered for prayers to mark the end of the Hajj, the annual pilgrimage to Mecca, Abdurahman Khadr was among them. He was volunteering at his local mosque and looking for a job. He wanted to be an accepted member of the Muslim community here, but he was worried about what the reaction would be when his story was eventually broadcast, especially the reaction from his own family.

Every day in Islamabad, his mother, Maha, would carefully fold up a treasured family heirloom, the partially burned, blood-spattered vest her husband was wearing when he was killed last October. Abdurahman's family did not yet know the full story of his cooperation with the CIA. They had told us that they would be deeply ashamed of him if he collaborated with the enemy.

ABDURAHMAN KHADR: They will dread me. My mother, especially, she will dread me for doing this. She will totally dread me for doing this.

TERENCE McKENNA: *[on camera]* What will she say?

ABDURAHMAN KHADR: She'll say, "You left us. You sold out on your father. You sold out on your people." You know, "You told a story." "You," you know, "worked with the CIA. You did this and you did that."

TERENCE McKENNA: "How could you do such a thing?"

ABDURAHMAN KHADR: "How could you do such a thing?"

ANNOUNCER: This is a special edition of *The National.*

NEWSCASTER: Tonight, al Qaeda family. A Canadian man admits his family's ties to al Qaeda and-

TERENCE McKENNA: *[voice-over]* After the broadcast of his story in Canada, Abdurahman's grandmother kicked him out of the house, and he was disowned by the rest of the family. He feels ostracized by most of the Muslim community here, some angry at him because he was part of al Qaeda, others because he cooperated with the American forces.

Two weeks ago, his mother returned to Toronto with his paralyzed younger brother to seek medical attention. The family has now begun to reconcile. Abdurahman is trying to start a new life. He says that one day, he would like to write a book about his personal journey from Osama bin Laden to the CIA.

SON OF AL QAEDA

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ANNOUNCER: There's more to explore at ***FRONTLINE***'s Web site, where you'll find in-depth interviews with Abdurahman Khadr, his mother, sister and brother, a closer look at members of the extended Khadr family and the glimpse it offers of the world and mindset of al Qaeda followers, a chance to view this program on line in streaming video and more. Then join the discussion at pbs.org.

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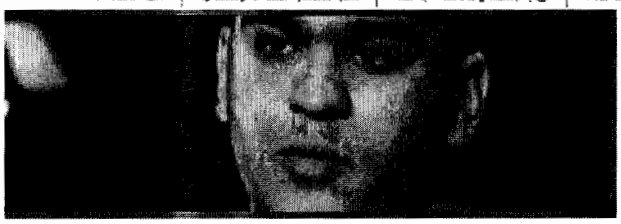

INTERVIEW ABDURAHMAN KHADR

Osama bin Laden | Sept. 11, 2001 | The training camps | Working for the CIA | Guantanamo | Bosnia | Return to Canada

In this interview, Abdurahman Khadr recounts his journey from Osama bin Laden to the CIA. He speaks of growing up alongside bin Laden and his family in Afghanistan and attending the terrorist training camps there; he tells of his capture by the Northern Alliance in Kabul after 9/11 and his work for the CIA as an undercover informant in Guantanamo and Bosnia; and he reveals why he decided to leave the CIA, return to Canada and go public with his story. This transcript is drawn from three interviews conducted by correspondent Terence McKenna in January 2004.

Just tell me a bit about what kind of man your father was, your memories of him growing up and what your relationship was like with him.

"Three times my father tried to get me to be a suicide bomber... I don't believe in blowing myself up, killing innocent people. I just don't believe in that."

My father was the normal person that was studying in Canada and all. ... And someone somewhere told him something about Islam and that what he was doing, which is living as a normal Muslim in Canada and feeding his family, was not good enough for Islam. ... [That] made him think himself over and what he wanted to do with his life.

That's when I think he met someone at HCI [Human Concern International] and they got together and they decided he was a good person to go [to Afghanistan]. He volunteered or something. He went to Afghanistan. He started working. He was very committed to relief work, my father. He met lots of people. He raised a lot of funds. And he started working and doing projects.

Anyways, when he got to Afghanistan he surely met some people, because then, you know, there was a relief organization but they were still helping lots of the people that were in the jihad. During that, you know, he surely met some people and they talked to him and so he started having a double life.

OSAMA BIN LADEN

Do you know when he met Osama bin Laden the first time?

I don't know when, but I'm sure it was around '88, '89, in the war. He met him and they became friends. Everything then was just about the Russian war. That's how he met him and that's how he got himself, you know, into the circumstance, which is ... being not only a relief worker but a mujahedeen too.

So what was your first impression of Osama bin Laden?

After the '95 Egyptian bombing in Islamabad, my father was arrested and there was the whole media thing that came out and the Canadian prime minister came to Pakistan and my mother and my brothers got to meet him.

Anyway, after my father was released, he came back to Canada. And when we were coming back from Canada, you know, I was looking through a magazine. I saw [bin Laden's] picture. And next thing I know, we're in Pakistan. My father's telling us we're going to a place and we're going to meet this person. I thought it was just like we're going to meet some people.

So we went to Jalalabad after a little bit. We got a house in Jalalabad. And one day he put us all in the car and he drove off. We drove off road for almost half an hour or more and then we came up to a compound. We went inside, and they took us into a big sitting room and we sat there and waited. And then the next thing I know, he's coming through the door.

You had seen him in a magazine?

In a magazine and I had seen this person that was America's most wanted and then the next thing I know, he's in front of me. So I'm amazed. I'm like, wow, this [is a] person who's big, you know?

What were your impressions of him?

I watched him. I was a child then. But I would say he's a normal human being. He's done lots of bad things and all of that and there's lots of human beings that have done a lot of bad things. But when you get really down it, he's a human being. He has issues with his wife and he has issues with his kids. Financial issues, you know. The kids aren't listening, the kids aren't doing this and that. So comes really down it, he's a father and he's a person.

How well did you get to know his family and his children?

His sons, again, they're normal children that, you know, want more. They love horses and their father had promised them that he would get them a horse if they memorized the Quran. So they were so anxious to finish memorizing it so they could get a horse, which shows you that they're

normal children, too.

I had insisted that [my father] get me a horse, too, so he got me a horse. So, you know, our friendship between me and his kids was mostly the horse, [how] the horses were fed, how they were cleaned and stuff like that.

Just describe his living situation a bit. How many wives and children were there? How big was his circle?

Osama has three wives. I think he had four, but I don't know so much about the fourth wife and then I know that he has three wives. From one wife, the first one, he has mostly all of his children, which I think are seven or eight. And then the second wife there is, like, two or three and the third wife there's two or three from her, too.

They lived all in the same house, his family -- like, a big house but in different, you know, inside houses. Other than that, there were people around him that just lived by being around him. They do nothing but living around him. People that came to Afghanistan all the way in the beginning when governments were supporting the war against the Soviets. So they came as doctors or engineers and then when they went back they were told they would be arrested and stuff, so they just had to hang around. So no one would pay them or anything. They didn't have jobs or anything. So they just, you know, hanged around Osama.

What were your relations with him?

I'm my father's son. My father is very big and he knows a lot of people. He knows Osama and all these people, but I'm again, the Canadian son because, you know, our family is not so strict in itself. So I like watching movies, as a normal kid, you know, but that wasn't okay with them. That's why there was always conflicts.

His sons were very strict. They wanted a horse but they didn't listen to music, they didn't want to talk about, you know, music or movies or anything.

How about using American products?

When we were living there, one day I went down to the city of Jalalabad, the bazaar, and I bought hot sauce and I brought it back. I was sitting in the big place where everybody was sitting in the house. That's how they ate. They would sit all and the big plates of rice and meat and we'd all eat together, you know. Anyways, I take it out and I spill some and I'd hide it again because I knew they were against any American products -- Pepsi, Coca-Cola or any of that.

Osama didn't want any American products around?

He was against any American products and I can tell you this. He was against using ice and he actually forbidded [sic] it on the people that lived around him. Anyhow the people smuggled it in but he had forbidded it.

He had forbidded electricity even if he knew they needed it, but he didn't want them in any way to be spoiled because with some things, that's how it starts, he says. It starts with ice and then something a little more and then a more and more and more and so he restricted. ... Lots of the people around him wanted stuff that, you know, were not American, but just pleasures of life that

you need every day. But he was trying to keep them as close to him and as close to his way of living as he can.

Do you think the idea was he might have to live again as he had done during the Afghan war?

Yeah, well, his idea is "I can live anywhere. I'll live anywhere. The important thing is my cause, is not me or where I live." That's why he lived in a mud hut. I can tell you that. He lived in a mud house, he and his family.

How would you characterize the relationship between your father and Osama?

Between my father and Osama, I could say they're friends. They're old friends. My father is one of those really old people. It's like buddies, you know, you're having buddies from your school and stuff. So they're old friends. My father really respects Osama and Osama really respects my father.

They had been through the war together.

Yeah.

Did Osama attend your sister's wedding?

The second wedding. He attended the wedding.

So describe the scene to me. Do you have a memory of that? How was he dressed or what was he--

He was dressed in normal clothes, which, you know, he's dressed in on TV and stuff. His turban, his salwar kameez, the Afghani clothes, and his coat. And with his stick. And his small AK-47.

He came after we already started. There was a big circle with people sitting around and stuff and they started singing. There was only talk and whatever. So I remember him coming, sitting down, listening to the singing. ...

How do you feel now about the choices your father made?

My father was a normal person and we should all understand that he was a normal person. When he went to Pakistan, he was with good intentions. He went to Pakistan to help the orphans. And he always had that part of him that was always working with orphans. Now that doesn't mean what else he does should be forgiven because he was helping orphans. But he was, you know, he went from Canada with good intentions. He went to help the Afghans, you know. And then there he met someone and he started believing in something...

My father made the choices, whenever he made them, in the very beginning for himself because then his children were kids and his wife didn't know anything about it. And then slowly people get involved in whatever the man of the house was in, you know. So the wife does and then the kids start getting into it too. ...

SEPT. 11, 2001

Let's start from Sept. 11. Where were you? What do you recall? What went through your mind?

Well, that day I was in Jalalabad with my father. My father had left to go to Al Qaeda compound up north a little bit of Jalalabad. I was sitting at the office listening to the radio and I was looking for some music or something on the VOA, which is the Voice of America. And it came on, you know, when they started talking about it, I couldn't understand what's happening. I thought it was some kind of commercial or something, something was wrong. I couldn't understand it. You know, maybe I heard it but it didn't register. A little later, my father came back, an hour or two later, and he told me, you know, what happened. ... It didn't register.

The next day we left [for] Kabul. When we left [for] Kabul we got to see on TV in Kabul. That's when instability period started in Kabul for all the Arabs that were living there and lots of Afghans, too. They were, you know, moving out of Kabul. So we started moving our stuff out of Kabul, too. There was a truck and we just kept on moving stuff slowly out of the house. [When] the bombing started, we totally moved the family out of the house. We'd still come to Kabul to pick [up] the stuff. It goes on like this until there was very little stuff left in the house, but we used to still come to the house... to stay for the night or something.

Anyway, Nov. 11 is [the] day the Taliban left. On that day my dad asked me to hire a truck with a driver. I went and hired a truck. I came back. We loaded up the truck. And it was the last truck and he was insisting that I not come back. I wanted to come back to Kabul. I wanted to see some friends and he was insisting that I don't come back. So I said, anyways, you know, I'll try. We left with the truck, me and my smaller brother Omar. We went to Logar. We unloaded the truck and the driver wanted his money so I had to come back with him. ...

Why did you come back [to Kabul] from Logar?

Because, first thing, I am a kid that likes to watch movies. I want the nightlife. In Logar there's no electricity, so I can't watch movies. When we were living in Logar I always used to come back, find a car and come back for two nights. One night just to go back because I knew there is electricity and I can watch a movie there somewhere, listen to music, you know. So ... that's why I came back -- one thing. ...

If you go back to your family, what are you going to get? All you're going to get is running up and down hills, valleys, staying in mud huts, running for the rest of your life until you get shot. And I didn't want that any more. I was sick of it. I had had enough of it. I just wanted it to stop. ...

Tell me where your mind was at.

My mind was always, the whole period that I was living with my family in Pakistan and Afghanistan, it was -- I wasn't comfortable with that living. I don't know why. It was just that I didn't get along very with the people that I was living with, which were Al Qaedas and you know, the Arabs that lived in Afghanistan. I was just not comfortable with those people. So twice I tried to run away from that life, from my family and to get back into Canada. But twice, these two times I tried they failed. ... So I went back.

Right at that very day when I came back to Kabul, I can't say, you know, I was running away from my family. No truly it was about the money, about going back to Kabul to, you know, hang out in Kabul for that night.

But now there was the hope of if I get captured, if I get captured by the Afghans or by anyone, after everything, they're going to give me back to the Canadians. And they're going to take me back to Canada. So I was thinking, you know, I should just stay in Kabul, even if I'm arrested. Wait in Kabul for a month or two until the embassy opens up and then just go into the embassy and stay in there. And tell them, "you know what, I'm going nowhere until you take me to Canada." But that very day it was, you know, just going back to Kabul. ...

Coming back to Kabul I saw all these cars leaving Kabul. The truck I was in was the only truck going towards Kabul. Every other car or truck or whatever was leaving Kabul. So we got to the city and we kind of realized that something was going on.

They tried to stop us but we just went on. So the truck driver asked me to go and stay in his house for the night. In the morning we got up, we got in a taxi and we drove and, of course, there was nothing, there was nobody. ... There was no Talibans, there was no Northern Alliance. There was nothing. It was six in the morning and the first car of the Northern Alliance that got to Kabul was at 7:30.

So, we got to the round-about my house was close to. We got out of the taxi and we were walking to my house. And that's where some former Talibans that had, you know, turned now into Northern Alliance, taking off their turbans and putting on karakol [hats], which is like a symbol for people there in Afghanistan. They stopped me and they told, "You're an Arab." I said I wasn't, I was an Afghan. They said, "Yes, you are an Arab." Anyways, they said to just, you know, sit on the side.

I waited for almost half an hour or something until this Northern Alliance car came by. They put me in the car and the driver was, like, "What are you?" I was like, "Well, I'm an Afghan." He's like, "Why are you arrested?" I said, "I don't know." He said then get out. And he told me to just leave. I got out of the car and ... this former commander of the Northern Alliance was driving by. He stopped. He saw us and someone from the people that arrested me told him that this is an Arab. So he came up to me, I think he had two, three other people with him with weapons and stuff. And they told me to get in the car. So I said okay. I got in the car. They said where is your house? I said my house is not here. They said no, show us where your house is. Somewhere around there, because everybody knows me, told him that his house is down there. We went up to my house and we went inside. There was no one. No one at all, but I could see the tires prints left on the ground so I knew that my father and my mother, which was the last people left in the house when I left with the truck, had left.

Anyways, we went inside. They looked all over the place for stuff. There was nothing. So they got me back outside. They put me in the car and they said okay, now, this is it. ...

[Editor's Note: Over the course of the next six weeks, Abdurahman says he was arrested and released several times. Finally, he is arrested again and put in an Afghan prison, where he is interrogated by Canadian and American officials.]

In the morning they arrested me and put me away. It was the Interior Ministry's, you know, like lock-up. And I was kept there for a month and a half and that was when I first had people interview me, British people. They came to interrogate me. ...

Why would the British come and see you?

Well this is after I was put in jail, you know. ... I don't know, they told me, "Well there's no Canadian embassy so we are responsible for any Canadians here in Kabul under detention." ...

Then they moved us from that jail to another jail which was the Afghani intelligence jails. There is a lot of them but the third intelligence directorate jail. They kept us there and that's where the Americans first interrogated me and then Canadians, the RCMP. They kept me there for a month and a half and then they moved us from there ... to another jail.

The other jail is the second directorate jail. They kept us there for a month and a half and then they moved me into a house. Of course, while in the third directorate's jailhouse, when the Americans started interrogating me, that's when I realized that there is no way out of this except to, like, you know, tell them, you know, okay I'll cooperate with them because this is this was their only way. They said, you know, "You work with us or, you know what? We can keep you here, we can take you to Cuba, we can do anything with you. Right now, no one in the world cares about this." ...

[What were the questions the Americans asked you?]

The questions: Where have you trained, in which camps? Who do you know in those camps? The trainers, where do you think they are? Did you know about Sept. 11? Did you not? Did your father know? Who does your father know? How does he know Osama? Are they friends? Is he an officer? Have you trained in Al Qaeda training camps. Have you trained in training camps? Your brother, Abdullah, what does he do? Where did he train? The people that you know, your brother-in-law, what is he? How did he meet your sister? The people that you know, how much do you know about them, their families? Are they Al Qaeda? Are they other groups like jihad or Egyptian groups or Libyan groups? And in those groups what are they? Are they big people in those groups or small people?

Why were you so willing to cooperate with them?

After all that had happened, you know, Sept. 11 and all, after we were put away in jail and stuff, I started registering stuff more as a normal person. Well, actually not a normal person -- a person totally against Al Qaeda. My mentality changed from an anti-American, anti-Northern Alliance to an anti-Al Qaeda in that period, in the period I got to jail. ...

I was, you know, being as cooperative as I can. In a week or two they started trusting me more and, you know, then they asked me, "Would you like to work for us? Tell us who the people we capture are."

And, you know, the very beginning, it was my first time in this situation and I was scared of jail. I said, "You know what? I'll do anything." So I was willing to do anything. ...

They said okay and then from that second directorate they took me out to a safe house. They kept me in a safe house for nine months. During these nine months they had their people come to see me. They had six guards on me, by the way, in the house. And during these nine months there was always people coming to meet me and ask me questions and stuff. ...

When the Canadian officials came to interview you, what did you tell them about your father?

I told them everything I knew -- that my father met with Osama, that he was in my sister's wedding. ... My father and Osama always met, you know. But I really wasn't in any meeting that

they talked about something serious so I wouldn't know. ... They asked me about my father. "He brings money from Canada. Where does he take that money?"

What did you tell them about your brother Abdullah?

We get back to the point where I told you that I was very pro-American, you know, pro-Canada. And I wanted to do my best to get back to Canada. So I made up a lie, which was that he is a leader of a training camp, which he's not. This was all the way after Sept. 11. He was taking, you know, like he was taking materials to there like rice, stuff like that. And I thought, you know, by just telling them that he's a leader of that, you know, they couldn't prove otherwise and it would be a good point that, you know, I'm really showing good faith, which was a lie.

Later in 2003, before I was released, I told the American that was a lie. It was just, a show to try to really get you to like trust in me. But since I said it someone put it up there on the board. It's not true. It's totally not true. My brother was never a leader of any training camp. He trained, like me he trained more than five, six times but he was never a leader of any camp.

THE TRAINING CAMPS

What did you tell them about your training?

I told them everything. Where I trained at, how much courses I had, the times of the courses as accurately as I can.

Tell me a bit more about that in terms of the detail you gave them.

Okay, the first time I went to training I was 11-and-a-half years old. ... My brother was 12 and we went to Khalden. We took the first course, which is the assault rifles course. We stayed in the course for two months and then we went back to Pakistan.

And then since like, I could say since '92 until 2003 I've been to Khalden like five times. I took an assault rifle course, explosive-making course, snipers, pistols, and ... a course that includes all of these.

How did you like this camp experience?

Well again this comes back to the part where I was always the rebel. I got the most punishments in these camps. I am famous in these camps. If you ask anyone he'll know me. Anybody that seen me or didn't see me in the camps. I was always trouble. You know, not doing my homework, you know, running off, speaking to the Afghans. Being given punishment and not finishing off the punishment, you know. So I always had that rebelliousness in me. That was trouble for them because everybody in these camps are very strict. They're military camps you know. They didn't like me but because of my father they kept me.

[What is your memory of the night President Clinton sent cruise missiles to attack the training camp after the African embassy bombings?]

I noticed something in the sky. There was something that was like lightning and you know,

flashing. So I just watched it and there was like, there was like three, four camps around the area. I was in Al Farooq, which was like second to the Americans, to hit it second. Jihad Wel was the one they thought Osama was in, so they started bombing it. They started bombing it, right away I ducked and I stayed on the floor, on the ground. And then they just started, you know, hitting all the camps and they hit our camp too. And you know, there were just explosives going around everywhere. After everything was done, I was the one that drove the injured people because there was like almost five, six injured people. I drove back to Khost. ...

When you were going to these camps, was there ever a time that you kind of believed in bin Laden and believed in the Al Qaeda organization?

The day I really believed in it was the day we were bombed in the training camp. All these people were killed and we were up on the mountain with guns, and we were just waiting for American soldiers to come down the mountain. I was like just waiting for them, "we're going to shoot as much of them as we can," you know? We've been bombed and we felt that, you know, we wanted them to come. We wanted a fight, you know.

Al Qaeda always wanted them to come and that's why the biggest wish of Al Qaeda after Sept. 11 was that American troops attack Afghanistan. That was their biggest wish. They knew when it would be bombs, but their biggest wish was like they were like wishing America, begging America to send troops, you know, ground troops.

[Why?]

Because they wanted to have an American to kill, an American to kill them, because kill an American, good thing. Get killed by an American, you're a shaheed, you know, a martyr in Islam. So they really wanted it.

And you believed in that for a while?

At that very point, I was so frustrated. That was the day I really hated Americans, that day when we were bombed.

In terms of the religious training that you got in Al Qaeda camps or around your father, how [did] they regard non-believers and the duty to fight and jihad?

In Islam, there is a saying by the prophet that there will always be a group of Muslims, very little, but these are going to be the group of Allah. These group are always going to fight for Islam. There's always going to be this group. They're going to be very little, very disgraced by people, everybody [will] try to kill them. But if you are with this group, this is the group that will go straight to [paradise]. This is the right group, if you're around that time, try to get to that group.

So they believed they were that group of people. They believed that they're on the right way, what they're doing is right and any Muslim in his right mind should get into this group.

And you believed that at some point?

Yes. Some days, I just believed that, you know, this is the right path and I'm with the right

people and I should really do this.

But you know, at no point did I believe in suicide bombing. Two or three times, I'm not sure, but two times, I'm sure now, my father himself tried to get me to become a suicide bomber. He sat me down with the Al Qaeda scholar, he sat me down with the person to train people to become suicide bombers. He sat me down with these two people and tried to convince me to become a suicide bomber. He's like, you know, you'd be our pride in this family, you'd be our pride if you do this. But I was totally against it. I was like, I believe in fighting, you know, someone on the ground and he shoots me and I shoot him. But I don't believe in blowing myself up, killing innocent people. I don't. I just don't believe in that. ...

How do you look back at your father doing that to you?

Well, I just see that he really believed in it. And he wanted me to believe in it too.

Did your father ever tell you, if you threaten this family or if you threaten this organization, you'll have to die?

My father always considered me the cancer in their body, and that's why he kicked me out of the house more than once. He said "you are like the cancer in this house. And I have to cut you out right now or you're going to infect the rest of the family." He always referred to me like this. This is what I told the people I worked with in the CIA too. He always referred to me as like cancer in a body. That "you are the one that smokes, drinks, wants to, you know, work his own mind and you're going to make your brothers like this. So I don't want to keep you because I want your brothers to be good Muslims and all." ...

[What was your reaction when you found out about the African embassy bombings?]

We found out the same day, right when it happened. I was in the guesthouse and people started talking, you know, there was two bombings. And like in four or five hours, there's a video. Someone ... puts it on the big TV in the guesthouse so everybody can watch it. So we found out right away.

What was your reaction?

I thought it was horrible. ... Those Africans or whatever they were, they weren't even Muslims. They were innocent people. I didn't think they had any right to kill all those people.

So most everybody else was celebrating?

Yeah, everybody was celebrating. It's a hit to America even if another thousand people, innocent people, got killed. It's just "we hit America, that's it. That's all that matters." ...

We were sitting in a guesthouse and the leader of the guesthouse went outside and brought juice for like everybody. Jugs and jugs of juice, just giving it out. Celebrate, everybody. And people were even making jokes that we should do this more often. You know, we'd get free juice. ...

Would you argue about [Al Qaeda attacks] with your father?

Oh yeah, I argued about it, about this and about Sept. 11. We talked about it a lot. So when I saw the video [of the Sept. 11 attacks], I was like looking at it and all and everybody was smiling, laughing. I was just looking at it, you know.

I saw this person jumping out of the building, you know, committing suicide, from the building because of what he's going through. And I didn't think it was funny, you know. I didn't think it was smart. I was like more thinking about it, what was going through that person's mind when he did it, you know?

And so my father was like, "what's your problem?" I said "I don't know, this was not right, you know. I don't think this was right and this going to cause a lot of trouble." He's like "well, you know, we hit America." I was like "well, you hit so much people that were in that building that didn't have anything to do." "Well they pay taxes and taxes get guns and the guns kill Muslims. We're hitting the American economy and there is collateral damage." I just didn't understand it. They explained it in 100 ways. I couldn't understand it. ...

WORKING FOR THE CIA

[Tell us about your first contact with the CIA.]

The first contact with the CIA ... it was the meeting where, you know, they started asking me questions. They told me that we know you've been talking to the British and you were very cooperative. And can you help us in this place, can you help us in that? I said well I've already told this to the British. I'll help you anyway. I just want to get out. ...

What kind of information were you providing? What were you telling them about? ...

When I was in the safe house, there was this tour. They called it Abdurahman tour. It was famous for that. I took like the people from the CIA, the FBI, the military. We'd go around in a car in Kabul and show them the houses of Al Qaeda people, the guesthouses, the safe houses, where houses were, you know. This was the guesthouse they used before, this was the guesthouse they used later. This is the safe house they used after Sept. 11, you know. Just show them the houses. So there was that tour. And otherwise, I just told them what I knew. ...

[Tell me about the agreement you signed with the CIA.]

This was in July. I remember because it was July 4, right around that time. They brought me a paper, they had me sign it. ... They said $5,000 bonus for you being very cooperative, and from now on just by, you know, working with us, just answering our questions, you get paid $3,000 a month, until you stop working for us. The paper said I would get paid until someone found out about this. Now the account was under my name. It was a CIA account somewhere. I don't know where. But the money went to my account. And whenever I want my money I can ask for it.

Did you tell them where you thought your father might be hiding?

They asked me where do you think he is. I know last time I know where he was, he was in Logar. After that I don't know where he is. The stuff that I didn't know I just told them straight in the face that I don't know.

They must have been particularly interested in Osama bin Laden. What did they ask you about him?

Well they asked me about his personal life because I don't know a lot about his professional life. I told them that he was in my sister's wedding when we were in Jalalabad in the compound. We lived in the same compound. ...

But all I know, all I know about him is him, you know, socially. I don't know anything about his work and that's all I told them. I know he plays volleyball. He plays soccer. The people around him are devoted to him. I don't know why, but they're just so devoted to him that they will not take any, you know, any doubts in him or anything.

You said he even played volleyball?

Yeah he played soccer and volleyball all the time. He was a server in the volleyball. ...

Okay, so to go back over something: From your point of view, what was your deal with the CIA?

The CIA wanted me to work for them. They found me very good with people, very good with languages, with cultures. I can fit in anywhere in a very fast time. I can find people to become friends with. ... So they found that I was a good person to work for them.

So from your point of view, what was the deal? They would pay you every month?

They would pay me monthly. The money would go to my account until I stopped working for them, and then that account, I could go and take my money out of the account, or they can send it to me in Canada, or something like that. So I didn't have any control over the account. I didn't know where the account was. That was one of the things I always brought up when they mentioned money. I said I don't know if I have a penny. You're saying I have that much and I'm counting the money I have in your account, but I don't know if I have a penny. Because it's not in my hand. I don't know anything about it.

But they said you would give up the money if?

The money would be gone if I told anyone. It just goes. It disappears if I tell anyone. ...

GUANTANAMO

Now when this idea came up of you going to Guantanamo, what did they tell

you your mission would be in Guantanamo?

Well, it would be to spend time with people, you know, put [me] next to people that are not talking. Tell us about them, talk to them, find what they know and tell us what they know, you know. So just find information from people. ...

[Tell us about your trip to Guantanamo.]

One day they brought me, they tied me up, they covered my face and everything. Locked my hands, my legs, my face, covered it up, put me in a car and we drove and drove and drove and they told me you're in Bagram now and they opened the door, they got me out of the car and they just dropped me on the ground.

Two other people came and got me by the hands and took me inside and that's where they took off my cover and stuff and they took off my clothes and everything. And they started taking pictures of me. Pictures, of my face and then pictures of my private parts, like my back, you know, my penis, you know, taking pictures of every part of my body.

Then they took me inside. They got me an orange suit. They put me in the orange suit and then they took me into a room and they put me on the ground. Again, hands, legs, everything cuffed and my face covered. My ears and everything covered. They put me on the ground and I was kept on the ground, on the concrete with nothing but that orange suit for 24 hours. I was not even allowed to move. If I moved, there was a ... MP outside and he would, like, scream at you and then he could give you punishment.

Twenty-four hours passed. They took me downstairs to general populations. General populations is like a camp inside this metal factory or something. There's a camp and every small compartment or whatever, there's 12 people. Twelve to 18 people. Now, nobody was allowed to talk. Nobody was allowed to share food. Nobody was allowed to communicate in any way. Everybody was on his own. You were in a place with other people but you were not allowed to talk to them, to touch them, to, you know, in any way communicate with them. ...

I stayed in Bagram for 10 days and then they took us, they showered us, they put us in new orange suits. The cuffed us up -- hands, legs -- to the stomach and they put us in a room. They had us sit cross-legged on our ass for eight to nine hours. And you could not move. You could not move your back, so you couldn't bend or straight. There's one position, you stay in it. If you move they hit you or they push you. So they tell you not to move.

After that, they put us in a truck for an hour or two -- the same position -- and they took us out of that to the plane. They tied us up in the plane, cuffed us up and everything in the plane. And we were sitting in our chairs for almost 15 or more hours and then they landed us in Cuba. Another two hours in the truck and then another two hours in the sun and then they took us inside into a clinic and they took off our orange suits, got us new orange suits, washed it, or washed us up and then they started taking our names, got us hand numbers and stuff. Then they put us into isolation.

In Cuba we were kept in isolation for a month. Anybody that comes new stays in isolation for a month. We had to scream to talk to the person next to you. And after a month they put me in the normal general population. Of course, no one, when I was in Bagram, some of the people in the military intelligence stopped me and they told me, you know what, you're going to be sent on a plane and stuff. So they kept in contact with the people from Kabul.

But after 10 days [in Bagram] -- I mean, what must have been going through

your mind at that point in time?

The worst part of these 10 days is the flight. Since they took us out from our rooms, washed us up and put us on the ground. There was points, you know, I just ... in my heart I wished to God that one of these MPs would go crazy and then shoot me. Just get up and shoot me. I was so depressed. I was so sick of anything. You lose hope sometimes of everything, you know. You go to Allah, you just try everything around you and then you lose hope of everything. ... I just wished for a bullet. ... I was like, please God, do something but just take away my life, you know. It was a horrible experience. ...

Did they warn you it was going to be a bit harsh?

They never told me it would be as harsh as it became. The day I was in Cuba, they told me, "You're going to be picked up by some people and then checked out." and stuff. But they never told me you're going to be on concrete for 24 hours and if something went wrong, you're going to be on concrete again for 48 hours. They never told me any of that.

How did they explain that bad treatment that you received?

Well, they wanted me to look like any other detainee. First, so when I get out, I can tell people that yeah, I've been treated like this and that. So the people around you in the cellblocks in Cuba, when they ask you about how was the flight, you know, you say well, oh the flight was bad. I hate the Americans. Look at them, they're treating us like shit. They say there're human rights but they don't have any of that. Just to, you know, put an expression in my heart that you know I have hate for Americans like you do. Tell me what are you, tell me this, tell me that. So you know, you can make them talk to you, give you information. ...

When we got to Cuba, after two hours they took us into the clinic. They wrote us up and did all the handprints, pictures, everything and then they took us to isolation. They took us into isolation for a month.

The month went by and then they took us out to general population. In general population we were kept with the other people in cellblocks. So you could see the person next to you, you could touch him but you could, like, only touch his finger or something because of these cages.

For three months I was in general population. Their hopes was when they take me to Cuba they could put me next to anyone that was stubborn and that wouldn't talk and, you know, I would talk him into it. Well, it's not that easy, first thing, because lots of people won't talk to anyone because everybody in Cuba is scared of the person next to him.

And I was feeling depressed. At one point I just started hitting the wall of the cage and tried to hang myself. I wasn't going to hang myself, but I just threatened to do it. I just was thinking, you know, I did everything to get out of this mess and this is what I get. You know, I did everything that I could to get out of this mess and this is what I get. And it took me, when I banged my head against the wall, they took me, they cuffed me up and they took me into the insane people's block. Then they brought me back to general population. After three months of being in general population, I just couldn't take it any more. I said you know what, you have to move me out of here now. I cannot stay in these blocks any more.

They moved me into another area of Guantanamo. Normal rooms split to half. Half of it is a bedroom and a bathroom and then in other half is a living room and a kitchen and TV. And they moved me into this room. I was kept in this room for five months. During the period they had psychiatrists come to see me, doctors, other, a lot of people from the CIA. After five months, they

said, "you know what, we're going to move you out of here." ...

What's your impression of Guantanamo? Do a lot of people belong there? What's your impression of the inmates?

They asked me always this question. I told them in 100 percent there is 80 percent of people that went to Afghanistan, like people that can't do anything. They've had enough. If you put them back in their countries they won't do anything. That's in 80 percent.

Among those 80 percent there is almost 60 in those 80, 60 that are people that haven't done anything. People that worked in a project in Pakistan, an old man that his son brought him, you know, just to sell him for $5,000. Drug dealers, people that didn't have anything to do with Al Qaeda were put there for no reason but because someone brought them there or someone thought of getting thousands for them, whoever captured them that they were Al Qaeda.

The rest, the 20 percent from the whole 100 percent, there's 10 percent of them that should be kept there and 10 percent of them if they go out and they catch up with Al Qaeda again they might go back to being Al Qaeda. But there's only like 10 percent of the people that are really dangerous, that should be there and the rest are people that don't have anything to do with it, don't even, don't even understand what they're doing here.

Just explain the bounty hunting, how people ended up there. That they paid a bounty.

At the very beginning, after Americans took over Afghanistan, they needed to show the American public that you know, we have got people. So there was normal Afghans would catch normal Arabs, normal small Arabs and go to the American base and tell them, you know what, we have a big commander. The American would say yes okay and they would just buy him.

If the Americans were paying large bounties, a large amount of money they would have ended up with a lot of innocent people there, don't you think?

Yes, a lot of innocent people. I told you the one story, I remember two, actually. One is the father that was brought by his own son. The son gave him a gun and took him up to an American base up there and took $5,000 for him. That's one story.

The second story is a drug user, a person that was sitting next to me, not worried about being in jail, not worried about what's going to happen to his family, not worried about what he's going to get. All he's worried about every time he asks the MPs to come around, asking them for a smoke, asking them for some hashish for you know, for marijuana, something like that, you know. Not even, he doesn't even know what he's doing here. Truly a drug addict, not Al Qaeda at all. ...

BOSNIA

The plan to move you from Guantanamo to Bosnia, how did that come out? How did you find out about it and what did they tell you about it?

Well it started with, "where are we going to take him? Are we going to take him to the States, and then we'll give him the training there and then we take him to Bosnia?"

Anyway, there was so much talk. They decided "well, we're just going to take him to Bosnia. We'll take him to Bosnia and get him in the pipeline there. There's lots of Arabs in the Bosnia from the war that was in Bosnia. And those Arabs must know something about what's going on, where the pipeline is from Europe. We want him to meet some Arabs there and tell them his story, tell them who his father is and from there, go to Iraq." So it just came like this, you know, and one week before it, they told me I'm going to go to Bosnia and then, you know, the thing happened.

You found out just a week before?

Yeah. There was a long two-month period of planning -- where should I go, to the States, to this, to that, and then, you know, in one week, they told me you're going to Bosnia and in one week, we left.

What can you tell me about the CIA training course? ...

They had [a] trainer, which is a very senior trainer, I found out from the CIA, come down to Cuba and he was with me for a week, I think, a week or two. Anyway, we started training with the normal things, mostly how to like do a dead drop. Or where you go and you check out a restaurant or a location to meet someone if you're like an agent, to meet your officer or if your officer wants to check out a place to meet an agent, so how you'd go. You go inside, you check the tables, you check the streets outside, you check, you know, the exits, the bathrooms, the location. The table exactly where you're going to sit. The weather it's going to be that time when you go to meet this person. Then the cultures of that area, people, do they shake hands, do they talk, are they nice, are they rude, do they like jokes? So to find out everything about this place you're going to. And you go meet one time and then you just, you know, you drop that place and go to the next place.

You did it every day for a week or 10 days?

For a week or 10 days, yes. He'd come in the morning and then we'd stay until afternoon and then he'd give me homework or assignments. ...

[Tell me] the details of the plane trip [to Bosnia.] How did this come about?

They came and they told me, well we'll be leaving soon, you know, in a week or something. They bought me clothes, they bought me everything. And then the day we were leaving, they told me the night that you'll be leaving tomorrow morning. Took my stuff, put it in the car and they covered my face and all. We left with the cars. We drove for almost 15 to 20 minutes. We got out of the car. There was a speedboat. We got in there. They told me we'd take a little tour because the plane is going to be a little late. So we went on this tour, an island, you know, I saw you know the spots and it was a really nice place.

So this kind of a harbor tour in Guantanamo?

Yeah. Around. They took me around. We did even some fishing, you know. Anyways, after the one-and-a-half-hour, two-hour tour in the speedboat, they took me to another place where we stopped, got out of the boat. We got into a car. Now they didn't cover my face anymore. Got to

the guard. Drove off for like 5, 10 minutes and then stopped in the car. And we stayed in the car and we waited for the plane. We waited for almost half an hour. Kept on getting calls that he was going to be late and was coming, and then it landed. It was a private jet. ...

How many people were on board?

On board were four security people, was the higher-up, the person, the CIA one, and there was an officer. And the pilots, two pilots I think, or three pilots.

What did they tell you was your mission in Bosnia?

In Bosnia, they said just go to a mosque. They told me about this one mosque in Bosnia which is very famous for Arabs going there. It's a big mosque, [the King] Fahd Mosque, built by the Saudis. They said to go there. It was still Ramadan, so they said go in the mosque, meet some people, find someone and get contact.

So I did go to the mosque every now and then. I went to it like every two days or something, sit in the mosque until I found someone. I started talking to him, became friends. He was really, like really out, you know, outgoing and talk to me. He's really talking and all. I took his name and all and gave it to them and they said well this is a very good contact. They were very happy that I made this contact. They told me just to stay in touch with him and go slowly on him and then in due time, a week or two, tell him that you want to go to Iraq, you know, that you change your mind about going back to Canada, you want to go to Iraq. And that's when it all broke down and everything went wrong.

Did they give you money?

They gave me money every now and then, yes. When I was in Bosnia, they rented me a house. They bought me a cell phone. The first day I got to Sarajevo, we went around shopping and we got some stuff for me, you know. And they gave me money every now and then, cash, to just you know buy stuff, if you need money, just for expenses.

When you went shopping, what did you buy?

When we went shopping... they had two people from the Bosnian intelligence worked for them with me, you know. So he was going around with me, so I bought a suit, I bought belts, you know, I bought everything. I bought a Walkman, I bought a cell phone, you know. I just bought anything I wanted to. And so we bought some, you know, some clothes and shoes and stuff.

... How did the deal come apart?

Well this was right after I met this Arab person at the mosque and I told them about it, and they were really happy and they gave me money. And they told me, "you know what, you know, you can go enjoy yourself and stuff. You've been good, and don't waste it. Don't show anyone that you're celebrating but just go enjoy yourself and stuff, you know, and just stay in touch with this person."

I took the money and I went and I sat down and I was thinking about it and I just thought, you know what, I can't take this anymore. I don't want to go on living like this. I want a home. I want

a family, you know. At points, I was in apartment in Bosnia, at points, for five or six days, I was alone. There was nothing, there was no one to talk to, there was no one to sit with. So I was alone and I just don't want this living. I just, I'm not a person that can live like this, you know. You know, and I thought you know what, I can't do this anymore. So I went [and] I called my grandmother.

If Al Qaeda people in Bosnia found out about you, what do you think would have happened?

They would have shot me.

No question in your mind.

No question in my mind. ...

Was this not at the back of your mind?

It was always in the back of my mind and that's what I always told the CIA. "You know what, you're paying me money and you think it's a lot, but you know there is that risk that I'll get shot. You know, so don't think you're doing me a big favor by giving me that money. I'm doing you a big favor by working for you. Because if I have a million dollar and I'm dead, I can't use those million dollars." ...

RETURN TO CANADA

In Bosnia you made this call to your grandmother. What happened?

When I met [the CIA] I told them I talked to my grandmother last night and she told me that she was going to talk and she was going to say everything. So they said let's see what happens.

So in the morning the news started coming out and we met again the next night. So he told me yeah, it's out in the *Washington Post* and in this and that. You need to move out of the house, the apartment you're living in. We're going to move you out today. They moved me out of there. They had two people stay with me until we moved all the stuff in the car and then we moved into a house. They were waiting to find a house we could stay in, a safe house. They found a safe house and I stayed in that house for two days and two nights until Saturday morning when I went out, when I went out to the embassy.

Why are you telling the story now?

Why am I telling the story right now? Because I do not want to keep this in my heart anymore. I cannot keep it in my heart anymore. I've got to tell people. I lied to them in the beginning and I want this to go out and I want the people to learn that I lied for a reason and I'm sorry to have lied [to] them and I want to tell them the real story, what really happened. ...

That is all the truth there is to it. I couldn't make up a story so complicated and so complex like this and I wouldn't need to anyways. And I wouldn't need to go on TV and say, you know. But this is the real story of what happened to me from Sept. 11 until now. And now you know. I want

Canada to know, I want my family to know, I want everybody to know because I just want to let go now since I told this story.

Since I said this story I know there's going to be people after me. My family is going to hate me, you know, my relatives. Why do you think I would do all of this if it was just a lie? Now would I just make up a story like this so I can have another, you know, 10 or 20 people from Al Qaeda being me? I'm not making up the story. It's the truth.

What are the consequences of you telling this story?

First of all my grandmother and my grandfather, where I stay right now, they're going to kick me out of the house. They will never admit what our family has gone through, what our family was and what we are. They will never admit it, first. My family in Pakistan they will never admit this at all. Why? Because they're totally, you know, they are what they are and they deny it. They will never admit this.

Here in Canada, lots of people are going to still be thinking, you know, this person is still lying. I don't want them to believe me, you know. It's just up to them. I'm telling you my story and that's all I can do. You know, I can only tell you what happened to me, the true story of my life. And after that it depends on you. I cannot prove any of what I said except I can give you really detailed story, but I cannot prove it.

What do you think would be the reaction to your story in the Toronto Muslim community and the Canadian Muslim community?

Well, to the Canadians I will just say this: The Muslim community here in Toronto, there is a lot of people that are happy that I'm back, you know, just as a Muslim. And there is people that will not understand and will totally deny me, hate me for telling the truth. Well, I will just tell you this, that I said the truth and I'm saying it right now because I never believed in what Al Qaeda did. I believe Islam is a very peaceful religion and that's why I started working for them anyways in the very beginning, because I think Islam is very peaceful. I think Islam doesn't call [for] the killing of innocent people. Islam is very peaceful. I think we can have a respected Islamic nation or state that believes in its religion, believes in its culture and believes in being peaceful, loving your neighbor, doing what you have to do, but in the same time not hurting the people around you.

What was your reaction when you were first told that your father had been killed?

My reaction was, he's my father. There is now no change to that. So as my father I love him and I will always love him as my father but not as what he did. So when they told me he was dead, you know, I was sad because my father was dead, you know. My father had just been killed. I'm so sad that he was killed because he's my father and I don't have any other reaction to it, you know.

I mean through this two years I've seen so much. The day they told me -- it was CIA -- after I was released and the first time I got to Bosnia in the base they told me that your father was killed. We're going to show you some pictures, but they never had the chance to. But you know, I've gone through so much that when they told me about it there was no reaction, there was no emotion. I don't know why because I've seen so much people get killed in front of me in Afghanistan. People, you know, the place I went to, that cell room where I was in the prison where you had to sit and you couldn't move and anything. So I've been through so much with, you know, I reacted with lots of people that totally no emotions were left. ...

Is it possible that you gave them any information which ended up in your father being killed?

No.

Why do you say that?

I didn't know anything about my father for two years. I didn't talk to him. I didn't communicate with him at all, so how could I know anything about him or where he was staying? ...

How do you feel about the CIA agents that you dealt with? How do you look at them now?

I could tell you one thing, they did their job and they would do anything for their job. They didn't care about the person that was in front of them. If it was me or anybody, you know, this is something they admitted, that there is a million other people like you out there. With the same money we can buy, you know, we can get anything, Canadian, we can get Arabs, we can get all kinds of people. We need you because you know, you're special in your own way but we can find someone else. ...

Your mother and your sister, how do you think they will react to your story?

They will totally deny it. They will totally deny it. They will totally be against it. They will dread me. My mother especially, she will dread me for doing this. She will totally dread me for doing this.

What will she say?

She'll say, "You left us. You sold out on your father. You sold out on your people. You know, you told a story, you know, you worked with the CIA, you did this and you did that."

"How could you do such a thing?"

"How could you do such a thing?" And I mean for, you know, for my mother or for my family, you know, I don't care for a million because if I lose my family, a million dollars, a billion dollars, it's nothing. So just to tell those people out there that doubt me that I'm just doing this because it's the truth, not for money or not for anything else. ...

What's going to happen to you now? Are you going to settle down?

I'm going to try to get back to my life, and that's what I'm trying to do right now. Again, there's the issue of my past is still hung on my back, so there's going to be a lot of, you know, pressure on me. And since you know, after this, there's going to be double that pressure on me because I still live with family. My family, as much as they do, they will always be my family. So when they find out that I've done all of this, that my thoughts are so different from theirs, you know, they're always going to be my mother and they're always going to be my grandfather and my sister

and whoever. But this will change their mentality of me. They might deny me at all, get me out of the family. They might kick me out of the house, you know.

But I am willing to do this because -- you know, I'm one person, right? I'm one person here in Canada. But I want to show people that I'm a person that lived all my life as Ahmed Said Khadr's son. A person that was raised to become an Al Qaeda, was raised to become a suicide bomber, was raised to become a bad person, and I decided on my own that I do not want to be that. I do not want to be a Muslim that's so loose, that so want to be Western. I want to be a good, strong, civilized, peaceful Muslim. And that means I can study, that means I can work with people next to me, whatever those people are -- black, white, Christian or Jew, whatever they are, just live peacefully with them and practice my religion.

How do you feel about your brother now? Apparently he got a bullet in the spine and is paralyzed.

Again, another part of our family story. One brother was put away, which is me. One other brother was in a house and that house was bombed and he was almost killed. Another brother was shot in the spine. To my father and to my mother, this is the ultimate in being an Islamic family because to them, dying all of us in the war against America, you know, is just being the top family because we all died in a way, you know, in fighting against American you know. Can you ask for more than that?

The death of martyrs.

Yeah, you know. To me, it's just the story of a Canadian family that was normal and that, you know, somewhere, something gone wrong and then the family, the father gone, the kids gone and the whole family put through all this misery for no reason because you didn't do anything.

Editor's Note: FRONTLINE asked the CIA to confirm or deny Abdurahman Khadr's story but the agency declined to comment. However, Abdurahman did submit to a polygraph examination at FRONTLINE's request, in which he was asked about his work for U.S. intelligence, being paid for it and being flown on a small jet to Bosnia for his mission there. On all major aspects of his story, Abdurahman passed the polygraph.

Abdurahman's mother and brother Karim returned to Canada in April 2004 to seek medical attention for Karim, who was paralyzed in the attack that killed his father. The family has now begun to reconcile.

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Maha, *left* and Zaynab, *right*.

INTERVIEW MAHA ELSAMNAH & ZAYNAB KHADR

A Canadian of Palestinian descent, Maha Elsamnah is the wife of Ahmed Said Khadr and the mother of Abdurahman Khadr. Zaynab Khadr is her daughter. In this interview, the two discuss the allegations against their family members. They deny that the family was ever officially a part of Al Qaeda but admit they are sympathetic to the organization. They also say they are proud that Ahmed Said Khadr died as a martyr for Islam and express their frustration with U.S. involvement in the Middle East. In April 2004, Maha returned to Canada to seek medical treatment for her youngest son Abdul Karim, who was paralyzed in the attack that killed his father. Zaynab still lives in Pakistan. This interview was conducted on Feb. 22, 2004.

"For the Americans we're Al Qaeda, for the Al Qaeda we're Canadians."
Zaynab Khadr

So if we could start, Maha with you, when was the last time you saw your husband and Karim? Were they together?

MAHA: Yes. Actually, I asked them to leave the house because they were making so much -- I don't want to remember because it was a sad day. I'm a very hyper person. I like things to be done as fast as possible, and they're very slow getting ready, and I can't do my work because they're all over the place

ZAYNAB: They were going shopping and I was going out with them. I don't know who was doing what, and my mother said, "Get out, go," and we said, "Mom wait." She's like, "No, go finish your work. Go, let me finish my work." We're like, "Mom, you're kicking us out," and she's like, "Yes, I'm kicking you out, now go."

MAHA: And that was it.

ZAYNAB: So we all went.

MAHA: Zaynab came the next day, and her father and Karim went somewhere else and I never [saw] them again.

That must weigh on your heart.

MAHA: Yes.

Why were you not in the same place [where your husband was killed]?

MAHA: ... We did not live in the same place, but he used to come and visit us where we are staying. But that day he left because he had a lunch function or something and he need to do shopping to prepare for the lunch. That's why he left the house at that time. Actually he just stayed one night with us, the night before--

ZAYNAB: He usually comes for one night or so.

MAHA: For one night and that's it.

Then you heard about the military attack?

MAHA: No that was in September when I saw him last time. And when I heard about the military attack, it was Oct. 6 or 7.

ZAYNAB: It was almost a week later. For a week we didn't know where he was.

MAHA: No two weeks.

ZAYNAB: More about two weeks later. For a week we didn't know where he was and then we got this letter asking for these things.

MAHA: Food and clothes.

And what did you hear?

ZAYNAB: First we got the letter asking for some clothes and some homemade food. And by the time we got them ready, it took about two, three days, and then we gave them to whoever was going to take them back to him.

And by the time they were going, the guy came back and said you know we can't get them through because all the roads are blocked. Something is happening in that area, but we don't know what's happening and it seems that there's a lot of military movement and we're just hoping for the best.

And then you heard that there had been a military attack?

ZAYNAB: Yeah on Oct. 2 we were hearing -- my mom, usually she listens to the radio--

MAHA: And I read the newspaper.

ZAYNAB: So she says, "There is something happening, there's something happening." And I said, "Mom it's OK, don't worry, it will eventually go, it's just propaganda." And eventually somebody, they said it's really serious what's happening. I said, "Well it's serious as serious as it can get. Nothing's going to happen unless it's meant to happen, so just relax and take it easy." Then they came and said you know, most probably your dad and brother have been killed.

What was your reaction to that? It was meant to be?

MAHA: You see I'm a very, very proud person and I stand for my right. ... So when they told me

he was killed, you know it meant -- we believe that death come when God had planned it. Before he created the humanity, it's planned, so I just accept. It hurts.

ZAYNAB: And we believe the dying by the hand of your enemy because you believe in--

MAHA: Defending your right.

ZAYNAB: You're doing it in the way of God, of Allah. It's the best way to die. And my father had always wished that he would be killed ... for the sake of Allah. I remember when we were very young he would say, "If you guys love me, pray for me that I get jihaded," which is being killed.

Become a martyr.

ZAYNAB: Yes, become a martyr. And we were really young and we would always say to him, people would say, you know, "What you're talking about, your dad would be killed," and we would say, "It's OK, he will become a martyr, and then he will--"

MAHA: Be in heaven.

ZAYNAB: And then on the day of judgement he can ask God to let us all go to heaven as well, so it's worth it. And that's what he always wished for.

MAHA: It hurts, it hurts very much because--

ZAYNAB: You know you're going to miss him but you're proud.

MAHA: Very much.

ZAYNAB: You're really glad he got what--

MAHA: He wanted.

ZAYNAB: -- he always wanted. He'd gotten really tired. He was not an old man.

MAHA: Physically and mentality tired he was at the very end.

ZAYNAB: He was just tired. ... And he always used to say, "Kids ... I'm very tired, and I think it's time for me to go. I'm very tired of this world and I think it's time for me to go." So when we heard he was killed, it was just like he can relax now.

MAHA: It's for us to complete the travel.

[When was] the next time you heard about Karim?

ZAYNAB: We heard about him on the news that, well it was just all this contradiction news -- that he'd been killed or he was alive. Some said my dad was killed, and some said my dad was alive, and some said my dad had escaped or that he was a prisoner. Some of the people said no your brother is alive, and he's being treated. ... Then that was it until the Canadians called me and said you know we saw your brother yesterday and he's in the hospital in Pindi.

And what did that mean to you?

ZAYNAB: It meant not just that he was alive, it wasn't just a word, it was someone has really

seen him. And when I saw the picture, I was like, yes, this is my brother.

MAHA: We were very happy to see him alive. But again it's the agony of having someone alive, but he is not in your custody, you cannot see him, you cannot reach him. It's very frightening.

What did the Canadian embassy tell you about his medical condition?

ZAYNAB: All they said is that he's got spinal injury and that he can't move his legs. He doesn't have feelings in his lower half. ...

Did he describe the battle to you, the attack?

ZAYNAB: He said my dad told him to go out and see if everything was in place. And he said, "I just went out and I was walking with my friend," and there were four other men around with them. And one of the men just shouted that, "Get down, get down."

He said, "There was a small valley beside us and me and my friend just went down in the valley and the guy and his three men just kept walking." And then he said that the army or whoever it is threw a hand grenade, and the four of them were killed and he was shot in his back. He said, "I was shot and I fell," and his friend got shot in his shoulder and his friend is 16.

He said for the next three hours [they] were just lying there. That's his word, "It was really sunny and we were bleeding, and we kept calling them and asking them to come and take us, but nobody would come near." And then he said, "We eventually told them to just throw some water at least." He said they threw a bottle and it went really far, and his friend who was better, crawled and got the water. Then he said that until three hours [they] were just lying there, and then they eventually told [them] take off your shirts and throw them. So he did and then they came and picked [them] up. He was transferred ... here by a helicopter.

Were they expecting an attack? Did they have any kind of warning?

ZAYNAB: No they weren't, because I told him, so this guy sort of, whichever the guy that shouted get down and save your life, and he said, "Actually he saved my life, and actually, I never knew there was an army until he shouted 'Get down.'" So no, they weren't expecting an attack. Because I [asked] him, "Did you have a weapon with you?" and he said, "I didn't have a weapon. I didn't know there was anything. I left my weapon with my dad."

So he was not carrying a weapon?

ZAYNAB: None whatsoever.

Did he describe to you the last words he had with his father?

ZAYNAB: I didn't ask him about that. He just said that my dad told me to go out and see if everything was in place.

So we don't know if they were expecting an attack. Do you know if there were

women and children there as well or were there just men?

ZAYNAB: Actually, I wouldn't describe my brother as a man, nor his 16-year-old friend nor his 14-year-old friend, or his 11-year-old friend.

So what was the youngest person there?

ZAYNAB: He was 11.

So that was the youngest.

ZAYNAB: Yeah the youngest was 11, and then there was this 13, and my brother was 14 and there was a 16, and their fathers and a couple of other men. I mean it wasn't that they were preparing for anything, it doesn't seem like that. They were just there having a good time.

They were there having a good time?

ZAYNAB: Yeah, it's just a house on the mountain and they were just--

MAHA: Living there.

There was a reason they separated themselves from you, presumably.

ZAYNAB: They moved a lot, because it was not secure to stay in one place for a very long time. So they moved a lot, not for any particular reason, like they were expecting something.

MAHA: And the locals usually ask us to change our addresses because they don't want to take too much responsibility.

Maha, could you tell me where was Abdullah through all this? Was he with them?

MAHA: To be honest with you, in that environment in the mountain, you don't get to know too much. And frankly I'm not the type to question so much "what are you doing, where are you going?" You know all these details, I feel is none of my business , or it's information that will be any useful for me.

So to be honest with you, I did not know. Until now, I keep saying it's God's planning that Karim was with his father in that house, because Abdullah is more grown up and he's more mature and he can protect himself better.

So to your understanding was he living with them at that time?

MAHA: I don't know.

The last time you saw them were they together?

ZAYNAB: The last day we were at home, yes, we were all there. Abdullah drove us and he got me back. You know he'd drive back and forth, it wasn't that far away a place. They were three or four hours away from the village we were in, so you can drive. Abdullah was mainly, he does lots of driving actually, since it's a rural area, broken roads and it takes a very long time to get from place to place. So he mainly, I don't now if he was there or if he knew exactly where my father was, but I know that he goes back and forth.

Did he hear of the attack as well?

MAHA: He must have. You know I think he did because he knew his father was killed.

How is Abdullah? Maha, have you spoken to him? What is his situation?

MAHA: We received letters coming very, very short. "I'm fine, how are you doing," that's it. He needs something, he asks us to get a shoe or a jacket or anything like this, and we send it with some of the locals. I think he just lives. He doesn't like exactly the way it's happening, this way, but I don't know.

I'm interested in Abdullah's case as well. Has he done anything that will cause him to be prosecuted? Is there any reason that he cannot go back to Canada, for example? Does he want to go back to Canada?

MAHA: Just he's the son of Mr. Khadr.

But that's enough.

ZAYNAB: It's in the newspaper that he's--

MAHA: Running a training camp or he's a second hand of Mr. Osama.

ZAYNAB: No, no. That's my father.

MAHA: My husband never was associated with -- I mean Osama was living in an area where we were working in Jalalabad, or in Kandahar when we were doing some project. We would meet sometime in social gathering and Eid, prayer, weddings, or whatever, but we were never Al Qaeda. Although we respect their cause, we respect whatever, we have our kind of work, our programs. We will associate sometime, but we were never [Al Qaeda]. My husband is already paying, and all my family is.

ZAYNAB: Abdullah in the newspapers is a trainer at Al Qaeda training camp. He was never a trainer.

MAHA: Ahmed, when he was injured, he was with some people who were doing something, but they were not Al Qaeda.

Did your children go to the bin Laden training camps?

MAHA: The big boys did, Abdurahman.

ZAYNAB: There is no such thing as the bin Laden training camps, they're just training camps where anybody can go.

MAHA: Anybody from outside.

ZAYNAB: And they don't belong to bin Laden, and they don't belong to Al Qaeda.

Who do they belong to?

ZAYNAB: You don't have to be from Al Qaeda to be a trainer in the training camp. They just want a trainer for whatever, who's good at it. ... And so it would be a training camp with some trainers who know what they're doing. Anybody can attend these training camps. And it's not exactly just for weaponry.

MAHA: Maybe people in charge must become, I think the people in charge must be--

ZAYNAB: Ma, not always. I don't think it's always, because sometimes if they can't afford it, different groups can help each other financially or if they have expertise. So it doesn't really belong to anybody. You don't have a training camp for Al Qaeda and a training camp for Al Jihad and a training camp for Gama'a al-Islamiyya. You just have a training camp in Logar, a training camp in Jalalabad, a training camp in Khost sometimes. So it's just a training camp and you never know, does this belong to this? It's just a training camp. It's more like being in a military school.

MAHA: With Abdurahman, it was mainly to teach him discipline and to keep him off the road. He was always kicked out, maybe he told you that. Nobody ever accepted because he never listened and he never followed the rules. He never wakes up on time, he never memorize his Quran.

For Abdullah, I think he was more disciplined, but Abdullah never get along with the guys there because he feels they underestimate him or they don't respect his opinion or they are too fanatic.

ZAYNAB: But he'd stay and finish whatever he was supposed to do and then he'd leave. But Abdurahman would just make a fight, and you'd just find him home next day. You'd just find him home next day. "I just had a fight, I'm not going back there again, no way you can ever get me back there again." And my father would get in the car and say, "Abdurahman, we're going back," and take him back. And in a couple of days, he'd be back. It was just back and forth all the time.

They tried to put him in school, he'd run away. They tried to put him in Karachi in a Quran school, and he came back on the bus.

MAHA: He tried to get him a job in Kabul again and he is never on time.

ZAYNAB: So these training camps are not just for you to use a weapon, it's more like it gives them discipline and teach them their religion and teach them how to do things the right way. And it's more like being in a common school. You have to just do everything very strict.

MAHA: And military training is part of it.

ZAYNAB: It's not everything. It's just part of it.

Abdurahman described it as an Al Qaeda-related camp.

MAHA: Maybe, because frankly they all had something with the guys from Al Qaeda, because they always think that they are superior to everybody else.

ZAYNAB: And maybe most of the guys around him were from Al Qaeda, so he thought maybe it was an Al Qaeda camp. It just doesn't necessarily have to be an Al Qaeda, maybe it was. I told you it doesn't have stigma that says this is an Al Qaeda training camp. Maybe some of them were and some of them weren't. They're not all Al Qaeda training camps.

Zaynab, how would you describe your family's relations with Osama bin Laden?

ZAYNAB: My father knew him a long time ago, 20 years ago. As a family, I only knew them in 1997.

MAHA: When we were in Jalalabad.

ZAYNAB: Yeah, when we lived in Jalalabad, that was the first time, I remember that I met them. Actually, it's not that they're not social people. They're very social, but they have lots of restrictions, where they go, when they go, where they come, when they come, who visits to them and how long you can stay in their house and all that. So you can't really have an intimate relationship with them, and you can't be really going and coming because they have to watch many things.

So we've seen them sometimes. We'd be in an area where many people are living, so we'd visit as many people as we can, because we were never one of Al Qaeda, so we never lived in their compounds. We were never living around their compounds, so whenever we would go to that place it would be like we'd like to see as many people as we could. And we'd see them in--

MAHA: Social gatherings --

ZAYNAB: Yeah, weddings--

MAHA: Studying circles, mainly studying circles, and once in Eid, and once at a wedding.

ZAYNAB: Or sometimes people would make this bazaar, and sell these things, and sometimes you'd get to see them there.

When was the last time you think you saw them?

ZAYNAB: Maybe it was 2000, the end of 2000, because I was in Canada in February 2001, and I saw them a couple of months before that.

I think there was a report in Canada that Osama attended your wedding.

ZAYNAB: Yeah he did.

When would that have been?

Sept. 9, 1999.

Maha you described him, that Osama and your husband were old friends. Did

they know each other from the Afghanistan war?

MAHA: Yes, that's when they met, the Afghanistan war.

ZAYNAB: It's not like you were his friend, it's like my father was the kind that respected people for their points of views. Even if you and me are different, I accept your point of view. I can't change it even if I don't like it. I respect [it], and you respect mine, so even if he had his--

MAHA: They had their differences.

ZAYNAB: But he respected him as a person that is standing up for something he believes in and is willing to sacrifice for it, and who is doing a lot of good for people who are helping him, these people who are keeping him in their country and he is helping them doing many things. So he respected him as a person and as a leader of his group or whatever he believes in.

But we were never part of them. We were never except as a part of any group, so we were always outsiders which you can see the ironic part of that, were not from this side and were not from that side, nor these like us, nor these like us. Each of them is throwing us to the other side.

Did you support the Taliban?

MAHA: Government wise, no never. Actually we had some differences with them because they were so much anti-girls education and--

ZAYNAB: They were always stubborn.

MAHA: Very stubborn and very old. Ignorant, even in Islamic understanding they were very ignorant. But we thought we would do our part to help them, not to help the government. So you know we really have many, many negatives, but we never like to talk about the negatives, because it was not our interest to emphasize the negatives. It was our interest to help the needy in any which way we can. Even if we really have to fight with the Taliban to get our project and to keep it running, and to do whatever pleased them just to keep it running we would do it.

ZAYNAB: My father, he said, "Don't look for differences, look for things in common. If you don't agree with this person on something leave this person and see what you agree with this person on, and work on that." So whatever he had that he did not agree with the Taliban, he just tried to go around it to what they did agree upon, and just work on that and ignore the rest. This was the way he worked. Some people say you got along with him because you probably supported them, it wasn't true. It's because my dad had a way of just--

MAHA: And we had a hard time but--

ZAYNAB: Yeah, but if he wanted to do something, he'd get to it and drop mentioning the bad parts. He always like to see the best of a bad situation.

MAHA: You know, they kept saying oh they're against teaching girls, they're against this and they kept just emphasizing all the Taliban negatives, and they never done anything to help them with their -- OK, if you cannot help them in education, help them in housewife. They would allow you to bring any medical assistance, help them with the orphanage, help them in any kind of assistance they allow you to get close to them. ...

ZAYNAB: I mean sometimes people just didn't try to understand, I mean they are stubborn people, and I'm not telling you they are perfect, but I for one could understand sometimes why they had these restrictions for things, for girls. To them, they wanted girls to be educated Islamically. It's their right. It is their government, and they believe in emphasizing Islamic law, so

they wanted their girls to be educated Islamically. And since Afghanistan had be ruled by the Russians or the Soviets for the last 20 years, they didn't have many Islamic ladies to teach these girls, so they, for them it was better for these girls not to learn than to learn to be--

MAHA: Communist mentality.

ZAYNAB: Yeah. For her to be ignorant is better than for her to be communist.

Maha, when Osama bin Laden turned his attention away from the Russians and he declared war against the Americans, who he called the crusaders, and went to war against the crusaders and the Jews, what was your reaction to that?

MAHA: To be honest with you, for us it doesn't matter the name of our enemy. For me, I'm originally Palestinian, from Palestine. For me, Israel is an enemy, although I never had any contact because I was not even born in Palestine. But because of what I hear they are doing, it hurts me everyday, everyday seeing people being killed, or being arrested or their homes being demolished. So it hurts me.

So for him to change his [rhetoric] against America , it's because of what the Americans have done in the Gulf. They have really abused Muslims too much, I mean 50 years ago, still they were helping Israel. Israel is number one to receive assistance from the States. Nobody ever noticed that the Americans are assisting the Israeli people, but when the Americans declared war against the Muslims and they came to Saudi Arabia because you see we believe Saudi Arabia is the holy land that no non-Muslims should rule in it.

ZAYNAB: No non-Muslim is allowed to enter it.

MAHA: Not even to enter it, and now the Americans are even running their own military camps in it, it became very annoying to any Muslim.

ZAYNAB: By the way, you know, he never, never, changed his angle. He did not declare war on the Russians and eventually declare war on the Americans. We fought the Russians because they invaded Muslim land, and when they were kicked out, we had nothing to fight them for. So they were finished.

And then the Americans started entering Muslim land, so it was just their turn. We are not fighting them because we like war. Us Muslims, we are not war people, but we do not like our rights to be taken. And he started it being very nicely, we really ask the Americans very politely to leave our country. You say you came for the Gulf War, the Gulf War is finished. Why are you staying? It is our right, this is our country to tell you that you were welcome then, you are not welcome now. We would like you to pack and leave. And the Americans won't leave.

So if you go back to how it all started, he did ask very nicely, and the people with him did ask, they said we are not enemies of the kingdom, we are not enemies of the army, we are not enemies of the government. All we are asking is that this is our land, and we would like these people to be out.

You know his first major military action was the African embassy bombings. What was your reaction to those?

ZAYNAB: They don't go and say excuse me, what did you feel about this, or were going to do this, what do you think about it? You just hear about it, and then you're like, oh some people are doing something.

So you thought it was not a bad idea then.

ZAYNAB: It's not that it wasn't a bad idea. First of all we thought, why Kenya and Tanzania? And then they said it's the biggest CIA in the Middle East.

MAHA: To be honest with you, we hate the Americans moving around in our country.

ZAYNAB: And he said before he did that, when he asked so many times, he said look, every American will become a target -- every American out of Afghanistan because Islamically, you cannot hurt a non-Muslim in an Islamic state. And we believed that Taliban was an Islamic state because they tried as hard as they could to emphasize Islamic laws. You could not hurt a hair on any non-Muslim's head or body in Afghanistan. [You] could be walking in the street, and you'd be like, "It's an American, and I cannot do anything." You can't even be impolite to him.

But he told them that when you chose not to leave Saudi and the Gulf you are making every single American a target. Because he said we as people have feelings as well, this is our land, you're taking it, and one day, somebody is going to rebel. And always whenever he was asked about people who did any operations in Kenya, Tanzania, or in Bali or in the States, he never said, "I knew who was doing it." He just said, "I think these are very brave people who have done something like that." Because as far as I know, he did not know who was doing the operation on Sept. 11, and he did not know when it was going to happen.

You don't think so?

ZAYNAB: I know so.

Why do you say that?

ZAYNAB: Because he always used to say, whenever you heard it that there are people outside who are working and just pray that they are protected, that no harm should befall them. And we would always say, "When? What is going to happen?" And he'd always say, "I don't know. I know something is happening, but I don't know what and I don't know where."

And for two years, he was saying that something might be happening, something might be happening. So I think that if he knew when and what was happening he wouldn't have started it two years [before] saying something is going to happen.

MAHA: Maybe he know there was some planning, but--

ZAYNAB: Maybe he gave money, maybe he gave an OK, maybe someone asked him, what do you think, or maybe it was mentioned. So he maybe knew something was going to happen, but he didn't know when or where or what.

They say this was the idea principally of Khalid Sheikh Mohammed. Did you ever see him did you know him or see him around?

MAHA: Never, never.

ZAYNAB: I think the first one to have the idea was Ramzi Yousef. He was the one who first tried it.

Because he was the author of the first World Trade Center attack and they had talked about hijacking planes.

MAHA: You know shedding blood, and killing is very painful. I don't know your people, but assume it was your son or your wife who had been slaughtered right in front of you, would you feel proud? You feel angry. You feel like you want to take revenge. You know, I know, maybe in the West, people are very cool, they take it very coldly if a child is raped, or being killed. In Afghanistan, in the tribal areas, people are full of respect for revenge. They will take revenge even if it's their cousin. They will take revenge. People have different feelings about--

ZAYNAB: It's known that the Easterns are very hot blooded. As far as I can see, they are. And I mean they've been quiet for quite a long time.

MAHA: We've been crushed for a long time, can't you see, and there is a lot of unjust--

ZAYNAB: I mean, we don't like seeing people killed. We can be watching an American movie and we know that we know that they're all Americans, and we know that it's just a movie, and that they're all actors, and you get sympathetic with the person whose getting killed. You keep saying it's an actor it's an actor, he's American, he's American. It just doesn't work because you're just sympathetic with the whole situation.

At the same time, when you're seeing your people being killed and killed and killed, everyday, everyday, everyday, and then you see whoever is doing this, or someone who has anything to do with him being killed, you don't want to feel happy. But you just sort of think, "They deserve it. They've been doing it for such a long time, why shouldn't they feel it once in a while?"

Maha, how did you and your husband react to Sept. 11 when you saw those video reports on television?

ZAYNAB: We never saw them on television.

I guess when you heard about it then.

MAHA: My husband was not in town. He was in Jalalabad, and I was in Kabul. To be honest with you, since I am Palestinian and I know the Americans are helping the Israelis so much, I said, "Let them have it. It's time that they feel," -- look, I don't want you to think--

ZAYNAB: Not the people themselves.

MAHA: Not the innocent people in the building, but I want to hurt that person, whoever give the order to the Israeli to kill the Palestinian. But you know, innocent people pay the price. Even in Afghanistan, innocent people have to be--

ZAYNAB: Sometimes you want to hurt somebody. I don't think whoever did that really wanted to kill all these people, or to kill people who had nothing to do with anything. But he really wanted to hit the American government where it will hurt it. Not the people, but it.

I mean sometimes innocent people pay the price. The Afghans, many of them are paying, for something they didn't even like. They did not like the Arabs being in Afghanistan but they are dying for it anyways. The Iraqis who hated Saddam are being killed nowadays for I don't know for what reason, although they hated Saddam and they probably had nothing against the states and they are still dying for it. Most of the time innocent people are paying the price.

In Palestine -- I mean, I insist on calling it Palestine and I will until the day I die because I don't believe in Israel and I don't believe you can build a state on the blood of another one. Thousands of years ago, it's always been Palestinian until 50 years ago. What happened to the map? Why did the name change?

MAHA: History changed completely.

ZAYNAB: It has always been Palestine, why did all of a sudden become Israel? What gave them the right to build their country on that of another? What gave them the right to destroy peoples houses, to kick them out of their houses, to kill their children, their men, their women, for what reason?

Maha, in Al Qaeda, children were taught to become suicide bombers, or think that was a good idea.

MAHA: I don't think so. This suicide bombing, I only heard about it when the Palestinians started doing it, people in Palestine. But to be honest with you, and until today--

ZAYNAB: Me and my brothers, we don't believe in suicide bombings.

MAHA: It's not being afraid of dying.

ZAYNAB: We're not saying that whoever is doing this is doing something wrong, I mean that's for him to decide between him and himself and his Lord. But I don't think that's the best way of doing things.

But do you understand Maha, why some parents would want their children to become suicide bombers?

ZAYNAB: I never heard anyone tell their children that he would like them to be a suicide bomber.

MAHA: Never. I can understand why someone would go--

ZAYNAB: I mean maybe we really respect those people. Not respect them, I think you must be a very brave person who is going and knowing I'm going to die.

MAHA: No not die, blow up.

ZAYNAB: It's not: He's in a battle he gets killed. It's: The minute I press this button or the minute I hit that building, I'm dead. And I know, and I'm doing it. You must be very brave. You must be very, very, very brave. I mean I don't have the guts to do that yet.

MAHA: And maybe because they have so much pain, so much pain, to the point to get you to walk into that--

ZAYNAB: I'm not afraid of death.

MAHA: But not this way.

ZAYNAB: But I don't think I have the courage to do it myself.

Maha, I guess a lot of Canadians would say how could a mother send her children to these camps for this kind of military training?

MAHA: To be a brave man. I like my son to be brave. I mean as I was telling you, if I was in Canada, I would like my son to be trained to protect himself, to protect his home, to protect his neighbor, to see a young girl innocent, being raped or attacked, to really fight to defend it. I would really love to do that, and I would love my son to grow with this mentality. ... So I would do training my child to defend his rights, it's OK.

ZAYNAB: And as Muslims, we are ordered to be trained, and always be ready--

MAHA: To defend ourselves.

ZAYNAB: The prophet ordered that people should get their children trained in swimming, aiming or sniping, and horseback riding. These are the three most important thing for a child even before he learns to read and write. ...

MAHA: And you would you like me to raise my child in Canada and by the time he's 12 or 13 he'll be on drugs or having some homosexual relation or this and that? Is it better? For me, no. I would rather have my son as a strong man who knows right and wrong and stands for it, even if it's against his parents. It's much better for me than to have my child walking on the streets in Canada taking drugs or doing all this nonsense.

You said that you were happy for your husband, that he wanted to die a martyr and he did. Do you want to see your children die the same death?

MAHA: Yes.

Fighting for Allah?

MAHA: Yes.

ZAYNAB: I'd love to die like that. I'd love my daughter to die--

MAHA: You know, we are promised that we go to heaven.

ZAYNAB: Hold on. I'd like you to go and meet kids on the street who have nothing to do with anything and tell them "would you like to die in your bed or die as a shaheed?"

As a martyr.

ZAYNAB: Yeah. And see what they'd answer. A Muslim.

MAHA: Even if simple, very simple, naïve. Yeah it's heaven. It's heaven, you know.

ZAYNAB: A shaheed is something really, really great. I mean, people who have nothing to do with religious, anything, when it comes to a shaheed, even the government of Pakistan when they're celebrating the martyrs of these people who died during the war to have independence, they are respected very much. They are heroes although they are already dead. But to them it's not that they're just dead, it's that they're shaheeds. That's what makes them here.

MAHA: And we are all dying at the very end. We are all dying. So you can choose the way you die or you can die just [with] drugs or whatever. But it's not funny to die and it's not very simple to be separated. It's very, very painful and it's very sometimes frightening. But we are all dying.

And you know, we thought we were perfect Canadians when we were helping everybody just for the sake of our belief. Not because Canada forced us, Canada encouraged us to do the relief work. But inside, we believe that we really have to do something to help others and to be proud of it in the hereafter, you know.

ZAYNAB: Death is a scary thing and for us the only thing that makes it not so scary is dying for the cause of Allah. Because we believe that each and every person would be questioned on the day of judgement for everything he did and said.

We also believe that the second you get into your grave that's when your [accountability] starts. That's when you start being either rewarded for your good deeds or being punished for your bad deeds.

We also believe that the grave can be a very dark and very difficult place and that people in there are not exactly dead. They're in another state. It's just you're not a life and you're not in the hereafter. You'd sort of in a transit and that they feel the punishment or they feel their reward. And for us, for you to be able to be granted that you will succeed in all these is for you to be a martyr. That's practically the only way that you would not be tortured in the grave, that you're staying for whatever long time would be a pleasant thing and that your bad deeds will all be forgiven. And that on the day of judgement you'd be -- a shaheed means a witness so you'd be a witness on the nations and that you'd be granted to ask a love of forgiveness for 70 of your family and that you'd be very close to the prophets.

So I mean you get many, many privileges if you die for the way of Allah, not necessarily you have to die in battle. Some people they really wish to die as a shaheed, as a martyr and it's their intention even if they die in their bed they get their reward.

MAHA: The prophet said to die when you're defending your blood or to die when you're defending your home or to die while you are defending your virginity is a martyr.

Maha, your son Omar, who is in Guantanamo, is accused of killing an American soldier by rolling a grenade out and killing an American medic. If that is true, are you proud of him for doing that?

MAHA: Of course. He defended himself. ...

ZAYNAB: If you were in that situation what would you have done? I'd like to ask everybody that.

MAHA: I hope you don't say I would bow down, say, "No, no, no."

ZAYNAB: Hold your hands in the air, "Don't shoot." ...

MAHA: Wouldn't you like your Canadian son to be so brave to stand up and fight for his right?

ZAYNAB: He'd been bombarded for four hours. Three of his friends who were with him had been killed. He was the only sole survivor. What do you expect him to do?

I'd like to know what they expected him to do, come up with his hands in the air? I mean it's a war. They're shooting at him. Why can't he shoot at you? If you killed three why can't he kill one?

Why does nobody say you killed three of his friends? Why does everybody say you killed an American soldier. Big deal.

It seems as if Abdurahman might have cooperated to some degree with the Americans to get out of captivity. How do you feel about that? Are you ashamed of him for doing that?

MAHA: He used his intelligence and it's okay.

ZAYNAB: As long as he didn't really help them. If he did, I'd be really ashamed of him. If he just fooled them, I don't mind it. If he really did something, I'd be ashamed of him.

Why? Because it's cooperating?

ZAYNAB: Because Islamically you're not allowed to cooperate with the enemy even if it'll cost you your life. ...

Why was Omar not with the others? Why was he in a different place?

MAHA: No, Omar was with us and at some time I remember his father told me that he was just going with some group of people to translate for them or to do some work because he is much better in English, even in Pashto, Farsi. And that's all I know. Actually I was shocked when I heard that Omar was injured, or captured or killed or whatever at the beginning.

ZAYNAB: My dad didn't know either.

MAHA: For a whole month Omar was missing and we were trying to find out his whereabouts until they said Omar was in some kind of military attack or something. And the news came piece by piece until, you know, that we find out. Actually she found first from the Internet that he was in Cuba. We did not know. We knew he was in a kind of battle and he was either killed or arrested and that's it.

ZAYNAB: He got on this group for the translation, whatever and they were staying in a house. And the Americans are paying everybody so much if they give them some information. Someone went and said you know, there are some Arabs in this house, so the Americans came, they had a gun battle and they wouldn't give up so they asked for air force. That's how it happened.

I'm told there's a video of Omar making bombs that would be part of the evidence against him. Would that surprise you or not?

ZAYNAB: Yes, very much because Omar is one of the ones that did not have military training.

So it just doesn't seem true to you that he could be doing that.

ZAYNAB: I mean I think my brothers Karim and Omar can shoot an AK-47 or a gun. He can throw a grenade yes. But to prepare a bomb? I don't think so.

MAHA: Not anybody can do this.

ZAYNAB: I mean I know some trainers who lost their fingers doing that. So I don't think a 15 year old who has never done it before, never had training for it would all of a sudden be able to do it.

MAHA: Anyway it's a time where people grew much faster than their age, you know. I mean boys or children they know much, much more than we expect. I don't know.

You mentioned these study circles. You would see the bin Laden family in the study circles. Tell me a little bit about that.

MAHA: What we were studying? Just Quranic translation or some Arabic lessons. Or you know as Muslims we have so much revelation about how we clean ourselves or how we pray and all this. We have to do exactly according to the prophet you know. And the prophet's sayings.

It's two hours and it's usually not in their homes. As Zaynab was saying, they have so much restriction and actually that was the only time we can see them because they are allowed once a week out of their house.

ZAYNAB: They are allowed to be visited one day a week and visit one day a week.

MAHA: So they keep their visits for the studies.

ZAYNAB: For the studies, and they'd be able to see everybody and at the same time they'd benefit from it. And actually their visit was only ... about two hours. So you can't go before and can't go after, and you can't go any other day except for that day.

MAHA: For me, I used to admire them because I know they were very, very rich family and they live in a very, very, very simple -- I mean I was like a queen compared to them because I was living in a house with electricity and water. They did not have this in their compound. As I said, we would never live in the compound. We always had our own residence. So they lived in a much, much simple and more severe lifestyle. I think they can afford better but I think their father always wanted them to live this because they have to be on the same level like everybody else.

ZAYNAB: Because he couldn't make everybody in the group live as good as his family, so his family had to be able to live like everybody else. Unless you could make everybody live such high living they just have to manage like everybody else.

Is it true he wanted nobody using modern conveniences, ice?

ZAYNAB: No.

No you didn't hear that?

ZAYNAB: No. I mean in Sudan for a while and he didn't allow them to drink cold water. Probably because he didn't believe in using modern conveniences because he wanted them to be prepared that one day there's no cold water, they'd be able to survive and it wouldn't be so difficult for them.

MAHA: He did not like soft drinks.

ZAYNAB: He didn't like to buy American soft drinks, Coke and Pepsi and all that, but his kids

sometimes would buy them. And he liked them to live more natural like. They had horses and camels. I mean he's a Saudi or more of a Bedouin. They love horses and camels and they had them even in their compound. But one of his kids loved cars so whatever allowances his father was giving him, he got enough money to buy himself a car.

Who's that?

ZAYNAB: One of his sons, his name was Saad. Another one just bought horses. Whenever he got money he'd buy a horse. Whenever he had money he'd buy a horse or camel and one of them just bought a car.

So I don't think he was against any of that stuff and they use computers and we had electric generators and they had washing machines and they had all these equipments to make movies and--

MAHA: And sometimes it would be kind of saving more. ... Osama would just spend most of their money on food so their life--

ZAYNAB: I mean they had a certain amount of income. Each had a way of spreading around that income for his own needs.

MAHA: But we were like living like queens compared to most of these people. Not because we loved luxury or we were very rich or we were using the people's money or orphan's money. Thanks to God we had our own income so we're not dependent on anybody.

ZAYNAB: I mean, we weren't living like queens as she's saying. Believe me. We always slept on the floor. We never had carpets. We always had this plastic thing on the floor and we were living in a house in Kabul which was made of--

MAHA: Concrete.

ZAYNAB: Yeah. It was marble, the floor, but we couldn't help it much, the house that we're sitting in, staying in. But otherwise we lived a very simple life all our life although we never had our own car. I was like, "Dad, come on here, you're the director of such and such and we don't even have our own car." And he said, "I don't have the money to buy a car."

We'd say, you know, "People who are less well off than us have their own car." And he said, "Well don't compare yourself to others. We don't need a car and we're not going to have one because we don't need one." ...

So he was always sort of "don't look too high because we're not staying." He always said, "This world is not for us to stay. In this world we're just travelers. So being light you can move easy. You be heavy you stick down. So get as light as you can." Of course we're not that light, we've been living here for the last 20 years and in 20 years you get heavy.

MAHA: We get lots of books and lots of pictures.

ZAYNAB: And my dad loves books.

Was Osama the same way with his children? Did you see him interacting with his own children?

ZAYNAB: I heard about it. I never saw it. Men and women don't mix. But as far as I know, it was very important for him to sit with his kids every day at least for two hours in the morning after their morning prayer. They sit and read a book at least. It didn't have to be something

religious. He loved poetry very much. So he tried to encourage them to read, memorize and write poetry. So every once in a while it would be a different book, sometimes it's about poetry, sometimes it's about history or sometimes it's about grammar, language, sometimes a religious book.

MAHA: And he loves sports.

ZAYNAB: Yeah he loved playing volleyball and loved horse riding. And he'd do it, I mean amongst people he was not Osama bin Laden. He was just Osama, just a sheikh. And kids played around him. Kids would go shake his hand. He played volleyball with them or just horse race with them. Just, he was just a normal person. And they'd go shooting he'd go with them. If he missed his target they'd laugh at him and stuff like that.

Maha, what were your impressions of him?

MAHA: To be honest with you my husband is the first and last man in my life. Nobody better than him. Osama is fine. I respect him for fighting for what he believed. As I was saying, I don't like killing and blood shedding. It's very painful but I think this is a sign of this time, of this world. It's everywhere -- Americans, Muslims, Arabs. Everywhere. I hate this but this is the way it is.

ZAYNAB: This is the language of the times. ...

Do you think that Osama has created a big success with his war against the United States?

ZAYNAB: I don't know. ... Ask for results. We're not responsible for results. We're asked to do whatever we can and that, I mean I can [take] exams, study as hard as I can but I can't be responsible for if I pass or fail. I do all I can and try as hard as I can. That's all I'm asked to do.

I guess I had the impression that there are a lot of more moderate Muslims around the world who felt that he has brought untold misery on to the heads of Muslims. He's brought hatred towards Muslims in the United States, in North America, in Europe.

ZAYNAB: There's no such a thing as moderate Islam. Islam is Islam. It's been there and it's been the same. Fourteen hundred years ago the same book. The same prophet. That's how it's going to be for until the day of judgment.

MAHA: It's not like Christianity, 2,000 years ago Jesus -- bless him, for us we believe he's a prophet, may God has blessing on him -- he said homosexuality is forbidden. Adultery is forbidden. Now it's all allowed. So this is modern Christianity. But for us, no.

ZAYNAB: I mean you can't bring two Bibles that would have the exact same things in it. You can bring as many Qurans as you like and open the exact suras and the exact same verses and you find exactly the same.

So you don't think there's such a thing as a moderate Muslim?

ZAYNAB: No. You either follow the Quran or you don't follow the Quran.

MAHA: Moderate Muslims are not following the complete Quran. ...

Did you have any differences with Osama bin Laden and his world outlook and whatnot? What did you disagree with?

MAHA: It's not himself personally. It's the people around him. They were kind of, sometime unjust, sometime they were--

ZAYNAB: Hard-minded.

MAHA: -- or taking sides or you know. They not allow Abdurahman in the compound period because they just did not like Abdurahman.

ZAYNAB: They didn't trust him.

MAHA: Period.

ZAYNAB: And you know what? For the Americans we're Al Qaeda, for the Al Qaeda we're Canadians.

MAHA: Yes.

ZAYNAB: It's really weird where you end up. I swear, we were never accepted because you know, we're Canadians. "They're the Canadians. They're the Canadians." Whatever thing we do different it's like, "it's okay, they're the Canadians."

MAHA: If we read English novel they think this is bad. If our kids have English movies we are not completely accepted in their society.

ZAYNAB: My father had nothing with women talking to men. You don't go socializing, but if you need to talk to them you talk to them. It's nothing unreligious in it. And for us to work or for girls or women to work and learn is no problem as long as she's doing it in the right way and for a good reason.

But some of them were just too narrow minded that no, women are for the house and that's how you're supposed to do it. And if you don't do that you're bad. So we were bad.

MAHA: And they would not allow their wives to visit us or socialize with us--

ZAYNAB: Because we were a bad influence.

MAHA: We're bad influence, yes. So they would come to us if they need--

ZAYNAB: If someone needed to go to the hospital--

MAHA: Or shopping.

ZAYNAB: They'd ask my dad to send one of us with his wife to the hospital because we could speak the language. But we were bad because my father allowed us to go with the driver.

That's some of the people, not everybody. Osama was pretty broad minded.

If you were bad, how was Abdurahman seen? He must have been just the devil

incarnate.

ZAYNAB: Yeah he just did whatever he wanted to do. He didn't care. He'd just go. And we'd be like, "Why are you supposed to not go there?" "It doesn't matter, I want to see my friends." And everybody's like, "He never listens, we're going to have to do this and this and that. Abdurahman, don't do it again." "Yeah okay I won't do it again." ...

If Abdurahman is such a troublemaker, did Osama ever complain about him to your husband?

MAHA: Not Osama, his people. Yes, they said Abdurahman is not allowed. Even us as a family we were kind of pushed away many times, practically pushed away. Don't come because of Abdurahman. And Abdullah, but mainly Abdurahman.

ZAYNAB: But Osama he was kind of a broad-minded person and he had kids who were teenagers and they must have had their problems and he knew you have to deal with them. You can't just push them away. These kids, if you push them away they'll just go and find whatever they want somewhere else. You just have to accept them and make them feel wanted and that they're important, otherwise they'll just find it somewhere else. ...

But you didn't feel that sometimes your whole family was punished because of Abdurahman?

MAHA: Oh yes, yes, many times.

ZAYNAB: "It's all your fault."

MAHA: Many times.

ZAYNAB: Oh I couldn't do anything. We'd all be like, "if you obey the orders, if you listen, if you do this, if you do this, we would have been like this, or the people wouldn't have said this, or people wouldn't have done this."

MAHA: And the very last days, not any of the camps would accept Abdurahman.

ZAYNAB: Nobody would take him.

MAHA: Nobody would take him.

ZAYNAB: "We take Abdullah, but not Abdurahman."

MAHA: And Abdullah, he's a quiet but he have his self pride that if somebody assault him -- you see because we have this little bit Western mentality. We see things open much wider. The Arab community do not accept us the way that we are. So they keep sometime putting him down that he kept it in himself.

ZAYNAB: So they're all accepting to take Abdullah who does not want to go and their not accepting to take Abdurahman who we'd like them to take. So they ended up both not going. ...

So Abdullah was accused of the suicide bombing in Kabul. What was your reaction to that when you heard?

MAHA: I did not know actually. She heard this first and she told me. I can't, of course. I know my son, he would not do a suicide.

ZAYNAB: As soon as I mentioned it to Abdul Karim, he was like, "Abdullah he'd never do it." I said, "That's exactly the way I thought." ...

How do you feel about the United States now after what you have seen these last few years?

MAHA: I know the States must have some good people, but I think the government is rotten.

ZAYNAB: Now they're trying to play God.

MAHA: Yeah.

ZAYNAB: Nobody can play God. God will break them very bad. I mean when the Russians tried to play God, God showed them who was God. It's the same thing.

MAHA: He chose the weakest people to break the Russians you know.

ZAYNAB: It's the exact same thing and actually it will be -- I mean the British were broken in Afghanistan the Russians were broken in Afghanistan and the Americans are coming just the same to be broken in Afghanistan. They will be.

MAHA: I feel sorry because they're not learning their lesson.

ZAYNAB: I remember I told my dad Afghanistan is the graveyard of the supreme powers. Maybe on every international border of Afghanistan they should have these three graves with one with the British flag and another one with the Soviet flag and another one without a flag so [when] the Americans fall we'll just put the American flag there. And he just laughed and he said, "You know people don't learn. If people would just read history it would save them so much trouble." ...

posted april 22, 2004

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Talk With ISNA President
Women & Gender Politics in Islam
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News

Zawahiri Warns U.S. Over Guantanamo Prisoners

"We expect neither justice nor fairness from America," Zawahiri

DUBAI, Aug 3 (IslamOnline.net & News Agencies) - A voice believed to be that of al-Qaeda number two Ayman al-Zawahiri vowed to take revenge if any prisoners held at the U.S. military base at Guantanamo Bay, Cuba were sentenced to death, in a tape recording broadcast Sunday, August 3 by an Arab Satellite Channel.

"America has announced that it is going to start putting Muslim prisoners on trial in military courts which could impose the death penalty. The crusaders will pay dearly for any harm that comes to the prisoners it is holding," the voice warned, according to the tape aired by Dubai-based television Al-Arabiya..

If authentic, the tape will be an evidence that Zawahiri is alive and free, in contradiction to news reports early July claiming he, along with other senior al-Qaeda officials were detained in Iran.

About 680 alleged members of al-Qaeda and Afghanistan's deposed Taliban regime are imprisoned at Guantanamo.

Originating from 42 countries, they have been held and interrogated by the United States there for up to 18 months. None of them have been charged with any crime.

Classified as "illegal combatants" by President George W. Bush, their fate is uncertain. Several groups have already been returned to their countries of origin, where the local authorities decide if they are to be released.

But hundreds more remain in Guantanamo with the prospect of facing a U.S. military tribunal, which can pass the death sentence.

"By judging them America will hold its own trial, and by condemning them it will condemn itself," said the voice on the tape, the authenticity of which could not be immediately confirmed.

"We expect neither justice nor fairness from America when it shows little interest in the principles to which it subscribes."

Anti-U.S. attacks worldwide will intensify, the voice warned. "What America has seen up until now is nothing but the first round of skirmishes. The big battle has not yet started."

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- Abu Gaith, Al-Zawahiri Free In Afghanistan: Al-Qaeda

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The tape urged the American people to "take the initiative and follow the path of reason and wisdom before it's too late."

It also warned "all those who helped (the U.S.) arrest" the Guantanamo detainees that "they will pay the same price" as the United States, which "is not capable of defending itself, and even less of defending them".

"May each prisoner held by the infidels know that their liberation is the responsibility of all the Mujahideen and that the day of liberation is close."

"It has set to the world an example in contempt for principles, including those in agreements it signed."

Zawahiri is number two on the U.S. Government's Most Wanted Terrorists list - behind only Osama bin Laden himself.

Detainees come from countries including Afghanistan, Pakistan, Canada, Australia and the United Kingdom, and include at least three teenagers.

The US has proposed to try some of the men - initially six - in a controversial system of military tribunals in which defense lawyers are appointed by U.S. officials and the cases are heard by military judges.

The UK Government has been assured by Washington that two British citizens who have nominated to face the military tribunal will be spared a death sentence if found guilty, according to the BBC online news service.

However, families of the detainees and human rights activists argue that the men will not be given a fair trial.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

06 CR 10028 GAO

UNITED STATES OF AMERICA	)	**CASE NO.**
V.	)	**VIOLATIONS:**
ABDULLAH AHMED KHADR a/k/a ABU BAKR	)	**18 U.S.C. § 2332(b)(2) Conspiracy to Murder United States National Outside the United States** **18 U.S.C. § 2332a(a)(1) and (3) Conspiracy to Use a Weapon of Mass Destruction** **18 U.S.C. § 924(c) Possession of a Destructive Device In Furtherance of a Crime of Violence** **18 U.S.C. § 924(o) Conspiracy to Possess a Destructive Device In Furtherance of a Crime of Violence** **18 U.S.C. § 2 Aiding and Abetting**

INDICTMENT

The Grand Jury charges:

COUNT ONE: (18 U.S.C. § 2332(b)(2)) – Conspiracy to Murder a United States National Outside the United States

At all times material to this Indictment:

1. All of the offenses referred to in this Indictment were committed in Afghanistan, Pakistan, and elsewhere out of the jurisdiction of any particular state or district of the United States, but within the extraterritorial jurisdiction of the United States. The defendant, ABDULLAH AHMED KHADR, is presently outside of the United States and is expected to be

first brought to the District of Massachusetts. Therefore, venue for these offenses is proper in the United States District Court for the District of Massachusetts pursuant to Title 18, United States Code, Section 3238.

2. The defendant KHADR's father, Ahmed Said Khadr ("Ahmed Said"), was a trusted associate of Al Qaeda leader Usama Bin Laden ("Bin Laden"). In 1997 and 1998, KHADR and other members of his family visited Bin Laden and his family at Nazim Jihad, Bin Laden's family compound outside of Jalalabad, Pakistan. In 1998, the Khadr family moved to the Bin Laden compound at Nazim Jihad, where they lived for about one month.

3. In the wake of the September 11, 2001 terrorist attacks on targets within the United States, United States military personnel and equipment, in addition to military personnel and equipment from other countries allied with the United States ("Coalition Forces"), were deployed to Afghanistan in October 2001. Combat thereafter ensued in Afghanistan between United States and Coalition Forces and fighters controlled by or allied with the Taliban and/or Al Qaeda.

4. From a date unknown to the Grand Jury, but at least by in or about May, 2003, through in or about October, 2004, in Afghanistan and Pakistan and elsewhere outside the United States,

ABDULLAH AHMED KHADR,

defendant herein, did knowingly and intentionally combine, conspire, confederate and agree with other co-conspirators, both known and unknown to the Grand Jury, to commit a killing that is murder as defined in Title 18, United States Code, Section 1111(a), of a United States national outside the United States.

5. In furtherance of the aforesaid conspiracy and to accomplish the object thereof, KHADR and his co-conspirators, both known and unknown to the Grand Jury, did do one or more acts to effect the object of the conspiracy, as follows:

a. In 2003, the local Al Qaeda-influenced shura council (a group of male local leaders) vested Ahmed Said with operational responsibility for organizing attacks against United States and Coalition Forces in the border area of Afghanistan near Shagai, Pakistan. To assist in his efforts, Ahmed Said asked KHADR to procure munitions for use by Al Qaeda and other fighters against United States and Coalition Forces.

b. From in or about May, 2003, through in or about October, 2003, KHADR purchased AK-47 ammunition, PK ammunition (for use in Russian PK machine guns), rocket propelled grenades, rockets, and 82 mm and 120 mm mortar rounds.

c. KHADR distributed such munitions to other members of the conspiracy, known to the Grand Jury, for use by Al Qaeda and other fighters in killing United States and Coalition Forces military personnel and other United States nationals in Afghanistan, and for training Al Qaeda and other fighters to kill United States and Coalition Forces military personnel and other United States nationals in Afghanistan, and to damage and destroy property owned, leased, and used by the United States in Afghanistan.

d. In addition to procuring the previously described munitions, KHADR provided explosive components, to wit, multiple 25-liter containers of hydrogen peroxide, to a conspirator, known to the Grand Jury, for use in making mines intended to be used in killing United States and Coalition Forces military personnel and other United States nationals in Afghanistan, and to damage and destroy property owned, leased, and used by the United States in Afghanistan.

e. After Ahmed Said was killed by Pakistani forces in October, 2003, KHADR continued his efforts to procure munitions intended for use in killing United States and Coalition Forces military personnel and other United States nationals in Afghanistan, and in damaging and destroying property owned, leased, and used by the United States in Afghanistan. In or about

October, 2004, KHADR engaged in negotiations for the purchase of missiles from a Pakistani conspirator, known to the Grand Jury, which KHADR intended to sell to another conspirator known to the Grand Jury for such use.

All in violation of Title 18, United States Code, Section 2332(b)(2).

COUNT TWO: (18 U.S.C. § 2332a(a)(1) and (3)) – Conspiracy to Use a Weapon of Mass Destruction

1. Paragraphs One, Two, Three, and Five of Count One of this Indictment are hereby incorporated by reference as if fully realleged and restated herein.

2. From a date unknown to the Grand Jury, but at least by in or about May, 2003, through in or about October, 2004, in Afghanistan and Pakistan and elsewhere outside the United States,

ABDULLAH AHMED KHADR,

defendant herein, did knowingly and intentionally combine, conspire, confederate and agree with other co-conspirators, both known and unknown to the Grand Jury, without lawful authority, to use a weapon of mass destruction, that is, a destructive device, to wit, one or more grenades, rockets, missiles, and mines, against a national of the United States while such national was outside of the United States and against property that was owned, leased and used by the United States outside the United States.

All in violation of Title 18, United States Code, Sections 2332a(a)(1) and (3).

COUNT THREE: (18 U.S.C. §§ 924(c) and 2) – Possession of a Destructive Device in Furtherance of a Crime of Violence and Aiding and Abetting

1. Paragraphs One, Two, Three, and Five of Count One of this Indictment are hereby incorporated by reference as if fully realleged and restated herein.

2. From a date unknown to the Grand Jury, but at least by in or about May, 2003, through in or about October, 2004, in Afghanistan and Pakistan and elsewhere outside the United States,

ABDULLAH ADMED KHADR,

defendant herein, knowingly possessed a firearm, that is, a destructive device, to wit, one or more grenades, rockets, missiles, and mines, in furtherance of a crime of violence for which he may be prosecuted in a court of the United States, that is, conspiracy to murder a United States national outside the United States, as set forth in Count One of this Indictment, and conspiracy to use a weapon of mass destruction, as set forth in Count Two of this Indictment.

All in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT FOUR: (18 U.S.C. § 924(o)) – Conspiracy to Possess a Firearm in Furtherance of a Crime of Violence

1. Paragraphs One, Two, Three, and Five of Count One of this Indictment are hereby incorporated by reference as if fully realleged and restated herein.

2. From a date unknown to the Grand Jury, but at least by in or about May, 2003, through in or about October, 2004, in Afghanistan and Pakistan and elsewhere outside the United States,

ABDULLAH AHMED KHADR,

defendant herein, did knowingly and intentionally combine, conspire, confederate and agree with other co-conspirators, both known and unknown, to commit an offense under Title 18, United States Code, Section 924(c), that is, to possess a firearm, that is, a destructive device, to wit, one or more grenades, rockets, missiles, and mines, in furtherance of a crime of violence for which he may be prosecuted in a court of the United States, that is, conspiracy to murder a United States national outside the United States, as set forth in Count One of this indictment, and conspiracy to use a weapon of mass destruction, as set forth in Count Two of this Indictment.

All in violation of Title 18, United States Code, Section 924(o).

A TRUE BILL

FOREPERSON OF GRAND JURY

JAMES B. FARMER
GREGORY MOFFATT
KIMBERLY P. WEST
Assistant U.S. Attorneys

JOHN T. GIBBS
Trial Attorney
Department of Justice

DISTRICT OF MASSACHUSETTS, Boston, February FEB - 8 2006, 2006

Returned into the District Court by the Grand Jurors and filed.

Deputy Clerk @ 12:40 P.M. 2/8/06

JS 45 (5/97) - (Revised USAO MA 11/15/05) **06 CR 10028 GAO**

Criminal Case Cover Sheet **U.S. District Court - District of Massachusetts**

Place of Offense: Overseas **Category No.** I **Investigating Agency** FBI/JTTF

City Overseas **Related Case Information:**

County N/A

Superseding Ind./ Inf. _____ Case No. _____
Same Defendant X New Defendant _____
Magistrate Judge Case Number 05M-1163-JGD
Search Warrant Case Number _____
R 20/R 40 from District of _____

Defendant Information:

Defendant Name Abdullah Ahmed KHADR Juvenile ☐ Yes ☒ No

Alias Name Abu Bakr

Address Scarborough, Ontartio, CANADA

Birth date (Year only): 1981 SSN (last 4 #): Non Sex M Race: Mid-East. Nationality: Canada

Defense Counsel if known: Unknown **Address:** _____

Bar Number: _____

U.S. Attorney Information:

AUSA J. Farmer, G. Moffatt, K. West **Bar Number if applicable** 559778 (G. Moffatt)

Interpreter: ☐ Yes ☒ No **List language and/or dialect:** English, Arabic (Egyptian)

Victims: ☐ Yes ☒ No **If Yes, are there multiple crime victims under 18 U.S.C. §3771(d)(2)** ☐ Yes ☐ No

Matter to be SEALED: ☐ Yes ☒ No

☒ **Warrant Requested** ☐ **Regular Process** ☒ **In Custody**

Location Status:

Arrest Date: December 17, 2005

☒ **Already in ~~Federal~~ FOREIGN Custody as** awaiting extradition **in** Toronto, CANADA.
☐ **Already in State Custody** _____ ☐ **Serving Sentence** ☐ **Awaiting Trial**
☐ **On Pretrial Release: Ordered by** _____ **on** _____

Charging Document: ☐ Complaint ☐ Information ☒ Indictment

Total # of Counts: ☐ Petty _____ ☐ Misdemeanor _____ ☒ Felony 4

Continue on Page 2 for Entry of U.S.C. Citations

☒ **I hereby certify that the case numbers of any prior proceedings before a Magistrate Judge are accurately set forth above.**

Date: 2/8/2006 **Signature of AUSA:**

JS 45 (5/97) - (Revised USAO MA 11/15/05) Page 2 of 2 or Reverse 06 CR 10028 GAO

District Court Case Number (To be filled in by deputy clerk): _____

Name of Defendant Abdullah Ahmed KHADR

U.S.C. Citations

	Index Key/Code	Description of Offense Charged	Count Numbers
Set 1	18 USC §2332(b)(2)	Conspiracy to Murder US National outside US	1
Set 2	18 USC §2332a(a)(1)&(3)	Conspiracy to use Weapons Mass Destruction	2
Set 3	18 USC §§924(c) and 2	Possession: Destructive Device/Crime Violence	3
Set 4	18 USC §924(o)	Conspiracy: Possess Destructive Device	4
Set 5			
Set 6			
Set 7			
Set 8			
Set 9			
Set 10			
Set 11			
Set 12			
Set 13			
Set 14			
Set 15			

ADDITIONAL INFORMATION:

UNITED STATES OF AMERICA	)	**Protective Order #**
	)	
	)	Protection of Identities of Witnesses
v.	)	And Intelligence Personnel
	)	
OMAR AHMED KHADR	)	
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	
a/k/a "Ahmed Muhammed Khali"	)	**4 June 2007**

1. This protective order is issued pursuant to the authority under the Military Commissions Act (MCA) of 2006 (10 U.S.C. §§ 948a, *et seq.*) and the Manual for Military Commissions (MMC), to include but not limited to:

   a. Rules for Military Commissions (RMC) 701(f)(8) and (l)(2);
   b. RMC 806;
   c. Military Commission Rules of Evidence (MCRE) 104(a);
   d. MCRE 505(e);
   e. MCRE 611(d)(2);
   f. Regulation for Trial by Military Commissions, Section 17-3.

2. Accordingly, IT IS HEREBY ORDERED:

   a. Names or other identifying information of witnesses and intelligence personnel that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;

   b. Unless disclosure has been authorized by the Military Judge, names or other identifying information of any witness shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of witnesses or intelligence personnel must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal.

3. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it warranted.

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

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

UNITED STATES OF AMERICA	**Protective Order # 1**
v.	Protection of Identities of All Witnesses
OMAR AHMED KHADR	**11 January 2006**

1. This Protective Order protects the identities or other identifying information of all individuals identified in materials provided to the Defense by the prosecution. In addition, this Order also applies to any identifying information obtained by the Defense during their independent discovery efforts.

2. The names and background information of witnesses are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, IT IS HEREBY ORDERED:

   a. Names or other identifying information of witnesses that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;

   b. Names or other identifying information of any witness shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of witnesses must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal; and

   c. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

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

IT IS SO ORDERED

R.S. Chester
Colonel, U.S. Marine Corps
Presiding Officer

UNITED STATES OF AMERICA	**Protective Order # 2** Protection of Identities of Investigators and Interrogators
v.	
OMAR AHMED KHADR	**11 Jan 2006**

1. This Protective Order protects the identities of law enforcement, intelligence, or other investigators and interrogators working on behalf of their government (collectively referred to as "investigators and interrogators") who participated in the investigation of the accused.

2. The names and background information of investigators and interrogators are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, IT IS HEREBY ORDERED:

a. Names or other identifying information of investigators and interrogators that have been or may, from time to time, be disseminated to Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below; and

b. Names or other identifying information of investigators and interrogators shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of investigators and interrogators must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal.

4. The following actions do not violate this protective order:

a. Showing pictures of individuals who had questioned the accused for the purposes of discussing the nature of those interrogations with the accused;

b. Using "nicknames" or any other name (aliases) that the individual who questioned the accused told to the accused when questioned. This does NOT include any name that the accused may have learned through some other means other than the individual themselves; and

c. Using physical descriptions of the individual who questioned the accused for the purposes of the defense discussing with the accused that specific interrogation.

5. The protective order protects the true identities of the individual from release to the accused and the public and of course any private information relating to the individual (family names, addresses, phone numbers, etc.).

6. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

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

IT IS SO ORDERED

R.S. Chester
Colonel, U.S. Marine Corps
Presiding Officer

[redacted]

From: [redacted]
Sent: Thursday, October 11, 2007 1:07 PM
To: [redacted]
Cc: Bley, Natalie, Ms, DoD OGC; Edmonds, Matthew, SSG, DoD OGC; Prasow, Andrea, Ms, [redacted]
Subject: Military Commissions Trial Judiciary Rules of Court: Change 1 FORMS in Word format 11 October 07
Attachments: MCTJ Rules of Court-Change 1 Forms (Word) 11 October 07.doc

MCTJ Rules of Court-Change 1 F...

Sirs,

Attached, for use by counsel, are MCTJ Rules of Court (with Change 1) Forms in Word format.
(Only Form 4-2 is changed from the previous version.)

v/r,

[redacted]

Military Commissions Trial Judiciary

[redacted]

MILITARY COMMISSIONS

TRIAL JUDICIARY

RULES OF COURT

MILITARY COMMISSIONS
TRIAL JUDICIARY

11 October 2007

MILITARY COMMISSIONS RULES OF COURT: CHANGE 1

From: Chief Judge of the Military Commissions Trial Judiciary

Subject: Military Commissions Rules of Court

Reference: (a) Military Commissions Act of 2006, 10 U.S.C. §§948a, *et seq.*, (M.C.A.)
(b) Manual for Military Commissions, 2007, (M.M.C.)
(c) Regulation for Trial by Military Commission

1. **Purpose**: To prescribe rules of court consistent with the references. This change includes updates to RC 1.6, RC 2.2b, c, e, g and i, RC 3.4a, 3.4c, 3.5b(2) & (3), 3.6(b)(1) and 3.8b, RC 4.2a (2)-(4), 4.3i, and Form 4-2, RC 6.1and 6.10, and RC 7.2.b.

2. **Background**: The references authorize, and the sound administration of justice for Military Commissions requires, rules of court for the conduct of Military Commission proceedings. The enclosed rules are intended to facilitate the smooth and orderly trial of Military Commission cases and are specifically promulgated within the authority of Rule for Military Commissions (R.M.C.) 108. To the extent that inconsistencies are perceived, the rules contained within references (a) and (b) shall control.

3. **Action**:

a. The judges of the Military Commissions Trial Judiciary shall ensure enforcement of these Rules of Court.

b. All counsel practicing before Military Commissions shall become familiar with these Rules and shall comply with them.

4. **Effective Date**: These rules are effective upon publication and shall remain in effect until cancelled, superseded, or modified.

RALPH H. KOLHMANN
Colonel, U.S. Marine Corps
Chief Judge, Military Commissions Trial Judiciary

RULES OF COURT FOR MILITARY COMMISSIONS

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Military Commissions Trial Judiciary

11 October 2007

Military Commissions Rules of Court

Rule 1. Scope, Short Form, Citations, Time

1. These Rules of Court (RC) are established pursuant to Manual for Military Commissions (M.M.C.), 2007, Rules for Military Commissions (R.M.C.) 108 and 801(b) (1), and shall apply to all cases referred to trial by Military Commission.

2. Rules of Court shall be interpreted to be consistent with the Military Commissions Act (M.C.A.), the M.M.C, and the Regulation for Trial by Military Commissions. In the event of any conflict between the M.C.A. or M.M.C. and the Rules of Court, the former two shall prevail.

3. Rules of Court may be cited as RC followed by the Arabic numeral of the Section and then the Arabic paragraph number, and if applicable, subparagraph letters. For example, this Rule and paragraph may be cited as RC 1.3.

4. The Rules of Court will be added to or modified on an as-required basis. Counsel and all other interested parties will be furnished any additions or modifications as soon as they are made.

5. A Military Judge may modify, change, or determine that a certain Rule of Court or any portion thereof is not applicable to a given trial by Military Commission. Before taking such action, the Military Judge will so advise counsel in the case, other interested parties, the Chief Trial Judge, and Military Commission Trial Judiciary (MCTJ) Staff.

6. In computing any period of time prescribed or allowed by these Rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. When a time (1630 hours, 4:30pm, 0900 hours) is used in these Rules, or in a message, order, email, or other directive from a Military Judge, that time refers to Washington, D.C. time, unless otherwise specifically stated.

Military Commissions Trial Judiciary

11 October 2007

Military Commissions Rules of Court

Rule 2. Communications

1. **Purpose.** This rule establishes general procedures for communications among counsel, the Military Judges and MCTJ Staff. These procedures are designed to avoid *ex parte* communications, to ensure that procedural matters leading to trial are handled efficiently, and to provide efficient and expeditious methods of communications. *Ex parte* communication by a party with the Military Judge or *vice versa* concerning the case is prohibited except as authorized by the M.C.A. or the M.M.C. (e.g., 10 USC Sec. 949d(f)(2)(C), R.M.C. 701-703 and Mil. Comm. R. Evid. 505).

2. The preferred, and most reliable, method of communication among the Military Judges and counsel is email with "Cc" to all opposing counsel, clerks and paralegals, the entire MCTJ Staff, and the Chief Prosecutor/Chief Defense Counsel and their chief legal clerks. The following email conventions will be followed. Failure to comply with these rules will result in the communication being returned for lack of compliance with these rules.

a. Do not send e-mail directly to the Military Judge. The Military Judge shall be listed as "Cc" only. The MCTJ Staff is the support staff for the Military Judges and is the clearing house through which their communications are routed. Communications sent directly to Military Judges will not be acted upon by the Military Judge, but will be forwarded to the MCTJ Staff for appropriate action. Communications will not be deemed to be received by a Military Judge unless and until the MCTJ Staff have been included on the e-mail.

b. All e-mail to the MCTJ Staff for action by a Military Judge shall be sent to all members of the MCTJ Staff. The email will also be "Cc" to counsel for both sides, the Chief Defense Counsel, the Chief Prosecutor, the Chief Legal Clerks for the Prosecution and Defense, and the paralegals assigned to the case. In addition, all pleadings will be "Cc" to the Clerk of Court, Office of Military Commissions.

c. Do not send classified information or protected information in the body of an email or as an attachment. If a filing or attachment would contain any information that could be considered classified information or protected information, then a redacted version, suitable for disclosure to the public, shall be provided and filed. All filings may be subject to public disclosure and must be redacted accordingly.

d. Keep emails to a single subject, and use a simple yet descriptive subject line. If the email is related to an item that has a filing designation (*see* RC 5), a pending motion, or item that is on the Filings Inventory (*see* RC 5), then a reference to the pending motion or item and the filing designation shall be included in the subject line.

e. List the case name in the subject line of every email.

f. Identify, in the body of the email, each attachment being sent.

g. Every paragraph and sub-paragraph of any email to the Military Judge or MCTJ Staff that contains more than one paragraph or sub-paragraph will be numbered or lettered to provide for easy reference. A logical numbering or lettering scheme will be used, such as: 12 a (1) (a) (i).

h. All attachments to a filing will be sent in the same email as the document to which it is an attachment. If such email would exceed the capabilities of the LAN, permission for an exception to send an attachment by separate email should be requested. (This practice will be used sparingly.)

i. Text attachments will be, in order of preference, in Microsoft Word, HTM/HTML, or RTF. In addition to the text version, a PDF version may be included. Attachments will not be in "track changes" or "mark-up" format. If it is necessary to send images, in order of preference, PDF, JPG, BMP, or TIFF may be used. If a party wishes to use some other file format, the party must request and receive permission from the MCTJ Staff.

j. Save all emails you send for your record copy of the communication.

k. Avoid archiving or compressing files (such as WinZip). Before sending an archived or compressed file, get permission from the MCTJ Staff.

l. If the Military Judge will need to know classified information to resolve the matter, that fact must be noted in the email and the location of the materials that he/she will need to review (if such facts or locations are not classified or protected).

m. Given the potential number of counsel and changes in the trial teams, all parties must ensure that all who need the email receive a copy. If any addressee notices that an email was not "Cc" to a person who needs to have a copy, such addressee shall forward a copy to the person who needs that email and advise the sender and all other "Cc" recipients of the failure to include the person.

3. Because of potential changes to the composition of trial teams, the Military Judge or MCTJ Staff may elect to send an email to the Chief Defense Counsel or Chief Prosecutor, and/or their respective Chief Legal NCOs, for distribution to all counsel, or all counsel of a particular team. The MCTJ Staff and the Military Judge will be copied on the email that is forwarded to those to whom distribution was directed in compliance with these instructions.

4. When a telephonic conference is necessary, the Military Judge will designate the person to arrange the conference call. Conference calls will be in accordance with R.M.C. 802.

5. When authorized by these instructions, or directed by the Military Judge, any member of the MCTF Staff may sign for and issue directions, instructions, requests, or rulings to the parties and others "For the Military Judge" or "By Direction of the Military Judge." Signatures "for" or "by direction of" carry the same force and effect as if signed by, or personally issued by, the Military Judge.

Military Commissions Trial Judiciary

11 October 2007

Military Commissions Rules of Court

Rule 3. Motions Practice

1. Purpose. This rule establishes the procedures for motions practice before Military Commissions.

2. Definitions.

a. A "motion" is an application to the Military Judge for particular relief or for the Military Judge to direct another to perform, or not perform, a specific act. A motion as used herein also specifically includes those motions addressed in R.M.C. 905, 906, and 907.

b. A "filing" includes a written motion, response, reply, supplement, notice of a motion, special request for relief, or other communication involved in resolving a motion.

c. A “response” is the opposing party’s answer to a motion.

d. A “reply” is the moving party’s answer to a response.

e. A “supplement” is a filing in regard to a motion other than a motion, response, or reply.

f. A “certificate of conference” is a statement by the moving party confirming that the moving party has conferred with the opposing party and whether the opposing party concurs with or objects to the requested relief.

3. How motions are made. Motions shall be made in writing in accordance with these instructions unless the Military Judge permits or directs otherwise. Should a matter come to the attention of a party at such a time or in a situation in which they have insufficient time to file a written motion, they shall immediately notify the Military Judge, all opposing counsel, and the MCTJ Staff of the nature of the motion, the nature of the relief sought, and the reasons why the motion cannot be made in writing. A motion must include a certificate of conference indicating that the moving party has conferred with the opposing party and whether the opposing party concurs or objects. When submitted by email, follow the instructions in RC 2.

4. Special requests for relief. A special request for relief relieves counsel of the specialized format for filings (motions, reply, and response) generally. A special request, and the responses and replies thereto, can be in the body of an email.

a. Ordinarily, requests for relief will be in the form of a motion using the format established herein. Counsel may at times have requests for relief that do not involve extensive facts or citations to authority. Common special requests for relief could address, for example, requests: to supplement a filing, for an extension to submit a filing, for an extension of a timing requirement, to adjust the date a filing was received, to append or attach documents to a previously made filing, or for similar matters that do not involve contested matters of law or fact.

b. A special request for relief must include a certificate of conference indicating that the moving party has conferred with the opposing party and whether the opposing party concurs or objects. If the moving party has made a best effort to confer with the opposing party and has not been able to do so through no fault of their own, the efforts made shall be listed.

c. The Military Judge or, on behalf of the Military Judge, a MCTJ Attorney Advisor may direct that a special request for relief be resubmitted as a motion before the matter will be considered by the Military Judge.

d. The content of a special request for relief will contain the name of the case, the precise nature of the relief requested, those facts necessary to decide the request, citations to authority if any, and why the relief is necessary.

e. A response may be submitted by the opposing party as soon as possible, but is not required.

5. Sending and receiving filings.

a. A filing is "sent" or "filed" when sent via email to the correct email address of the recipient(s). If there is a legitimate question whether the email system functioned correctly (undeliverable email notification for example), the sender shall again send the filing until satisfied it was transmitted or an email receipt is received.

b. A filing is "received" by the opposing party when it is sent to the proper parties, with the following exceptions:

(1) The recipient was outside the continental United States (OCONUS) when the email was sent, in which case the filing is received on the first duty day following return from OCONUS.

(2) The filing was sent on a Friday after 4:30 p.m., Saturday, or Sunday, in which case the filing is received the following Monday. If the following Monday is a federal holiday, the filing is received on the following Tuesday. A document filed or sent on a federal holiday is not received until the first business day after the federal holiday.

(3) The filing was sent Monday - Thursday after 4:30 p.m., in which case the filing is received the following day.

(4) Upon request by the receiving party or the Chief Prosecutor or Chief Defense Counsel or their Deputies on behalf of their counsel, the Military Judge establishes a different "received date" to account for unusual circumstances. Requests to extend the time a filing was received shall be in the form of a special request for relief. In the alternative, a request for an extension may be filed.

6. Timing for filing motions, responses, and replies.

a. Motions.

(1) Timing. Motions addressed in R.M.C. 905(b)(1) – (5) must be raised and made by the time provided in R.M.C. 905(b) unless the Military Judge directs otherwise. As to other motions, the Military Judge will ordinarily establish a deadline for the filing of motions by way of an Order.

(2) Format of a motion: *See* Form 3-1.

(3) Waiver. Motions which are not made in a timely fashion are waived. Requests for exceptions to waiver must be addressed to the Military Judge with motion-specific reasons for failure to make the motion in a timely fashion.

b. Responses.

(1) Timing. Unless the Military Judge provides otherwise, a response is due within 7 days after a motion is received.

(2) Format of a response: *See* Form 3-2.

c. Replies.

(1) Counsel may submit a reply to a response, however Counsel must take care that matters that should have been raised in the original motion are not being presented for the first time as a reply. Replies are unnecessary to simply state that the party disagrees with a response. If a reply is not filed, that indicates that the party stands on their motion or initial filing, and it does not indicate agreement with a response.

(2) Timing: Replies shall be filed within three days of receiving a response unless the party does not desire to file a response.

(3) Format for a reply: *See* Form 3-3.

7. Burdens of proof and persuasion in motion practice.

a. As a general rule, the burden of proof (production of evidence and preponderance of evidence), and the burden of persuasion are on the moving party. (*See* R.M.C. 905(c)). In any motion in which the moving party does not believe that the general rule should apply, or believes

that one or both of the burdens should change after a certain quantum of evidence is introduced, the party must provide in the filing:

(1) A statement of the burden of proof (production of evidence) in the particular motion;

(2) A statement of the burden of persuasion in the particular motion;

(3) The point, if any, at which either the burden of proof or the burden of persuasion is shifted to the non-moving party; and,

(4) The legal argument in support of the statement. (Stating merely that fairness requires shifting the burden of proof or persuasion is not sufficient legal argument.)

b. A response must address those matters concerning shifting of the burden(s) raised by the moving party.

8. Rulings on motions.

a. The Military Judge shall make final rulings on all motions submitted to him/her based upon the written filings of the parties submitted in accordance with this Rule, and the facts and law as determined by the Military Judge, unless:

(1) Material facts necessary to resolution of the motion are in dispute and require the taking of evidence;

(2) A party correctly asserts in a filing that the law does not permit a ruling on filings alone, accompanied by citation to the authority which prohibits the Military Judge from ruling on the filings alone; or,

(3) The Military Judge, in his/her sole discretion, determines that oral argument is necessary to provide a full and fair trial.

b. *See also* R.M.C. 905(e).

Form 3-1 Format for a Motion

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	**Defense Motion** to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones [Date motion filed] *Note: Use bold as shown above.* .

Note: The caption above was created using a 2 column table. Counsel may use that method, or any other, that separates the name of the case from the name of the filing.

*NOTE: The following will be included in **separately numbered paragraphs**. Use Arabic numbers.*

1. A statement that the motion is being filed within the time frames and other established guidance or direction of the Military Judge.

2. A concise statement of the relief sought.

3. (Optional) An overview of the substance of the motion.

4. (May be required) Statement concerning burden of proof.

5. The facts, and the source of those facts (witness, document, physical exhibit, etc.). Each factual assertion will be in a separate, lettered sub-paragraph. This will permit responses to succinctly admit or deny the existence of facts alleged by the moving party. If the facts are, or the identity of the source is, protected or classified, that status will be noted.

6. Why the law requires the relief sought in light of the facts alleged, including proper citations to authority relied upon.

7. Whether oral argument is requested or required by law. If asserted that argument is required by law, citations to that authority, and why the position of the party cannot be made fully known by filings.

8. The identity of witnesses who will be required to testify on the matter in person, and/or evidentiary matters that will be required. Listing a witness is not a request for the witness. Requests for production of witnesses by the defense must be made separately, and in accordance with R.M.C. 703. Stating the evidence needed is not a discovery request or a request for access to evidence.

9. A certificate of conference indicating that the moving party has conferred with the opposing party and whether the opposing party concurs with or objects to the requested relief.

10. Additional information not required to be set forth as above.

11. A list of attachments.

Form 3-2 Format for a Response

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	**D-1** *(Filing Designation as assigned by MCTJ Staff)* **Government Response** To Defense Motion to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones [Date motion filed] *Note: Use bold as shown above.*

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the response is being filed within the time frames and other established guidance or direction of the Military Judge.

2. Whether the responding party believes that the motion should be granted, denied, or granted in part. If granted in part, the response shall be explicit about what relief, if any, the responding party believes should be granted.

3. (Optional) Overview - This paragraph is not required even if the motion had an overview.

4. Those facts cited in the motion that the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion. The agreed upon facts will correspond to the subparagraph in the motion containing the facts involved.

5. The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), insofar as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered subparagraph. If the facts or identity of the source is protected or classified, that status will be noted. These factual assertions will correspond to the subparagraph in the motion containing the facts involved.

6. Why the law does not require or permit the relief sought in light of the facts alleged, including proper citations to authority relied upon.

7. (May be required) Address issue regarding burdens if addressed in the motion, or it is otherwise required to be addressed.

8. Whether oral argument is requested or required by law. If asserted that argument is required by law, citations to that authority, and why the position of the party cannot be made fully known by filings.

9. The identity of witnesses who will be required to testify on the matter in person, and/or evidentiary matters that will be required. Listing a witness is not a request for the witness. Requests for production of witnesses by the defense must be made separately, and in accordance

with R.M.C. 703. Stating the evidence needed is not a discovery request or a request for access to evidence.

10. Additional information not required to be set forth as above.

11. A list of attachments.

Form 3-3 Format for a Reply

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	**D-1** *(Filing Designation as assigned by MCTJ Staff)* **Defense Reply** to Government Response to Defense Motion to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones [Date motion filed] *Note: Use bold as shown above.*

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the reply is being filed within the time frames and other established guidance or direction of the Military Judge.

2. In separately numbered paragraphs, address the response as needed. When referring to the response, identify the paragraph in the response being addressed.

3. Citations to additional authority if necessary.

4. The identity of witnesses not previously mentioned in the motion or response who will be required to testify on the matter in person, and/or evidentiary matters not previously mentioned in the motion or response that will be required. Listing a witness is not a request for the witness. Requests for production of witnesses by the defense must be made separately, and in accordance with R.M.C. 703. Stating the evidence needed is not a discovery request or a request for access to evidence.

5. Additional information not required to be set forth as above.

6. A list of any additional attachments.

Military Commissions Trial Judiciary

11 October 2007

Military Commissions Rules of Court

Rule 4. Appearance, Absence, and Excusal, Relief or Withdrawal of Counsel

1. **Purpose.** This rule governs the entry of appearance of counsel, absence, and excusal, relief or withdrawal of counsel.

2. **Detailing and appearance.**

a. Military Counsel.

(1) Military counsel have made an appearance on behalf of the United States or an accused when such counsel are detailed by proper authority to a case which has been referred for trial by a Military Commission.

(2) Upon referral of a case, the Chief Defense Counsel and the Chief Prosecutor will provide copies of detailing documents to the MCTJ Staff and, if known, to opposing counsel.

(3) Until the DDC is relieved or excused from his/her duty of representation by competent Authority, in accordance with R.M.C. 505, the DDC will continue to represent the interests of an accused.

(4) Under R.M.C.109 and 506, it is the responsibility of the Chief Defense Counsel (CDC) to provide representation for an accused at all times by detailing a qualified defense counsel. R.M.C. 502 outlines the qualifications and duties of personnel of Military Commissions; to include detailed defense counsel, associate or assistant defense counsel, and civilian defense counsel. (*See also* Regulation for Trial by Military Commissions, Chapter 9).

b. Civilian Defense Counsel (CC). A CC will be deemed to have entered an appearance with the Commission when the CC submits Form 4-1, the notice of appearance and agreement, including MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel, by email to the Military Judge through the MCTJ Staff.

c. Associate or Assistant Defense Counsel. An associate or assistant defense counsel may perform any act or duty which a defense counsel may perform under law, regulation, or custom of the service, under the supervision of the defense counsel. (*See* R.M.C. 502(d)(6)). DDC or CC, if they are lead counsel, should ensure that Assistant Defense Counsel are always afforded the appropriate supervision. Assistant Defense Counsel may not appear alone at any session of a Military Commission or a R.M.C. 802 conference, and may not submit motions

under only their signature. Assistant Defense Counsel have made an appearance when a written notice of detail is provided to the Military Judge by the detailing authority.

d. Other Assistants to Counsel. If a party has R.M.C. 506(d) assistant(s) who will be present at a commission session or trial, and the party desires the assistant's presence at counsel table, the party will notify the Military Judge, the MCTJ Staff, and opposing counsel of the identity of the assistant and the capacity in which the assistant will serve.

e. If any counsel believes that his/her participation in the Military Commissions or representation of an accused is or may be prohibited because of ethical or other considerations, he/she shall follow the procedures set forth in R.M.C.109.

3. **Presence of counsel at Commission sessions.** The following rules govern the presence of counsel at Commission sessions.

a. As a general rule, all counsel who have entered an appearance in a specific case must attend all sessions of that case before the Commission.

b. The Military Judge may authorize counsel's absence from a particular session with advanced waiver of that counsel's presence by their client. Any counsel seeking authorization for absence from a session will request permission from the Military Judge and provide written evidence of the waiver by the client. The requirements of paragraph 3.e below must be met. The "client" for the purposes of the prosecution shall be the Chief Prosecutor or the lead prosecutor. (*See* paragraph e(2) below).

c. Because a closed session may be required during any session and could occur without warning, at least one Detailed Military Defense Counsel must attend all Commission sessions.

d. If a counsel's presence is waived by the client and such absence has been authorized by the Military Judge, that absence will not limit the business that is scheduled to be accomplished at the session for which a counsel has been authorized to be absent. For example, if the Commission is scheduled to hear motions, the fact that a client has waived the appearance of a counsel would not allow a party to defer or avoid litigating a motion because said counsel is not present. Similarly, consideration of matters that arise during a session in which a counsel's presence has been waived will not be subject to deferral simply because of the absence of the counsel whose presence has been waived.

e. The notice of waiver to the Military Judge will be submitted by email through the MCTJ Staff and will contain the following information:

(1) In the case of the defense, a signed waiver by the accused must be provided to the Military Judge in advance of the scheduled session. The waiver must indicate that:

(a) The accused is expressly waiving the presence of a named counsel for the scheduled Commission session and be signed by the accused, DDC, and the lead defense

counsel, if other than the DDC. The waiver will be in English or, if the original is in a language other than English, translated into English.

(b) The accused and lead counsel for the defense and the counsel seeking permission to be absent are aware that absence of the counsel does not permit delay or deferral of business of the Commission because said counsel is absent, and that another counsel for the defense who will be present can fully address and litigate, if necessary, any business of the Commission.

(c) The accused understands that another of his defense counsel is responsible for ensuring all business of the Commission can be conducted at the session.

(d) The request is not for the purposes of seeking delay and will not, in fact, delay Commission proceedings.

(e) The format contained at Form 4-2, Waiver of Counsel, may be used by the defense.

(2) In the case of the prosecution, the waiver must be approved by the Chief Prosecutor or lead prosecutor. The absence of a prosecutor for a particular session will not limit the business to be conducted at that session, whether anticipated or not.

f. In lieu of the signed waiver (Form 4-2), the client may, at a session at which the civilian counsel is present, state that the civilian counsel's presence is waived for all subsequent sessions at which the civilian counsel does not appear. The client must state that he understands those matters addressed in paragraph 3.e(1)(b) above and specifically that he understands that other matters may be handled at such sessions which would normally have been handled by the civilian counsel and that he waives such advice and assistance.

g. In cases in which there has been an on-the-record or written waiver of the future presence of civilian counsel at sessions, the civilian counsel will not be required to be present at all sessions.

h. If, at any session, the accused seeks to revoke his written or on-the-record waiver of the presence of the civilian counsel, the civilian counsel will be required to be present at all subsequent trial terms of the Commission. Alternatively, the civilian counsel may request to withdraw from the case completely, and the request may be granted at the discretion of the Military Judge. Any such revocation of waiver by the accused during a given trial term will not require the civilian counsel's presence during the trial term at which the revocation of waiver was made.

i. Any request for waiver of appearance of assistant defense counsel or any military counsel will be addressed by the military judge as appropriate.

4. Excusal, relief or withdrawal of counsel.

a. Excusal/Relief/Withdrawal: The termination of all representational responsibility of a detailed counsel or a qualified civilian counsel after entering an appearance.

b. Detailed Counsel: *See* R.M.C. 505(d) and 506(b).

c. Defense Counsel: *See* R.M.C. 506(b).

Form 4-1 Notice of Appearance and Agreement

UNITED STATES OF AMERICA v. NAME	)))))))))	CIVILIAN DEFENSE COUNSEL NOTICE OF APPEARANCE AND AGREEMENT (DATE)

1. Pursuant to procedures of court/instruction for counsel, I, ATTORNEY'S FULL NAME, hereby provide notice to the Military Judge of my appearance on behalf of CLIENT'S FULL NAME. My office address, phone numbers, and email address are: ADDRESS, VOICE AND FAX PHONE NUMBERS, & EMAIL ADDRESS. I am an active member in good standing licensed to practice in the following jurisdictions: LIST BAR ADMISSIONS.

2. I have attached MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel.

_____
COUNSEL NAME

Form 4-2 Waiver of Presence of Counsel

UNITED STATES OF AMERICA	)	WAIVER OF PRESENCE OF COUNSEL
v.	)	
NAME	)	(DATE)

1. I, ACCUSED'S FULL NAME, hereby provide notice to the Military Judge that I waive the presence of FULL NAME OF ATTORNEY, my defense counsel for the Commission session scheduled for DATE. By my signature below, I certify that:

a. I have fully discussed this waiver with my defense counsel, NAME OF COUNSEL WITH WHOM DISCUSSED, and he/she has fully advised me of, and I understand my right to, have my defense counsel present for Commission sessions. I have also been advised and understand that the absence of NAME OF ABSENT ATTORNEY will not delay or defer the business of the Commission, whether previously scheduled or arising during the Commission session. I further understand and agree that NAME OF COUNSEL WHO WILL BE PRESENT AT THE SESSION is/are competent and fully capable of representing me and litigating all matters that are scheduled for or may come up at the Commission session. I further certify that this waiver is not made in an attempt to delay the proceedings and in fact will not delay the proceedings.

b. I am voluntarily executing this waiver of counsel after being fully advised of my right to counsel and discussing that right with my defense counsel. No one has threatened me or in any way forced me to execute this waiver and I believe it is in my best interest to execute it.

_____
ACCUSED

I/We, NAME OF DETAILED DEFENSE COUNSEL & LEAD DEFENSE COUNSEL (if other than DDC), by my/our signature below, certify to the Military Judge that:

1. I/we have fully discussed the substance of this waiver with the accused, NAME OF ACCUSED, and he fully understands its content and impact.

2. This waiver will not in any way delay or inhibit the business of the Commission, whether scheduled or that may arise at the next session, and this waiver is not offered to delay or defer the business of the Commission.

3. The Detailed Defense Counsel, NAME OF DDC TO BE PRESENT, is fully qualified and competent to litigate all matters that should arise at the scheduled Commission session.

4. I believe it is in the best interest of the accused that he execute this waiver.

_____ _____

Detailed Defense Counsel/Date Lead Defense Counsel/Date

Military Commissions Trial Judiciary

4 May 2007

Military Commissions Rules of Court

Rule 5. Filings Inventory

1. Purpose. This rule establishes:

a. Requirements for the MCTJ Staff to maintain a Filings Inventory. The purpose of the Filings Inventory is to set forth which filings and other matters are before the Military Judge.

b. Responsibilities for counsel to use filing designations, once created, and to check the accuracy of a Filings Inventory, upon receipt, so that counsel are certain of those matters before the Military Judge.

2. Establishing the Filings Inventory. The MCTJ Staff shall establish and maintain a Filings Inventory for each case referred to the Commission, which reflects those filings pending before the Military Judge.

a. As soon as the first filing on an issue is received, the MCTJ Staff shall assign a *filing designation* using one of four categories below followed by a number:

P for a filing or series of filings initiated by the prosecution.
D for a filing or series of filings initiated by the defense.
MJ for a filing or series of filings initiated/directed by the Military Judge.
PO for protective orders issued by the Military Judge.

(The terms “filing number” and “filing designation” may be used interchangeably.)

b. The number following the category designation shall be the next unused number for the category and case. The *filing designation* (category and number e.g., P2, D4, PO1) shall be unique for each case and the designation shall not be reused in that case.

c. To identify a specific document, the filing designation will include a letter and the MCTJ Staff may, as required, add a simple description of the nature of the filing such as Motion, Response, Reply, Supplement, Answer, or other designation assigned, plus the name of the accused. For example, the second prosecution motion in Jones would be P2. The response would be P2A. The reply would be P2B. MCTJ Staff might also make the designation "P2B - Reply, Compel Discovery - Jones."

d. The Filings Inventory shall contain an Active Section which lists all filings currently before the Military Judge.

e. The Filings Inventory shall also contain a listing of all filings which are no longer pending before the Military Judge (matters which have been resolved in some fashion). These items shall be placed in the Inactive Section of the Filings Inventory.

3. Filing designation and future communications or filings.

a. Once a filing designation has been assigned, all future communications - whether in hard copy or by email - concerning that series of filings will use the filing designation as a reference in addition to the name of the filing. This includes adding the initial file designations to the style of all filings, the subject lines of emails, and the file names to ALL email attachments. Examples:

* An email subject line forwarding a response to P2 in US v Jones should read: *"P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith."* The filename of the filings shall be the same as the response being sent.

* The filename of a document that is an attachment to the response should read: *"P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith - attachment - CV of Dr Smith."*

b. Each of the designations or filenames listed above may also include other descriptions or information (date, when filed, etc.) the parties may wish to add to assist in their management of filings.

c. The names given to matters that may appear on the Filings Inventory - such as the subject of a motion - will not be classified or otherwise protected as the Filings Inventory is intended to be transmitted through unsecured networks. Counsel must therefore ensure that the names of their filings are not in themselves classified.

4. Distribution of the Filings Inventory.

a. After making a filing, a party may request, by email, the filing designation that has been assigned by the MCTJ Staff.

b. At the request of any party or the Clerk of Court, Office of Military Commissions, the MCTJ Staff shall provide a copy of the current Filings Inventory as soon as practicable.

c. The MCTJ Staff shall from time to time, or when directed by the Military Judge, distribute copies of the Filings Inventory to the Military Judge, all counsel on the case, the Chief Prosecutor and Chief Defense Counsel (and their Deputies and Chief Legal NCOs,) and the Clerk of Court, Office of Military Commissions.

d. The Military Judge shall ensure that a copy of the current Filings Inventory is marked as an Appellate Exhibit at the beginning of each session of the Commission, so that parties may refer to filings by the filing designation.

e. At sessions of the Commission, counsel shall, whenever possible, refer to a filing by the filing designation so the record is clear concerning precisely which filing or issue is being addressed.

5. Counsel responsibility when receiving the Filings Inventory. The Filings Inventory is the only method by which counsel can be sure which filings have been received by the Military Judge, and which matters are before the Military Judge.

a. Counsel will examine each Filings Inventory as it is received and notify the MCTJ Staff, Military Judge, and opposing counsel of any discrepancies within one duty day.

b. If counsel believe they have submitted a filing which is not reflected on the Filings Inventory, they shall immediately send that filing - with all attachments - to the MCTJ Staff, Military Judge, and opposing counsel, noting the discrepancy.

c. If there is a discrepancy in the Filings Inventory and counsel fail to take the corrective action as indicated above and in paragraph 6 below, the Military Judge may elect not to consider that filing.

6. Effect of omission in Filings Inventory.

a. If a filing or other matter is not on the Filings Inventory, it is not before the Military Judge for decision. If a matter has been mistakenly left off the Filings Inventory, it is the responsibility of counsel to note the omission and advise the MCTJ Staff. (*See* paragraph 5, above).

b. If counsel believe that a matter should be on the Filings Inventory and have made that known to the MCTJ Staff, and the MCTJ Staff does not or fails to include the matter on the Filings Inventory, it is the responsibility of counsel to raise the matter with the Military Judge.

c. Failure to fulfill the responsibilities noted above constitutes waiver should the Military Judge not address or rule upon a matter that is not on the Filings Inventory.

Military Commissions Trial Judiciary

11 October 2007

Military Commissions Rules of Court

Rule 6. Trial Exhibits and Transcript of the Proceedings

1. **Purpose.** This rule establishes guidelines for marking, handling, and accounting for trial exhibits and the transcript of the proceedings in Military Commission trials.

2. **Definitions:**

a. Exhibit:

(1) A document or object, appropriately marked, that is presented, given, mentioned, or shown to the Military Judge, any other Commission member, or a witness during a session of the Commission.

(2) A document or object, appropriately marked, that is offered or received into evidence during a session of the Commission, or referred to during a Commission session as an exhibit.

(3) Other documents or objects that the Military Judge directs be marked as an exhibit or are marked with the Military Judge's permission.

b. Prosecution or Defense Exhibits *for identification* are exhibits sponsored by a party and:

(1) Intended to be considered on the merits or sentencing, but either not offered into evidence, or offered into evidence and not received; or,

(2) Not intended to be considered on the merits or sentencing, but used in some other manner during the trial such as a statement used to refresh the recollection of a witness with no intent to offer the statement.

c. Prosecution or Defense Exhibits are exhibits that have been offered and received into evidence on the merits or sentencing.

d. Appellate Exhibits are those exhibits:

(1) Presented for or used on a matter other than the issue of guilt or innocence, or a sentence. Motions, briefs, responses, replies, checklists, written instructions by the Military Judge for the Commission members, findings and sentencing worksheets, and other writings used during motions practice are among the most common forms of Appellate Exhibits.

(2) The Military Judge may decline to have lengthy publications or documents marked as Appellate Exhibits when the precise nature of the document can be readily identified at the session and later on appeal or review. Examples would be well-known directives, rules, cases, regulations, etc.

(3) *See* Rule of Court 8 regarding marking, recording, and controlling Appellate Exhibits.

e. Dual use exhibits. An exhibit identified on the record that is needed for a purpose other than the reason for which it was originally marked. A dual use exhibit allows an exhibit to be used for more than one purpose without having to make additional copies for the record. Example 1: An Appellate Exhibit that a counsel wants the Commission to consider on the merits. Example 2: A counsel marks an exhibit for identification but does not offer it, and opposing counsel desires to offer that exhibit. An exhibit may be used for a dual use only with the permission of the Military Judge, and the exhibit must be properly marked to show both uses. If the dual use exhibit will be provided to the members, the members will be given a copy that does not reflect that the exhibit is also an Appellate Exhibit.

3. **Rules pertaining to marking, handling, and referring to exhibits.**

a. Any exhibit provided to the Military Judge, a Commission member, or a witness during a session of the Commission shall be properly marked.

b. Any document or other piece of evidence present in the courtroom which is referred to in a session before the Commission as an exhibit shall be properly marked.

c. Any document or other piece of evidence which is displayed for viewing by a witness, the Military Judge, or a Commission member during a session of the Commission shall be properly marked. In the case of an electronic presentation (slides, PowerPoint, video, audio or the like) the Military Judge shall direct the form of the exhibit to be marked for inclusion into the record. The parties should be prepared, at trial, to provide hard (paper) copies of PowerPoint presentations and transcripts of audio or audio/video exhibits.

d. When a party marks or offers an exhibit that in its original state was in a language other than English, and the party marking or offering the exhibit has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also mark and provide to opposing counsel an exhibit containing the English translation along with a copy of the original un-translated document, recording, or other media in which the item was created, recorded, or produced.

e. Parties that mark or offer exhibits which cannot be included into the record or photocopied - such as an item of physical evidence - shall inquire of the Military Judge as to the form by which a tangible representation or substitution of the exhibit shall be included in the record.

f. Before an exhibit is referred to by a counsel for the first time, or handed to a witness, the Military Judge, or a member of the Commission, it shall be first shown to the opposing counsel so that opposing counsel knows the item and its marking, even if the counsel is certain opposing counsel is familiar with the exhibit and its marking.

4. **How exhibits are to be marked.** *See* Form 6-4.

5. **Marking exhibits.**

a. Before trial. Pre-marking of Prosecution or Defense Exhibits will only be done by the court reporter. Counsel are encouraged to provide to the court reporter any exhibits they intend to use at a session of the Commission in advance of that session. Numbers shall not be applied to Appellate Exhibits in advance of any session, except as directed by the Military Judge or the MCTJ Staff.

b. At trial. Counsel should confer with the court reporter regarding marking exhibits which they are offering. Counsel are not allowed to mark Appellate Exhibits. The court reporter or the Military Judge may mark any exhibits during trial. *See* Rule of Court 8 regarding marking, recording, and controlling Appellate Exhibits.

6. **Marked exhibits not offered at trial and out of order exhibits.**

a. Counsel are not required to mark, offer, or refer to exhibits in the numerical or alphabetical order in which they have been marked. Example: The Defense pre-marked Defense Exhibits A, B, and C all for identification. At trial, the Defense wishes to refer to or offer Defense Exhibit C for identification before Defense Exhibit A or B for identification has been offered or mentioned. That sequence *is* permissible.

b. If an exhibit is pre-marked but not mentioned on the record or offered, counsel are responsible for ensuring that the record properly reflects exhibits by letter or number that were marked but not mentioned or offered. This is ordinarily done at the close of the last session of the day. Counsel may either do this on the record or may coordinate with the court reporter immediately after the session to ensure that the official log of exhibits is correct. (*See* paragraph 8, below.) If counsel chooses to do this on the record, an example of the correct procedure is: "Let the record reflect that the Prosecution marked, but did not offer, display, or mention, the following Prosecution Exhibits: 3, 6, and 11." The party will ensure that the court reporter is given and retains the marked exhibit, even though it has not been admitted into evidence.

c. Exhibit for identification marking as compared to the exhibit received. If an exhibit for identification is received into evidence, the received exhibit shall carry the same letter or number. Example: Offered into evidence are Prosecution Exhibits 1, 2, and 3 for Identification. Prosecution Exhibit 1 and 3 for Identification are not received. Prosecution Exhibit 2 for Identification is received. Once received, what was Prosecution Exhibit 2 for Identification is now "Prosecution Exhibit 2." The court reporter will mark the words "for Identification" off of the exhibit.

d. Form 6-4 is a guide for marking trial exhibits.

7. **How exhibits are offered.**

a. Prosecution and Defense Exhibits. In the interests of economy, to offer an exhibit, it is only necessary for counsel to say, "[(We) (The Defense) (The Prosecution)] offer(s) into evidence what has been marked as [(Prosecution Exhibit 2 for identification) (Defense Exhibit D for identification).]

b. Appellate Exhibits. Appellate Exhibits are not offered. They become part of the record once the Military Judge has directed that they be marked.

8. **Confirming the status of an exhibit.** The court reporter and Military Judge together shall keep the official log of exhibits that have been marked, and, in addition, with respect to Prosecution and Defense Exhibits, an annotation showing whether an exhibit has been offered and/or received. Before departing the courtroom after the last session of every day, counsel for both sides shall confer with the court reporter to ensure the log is properly annotated, is correct, and that all exhibits are accounted for.

9. **Control of exhibits.** During trial, and unless being used by counsel, a witness, the Military Judge, or other members of the Commission, all exhibits that have been marked shall be placed on the evidence table in the courtroom consistent with any regulations concerning the control of classified, privileged, or protected information. After the end of each session, the court reporter and the Security Officer, as directed by the Clerk of Court, Office of the Military Commissions, shall secure all classified exhibits until the next session. As to unclassified exhibits, the court reporter will inventory all exhibits and maintain control over such exhibits until the next session.

10. Transcript of the Proceedings. In accordance with R.M.C. 1103, during the course of a trial, the transcript of the proceedings of any session will be provided to the Military Judge who presided over the session in question before it is given to any other person or to the parties. In accordance with R.M.C. 1103 and R.M.C. 1104, prior to authentication of the record of trial, only the Military Judge can authorize the release of the unauthenticated transcript or any portion thereof. At the direction of the Military Judge, the court reporter will provide the transcript or portions thereof to counsel for errata purposes prior to authentication.

11. **Sample forms.**

a. Form 6-1: Appellate Exhibits.
b. Form 6-2: Prosecution Exhibits.
c. Form 6-3: Defense Exhibits.
d. Form 6-4: Marking Exhibits.

Form 6-1 Appellate Exhibits Log

US v. _____ Page ___ of ___ Pages

Arabic Number	Description	Mark X if classified or protected	Filings Inventory number (if applicable)

Form 6-2 Prosecution Exhibits Log

US v. _____ Page ___ of ___ Pages

Arabic Number	Description	Mark X if classified or protected	Offered	Received

Form 6-3 Defense Exhibits Log

US v. _____ Page ___ of ___ Pages

Letter	Description	Mark X if classified or protected	Offered	Received

Form 6-4 Marking Exhibits

I. Unclassified Exhibits and Exhibits that are not Protected Information		
Type of Exhibit	**Examples**	
	First Page - Single Page Exhibit	**Multiple Page Exhibits**
Prosecution Exhibits for Identification. Use Arabic numerals	Prosecution Exhibit 1 for Identification *OR* PE 1 for identification *OR* PE 1 for ID	*First page*: PE 1 for ID Page, 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Defense Exhibits for Identification. Use letters. After the letter Z is used, the next exhibit shall be AA.	Defense Exhibit A for Identification *OR* DE A for identification *OR* DE A for ID	*First page*: DE A for ID, Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Prosecution Exhibits and Defense Exhibits	Military Judge or Reporter will mark through ~~for Identification~~ *OR* ~~for ID~~.	*First page*: Mark through on first page. *Subsequent pages*: No markings necessary if properly marked as above.
Appellate Exhibits Use Arabic numbers	Appellate Exhibit 1 *OR* AE 1	*First page*: AE 1, Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Attachments Letters or numbers depending on how indexed in the Appellate Exhibits	Attachment 1 to AE 3 *OR* Attachment A to AE 3	*First page*: Attachment 1 to AE 3, page 1 of 3 *Subsequent pages*: 2 of 3, 3 of 3.

II. Classified Exhibits

Mark the same as I, and in addition, adhere to directives regarding the proper markings and cover sheets.

III. Unclassified, Privileged, or Protected Exhibits

Mark the same as I, above, adding the words on the first page or cover sheet “Privileged Information” or “Protected Information.”

Military Commissions Trial Judiciary

11 October 2007

Military Commissions Rules of Court

Rule 7. *Amicus Curiae* Briefs

1. **Purpose.** This rule establishes general procedures for submitting an *amicus curiae* brief. An *amicus* brief, which logically addresses an important matter not previously considered by the Commission, or addresses an important matter in a way that another brief filed with the Commission does not, might be of benefit. Briefs that do not meet this standard would not assist the Commission.

2. **Submitting briefs**. A person individually, or on behalf of an organization or entity, may provide an *amicus* brief to the Clerk of Court, Office of Military Commissions by sending the brief as an attachment to the following email address: CCMC@dodgc.osd.mil. The person submitting the brief must meet the following qualifications, and such qualifications shall be stated in the first paragraph of the brief.

a. The submitter is an attorney who is licensed to practice before the highest court of any State of the United States or the District of Columbia;

b. If the submitter is a party to any Commission case in any capacity, has an attorney-client relationship with any person whose case has been referred to a Military Commission, is currently or is seeking to be *habeas* counsel for any such person, or is currently or is seeking to be next-friend for such person, the submitter must so state and further state the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding; and,

c. The submitter certifies, by submitting the brief, that he or she in good faith as a licensed attorney believes that the law is accurately stated, that he or she has read and verified the accuracy of all points of law cited in the brief, and that he or she is not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

3. **Format.** Any *amicus* brief submitted to the Clerk of Court, Office of Military Commissions shall comport with the following:

a. The brief must be in PDF (Adobe Acrobat) format as an attachment to the email submitting the brief to the Clerk of Court, Office of Military Commissions.

b. The brief, when printed, will contain one inch margins on 8 1/2 x 11 paper and be in a 12 point type face. The brief will be double-spaced and will not exceed 25 pages.

c. The brief may use URLs (web links) as cites to legal authority not generally available through legal research services such as LEXIS or Westlaw. URL matters are not part of the brief, and the brief will be rejected by the Clerk of Court, Office of Military Commissions or the Military Judge, if URL matters are viewed as an attempt to exceed page limitations. Parties submitting briefs are responsible for ensuring that the URL is functional on the date of submission.

d. The brief must follow the format set forth in Form 7-1.

4. **Action by the Clerk of Court, Office of Military Commissions.** When received by the Clerk of Court, Office of Military Commissions, he or she shall:

a. Send a copy to the MCTJ Staff;

b. Send a copy to the Chief Defense Counsel and Chief Prosecutor who may, in turn, forward such briefs to other counsel associated with the case.

5. **Consideration by a Military Commission**.

a. An *amicus* brief may be considered by a Military Commission only if:

(1) A filing (motion, response, or reply) by a party cites and endorses an *amicus* brief and a copy of the brief is appended to the motion filing; and,

(2) The *amicus* brief cited is relevant to the issues being asserted in the filing; and,

(3) The *amicus* brief, the certification, and its manner of submission meet the criteria in paragraphs 2 and 3 above.

b. The Military Judge may consider an *amicus* brief *sua sponte*, regardless of the provisions of this paragraph.

6. **Other matters.**

a. No person may argue an *amicus* brief before the Military Judge without specific, prior leave from the Military Judge. However, any party may invite the attention of the Military Judge to an *amicus* brief cited in the party's motion or response or in oral argument when such argument is permitted.

b. The submission, processing, and consideration of *amicus* briefs will not be allowed to delay the Commission.

7. **Timeframe exceptions**.

a. If a significant *amicus* brief has been made available as provided in paragraph 4, above, after a party has filed a motion, response, or reply on the same or a substantially similar

issue, and before the Military Judge has issued a ruling on the record or in writing, a party may request the Military Judge consider the *amicus* brief by:

(1) Requesting in the body of an email that the Military Judge consider the brief and attaching the brief; *and*,

(2) Stating those matters raised in the brief that were not considered or known before all filings were due.

b. If the Military Judge agrees to consider the brief, the Military Judge may allow the opposing party to file a response. If so, the Military Judge will advise the opposing party of the time limit. As a general rule, no reply to that response will be permitted. No adverse inferences will be drawn from an election by the opposing party not to respond to an *amicus* brief.

Form 7-1 Format for an *Amicus* Brief

UNITED STATES v. (Name of Accused) **BEFORE A MILITARY COMMISSION CONVENED PURSUANT TO THE MILITARY COMMISSIONS ACT OF 2006** *(Date brief is sent to the Clerk of Court, Office of Military Commissions)*	*Amicus Brief filed by* *(person filing the brief)* *[on behalf of (if applicable, indicate the entity on whose behalf the brief is submitted)]*

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers. Sub paragraphs will be numbered or lettered.

1. (Required in every brief.). My name is _____. I certify that I am licensed to practice before the (state jurisdiction). I further certify:

a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor I am seeking to be *habeas* counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person. **OR,**

b. I am (describe the condition listed in paragraph 1a above and the specific individual case involved) and I further state the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding.

c. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

2. Issue(s) Presented. [Set forth, in a concise statement, each issue presented.]

3. Statement of Facts. [Set forth accurately all facts pertinent to the issues raised.]

4. The law.

5. Argument. (Optional.)

Signature Block
Office Address
Email Address
Phone Number

Military Commissions Trial Judiciary

4 May 2007

Military Commissions Rules of Court

Rule 8. Appellate Exhibits

1. **Purpose.** This rule establishes guidance regarding marking and maintaining Appellate Exhibits.

2. The MCTJ Staff will preserve the communications and filings of the parties marking them as Appellate Exhibits (AE), as directed by the Military Judge, and keeping an index of Appellate Exhibits. Copies of all Appellate Exhibits (except in the case of material requiring special handling) will be made available to counsel for both sides and in the courtroom during any session. Once a session has been held, the original copy of each Appellate Exhibit will be provided to the court reporter for safekeeping and future availability. The Clerk of Court, Office of Military Commissions will determine whether the original or a duplicate original is required for purposes of the Record of Trial.

3. Once marked and approved by the Military Judge, electronic copies of the Appellate Exhibits will be provided to the court reporter. Neither the Military Judge nor the MCTJ Staff will perform any security or other review for classified, Privacy Act, or Sensitive But Unclassified information. If the Military Judge determines that an Appellate Exhibit should not be released in the interests of ensuring the parties receive a fair trial or for other reasons, the Military Judge will direct that a particular exhibit be sealed or not released to the public for a certain period. The Military Judge's decision to seal or not authorize the release of an Appellate Exhibit, or a portion thereof, will be communicated to counsel for both sides and to the court reporter and the Clerk of Court, Office of Military Commissions.

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES OF AMERICA	)	**CMCR CASE NO. 07-001**
v.	)	***RULING ON REQUEST FOR RECONSIDERATION AND MOTION TO ATTACH***
OMAR AHMED KHADR	)	**DATE: OCTOBER 2, 2007**

Upon review and consideration of the Appellee's Motion for Reconsideration and Motion for Leave to File Attachments, dated October 1, 2007, the Motion for Leave to File Attachments is GRANTED, and the Motion for Reconsideration is DENIED.[1]

FOR THE COURT:

LEROY F. FOREMAN
Clerk of Court

[1] Judge Holden did not participate in this ruling.

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

Date: 3 OCT 07

MEMORANDUM FOR Omar Ahmed Khadr, 0766, Guantanamo Bay, Cuba

SUBJECT: Service of Ruling on Request For Reconsideration and Motion to Attach from the Court of Military Commission Review in the Case of United States v. Omar Ahmed Khadr, a/k/a "Akhbar Farhad", a/k/a "Akhbar Farnad," a/k/a "Ahmed Muhammed Khali"; Case No. 07-001, dated 2 October 2007

You are hereby served with a copy of the Ruling on the request for reconsideration of the decision of the Court of Military Commission Review and a motion for leave to file attachments, on OCTOBER 3, 2007, pursuant to Chapter 25 of the Regulation for Trial by Military Commissions and the Rules for Military Commission. A copy of the ruling has been provided to your detailed defense counsel.

AFFIDAVIT OF SERVICE AND NOTIFICATION OF RIGHTS

I hereby certify that a copy of the Ruling of the Court of Military Commission Review were served on Omar Ahmed Khadr this 3rd day of OCTOBER, 2007.

[redacted]
Typed/Printed Name/Grade

[redacted]
Signature

JTFGTMO/SJA OFFICE
Organization

APO AE 09360
Address of Organization

UNITED STATES OF AMERICA, Appellant	))))

military commission for a period of 20 days to allow Appellee to meaningfully exercise his right to appellate review of this Court's decision.

Facts

On 4 June 2007 the military judge ruled that the military commission only had jurisdiction to try individuals who had been previously determined to be UECs. As Appellee had never been determined to be a UEC, the military judge dismissed all charges against Appellee without prejudice, refusing to make a determination as to Appellee's status himself. On 29 June 2007 the military judge denied Appellant's motion for reconsideration. On 4 July 2007 Appellant filed its interlocutory appeal of the military judge's decision with this Court.

On 24 September 2007, this Court issued its decision reversing the military judge's order and holding that the commission had jurisdiction to make the determination as to UEC status itself.

The next day, 25 September 2007, the military judge issued a brief email order setting out, in only two paragraphs, the parameters that would govern the initial status determination hearing. Order of 25 Sept 2007 ¶¶ 8-9 (attached as Exhibit A). The order allowed parties one week to submit all materials upon which it intended to rely at the status determination hearing. The order required the prosecution and defense to submit evidence simultaneously, outside the context of an on the record hearing. The order did not require the prosecution to specify the factual basis on which it intended to establish Appellee's status as a UEC. And, lastly, the order restricted Appellee's ability to raise legal claims relating to the UEC determination arising under international law, constitutional law, or criminal law. The order implies that the Military Judge intends to make a "threshold or initial determination of jurisdiction" at the first session of the military commission on this thinnest of factual and legal foundations. Defense counsel

immediately moved for a continuance, which the military judge granted in a second email order. Order of 27 Sept 2007 (attached as Exhibit B). Although the date for the first hearing has been postponed, the Military Judge's order granting the continuance suggests his intention to proceed in the fashion outlined above.

Argument

The two orders issued by the military judge since this Court's decision demonstrate that it is impossible for the military commission to provide the fair status determination hearing to which this Court acknowledges Appellee is entitled. *United States v. Khadr*, CMCR 07-001, at 15, 25 & n.38 (Sept. 24, 2007). The military judge's orders show that the commission, constituted for the purpose of trying criminal charges against unlawful enemy combatants, simply cannot temporarily transform itself into a competent tribunal for making the initial status determination upon which its special criminal jurisdiction depends. To permit the current proceedings to go forward would severely prejudice Appellee's case and violate international law and fundamental notions of due process.

In brief, the military judge's two orders fail to set forth adequate procedures for the conduct of the initial status determination hearing. The military judge simply lacks guidance in this Court's opinion or the Military Commissions Act from which to fashion an adequate status determination procedure. Moreover, the military judge appears mindful of the impropriety of subjecting Appellee to the jurisdiction of this special tribunal absent a proper determination of status rendering Appellee amenable to commission jurisdiction. Yet in the rush to establish a basis for jurisdiction, the military judge has indicated his intention to adopt a summary process, which renders the determination fundamentally unfair. The Catch-22 situation faced by the judge can be summarized as follows: have a fair proceeding that requires the accused to litigate

extensively in a tribunal that may have no lawful jurisdiction over him, or summarily determine jurisdiction and truncate what limited rights the accused has to contest the legal and factual basis for the commission's jurisdiction.

Clearly, the military judge desires to establish a basis for jurisdiction as quickly as possible. The manifest result of this Court's decision is thus an ad hoc and unfair proceeding. Furthermore, the upshot of concentrating the administrative status determination and criminal trial in one tribunal, as required by this Court, combined with the unavailability of interlocutory appeals, is that the Appellee, if determined to be an UEC at the initial hearing, will have no opportunity to contest his designation until *after* the commission tries him and imposes a sentence. This procedure, envisioned by this Court's decision and the military judge's order, would result in the Appellee being subjected to the very sort of extraordinary criminal tribunal that the Geneva Conventions prohibit, unless and until a person has been properly adjudicated as not a prisoner-of-war. This procedure also strips Appellee of the right to contest his status determination by petitioning the D.C. Circuit, one of the protections afforded all detainees under the independent Detainee Treatment Act regime that provides discovery rights absent from the status determination procedures the military judge implemented. Postponing the review made possible by the DTA until after trial would render the protections therein meaningless: the whole point of contesting status is to avoid being wrongly held and, post MCA, tried by military commission.

As a threshold matter, this Court can properly reconsider its decision in light of the new orders issued by the military judge. *Bd. of Trs. of Bay Med. Ctr. v. Humana Military Health Care Srvcs. Inc.*, 447 F.3d 1370, 1377 (D.C. Cir. 2006)) ("Courts have recognized three grounds justifying reconsideration: 1) an intervening change in controlling law; 2) the availability of new

evidence; and 3) the need to correct clear error or manifest injustice.") (internal citation omitted). The military judge's recent orders constitute new evidence directly relevant to the competence of the commission to conduct an initial status determination hearing. Furthermore, the orders indicate that in the absence of reconsideration, Appellee will be subjected to a manifestly unjust proceeding.

I

The military judge's orders do not, and could not, afford Appellee a fair status determination hearing, as guaranteed by international law and this Court's own prior decision.

A. The military judge's orders do not afford any opportunity for pre-trial discovery nor adequate notice and an opportunity to respond.

The military judge's two orders are deficient in several respects. Significantly, the first order does not provide for any opportunity for pre-hearing discovery. Rather, it simply directs the government to "provide the commission and the defense the materials upon which it intends to rely to establish that the accused is an Unlawful Enemy Combatant" within one week. Order of 25 Sept 2007 ¶ 8. The order does not appear to provide any opportunity for the Appellee to demand information in the government's possession that might be relevant to his defense, but which the government does not intend to use at the hearing. The second order does not remedy this flaw. While it does extend the deadline for submitting materials to the commission, it does not allow for any discovery. Rather, it simply directs the government to "insure that all materials previously provided to LtCol Vokey are provided to LCDR Kuebler." Order of 27 Sept 2007 ¶ 9. *See generally* Army Regulation 190-8 1-6(e) (setting forth procedures governing conduct status determination proceedings).

The consequences of this Court's ruling that the military judge may make the initial status determination and the procedures established by the military judge in his 25 September

order are that Appellee has fewer rights and protections than detainees appealing an administrative UEC determination to the D.C. Circuit Court of Appeals pursuant to the DTA. This Court's ruling that the military judge may determine whether Appellee is a UEC, a finding that a separate tribunal has always made in the past, removed the potential for appeal of that determination before trial that exists under the Detainee Treatment Act. *See* DTA § 1005 (e)(2). This is significant because, while detainees have limited rights to discover evidence at a Combatant Status Review Tribunal ("CSRT"), they hold much broader discovery rights on appeal of CSRT decisions before the D.C. Circuit Court of Appeals. *See Bismullah v. Gates*, 2007 U.S. App. LEXIS 17255, at *23-*24 (D.C. Cir. July 20, 2007). On appeal before the D.C. Circuit, a detainee challenging a UEC classification is entitled to all the information that the government has in its possession and could practicably share. *See id.*[1] But, here, if the military judge proceeds as planned, Appellee will be forced to trial on criminal charges based on a status determination made in the absence of discovery *and* without an opportunity to appeal that determination prior to trial.

Despite the absence of discovery, the military judge ordered the defense to "provide the commission and the government any materials upon which it intends to rely to refute a designation as an UEC" on the same day that the government must submit its evidence supporting a UEC designation. Order of 25 Sept 2007 ¶ 8. Requiring Appellee to defend against

[1] As the D.C. Circuit put the point in the context of its review of a CSRT determination, neither the court nor the petitioner's counsel can consider whether "a preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant without seeing all the evidence, any more than one can tell whether a fraction is more or less than one half by looking only at the numerator and not as the denominator." *Bismullah*, 2007 U.S. App. LEXIS 17255, at *18. Defense counsel is unclear as to whether "all materials previously provided to LtCol Vokey," Order of 27 Sept 2007 ¶ 9, constitute all the information that the government has in its possession and could practicably share.

the government's evidence before seeing it deprives Appellee of the right to adequate notice and an opportunity to be heard – rights that this Court described as among "the most indispensable and important judicial guarantees among civilized nations honoring a tradition of due process and fundamental fairness", the denial of which "violates Common Article 3." *United States v. Khadr*, CMCR 07-001, 15 (Sept 24, 2007).

B. The initial status determination proceedings before the military commission are so ad hoc as to violate fundamental norms of fairness.

Without any statutory or regulatory guidance on how a military commission is to perform status determinations, the military judge has been forced by this Court's decision to improvise an ad hoc procedure for making the initial status determination. For example, the military judge's orders leave it entirely unclear what evidence will be permitted at the initial status determination. The orders fail to indicate what evidentiary objections the court will entertain and what law the judge will apply in ruling on such objections. It is not even clear whether the Appellee will be permitted to call witnesses to contest his alleged status as an Unlawful Enemy Combatant (UEC).

Furthermore, it is not clear from the military judge's order whether evidence received for the initial status determination will be received on the record. Order of 25 Sept 2007 ¶ 8. This would profoundly hinder the ability of the military judge or an appellate court to review the adequacy of the status determination proceeding. Finally, and perhaps most egregiously, the military judge's orders fail even to set forth the standard of proof that will govern the determination of UEC status. Given such uncertainty, it is impossible for the Appellee to adequately or effectively prepare for his status determination hearing.

Such uncertainty, however, is not merely a deficiency that would be remedied if the military judge issued more detailed rules regarding the conduct of the initial determination

hearing. The military judge simply lacks sufficient guidance from this Court from which to fashion an adequate hearing procedure. The MCA is also silent as to how such an initial determination should be carried out and the Detainee Treatment Act, which sets out some guidelines for the Combatant Status Review Tribunals, does not apply to the commission.

The unavoidably ad hoc and arbitrary nature of the procedures for status determinations before the commission violates fundamental understandings of due process. As the Supreme Court has "emphasized time and again, . . . the touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (internal quotations and citations omitted). A principle so profoundly ingrained in the jurisprudence and national psyche of the United States should not be so easily discarded.

The deficiencies relating to pre-hearing discovery and the complete uncertainty regarding evidentiary issues and the conduct of the status determination proceedings demonstrate that the commission is simply not equipped to provide the fair status determination to which the Appellee is entitled under this Court's decision and international law.[2] The ad hoc nature of the proceedings suggests that this Court erred in construing § 948a(1)(A)(i) as granting the commission authority to hear evidence, and ultimately to decide, the Appellee's UEC status. Rather, it militates toward an interpretation of the statute that requires the UEC status to be

[2] Geneva Convention Relative to the Treatment of Prisoners of War, art. 5, 75 U.N.T.S. 135, Oct. 21, 1950 (hereinafter GPW); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 45, 1125 U.N.T.S. 3, June 8, 1977 [hereinafter Protocol I].

determined by "another competent tribunal established under the authority of the President or the Secretary of Defense" under § 948a(1)(A)(ii).

II

The military judge's orders reveal the fundamental unfairness of concentrating the initial determination of status and the criminal trial in a single tribunal.

A. If the military judge does not determine Appellee's status at the outset, the military commission is exercising jurisdiction over Appellee prior to status determination in contravention of international law.

The Third Geneva Convention and First Additional Protocol to the Geneva Conventions require that a person held must be tried "by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power," i.e. by courts-martial, until and unless they have been determined by a competent tribunal not to be prisoners-of-war. GPW arts. 102, 5; Protocol I art. 45. As stated in this Court's decision, "Article 45(2) of Protocol I to the Geneva Conventions . . . suggests that a detained individual who is not being held as a POW has the right to assert an entitlement to POW status before a judicial tribunal, and that judicial adjudication of combatant status shall occur before trial for any alleged substantive offense." *Khadr*, CMCR 07-001, at 25 n.38.

If the military judge fails to conduct a status determination at the outset of proceedings, i.e., prior to arraignment, he will be subjecting the Appellee to the jurisdiction of a special criminal tribunal before he has been determined not to be a POW and, therefore, while he still enjoys presumptive POW status. This demonstrates the Catch-22 mentioned above and reflects the impossibility of transforming a commission constructed by statute for the sole purpose of trying criminal charges against UECs into a status determination tribunal. In any case, the

procedures envisioned by the commission would violate the rights of detainees not to be treated inconsistently with their presumptive status as POWs. *See* GPW art. 5; Protocol I art. 45.

B. The military commission cannot make an initial determination focused solely on Appellee's unlawful enemy combatant status without precluding a fair opportunity for Appellee to assert prisoner-of-war status.

This Court ruled that allowing Appellee to assert POW status in a pre-trial motion would be sufficient to bring the military commission process in accord with Article 45(2) of Protocol I. *Khadr*, CMCR 07-001, at 25 n.38. However, the military judge's order regarding the status determination hearing renders that protection essentially void. If the military commission rules on whether Appellee is an unlawful enemy combatant *before* hearing Appellee's motion to assert POW status, the military commission will effectively prejudge Appellee's POW status before receiving, much less ruling on, the motion envisioned by this Court's decision. Such a prejudicial procedure would be a flagrant violation of "our most basic and fundamental notions of due process." *Khadr*, CMCR 07-001, at 15.

Furthermore, even if the military commission were to hear the motion for POW status at the status determination hearing, Appellee would be subject to the restrictions imposed by the military judge's order including the prohibition against raising issues of "international law, constitutional law, criminal law." Order of 25 Sept 2007 ¶ 9. Hearing the motion to assert POW status in such a context would vitiate his "right to assert an entitlement to POW status before a judicial tribunal." *Khadr*, CMCR 07-001, at 25, n.38. Indeed, the very term "POW" employed by this Court references international humanitarian law, making the restrictions the military judge imposes troublingly inconsistent both with international law and this Court's decision.

C. Depriving Appellee of the right to bring claims based on international, constitutional or criminal law in the status determination hearing may result in Appellee being subjected to a proceeding that lacks legal authority, is fundamentally unfair, and is in violation of this Court's own decision.

The Military Judge's first order appears to forbid the Appellee from challenging the sufficiency of the procedures and the legal standards used to make the crucial threshold determination of whether he is an UEC. Order of 25 Sept 2007 ¶ 9. Specifically, it appears that Appellee will not be able to raise any arguments that relate to international law, constitutional law, or criminal law in conjunction with the initial determination. *Id.* These are crucial limitations, as the Appellee has a number of legal claims to bring in connection with the application of the MCA definition of "unlawful enemy combatant." For instance, Appellee disputes that the MCA can be applied, without violating the Constitution or relevant international law, to someone, such as himself, who was a minor at the time of the alleged misconduct.

The military judge's second order confirms that the Appellee is unlikely to be able to raise such threshold legal issues in advance of (or even during) the initial determination proceeding. Order of 27 Sept 2007 ¶ 5(a) ("[T]he Commission is giving no weight to the [legal concerns raised by the Defense counsel in the supplement to its request for a continuance]. The Commission will determine the scope of the proceeding following the arraignment.").

Preventing the resolution of such legal disputes before or during the initial determination means that the Appellee could be determined to be an UEC, and thus subject to the extraordinary criminal jurisdiction of the commission, in an initial determination hearing that itself is unconstitutional or a violation of the relevant laws of war. It is plainly insufficient for the military judge to provide that "[a]ny limitation [imposed on the scope of legal arguments at the initial determination] will not affect the ability of the defense to present matters in conjunction with an ordered motion schedule." Order of 27 Sept 2007 ¶ 5(a). The military judge appears to

envision that motions challenging the legality of the initial determination will be made *after* the commission has already made the determination as to his status. In such a situation it will be impossible to disentangle the legal issues relating to the threshold administrative status determination from those relating to the criminal proceeding. Not only would this make the work of the military judge needlessly difficult, but it would result in the extraordinary circumstance of a criminal tribunal ruling on the legality of its own separate and prior administrative proceeding – a proceeding which, if found to be invalid, would wholly divest the court of any criminal jurisdiction whatsoever over the Appellee.

Furthermore, it does not appear that the Appellee would have the opportunity to appeal any adverse rulings by the military judge relating to the legality of the initial status determination until *after* the commission has rendered a judgment and sentence on the criminal charges.[3] Even if such an appeal were somehow to be allowed, the proceedings could not be stayed pending the outcome of such an appeal. RMC 707(b)(4)(F).

This contrasts starkly with the procedures established under the Detainee Treatment Act, for appeals of Combatant Status Review Tribunal (CSRTs) determinations. The DTA authorizes the D.C. Circuit to "determine the validity of any final decision of a [CSRT]." DTA § 1005 (e)(2)(A). Such review allows the D.C. Circuit to consider whether the detainee's status determination is "consistent with the standards and procedures specified by the Secretary of Defense for [a CSRT]." DTA § 1005 (e)(2)(C)(i). By charging the military commission with making the initial status determination, a determination that has in the past always been made by

[3] *See* Rules for Military Commissions [hereinafter RMC] 1201(c) (providing that this Court can only appeal matters referred to it under RMC 908 or RMC 1111); RMC 908 (providing a right of interlocutory appeal only to the United States and not to the Defendant); RMC 1111 (requiring trial record to be sent to this Court only *after* guilt has been adjudicated, a sentence imposed, and the Commission has been adjourned).

a separate tribunal, this Court eliminated the potential for an independent appeal of that issue. This frustrates the scheme established by Congress under the DTA and eliminates a key procedural protection.

As a result, if the status determination hearing is permitted to go forward in the commission, there is a very real possibility that Appellee will be improperly subjected to the very sort of extraordinary trial that the Geneva Conventions prohibit for persons whose prisoners-of-war status remains in doubt. If, as Appellee contends, the initial status hearing is procedurally inadequate, and without legal authority under the Constitution and relevant international law, he will not have been properly determined to be subject to such an extraordinary criminal tribunal, and he will have suffered the irreparable harm of being subjected to trial in a court with no legal authority over him.

In light of the orders of the military judge and the manifest injustice that would occur if the present course continues, we ask this Court to reconsider its decision to charge the commission with making the initial status determination and to transfer this responsibility to some other competent tribunal established under the authority of the President or the Secretary of Defense.

III

If the Court elects to abide by its 24 September ruling, it should provide guidance to the military judge regarding the process for determining Appellee's status.

If the Court decides to stand by its 24 September decision, notwithstanding the clear deficiencies discussed above, it should exercise its supervisory authority to provide clear guidance to the military judge regarding the process by which Appellee's status is to be adjudicated. The specific defects in the process contemplated by the military judge are noted

above. They include (1) the absence of any requirement for the prosecution to provide notice of the factual basis for the UEC determination; (2) the absence of an opportunity for the defense to conduct meaningful discovery in connection with the UEC determination; (3) the apparent intention to collect evidence off the record in contravention of the MCA's requirement that proceedings be conducted in the presence of the accused and that the accused be afforded the opportunity to examine all evidence against him;[4] and (4) denial of the ability to bring potentially meritorious legal claims bearing on the legality and/or interpretation of the MCA's definition of "unlawful enemy combatant." The Court should order the military judge to conduct the status determination in such a way as to avoid each of these deficiencies. In particular, regarding the absence of an opportunity for meaningful discovery, if defendants are to proceed directly from the military commission's status determination to trial, without the opportunity to appeal the status determination, then the military commission's function must by necessity, and at a minimum, encompass both the CSRT and D.C. Circuit Court of Appeals functions, permitting military commission defendants the same scope of discovery detainees obtain before the D.C. Circuit on DTA petition review.

IV

If the Court elects to abide by its 24 September decision, it should stay proceedings before the military commission for a period of 20 days in order for the accused to meaningfully exercise his right to appellate review.

R.M.C. 908(c)(3) provides that the accused has the right to file a petition of review of any adverse decision by this Court with the U.S. Court of Appeals for the District of Columbia Circuit within 20 days of the date of such decision. As noted above, within 24 hours of this Court's decision on 24 September, the military judge had scheduled an arraignment within the

[4] *See* 10 U.S.C. § 949a(b).

20-day period for filing an appeal, and set suspense dates for preliminary matters relating to the UEC determination approximately one week from the date of his initial order. As Appellee's counsel argued to the military judge, it is simply impossible for counsel to adequately prepare for an initial session (especially as contemplated by the military judge) and meaningfully evaluate and exercise his right to appellate review under R.M.C. 908(c)(3).

The prosecution will likely argue in response that because the time periods for arraignment and trial under R.M.C. 707 begin to run upon issuance of the CMCR decision, the military judge (as he himself indicated in his 25 September order) is under a duty to conduct the arraignment within 30 days, and that, as a result, the military judge must be free to schedule the arraignment immediately upon issuance of the decision. This position is in error for at least two reasons: first, there is no valid reason why the military judge should not be able to wait until the 20-day period under R.M.C. 707 has run and then schedule the arraignment. Allowing the period to run leaves ten days to schedule and conduct an arraignment, which should be a sufficient amount of time. After all, the Secretary of Defense promulgated both rules at issue, i.e., R.M.C. 707 and R.M.C. 908, and consciously chose to allow the defense 20 days in which to evaluate its options and file an appeal, knowing full well that the government's speedy trial clock would "tick" upon remand by the CMCR.

The prosecution may additionally argue that if the military judge is to have all the necessary information for a determination of status at the initial session (as contemplated by the military judge's 25 September order) he must act promptly to establish suspense dates and timelines as he did in this case. For the reasons discussed above, the defense does not believe that the status determination can be conducted in such a manner consistent with fundamental

notions of due process. As a result, the perceived necessity of these procedures cannot serve as justification for material infringement with the appellate rights of the accused.

Accordingly, in the event the Court elects to abide by its 24 September decision, it should stay proceedings in the military commission for a period of 20 days from the date of its decision. If the Appellee files a petition for review within that time period, the military commission is divested of jurisdiction to proceed and the speedy trial clock stops. If not, the military judge has ten days in which to arraign the accused. Stay by the CMCR prevents the parties from having to litigate the issue of continuance in connection with the matter once again.

Conclusion

For the foregoing reasons, Appellee requests the Court to reconsider its decision of 24 September and rule that the military commission is without authority to determine that the accused is a UEC under the MCA and that the determination of status must be made by a CSRT[5] or "other competent tribunal." Alternatively, Appellee requests the Court to direct the military judge not to conduct an initial determination of status in the manner contemplated by his 25 September order, and stay proceedings in the military commission for a period of 20 days while the defense evaluates and possibly exercises its options for appeal.

Respectfully submitted,

Dennis Edney
234 Wolf Ridge Close
Edmonton, Alberta, T5T 5M6
Canada
Phone: (780) 489-0835
Email: dedney@shaw.ca
Law Society of Alberta (ID: 7997)
Admitted *pro hac vice*

[5] Appellee does not concede the lawfulness of the CSRT as presently constituted. Congress has created a separate process under the DTA to determine whether or not those procedures are lawful.

Nathan Whitling
Parlee McLaws LLP
#1500, 10180 -101 Street
Edmonton, Alberta, T5J 4K1
Canada
Phone: (780) 423-8658
Facsimile: (780) 423-2870
Email: nwhitling@parlee.com
Law Society of Alberta (ID: 11321)
Admitted *pro hac vice*

/s/
William C. Kuebler
LCDR, JAGC, USN
Appellate Defense Counsel
Rebecca S. Snyder
Assistant Appellate Defense Counsel
Office of Military Commissions
1099 14th Street, N.W.
Suite 2000E
Washington, DC 20005
kueblerw@dodgc.osd.mil
202-761-0133 ext. 116
FAX: 202-761-0510

PANEL No. _____
GRANTED (signature) _____
DENIED (signature) _____
DATE _____

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to this Court; Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Lieutenant Clayton Trivett, Jr., JAGC, USN on 1 October 2007.

/s/
Rebecca S. Snyder
Assistant Appellate Defense Counsel

UNITED STATES OF AMERICA, Appellant	))))))))))))))))	IN THE COURT OF MILITARY COMMISSION REVIEW MOTION FOR RECONSIDERATION ON BEHALF OF APPELLEE CASE No. 07-001 Hearing Held at Guantanamo Bay, Cuba on 4 June 2007 Before a Military Commission Convened by MCCO # 07-02 Presiding Military Judge Colonel Peter E. Brownback III
v. OMAR AHMED KHADR, Appellee		

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

Relief Sought

COMES NOW Appellee and respectfully requests that this Court attach the following documents to Appellee's to Motion to Reconsider filed concurrently herewith:

A) Col Brownback email of 25 September 2007; and

B) Col Brownback email of 27 September 2007.

These documents are necessary to support the factual basis for Appellee's Motion to Reconsider. Therefore, this Court should grant Appellee's motion motion.

Respectfully submitted,

Dennis Edney
234 Wolf Ridge Close
Edmonton, Alberta, T5T 5M6
Canada
Phone: (780) 489-0835
Email: dedney@shaw.ca
Law Society of Alberta (ID: 7997)
Admitted *pro hac vice*

Nathan Whitling
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Email: nwhitling@parlee.com
Law Society of Alberta (ID: 11321)
Admitted *pro hac vice*

/s/
William C. Kuebler
LCDR, JAGC, USN
Appellate Defense Counsel
Rebecca S. Snyder
Assistant Appellate Defense Counsel
Office of Military Commissions
1099 14th Street, N.W.
Suite 2000E
Washington, DC 20005
kueblerw@dodgc.osd.mil
202-761-0133 ext. 116
FAX: 202-761-0510

PANEL No. _____
GRANTED (signature) _____
DENIED (signature) _____
DATE _____

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to this Court; Major Jeffrey D. Groharing, USMC; Captain Keith A. Petty, JA, USA; and Lieutenant Clayton Trivett, Jr., JAGC, USN on 1 October 2007.

/s/
Rebecca S. Snyder
Assistant Appellate Defense Counsel

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

[redacted]

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

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

v/r,

[redacted]

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

[redacted]

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

COL Brownback

Exhibit A

Counsel in the case of United States v. Khadr,

1. Chronology:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit A

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

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

Peter E. Brownback III

COL, JA, USA

Military Judge

Exhibit A

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

[redacted]

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

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

v/r,

[redacted]

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

[redacted]

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

Please distribute it to other interested persons.

COL Brownback

Exhibit B

Counsel in the case of United States v. Khadr,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

interest from the requested delay.

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

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

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

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

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

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

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

Peter E. Brownback III

COL, JA, USA

Military Judge

[redacted]C

From: [redacted]
Sent: Monday, October 22, 2007 10:44 AM
To: [redacted]
Cc:

Subject: RE: US v. Khadr Detailed Counsel

Attachments: R Snyder Detail letter.pdf

R Snyder Detail letter.pdf (36...

Sir,

Please find attached a copy of Ms. Snyder's detailing letter.

VR,

LCDR Kuebler

-----O
From: [redacted]
Sent [redacted] AM
To: [redacted]OGC; [redacted] Counsel

Sir,

Has Ms. Snyder been detailed as counsel in US v Khadr? If so, please forward the detailing memo. Thank you.

v/r,

[redacted]

Military Commissions Trial Judiciary

[redacted]

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

August 1, 2007

MEMORANDUM FOR Ms. Rebecca S. Snyder

Subject: Detailing as Assistant Defense Counsel in the Military Commissions Case of *United States v. Omar Khadr*

Pursuant to Rule for Military Commissions 503(c), and paragraph 9-1(b)(1)(B) of the Regulation for Trial by Military Commissions (27 April 2007), I hereby detail you as Assistant Defense Counsel in the military commissions case of *United States v. Omar Khadr*.

D. H. Sullivan
Col, USMCR
Chief Defense Counsel

Copy to:
LCDR William C. Kuebler, JAGC, USN

[redacted]

From: [redacted]
Sent: Wednesday, October 24, 2007 5:35 PM
To: [redacted]
Cc: [redacted]
Subject: FW: R.M.C. 802 Summary With Attachments - 24 October 2007 - US v. Khadr
Follow Up Flag: Follow up
Flag Status: Purple
Attachments: jurist.pdf; GM 19 Sep piece.pdf; Summary of Ex Parte Telephone Conference Call on 24 Oct 2007.pdf; LCDR Kuebler - Affidavit -20 Aug 07.pdf; Khadr Memo 30 Oct 02 and 24 May 07.pdf; Designation as Foreign Consultants - Edney and Whitling.pdf; Affidavit%20of%20Abdullah%20Khadr%20%28E5206238%29[1].pdf; Affidavit - Nathan Whitling.pdf; Affidavit - Dennis Edney.pdf

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

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Wednesday, October 24, 2007 17:14
To: [redacted]
Cc: [redacted]
Subject: R.M.C. 802 Summary With Attachments - 24 October 2007 - US v. Khadr

[redacted],

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

COL Brownback

Counsel in the case of US v. Khadr,

1. Reference is made to:

    a. Document, 24 Oct 07 Summary of 24 Oct 07 RMC 802 Telephone Call, attached.

b. 20 August 2007, affidavit, LCDR Kuebler, attached.
c. Globe and Mail article, 19 September 2007, attached.
d. Blogshot, Jurist, 17 October 2007, attached.
e. Undated affidavit of Abdullah Khadr, attached.
f. Writing, 30 October 2006 and 24 May 2007, Omar Khadr, attached.
g. Memorandum, Susan Crawford, 17 May 2007, Designation of Foreign Consultants, attached.
h. Affidavit, Mr. Edney, 17 May 2007, attached.
i. Affidavit, Mr. Whitling, 13 May 2007, attached.

2. References 1b thru 1f were provided to the military judge by email at 1033, 24 October 2007. References 1a and 1g thru 1h were provided to the military judge by email at 4:41 PM, 24 October 2007.

3. The military judge adopts reference 1a as the summary required by R.M.C. 802.

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

[redacted]

From: [redacted]
Sent: Tuesday, October 30, 2007 9:53 AM
To: [redacted]
Subject: FW: Approval of Defense Request for Ex Parte Conference US v Khadr
Attachments: LCDR Kuebler - Affidavit -20 Aug 07.pdf; Khadr Memo 30 Oct 02 and 24 May 07.pdf; jurist.law.pitt.edu-hotline-2007-10-us-military-counsel-.mdi; G&M 19 Sep piece.doc; Affidavit%20of%20Abdullah%20Khadr%20%28E5206238%29[1].pdf

---

From: [redacted]
Sent: Wednesday, October 24, 2007 10:34
To: [redacted]
Cc: [redacted]
Subject: RE: Approval of Defense Request for Ex Parte Conference US v Khadr

Sir,

1. The attached materials are provided for review by the military judge in connection with the ex parte conference.

VR,

LCDR Kuebler

From: [redacted]
Sent: Wednesday, October 24, 2007 10:23 AM
To: [redacted],
Cc: [redacted]
Subject: FW: Approval of Defense Request for Ex Parte Conference US v Khadr

COL Brownback has directed that I send the email below to the persons addressed above.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Wednesday, October 24, 2007 10:10
To: [redacted]
Subject: Approval of Defense Request for Ex Parte Conference

[redacted]

Please forward the email below to the counsel in the case of United States v. Khadr and distribute it to the persons who were copied on LCDR Kuebler's email of 3:41 PM, 23 October 2007, Subject: Request for Ex Parte Conference, and to [redacted], MCTJ.

COL Brownback

Counsel in the case of US v. Khadr,

1. References:

a. Email, LCDR Kuebler, 3:41 PM, 23 October 2007, Subject: Request for Ex Parte Conference.
b. Email, [redacted], 5:03 PM, 23 October 2007, Subject: Re: Request for Ex Parte Conference.
c. Email, CPT Petty, 09:25 AM, 24 October 2007, Subject: Re: Request for Ex Parte Conference.
d. Various fonecons, [redacted]/Mr. Berrigan, 23/24 October 2007, Subject: Administrative Details for Ex Parte Conference.

2. The commission has considered the Defense request for an *ex parte* conference (Reference 1a) and the Government's lack of objection to the request (Reference 1c). The commission has also reviewed and considered the pertinent portions of the M.C.A., the M.M.C., the Rules of Court, and the DoD Regulation for Trial by Military Commission.

3. The commission determines that there is no absolute prohibition on the Defense presenting appropriate matters to the military judge *ex parte*. Consequently, based on the representation of the Defense in Reference 1a, the commission authorizes the requested presentation.

4. The presentation will be made by telephonic conference. [redacted] and Mr. Berrigan will make the required arrangements. Present at the conference, by telephone, will be COL Brownback, LTC Chappell, [redacted], Mr. Berrigan, and LDCR Kuebler. [redacted], and Mr. Berrigan will take extensive notes, prepare a proposed summary of the conference, and distribute the proposal to those present. The military judge will review the proposal, make any required changes, and provide the military judge's summary of the conference to LCDR Kuebler. LCDR Kuebler will either accept the military judge's summary and so advise the military judge or provide the military judge a separate summary.

5. During or after the conference, the military judge will determine if the subject matter of the conference or the contents of the conference must be sealed in order to provide a fair trial. The military judge will also determine if such seal, if applied, must remain in place until a time certain during the trial proceedings, until convening authority review, until appellate review, or if it should remain sealed regardless. The military judge will advise all addressees of his decision.

6. Given that the information provided to the military judge during this conference will be matters provided to him during the course of the trial, any information provided will not be a proper subject for voir dire or challenge.

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

----- Original Message -----
From: [redacted]
To: [redacted]
Cc: [redacted]
Sent: Wednesday, October 24, 2007 9:30 AM
Subject: RE: Request for Ex Parte Conference

Sir,

1. The Government does not object to the proposed communication between the Defense and the Military Judge.

2. The Government does however request to be notified whether the detailed defense counsel believes he no longer represents the accused, and if the accused could be representing himself at the 8 November hearing. If that is the case, the Government requests permission to serve discovery directly on the accused, so that he will have the opportunity to prepare for the 8 November hearing.

3. Additionally, [redacted] emai [redacted] roharing on all correspondence. [redacted] and [redacted]

V/r,

Keith A. Petty
Captain, U.S. Army
Prosecutor
Office of Military Commissions
[redacted]

From: [redacted]
Sent: Tuesday, October 23, 2007 5:03 PM
To: [redacted]
Cc: [redacted]

Subject: RE: Request for Ex Parte Conference

COL Brownback has directed that the government response, if any, to the defense Request for Ex Parte Conference is due NLT 1200 hours, 24 October 2007. Any authority supporting the government's position shall be included.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

[redacted]

From: [redacted]
Sent: Tuesday, October 23, 2007 15:42
To: [redacted]
Cc: [redacted]

Subject: Request for Ex Parte Conference

Sir,

1. The defense respectfully requests the military judge to conduct an ex parte conference with detailed defense counsel (and their supervisor) to discuss certain matters relating to Mr. Khadr's choice and election of counsel. Due to the sensitive nature of the matters to be discussed, it would, in the view of the defense, be inappropriate to include government counsel in the discussion. Although the defense intends to refrain from disclosing privileged matters, there is a strong possibility that the discussion will touch upon issues of case strategy and defense theories, disclosure of which to the government would prejudice the defense in preparation for trial.

2. There is no express authority within the Military Commissions Act or its implementing regulations for ex parte discussions between judge and the defense (only for ex parte communications with government counsel). However, such ex parte discussions between the court and counsel are not without precedent in court-martial practice. See, e.g., United States v. Campbell, 2007 CCA Lexis 107 (NMCCA Mar. 29, 2007) (ex parte conference between defense counsel and military judge to discuss issues relating to accused's choice of counsel). Moreover, the military judge would appear to have the authority to seal the record of such a conference to protect confidential defense information from the prosecution. See In re Search Warrant for Secretarial Area Outside of Office of Gunn, 855 F.2d 569 (8th Cir. 1988); Matter of Eye Care Physicians of America, 100 F.3d 514 (7th Cir. 1996); Matter of Flower Aviation of Kansas, Inc., 789 F. Supp. 366 (D. Kan. 1992).

3. The defense requests the aforementioned conference to take place (presumably, via telephone) at the earliest possible opportunity. In the event the military judge approves this request, the defense intends to provide the military judge (and not the government) with certain written materials to be referenced in the course of the discussion.

VR,

LCDR Kuebler

Summary of Ex Parte Telephone Conference Call on 24 Oct 2007 ICO U.S. v. Omar Khadr

Parties: COL Peter Brownback, Military Judge
LCDR William Kuebler, Detailed Defense Counsel
Mr. Michael Berrigan, Deputy Chief Defense Counsel
[redacted]

1. LCDR Kuebler sent the following items to the military judge this morning:

a. 20 August 2007 affidavit of LCDR Kuebler

b. Affidavit of Abdullah Khadr

c. Globe and Mail article of 19 September 2007

d. Copy of "Jurist" internet entry of 17 October 2007

e. Memo of Omar Khadr of 24 May 2007.

2. LCDR Kuebler reviewed matters that occurred at GTMO on 3 Jun at the RCM 802 Session and on 4 Jun at the Arraignment Hearing.

3. LCDR Kuebler related divergence between himself and Mr. Dennis Edney. There is a conflict of roles and responsibilities. During this telephone conference, LCDR Kuebler referenced the documents mentioned in paragraph 1. Mr. Berrigan raised additional matters concerning possible conflicts of interest arising in connection with Mr. Edney's participation in this case.

4. LCDR Kuebler stated he wants to meet with Omar Khadr with Ms Rebecca Snyder and Mr. Nathan Whitling in advance of the arraignment. He hopes this will maximize the chance that Mr. Khadr accepts them as his defense team if Mr. Edney is unable to participate as a foreign attorney consultant.

5. Mr. Berrigan pointed out personnel and systemic problems involving lack of military counsel in the Office of the Chief Defense Counsel and the ability of an accused to discharge detailed counsel. He is concerned with the possibility that Omar Khadr may demand to be given another detailed defense counsel.

6. LCDR Kuebler requested a delay from 8 Nov 07 to on or about 6 Dec 07. He wants to travel to GTMO with Ms Snyder and Mr. Whitling the week of 5 November.

7. LCDR Kuebler offered additional matters in support of his request for a continuance. LCDR Kuebler noted his duties as Detailed Appellate counsel and noted upcoming

deadlines in District of Columbia Circuit Court of Appeals litigation. The deadlines require submission of matters on 31 Oct 07 and 2 Nov 07.

8. Judge Brownback will consider matters addressed and will answer requests by 1200 hours on 25 Oct 07.

9. LCDR Kuebler was asked to determine which portions of this summary cannot be released to the Government.

Court File Number: A-184-06

FEDERAL COURT OF APPEAL

BETWEEN :

OMAR AHMED KHADR

Appellant
(Respondent on the Motion)

- and -

THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA,
THE MINISTER OF FOREIGN AFFAIRS,
THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, and
THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Respondents
(Applicants on the Motion)

AFFIDAVIT OF LT. CDR. WILLIAM KUEBLER

I, Lieutenant Commander William C. Kuebler, of the United States Navy, am the detailed defense counsel for Mr. Omar Ahmed Khadr ("Omar") and as such have personal knowledge of the matters hereinafter deposed to save and except where stated to be on information and belief.

1. I, along with Mr. Dennis Edney and Mr. Nathan Whitling, act as defense counsel for Omar in the military commission prosecution of *United States of America v. Omar Khadr*. I am Omar's detailed defense counsel before the military commission convened in Guantanamo Bay, Cuba, and his Appellate Defense Counsel before the Court of Military Commission Review ("CMCR").[1]

---

[1] I am also Omar's counsel of record in proceedings before the U.S. Court of Appeals for the District of Columbia Circuit and will so act in proceedings before the U.S. Supreme Court. I anticipate moving the admission of Messrs. Edney and Whitling to appear pro hac vice in connection with both proceedings.

2. On information and belief, Omar was first captured following a battle near Khost, Afghanistan, in July of 2002. He was then 15 years of age. Within several months of his capture, Omar was taken by U.S. forces to the detention facility located at Guantanamo Bay, Cuba, and has been detained there ever since.

3. I am advised by Mr. Whitling and do verily believe that Mr. Edney and Mr. Whitling were first retained by Omar's family to act as Omar's legal counsel in approximately November of 2003. Since that time, Mr. Edney and Mr. Whitling have acted as Omar's counsel in proceedings in both Canada and the United States.

4. On information and belief, since his first meetings with American lawyers, in November of 2004, Omar expressed a wish to receive visits from Mr. Edney and Mr. Whitling.

5. On May 17, 2007, Mr. Edney and Mr. Whitling were first appointed as "Foreign Attorney Consultants" for Omar. Attached to this my Affidavit and marked as Exhibit A is a copy of the letter confirming this appointment signed by Susan J. Crawford, Convening Authority for Military Commissions.

6. Following their appointment as Foreign Attorney Consultants, Mr. Edney and Mr. Whitling were first permitted to visit with Omar on May 24, 2007. At that time, Omar provided written confirmation of his wish to dismiss all his U.S. lawyers and to prohibit them from acting for him. He also provided written confirmation that he would only accept Mr. Edney and Mr. Whitling as his lawyers. Attached to this my Affidavit and marked as Exhibit B is a copy of this written statement from Omar. Subsequent to these events, on or about 5 June 2007, Omar consented to my representation.

7. As a result of the legal services provided by Mr. Edney and Mr. Whitling to Omar in the past, as well as their relationship with Omar's family, they are uniquely positioned to maintain an attorney-client relationship with Omar.

8. On 3 June 2007, during a pre-trial conference with Col. Peter Brownback, the Military Judge assigned to Omar's case, I advised the commission that we will seek to have Mr. Edney and Mr. Whitling participate as "associate" or "assistant" defense counsel at trial (the Military

Commissions Act requires a civilian defense counsel to be (1) a U.S. citizen and (2) a member of the bar of the bar of a U.S. federal court or the highest court of a state of the United States). This will likely take the form of a motion to admit Messrs. Edney and Whitling to appear before the military commission, in substance, as "pro hac vice" counsel, subject to my supervision. Messrs. Edney and Whitling are currently so admitted before the Court of Military Commission Review, the rules for which contain a provision expressly providing for foreign counsel to appear pro hac vice. Counsel for the Prosecution has indicated that they do not expect to object to Mr. Edney and Mr. Whitling acting as counsel on this basis before the military commission, if and when proceedings resume therein.

9. On June 4, 2007, Mr. Edney and Mr. Whitling attended the military commission at Guantanamo Bay and sat with me at the defense table, where defense counsel for the accused would sit, and addressed the commission on the record. On that date, Col. Brownback dismissed the prosecution without prejudice. This decision is now under appeal, and oral argument is scheduled before the Court of Military Commission Review on August 24, 2007. I have moved to admit Mr. Edney and Mr. Whitling to appear and act as Omar's counsel in connection with that appeal *pro hac vice*, which motion the court granted. A copy of the order granting the motion is attached as Exhibit C. Mr. Whitling is expected to argue the merits of the government's appeal.

10. Col. Brownback's decision does not entail the end of Omar's prosecution and does not pertain to his release from custody. This decision identifies a jurisdictional defect which the government can and likely will cure if found to be necessary. I am confident that the prosecution of Omar will continue whether or not Col. Brownback's decision is affirmed on appeal.

11. There is no funding available in the United States for Mr. Edney and Mr. Whitling to act as counsel in the military commission proceedings. However, I have recently received confirmation from the National Association of Criminal Defense Lawyers that funding in the amount of $10,000 has been made available for reasonable travel costs for Mr. Edney and Mr. Whitling in relation to this prosecution.

12. I am advised by Mr. Edney and Mr. Whitling and do verily believe that neither of them will be able to act as Omar's defense counsel at trial or appeal before the military commission or other courts or tribunals without a reasonable level of funding for their services.

13. My appointment as detailed defense counsel does not in and of itself establish the existence of an attorney-client relationship between myself and Omar. Although Omar has consented to my representation, this is due principally to the efforts of Mr. Edney and Mr. Whitling. Their participation and involvement as defense counsel in the prosecution, and related appeals and reviews, is essential to my ability to maintain an attorney-client relationship with Omar.

14. If Omar is unable to be represented by Mr. Edney and Mr. Whitling, it appears that Omar will not agree to have me act as his lawyer. Instead, he will likely either choose to represent himself or will refuse to participate in the proceedings altogether. Since Omar has no legal training, and no ability to defend himself in a prosecution, this would constitute a denial of Omar's right to counsel and would result in an unfair prosecution. It is therefore my view that the ability of Mr. Edney and Mr. Whitling to jointly represent Omar with me is essential to the fairness of this prosecution.

15. This Affidavit is sworn in the City of Washington, District of Columbia and has been executed in the manner required by the Courts of this jurisdiction for the admission of Affidavit evidence.

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)
) LT. CDR. WILLIAM C. KUEBLER

Subscribed to & Sworn Before me

THOMAS ROUGHNEEN
ATTORNEY-AT-LAW, NJ.
AUTHORITY 10 U.S.C. 1044(a)

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

CONVENING AUTHORITY

MAY 17 2007

MEMORANDUM FOR LCDR William C. Kuebler, Detailed Defense Counsel for Omar Khadr

SUBJECT: *U.S. v. Khadr*: designation of Mr. Dennis Edney and Mr. Nathan Whitling as foreign consultants

Pursuant to R.M.C. 506 and Chapter 9-6 of the Regulation for Trial by Military Commissions, I hereby authorize the above named individuals to serve as Foreign Consultants in the case of *U.S. v. Khadr* subject to the following conditions: (1) The consultants are not experts for the defense team; (2) they are not compensated by the U.S. Government; (3) they must be attorneys; (4) they must be personally retained or released by Mr. Khadr; (5) they must have the appropriate security clearance; and (6) they sign the attached "Affidavit and Agreement by Foreign Consultant."

As members of the Khadr defense team, Mr. Edney and Mr. Whitling are subject to the requirements of the Military Commissions Act of 2006, Pub. L. No. 109-366 (M.C.A.), the Manual for Military Commissions (M.M.C.) and the Regulation for Trial by Military Commissions (Regulation) to the same extent as detailed and civilian defense counsel, specifically including Chapters 9 and 18 of the Regulation and to the terms specified in Figure 9.2 therein.

This memorandum does not provide Messrs. Edney and Whitling with any right or privilege not articulated in the M.C.A., M.M.C., and Regulation. DoD Regulation 5200.2-R (Personnel Security Program) and DoD Regulation 5220.22-M (National Industrial Security Program Operating Manual) provide further requirements for obtaining security clearances for non-U.S. citizens; DoD Directive 5230.20 (Visits, Assignments and Exchanges of Foreign Nationals) regulates visits by Mr. Edney and Mr. Whitling to the United States Government facilities.

Messrs. Edney and Whitling must each sign the attached "Affidavit and Agreement by Foreign Consultant" and provide copies to my legal advisor before this memorandum becomes effective.

Susan J. Crawford
Convening Authority
for Military Commissions

cc. Chief Defense Counsel
Chief Prosecutor

Printed on Recycled Paper

30. Oct. 2006

I Omar. A. Khadr withdrow every /all / any lawyer from representing me in Habeas Corpus, Military Commission or any form of U.S Courts, And do not allow any body to do any thing on my behalf in any way in any form of U.S Court or military Commission.
And donot allow any U.S lawyer to do any thing on my behalf and pull all my atharaizations that I have given them

Omar Ahmed Khadr
Omar A. Khadr

May 24, 2007

I Omar A. Khadr confirm my decision above.

I dismiss all lawyers, including:

Lt. Col. Colby Vokey, Capt. John Merriam, Muneer Ahmad, Richard Wilson and Kristine Huskey

and anybody else from doing anything on my behalf except Dennis Edney and Nathan Whitling.

EXHIBIT B

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES OF AMERICA	**CMCR CASE NO. 07-001**
v.	**MILITARY COMMISSION**
OMAR AHMED KHADR	**RULING ON MOTIONS AND BRIEFING ORDER DATE: 13 JULY 2007**

Upon consideration of the various Motions submitted by both the Government (Appellant) and the Defense Team for Mr. Khadr (Appellee), filed with this Court on 11 and 12 July 2007 concerning the pending Government appeal, the rulings as itemized below are entered.

Additionally, as confusion has been generated concerning the briefing timelines required by this Court's Rules of Practice in regard to a Government appeal, a revised and final Briefing Order is provided for the parties below. *See* Rule of Practice 21(a). This Briefing Order supersedes that issued by the Clerk of Court on 11 July 2007. Additional guidance shall be published by the Clerk of Court on a later date clarifying our Rules of Practice in this regard.

ORDERED:

Defense Motions:

1. Motion for Emergency Relief (Continuance to 3 August 2007) – **GRANTED** (as modified by Briefing Order below) on 12 July 2007.
2. Motion to Attach Documents in Support of Motion for Emergency Relief – **GRANTED** on 12 July 2007.
3. Motion to Admit Foreign Attorneys Edney and Whitling As Counsel *Pro Hac Vice* – **GRANTED** on 12 July 2007.
4. Motion to Waive Specific Requirements in CMCR Rule of Practice 8(A) for Foreign Attorneys (Edney and Whitling) – **GRANTED** on 12 July 2007.

Government Motion:

1. Motion for Continuance (Enlargement of Time) to 19 July 2007 to File Additional Briefing – **GRANTED** (as modified by Briefing Order below) on 13 July 2007.

Briefing Order for Government Appeal:

1. The Government's supplemental brief on the matter under appeal shall be due not later than 23 July 2007 [note: this expands period originally requested/granted above].

2. The Defense's brief in response on the matter under appeal shall be due not later than 13 August 2007 [note: this expands period originally requested/granted above].
3. Any Government reply brief to the Defense's brief in response shall be due not later than 17 August 2007. If the Government does not intend to file a reply brief, they shall notify the Court of that fact as soon as possible after receipt of the Defense brief in response.
4. Oral argument, if requested/ordered, shall be held within 10 days of receipt of any Government answer brief filed on 17 August 2007. If the Government elects not to file an answer brief, oral argument, if requested/ordered, shall be held within 10 days of receipt of the Defense's brief in response, or notice of the Government's election not to file such an answer, whichever occurs first.

Absent extraordinary circumstances, no further enlargements of time shall be granted in regard to the matter currently before the Court.

JOHN W. ROLPH
Deputy Chief Judge

AFFIDAVIT AND AGREEMENT BY FOREJGN **CONSULTANT**

to the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *codified in part at* 10 U.S.c. § 948a. *et seq.,* thc Manual for Military Commissions promulgated January 18,2007, and Chapter 9-6 of the Regulation for Trial by Military Commissions, [LOCAL FOREIGN], make this Affidavit and Agreement for the purposes of serving as a foreign consultant in the military commission of Omar Khadr.

1. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

   A. I have read and understand the Secretary's Manual for Military Commissions, and all other Military Regulations, Orders, Instructions and Directives applicable to trial by military commissions. 1 will read all amendments, rescissions or promulgations pertinent to the aforementioned.

   B. I am aware that my qualification as a foreign consultant does not guarantee my access to any information subject to the national security privilege under 10 U.S.C. § 949d(t).

U. Agreements. I hereby agree to comply with all aspects of the M.e.A. the M.M.C., the Regulation for Trial by Military Commissions, in particular and without limitation, to the conditions articulated in Chapter 9, Figure 9.2, and Chapter 18. Further, I agree to comply with any Court Rules prescribed by the Military Conmission Trial Judiciary or the presiding military judge including rules of court governing proceedings.

I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as a foreign consultant or Mr. Khadr.

/s/

Print Name: [illegible]

Address: [illegible]

Date: [illegible]

STATE OF Ontario, Canada)

COUNTY OF Toronto)

Sworn to and subscribed before me, by [illegible], this 11th day of May, 2007

Notary [illegible]

My commission expires: [illegible]

Parlee McLaws LLP
BARRISTERS & SOLICITORS
PATENT & TRADEMARK AGENTS

August 13, 2007

NATHAN J. WHITLING
DIRECT DIAL (780) 423-8658
EMAIL: nwhitling@parlee.com
OUR FILE #. 62695-3/NJW

VIA FACSIMILE

Convening Authority's Office

Attention: Jason Foster

Dear Sir:

Re: USA v. Khadr

Please find enclosed one Affidavit and Agreement by Foreign Consultant. I also enclose for your reference the letter confirming foreign attorney approval dated May 17, 2007.

Yours truly,

PARLEE McLAWS LLP

Per: NATHAN J. WHITLING

NJW/ab
Encls.

cc: Lt. Cmdr. William Kuebler

{E3354825.DOC.1}

AFFIDAVIT AND AGREEMENT BY FOREIGN CONSULTANT

Pursuant to the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *codified in part at* 10 U.S.C. § 948a. *et seq.*, the Manual for Military Commissions promulgated January 18, 2007, and Chapter 9-6 of the Regulation for Trial by Military Commissions, I [Nathan Whiting], make this Affidavit and Agreement for the purposes of serving as a foreign consultant in the military commission of Omar Khadr.

I. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the Secretary's Manual for Military Commissions, and all other Military Commissions Regulations, Orders, Instructions and Directives applicable to trial by military commissions. I will read all amendments, rescissions or promulgations pertinent to the aforementioned.

B. I am aware that my qualification as a foreign consultant does not guarantee my access to any information subject to the national security privilege under 10 U.S.C. § 949d(f).

II. Agreements. I hereby agree to comply with all aspects of the M.C.A. the M.M.C., the Regulation for Trial by Military Commissions, in particular and without limitation, to the conditions articulated in Chapter 9, Figure 9.2, and Chapter 18. Further, I agree to comply with any Court Rules prescribed by the Military Commission Trial Judiciary or the presiding military judge including rules of court governing proceedings.

I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as a foreign consultant or for Mr. Khadr.

/s/

Print Name: Nathan Whiting

Address: 1500, 10180 - 101 Street

Edmonton, Alberta

Date: August 13, 2007

Province
~~STATE~~ OF ALBERTA)
Country
~~COUNTY~~ OF CANADA)

Sworn to and subscribed before me, by Nathan Whiting, this 13th day of August, 2007.

Notary David P. Wedge
Barrister & Solicitor

My commission expires: Now, being a barrister - solicitor.

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

CONVENING AUTHORITY

MAY 17 2007

MEMORANDUM FOR LCDR William C. Kuebler, Detailed Defense Counsel for Omar Khadr

SUBJECT: *Us. v. Khadr:* designation of Mr. Dennis Edney and Mr. Nathan Whitling as foreign consultants

Pursuant to R.M.C. 506 and Chapter 9-6 of the Regulation for Trial by Military Commissions, I hereby authorize the above named individuals to serve as Foreign Consultants in the case of *US. v. Khadr* subject to the following conditions: (1) The consultants are not experts for the defense team; (2) they are not compensated by the U.S. Government; (3) they must be attorneys; (4) they must be personally retained or released by Mr. Khadr; (5) they must have the appropriate security clearance; and (6) they sign the attached "Affidavit and Agreement by Foreign Consultant."

As members of the Khadr defense team, Mr. Edney and Mr. Whitling are subject to the requirements of the Military Commissions Act of 2006, Pub. L. No. 109-366 (M.C.A.), the Manual for Military Commissions (M.M.C.) and the Regulation for Trial by Military Commissions (Regulation) to the same extent as detailed and civilian defense counsel, specifically including Chapters 9 and 18 of the Regulation and to the terms specified in Figure 9.2 therein.

This memorandum does not provide Messrs. Edney and Whitling with any right or privilege not articulated in the M.C.A., M.M.C., and Regulation. DoD Regulation 5200.2-R (Personnel Security Program) and DoD Regulation 5220.22-M (National Industrial Security Program Operating Manual) provide further requirements for obtaining security clearances for non-U.S. citizens; DoD Directive 5230.20 (Visits, Assignments and Exchanges of Foreign Nationals) regulates visits by Mr. Edney and Mr. Whitling to the United States Government facilities.

Messrs. Edney and Whitling must each sign the attached "Affidavit and Agreement by Foreign Consultant" and provide copies to my legal advisor before this memorandum becomes effective.

Susan J. Crawford
Susan J. Crawford
Convening Authority
for Military Commissions

cc. Chief Defense Counsel
Chief Prosecutor

Printed on Recycled Paper

30. Oct. 2006

I Omar. A. Khadr withdrow every /all / any lawyer from representing me in Habeas Corpus, Military Commission or any form of U.S Courts, And do not allow any body to do any thing on my behalf in any way in any form of U.S Court or military Commission.
And donot allow any U.S lawyer to do any thing on my behalf and pull all my atharaizations that I have given them

Omar Ahmed. Khadr
Omar A. Khadr

May 24, 2007

I Omar A. Khadr confirm my decision above.

I dismiss all lawyers, including:

Lt. Col. Colby Vokey, Capt. John Merriam, Muneer Ahmad, Richard Wilson and Kristine Huskey

and anybody else from doing anything on my behalf except Dennis Edney and Natha Whitling.

Omar A. Khadr

Action No.: EX0037/05
Deponent: Abdullah Khadr
Date Sworn: ___ day of _____, 2006

SUPERIOR COURT OF JUSTICE

(TORONTO REGION)

BETWEEN :

THE UNITED STATES OF AMERICA

Extradition Partner

- and -

ABDULLAH AHMED KHADR aka ABU BAKR

Person Sought

AFFIDAVIT OF ABDULLAH KHADR

I, ABDULLAH KHADR, of the City of Scarborough, in the Province of Ontario, MAKE OATH AND SAY THAT:

1. I am the Person Sought in this proceeding and as such have personal knowledge of the matters hereinafter deposed to, except where stated to be based on information and belief, in which case I verily believe the same to be true.

General Background

2. I was born in Canada on April 30, 1981. I am a Canadian citizen.

3. I lived in Canada for the first 3.5 years of my life before my family and I moved to Pakistan. Over the next 13 years, my family and I moved back and forth between Pakistan and Canada. The last time we moved to Pakistan was in early 1998.

4. My formal education ended when I moved to Pakistan in 1998 at which point I had completed grade 8.

5. My family and I lived in a house in Peshower, Pakistan. We later relocated to Afghanistan in 1999 because that was where many of my father's charitable projects were located.

6. At this time, my family and I lived in a small Arab community, Nazim Jihad. Given the small size of the Arab community, everyone in the community knew everyone else. It was not unusual for the entire community to be invited to Ramadan celebrations, weddings and the like.

7. Arab people were a minority in both Afghanistan and Pakistan, and were considered foreigners and "guests".

My Father – Ahmed Said Khadr

8. My father, Ahmed Said Khadr, was a computer engineer trained in Canada who devoted his life to alleviating the suffering of underprivileged people in Pakistan and Afghanistan. He worked tirelessly and provided practical help by establishing schools, orphanages and mobile dispensaries.

9. I am aware of assertions published in the media that my father was a member of Al Qaeda. I am aware that some media stories have even asserted that he was a "founder" or a "financier" of Al Qaeda. All of these statements are false.

10. During his years in Afghanistan and Pakistan, my father worked for two charitable organizations, Human Concern International (HCI) and Health and Education Project (HEP). Both of these organizations provided essential support and services to the underprivileged.

11. As discussed in greater detail below, my father's activities with HCI and HEP included fundraising, including fundraising in Canada. As far as I am aware, not one penny of the money he raised was provided to Al Qaeda or used for any purpose other than the charitable purposes for which it was collected.

12. The suggestion that my father was a financier for Al Qaeda is absurd. It is common knowledge that Osama Bin Laden is an extremely wealthy individual controlling millions of dollars of his own, and that money for Al Qaeda is raised from rich people in Saudi Arabia. The amounts of money raised and spent by my father in his charitable work were so small that they would not have been of any interest to Al Qaeda, even if my father was inclined to be a "financier" for them.

13. My father was only driven to provide humanitarian help to the most vulnerable. He also wished that Muslims had better control of their own natural resources in order to educate and feed its people. He would often say, "We are the richest in resources, however we are the poorest".

14. From 1985 to 1995, my father worked with HCI, a Canadian federally registered charitable organization which was established to help alleviate suffering through sustained development projects and emergency relief programs that foster self- reliance and preserve human dignity. My father was the Regional Director of HCI Pakistan.

15. My father's work with HCI dealt primarily with projects for the assistance of refugees in Afghanistan and Pakistan who had been displaced by the war with the former USSR. Those 14 years of war left some 300,000 widows, 600,000 disabled, and 1,000,000 orphans.

16. In approximately 1994 or 1995, HCI and my father were appointed by the World Food Project to administer a major project involving the development of olive farms and a pickling factory. The funding for this project was approximately $2 million and it was one of the largest projects in Afghanistan. Attached to this my Affidavit and marked as Exhibit A are a number of family photographs of the olive farms, factory, workers, and administrators involved in this HCI project.

17. A number of Agriculture and Irrigation Projects were also established in conjunction with the United Nations Development Program. My father also worked with such international aid

organizations as the World Health Organization, the International Committee of the Red Cross, CARE International, the European Union, and UNESCO.

18. Some of my father's other activities with HCI were:

- Five (5) clinics and two (2) hospitals were established in Peshower at different Afghani refugee camps.
- Schools and vocational institutes, emergency mobile clinic were established at Pakistan border with Afghanistan.
- Aid giving centres, under the name of "Hope Village" at Akora Khattak, were established to include clinics, schools, and mosque.
- Vocational centres for needy women, disabled persons and refugees for learning and manufacturing leather goods, carpet weaving and sewing were established under the name of "Hope Village" near Peshawar.
- A hospital under the name of Makkah Mukaram Hospital was established to care for thousands of orphans.

19. In 1991, while my father was supervising the construction of irrigation canals on behalf of the World Food Program, a person walking nearby him stepped on a land mine which must have been planted during the war with the USSR. My father's hand was nearly lost, and was simply hanging by a piece of skin. It was reattached, but my father never had use of it again. Also, a piece of shrapnel passed through his buttock and out his stomach. This accident caused him to return to Canada and remain in a hospital for about 2 years. Once he returned to Afghanistan in 1993, my father required help getting around, but still carried on with most of his daily routine. These injuries presented serious difficulties for my father for the rest of his life.

20. On November 19, 1995, suicide bombings occurred at the Egyptian embassy in Islamabad, Pakistan. Some 16 people were killed in this incident.

21. On December 3, 1995, my father and three other HCI employees were arrested by officials of the Government of Pakistan and held for approximately 4 months. It is my information and belief that my father was simply picked up because he was the eldest Egyptian in Pakistan

and was presumed to know something about the bombings. Eventually, following intervention from Prime Minister Jean Chretien, he was released, and all charges against him pertaining to this incident were dropped.

22. Out of concern for its ability to continue its charitable work, HCI retained the services of Mr. Marc R. Duguay, a Canadian Barrister and Solicitor, to attend at HCI's offices in Pakistan and to conduct an independent review of HCI's operations and my father's arrest. Mr. Duguay conducted a thorough review of all of HCI's files, interviewed all available witnesses, and concluded that there was no evidence linking my father or HCI to the bombings, nor was there any evidence of any wrongdoing, unethical or illegal acts of any nature under any circumstances. Attached to this my Affidavit and marked as Exhibit B is a copy of Mr. Duguay's report dated July 22, 1996.

23. HCI did all it could to support my father throughout his ordeal. However, HCI was concerned about the negative public perception associated with the charges in Pakistan, and feared that these problems might affect its charitable fundraising. HCI therefore decided to cut ties with my father and to replace him. My father and HCI then parted on good terms.

24. HCI continues to flourish today. It advances many charitable causes throughout the Middle East. Its head office is located at 877 Shefford Road, Gloucester, Ontario, K1J 8H9. Its telephone number is (613) 742-5948 and its facsimile number is (613) 742-7733. Attached to this my Affidavit and marked as Exhibit C is a copy of a recent 25th Anniversary Report prepared by HCI detailing its history of charitable work, including the years when my father was Executive Director. This report reproduces copies of letters from the Prime Minister of Canada, the Premier of Ontario and many other distinguished people congratulating HCI on its distinguished history.

25. After leaving HCI in 1995 or 1996, my father began to operate a charitable organization called Health and Education Projects International (HEP). HEP was incorporated under the *Canada Corporations Act*. It had a registered office in Canada at 1783 Marquis Avenue,

Gloucester, Ontario, K1J 8L5. It had a mailing address at P.O. Box 880, University Town, Peshawar, Pakistan.

26. In 1998, I began working with my father on HEP's charitable projects. In doing so, I became familiar with HEP's charitable facilities and operations.

27. I am aware of allegations contained in a book and elsewhere that HEP had no legitimate charitable operations and was simply a "front" for funnelling money to Al Qaeda. This is completely false.

28. Attached to this my Affidavit and marked as Exhibit D are HEP's Financial Accounts for the fiscal year ending March 31, 2000, prepared by Iftikhar Ali & Co., Chartered Accountants. The following entries reflect an accurate summary of HEP's operations and operating costs for that fiscal year:

7 - PROJECTS OPERATING COST

Kabul Sick Children (Indira Ghandi)	178,169.00	3,316.00
Baghlan Girls School	12,554.00	234.00
Jalalabad Orphanage	207,700.00	3,866.00
Khost Vocation Center	24,959.00	465.00
Laghman Girls School	80,578.00	1,500.00
Logar Orphanage	121,976.00	2,270.00
Wardak Orphanage	67,333.00	1,253.00
Widows & Orphans	36,371.00	677.00
School Assistance	48,888.00	910.00
Relief Materials Container (C & F)	161,194.00	3,000.00
Feeding (Zakat, Zabiha, Aqiqa & Emergency	976,093.00	18,166.00
Jalalabad Farm	1,007.00	19.00
	1,916,822.00	35,674.00

29. As HEP's Financial Accounts indicate, our single largest facility was the orphanage in Jalalabad, which operated out of a building which also housed HEP's main office. We had approximately 300 boys at this orphanage. Attached to this my Affidavit and marked as Exhibit E are family photographs of the Jalalabad orphanage and office, including

photographs of the children who were cared for at this facility. I took many of these photographs.

30. HEP also operated an orphanage for boys in Wardak, Afghanistan. We were also able to care for girls at this orphanage for a brief time. Attached to this my Affidavit and marked as Exhibits F are copies of family photographs of the Wardak orphanage and the children cared for at this orphanage.

31. HEP also operated a Girls' School in Laghman for approximately 300 girls. Attached to this my Affidavit and marked as Exhibit G are copies of family photographs of the Laghman Girls School being constructed and when it was completed.

32. HEP also operated the Baghlan Girls School for about 150 girls. Attached to this my Affidavit and marked as Exhibits H are copies of family photographs of this facility.

33. Our activities in Jalalabad including vocational training for the handicapped. Our program included training in sewing, and the participants would receive their own sewing machine at the end of the program. Attached to this my Affidavit and marked as Exhibits I are family photographs of this program.

34. HEP also operated an orphanage in Logar. We had about 50 boys at this orphanage. Attached to this my Affidavit and marked as Exhibit J are copies of this facility and some of the children registered there.

35. Each orphanage was in a different province and so my job required a lot of travelling. It was a major responsibility to keep everything running smoothly and so it took up a great deal of my time between 1998 and 2001.

36. Some of HEP's other activities included:

- Medical instruments and supplies were provided to Kabul Children's Hospital and Malalai Females Hospital, Kabul;

- Baby formula and dried milk was provided by donations from Bahrain were supplied to the Minister of Public in Kabul to be distributed to the infants and children at Kabul Sick Children's Hospital;
- Funds were provided for the running of the Jalalabad Public Health Hospital, University Hospital, and Faternah Al Zahraa Children and Females Hospital;
- HEP arranged for emergency feedings including the distribution of flour, rice and oil to hundreds of orphans, widows, disabled and needy government employees;
- Vocational Centers for women and disabled persons in several places throughout Afghanistan.

37. It was my responsibility to generally oversee the hospital and the 3 orphanages in Laghman, Jalalabad and Logar. There were approximately 20 to 25 teachers at these orphanages. The teachings dealt with general education like reading, writing and arithmetic. There was no anti-American indoctrination or any dogma of any kind.

38. My main duties were to ensure that the orphanages were running properly. Also, if my father was too busy, I would pick up the money from the bank and deliver it to the orphanages. The money would be used to pay for necessary supplies, the salaries of the teachers, and a small allowance to the children which was to be given to the family that was taking care of them. On occasion I would also bring clothes, gifts, or food.

39. Operating HEP's charitable facilities in Afghanistan presented many serious difficulties. Ensuring the everyday running of these projects required my father to establish friendly relationships with many individuals and groups with different backgrounds and ideologies who had influence in the areas where our charitable projects were located. This included dealing with groups who were ideologically opposed to each other including the Northern Alliance, the Taliban, Osama Bin Laden, Pakistani Intelligence and many political members of the Arab Muslim community. My father did not enter into these relationships for ideological purposes, but rather out of necessity to further his charitable objectives.

40. In particular, providing education to girls at our orphanages was extremely difficult and controversial under the Taliban regime. My father had difficulties with the Taliban when the

orphanage in Laghman first opened since the Taliban disliked the idea of providing education to girls. However, my father firmly believed that girls had a right to receive education. Despite pressure from the Taliban, my father was able to use his skills to prevent the Taliban from interfering with the girls' ongoing education. He obtained a letter from Taliban leaders that instructed its members to leave my father and the orphanage alone.

41. One of many powerful people in the region that my father had contact with was Osama Bin Laden. Osama Bin Laden provided money to some of the same hospitals as my father and also supported certain agricultural projects in Afghanistan. To my knowledge, my father had no involvement with Al Qaeda or any of Osama Bin Laden's terrorist activities.

42. At one time during our family's time in Afghanistan, we lived in a community of Arab people which was adjacent to a compound or community of Osama Bin Laden. We simply lived in this area so that we could live near other members of the Arab community. We had no involvement or affiliation with Osama Bin Laden, Al Qaeda, or any terrorist or extremist ideology.

43. Also, one of HEP's orphanages was located in the Northern Alliance territory, so it was necessary for my father to build relationships with the leaders of the Northern Alliance.

44. My father often felt frustrated by all of the internal fighting and bickering that occurred in Pakistan and Afghanistan amongst the various tribal warlords and politicians. He was often called upon to mediate negotiations between rival groups in an attempt to establish peace, which in turn would allow his humanitarian projects to continue. Since my father did charitable work, and since he was not associated with any group, faction, or organization, he was seen as a neutral and trusted person.

45. My father never involved his children in his efforts to mediate political disputes, and never spoke with us about any kind of ideology. As far as I am aware, he was only interested in advancing his humanitarian projects. Occasionally, I would voice my desire to do other

things, such as start my own business. My father dissuaded me from that course insisting the relief work we were doing was more important.

46. By 2000, my father was becoming progressively weaker as a result of his injuries in 1991. He had no use of his hand. He was seriously restricted as to how much travelling he was able do. He began to rely more and more upon me in the running of the various projects.

47. Throughout this period, my family lived exclusively on money which was paid to my father as a disability pension which had been maintained as part of his former employment in Canada, and which he had been entitled to as a result of his accident in 1991. This pension paid him about $3,000 per month. Of this money, our family spent about $600 to $700 per month on our living expenses and try to save what we had left in a savings account at the Scotia Bank in Canada. It is my understanding that there is about $35,000 in this account, but that it has now been frozen by the Canadian government. Insofar as I am aware, all of the money in this account was derived from my father's disability pension, and not from any illegitimate source.

48. I know that my father was extremely careful in ensuring that the money he raised for charitable purposes was only used for those charitable purposes. For example, when our family used the office's car to go shopping, my father always ensured that the gas was paid for or replaced out of our own money.

49. Just prior to September 11, 2001, while crossing the border from Afghanistan to Pakistan, my father ran into trouble with certain Pakistani officials. These officials demanded a share of the charitable funding my father was receiving from international relief organizations. My father refused to pay this bribe. The Pakistani officials then beat up my mother and attempted to kidnap my father. They also refused to return my father's passport until he agreed to their bribe which made it very difficult for him to get around. It was about a month after this incident that the Pakistani authorities placed his name on the UN list of people who were allegedly supporting Taliban.

Attending Camp at 13 Years of Age

50. In 1994, when I was only 13 years of age, I was sent to a camp with my younger brother Abdurahman. As discussed in greater detail below, people have suggested to me that I actually ran this camp and that since I attended this camp when I was 13, I have been trained to be a terrorist. These assertions are false.

51. The camp I attended was not run by, or in any way affiliated with, Al Qaeda or any other terrorist organization.

52. Attending a camp of this nature was a normal thing in our culture which most children did at that age. Many Muslims in this part of the world believe that all males should receive basic training when they are young in case they are required to defend themselves. There is a Muslim prophet saying, "Teach your kids how to shoot, how to ride horses and how to swim". Believing in this saying does not mean that you are a terrorist.

53. The camp, which lasted 2 months, was located in Afghanistan. At the camp, we were involved in various activities including hiking, volleyball, soccer, fishing, praying, fasting, swimming and basic training. The basic training component of the camp involved learning about guns and explosives. I never learned how to make explosives, only how to use them.

54. There was no anti-American indoctrination, or dogma or ideology of any kind taught at this camp.

55. I enjoyed most of the activities in this camp, particularly fishing and cooking. That said, I have never been interested in the hiking as I do not like much physical activity or soldiering.

56. The military component of the camp was the only time I ever received such training. I have never been interested in being a soldier or involving myself in politics. I am not a violent person.

Situation Post September 11th, 2001

57. After September 11, 2001, the Americans came and occupied Afghanistan. Once the Taliban fell in October of 2001, all of our orphanages and hospitals closed because people had to try to find some place safe to go. It was at that time that I stopped working.

58. All of the Arab people in Afghanistan, including our family, fled from the Americans and allied forces after the fall of the Taliban. At this time, our family was living in Logar, Afghanistan. There were only about 5 or 6 Arab families in that province at the time and all of them fled from the Americans. We knew that the Americans were arresting Arab people who had no political involvement and sending them to places like Guantanamo Bay, Cuba. We fled even though we knew that we had not done anything wrong.

59. We received no assistance from Al Qaeda or any other organization in fleeing from the Americans. We simply fled as a family in the car we had.

60. During this time, life became very difficult for my family. Travel became increasingly dangerous in Afghanistan, so we and many other refugees fled to he mountains along the border between Pakistan and Afghanistan. We were essentially trapped here since my father was still out of favour with Pakistani Intelligence and the Americans were occupying Afghanistan.

61. We lived in a small village in the mountains called Mentay for approximately 2 years. Throughout this time, I was responsible as the oldest son to care for my family. I would do the shopping, chop wood and get water out of the well. I also spent a lot of time reading and playing on my father's computer. There was not much else for us to do. The various humanitarian projects such as the running of hospitals and orphanages were all closed down when the Northern Alliance overthrew the Taliban government.

62. By this time, my father's disability was becoming so severe that he required our physical assistance to get around. He kept reminding me that my only focus during this difficult time was taking care of the family.

63. I later learned of the death of my father in October of 2003. I was told by some locals that the village that he and my youngest brother were in had been bombed by Pakistani and American airplanes.

Dealings with Canadian Embassy Officials prior to Arrest

64. After my father's death, my family and I moved to Islamabad, Pakistan, where we could get assistance from friends. While in Islamabad, I did not work. My family and I lived off the little money left by my father and the support of friends.

65. While living in Islamabad, my sister and mother went at least twice a week to the Canadian Embassy for assistance in determining the status of my youngest brother Kareem who had gone missing with my father. We also sought Embassy assistance in being repatriated back to Canada.

66. On or about April 22, 2004, my mother and sister provided the Canadian Embassy with our passports for renewal. They were advised to return a week later. On returning to the Embassy, Canadian officials refused to renew our passports or to return the original ones. As a result, we found ourselves stateless and subject to arrest under Pakistani law for staying in Pakistan without travelling documents.

67. My mother and sister then retained the services of the law firm Hasmat Habib Law Associates, in early 2004, to assist them in obtaining a renewal of the passports from the Canadian Embassy, in Islamabad, without success. Attached to this my Affidavit and marked as Exhibit K is a copy of materials filed by this firm with the Supreme Court of Pakistan.

68. It was at this time that I was contacted by someone who identified himself as "Michael" from the Canadian Security Intelligence Service or "CSIS". During a phone conversation we had, he offered to help me return to Canada if I could provide him with information. It was shortly after that discussion that I was picked up by Pakistani intelligence officials. As discussed in greater detail below, I later met "Michael" while being detained in prison by Pakistani intelligence as he was part of the CSIS contingent who interrogated me for several days.

Arrest in Islamabad, Pakistan on or about October 15th, 2004

69. I was arrested in Islamabad, Pakistan on or about October 15, 2004, at approximately 4:00 p.m. At the time of the arrest I was picked up at a street crossing in Islamabad, with two young friends of mine. The car I was in was surrounded by men speaking Urdu. After a brief conversation with the one man, another man opened the door, reached inside and punched me hard in the face with a closed fist. My friends and I were then taken out of the car and placed in a Land Cruiser with government plates.

70. Once inside the Land Cruiser the men frisked me and took my watch and mobile phone. My hands were then cuffed behind me and my eyes were covered with both a blindfold and hood, which remained on my head for at least the next 24 hours. There were a total of 7 of us in the vehicle including my friends. It was at this point that I asked them who they were and where I was going. One of the men simply said, "you will know". I was terrified and confused. I had no idea why this was happening to me.

Arriving at Islamabad I-9

71. After being in the vehicle for about 5 minutes I was taken to a building that I later found out was the 2 or 3 story prison in Islamabad I-9.

72. Once we arrived at the prison, the men shackled my legs and started hitting me with what felt like a hard-rubber stick or paddle. They also kicked me on the backside to get me to move towards the prison. I was unable to identify exactly what the object was or who was actually

hitting and kicking me because my eyes were covered. I was then separated from my friends and forced down a set of stairs into a basement. That was the last time I saw either of my friends.

Basement of the Prison

73. As soon as I arrived, I was placed in a room ("My Cell"), and I was searched. The men took away my belt and the money in my pockets. One of the men then held me, while another removed the hood and blindfold just long enough to take my photograph. After my photograph was taken, one of the men yelled at me to remain where I was standing. They then left the room.

74. While in My Cell, I was forced to stand facing the wall. I was still blindfolded, hooded, handcuffed and shackled. I knew I was facing the wall because a couple of times when I became tired and began to slouch, a guard would come into the room and hit me with the hard-rubber paddle on the back of my head causing the front of my head to hit the wall. After threatening me, and ordering me to stand straight, he would leave the room again.

1st Interrogation

75. After standing in My Cell for about an hour I was forcefully taken to another room down the hall ("Room #1). I was still blindfolded, hooded, handcuffed and shackled. When I first entered the Room #1, I was stripped completely naked other than my shirt hanging off my cuffs and the hood on my head. This made me feel completely defenceless and vulnerable. I was becoming even more terrified, and I thought to myself that I would do whatever I could to co-operate with these people and to satisfy them.

76. Then the interrogations started. The men began to scream curses at me in English and make terrible threats. A lot of their questions started with "*I will kill you!*" or "*I will fuck you!*". This terrified me, particularly since I could not see what was going on, since I was standing

naked, and since I never knew what would happen next. Based on the sounds of things going on around me, I could tell that there were at least 2 people in the room.

77. Throughout this first interrogation, my Pakistani interrogators, who never identified themselves, asked me questions about who I was, where I was from, questions about my family, my knowledge of Al Qaeda and so on. The questions were not continuous. They would ask me a bunch of questions and then leave the room for awhile. When they came back they often asked me very similar questions hoping that I would change my answers. When the interrogators were not in the room, someone else was present and watching me, to ensure that I remained in the same position. If I made any move at all, I would be struck with the hard-rubber paddle. Throughout my entire time in this room, I was not allowed to sit down or to go to the washroom.

78. Throughout the interrogation, if I did not know the answer to a question or if I began to slouch from standing so long someone would hit me with the hard-rubber paddle. I tried my best not to slouch, but as I became more and more exhausted, it became more and more difficult for me to remain standing straight.

79. During this first interrogation, one of the interrogators with really big hands grabbed my testicles and squeezed them hard in his clenched fist, while continuing to shout the same questions at me. This caused me horrible pain. This same action was repeated another time later when no questions were being asked.

80. My interrogators then began threatening to put a stick in my rectum. Then one of them began to insert the stick in the area of my rectum, but then stopped and began hitting my testicles and shouting "*I'm going to fuck you dry!*". This terrified me.

81. They then made more threats and asked me some more questions. I was unable to give them answers they wanted. They then shouted at me to bend over. They proceeded to hit me repeatedly on my backside with the hard-rubber paddle. I was then told to kneel with my

chest to my thighs. They then proceeded to penetrate my rectum with a stick. I was in a state of complete shock.

82. This interrogation in Room #1 went on for approximately 2 to 3 hours. At no point did my interrogators ever indicate to me who they were. Any attempt on my part to request to speak to the Canadian Embassy or ask any questions whatsoever, only angered them and led to more severe beatings. All of my requests to be given an opportunity to pray were refused and therefore during the beatings I would repeatedly say, "With God I am fasting", referring to Ramadan.

Back to My Cell

83. After the first portion of the interrogation, I was taken back to what I think was My Cell. One of the men gave me some water and a biscuit to break my fast. Again I requested to pray, but they told me to continue to stand and wait in the corner.

84. During this time period I was not asked any questions. However a guard continued to watch over me. In order to prevent myself from collapsing, I leaned my forehead against the wall for support. I once collapsed on the floor, at which point, the guard allowed me to sit for a couple of minutes before forcing me to stand up again. I was forced to remain standing in My Cell throughout the night. I was still blindfolded, hooded, handcuffed, and shackled.

2nd Interrogation

85. After standing and waiting for a very long time, my jailers came and gave me some tea and a biscuit. I presumed it was morning.

86. I was then taken to another interrogation room ("Room #2") that was just down the corridor. I believe it was a different room because it was further down the hall than Room #1, but I cannot be certain of this. Except for the brief moment when my photograph was taken, I had been blindfolded and hooded since being put into the Land Cruiser.

87. During this interrogation, I was still forced to stand, but this time I was facing my interrogators. There were either 3 or 4 men in the room but only one questioned me while another would hit me on the head. The person speaking initially asked me some of the same questions and then asked me more specific questions about my father, Abdurahman, and certain others like Sheikh Iessa, Omar Ahmati and a Dr. Amin. He specifically wanted to know what knowledge I had about the whereabouts of Dr. Amin whose number they said was on my mobile phone. I told the men that I did not know any Dr. Amin and that I had only received the mobile phone the day prior and the only call I had made was to my sister Zaynab.

88. It appeared that these men were most interested in some sort of a plot to kill a Pakistani official. They told me that someone I knew was a conspirator and for that reason I must have known what was going on. I knew nothing whatsoever about any such plot and I still do not know if there ever was such a plot.

89. This interrogation lasted for about 2 or 3 hours at which time I was taken to another room again. I think I was returned to My Cell.

90. Once again I was ordered to keep standing. As was the case before, I was still not allowed to pray or go to the washroom. As it had been so long, urine began to run down my leg onto the floor.

3rd Interrogation

91. After making me stand and wait in My Cell for a few more hours, they came back and took me to Room #2 again. Here they interrogated me for about 2 more hours. I was becoming overwhelmingly tired. Once again, they asked me questions, many of which were repeated from before and later repeated by the CIA, FBI, RCMP, and CSIS. I thought to myself that I had to tell them anything they wanted to hear, or else this treatment would continue to get worse and worse.

92. After this interrogation, I was returned to what I think was My Cell and finally allowed to sit on the floor. I was also given something small to eat. I sensed it was night time again.

Description of Rooms

93. My Cell was an 8 by 8 square concrete room with no toilet. The only light in the cell came from a small window (about 1 foot high and 3 feet wide) at the top of the wall facing outside. After the sun went down, the cell was pitch black. The concrete floor was filthy with dirt. There was a small matt in the room for me to sleep on. I was not given any blankets. I was given one water bottle each day, which I used as a toilet sometimes after I finished drinking from it. There were beetles or cockroaches everywhere. The cell was closed off from the corridor by two doors. The door closest to the interior of the cell was made of steel bars. On the other side of that door, there was also a solid steel door that had a little window that could only be opened from the outside.

94. Room #1 was also a concrete room with a concrete floor. It appeared to be sound-proof. There were no windows and the room was illuminated by fluorescent lights. There was a wooden desk and cupboard. There was also a camera. Other than the placement of the cupboard, Room #2 was similar to Room #1.

Day Two of Interrogations

95. After approximately 24 hours from the time I first arrived, guards came for me and took me back to what I think was Room #2. It was at this point that they removed my hood and blindfold. After this, my eyes were not covered while I was in any of the rooms or My Cell. But whenever I was moved from one room to another, my eyes were always covered.

96. When my eye covering was finally removed, I saw that my torturers were 3 Pakistani men who were sitting on chairs facing me. One man, whom I found out later administered most of the beatings, was a Major ("Major #1"). He was approximately 6 feet tall with dark features.

He was skinny and smoked a lot. Another guy, who was a Colonel, was approximately 5 feet 8 inches. He also had dark features, but was a much stockier man. The third person was also a Major ("Major #2"). He had studied in Canada. He later pretended to be friendly to me and he often apologized for the way they had treated me. He was always apologetic and friendly when the other men were not around. The reason I knew their titles was because I either overheard them in conversation or I found out later from CSIS.

97. In this room, I continued to be shackled and handcuffed. I was ordered to remain standing. To this day, I continue to have problems with my feet because of all the standing I was forced to do. My torturers did not appear to carry any guns. There was, however, always a guard just outside that patrolled the corridor with a gun.

98. The questions at this interrogation were very similar to the questions I had already been asked. Again they asked me questions about my father, my supposed Al Qaeda connections, my father's acquaintances, the assassination attempt on a Pakistani official, my supposed familiarity with weapons, and my supposed terrorist involvement. This carried on for about 5 to 6 hours during which I was continually hit on the head when they did not like my answer. I was constantly threatened.

99. At one point, they forced me to tell them my e-mail addresses and passwords. I told them about both a Hotmail e-mail account I had and also a Yahoo e-mail account. They also asked me about a friend of mine named Abdurahman. (This is not my brother of the same name.)

100. One of the main subjects the Pakistanis kept asking me about was my supposed involvement in some sort of plot to assassinate a Pakistani government official. They told me that my friends were involved in such a plot and that therefore I must have been involved. As a result of what they did to me, I eventually told them that I did know about such a plot, but that I was not involved in it. I just made up a government official, and said it was the Prime Minister. This was completely untrue. It was also clear to me that the Pakistanis knew that these statements were untrue since I was never charged with being involved in such a plot.

101. Later, I was returned to My Cell and finally given an opportunity to sleep. I was also provided with orange pants and a shirt to wear. Despite being allowed to sleep, the guards would disturb my sleep by waking me up every little while. I would be forced to stand up, and then allowed to go back to sleep.

102. After a couple hours of sleep, the guards came back in and told me that they had sent an e-mail message to Abdurahman from my e-mail account asking him to meet me. They told me that their plan was to take me to Peshower, and to have me sit in a car and wait for Abdurahman to arrive. If, at anytime, I gave any indication that I was in their custody they said that they would arrest my sister Zaynab and do to her what they had done to me. I had no choice but to do what they said. I did not want them to harm my sister.

103. I also spoke with a Brigadier who told me that if I told him something new that I had not told anyone else, he would try to help me get out of that place.

104. After speaking with the Brigadier they took me back to My Cell. I was given some bread and stew to break my fast. I stood and prayed. The cell was very cold and my request for a blanket was denied. This was the first time since I had been arrested that I was allowed to sleep for an extended period of time.

Day 3

105. When I woke up, I noticed that there was blood on the ground. As a result of the beatings that I had received on my head, my right ear was bleeding. It continued to bleed for around a month after that. My ear still hurts if water gets into it.

106. That morning, I was taken to Peshower in a Land Cruiser by someone I later found out to be a Major. He was accompanied by a guard. Once in Peshower, I was put into a smaller car and we waited. After a short time, my friend Abdurahman approached the car. When he did so, he was arrested. That night I was driven back to the prison without my eyes being

covered, so no one seeing the car would get suspicious. It was at this time that I was able to determine that I was being detained somewhere in Islamabad I-9.

107. I was ashamed at the trouble I had gotten my friend into. To my knowledge, he was not politically involved, and there was no legitimate reason for his arrest. I never saw him again.

17 Days of Interrogations by Americans

108. I was allowed to sleep throughout the night. The next morning the Americans arrived.

109. I had been arrested on the first day of Ramadan. When the Americans had finished questioning me and I was transferred to another prison, there was 10 days left in Ramadan. From this I believe that my first period of interrogation by the Americans lasted 17 days.

110. These initial 17 days of interrogation sessions by the Americans would always last from at least 10:00 p.m. to 3:00 a.m. Then they would typically come get me for more questioning at 7:00 or 8:00 a.m. and continue the questioning to 5:00 or 6:00 p.m. Then I would sleep until about 9:00 p.m. and the interrogations would begin again at about 10:00 p.m. On at least one day, the questioning continued all night and into the next day without me being allowed to sleep at all.

111. During the 17 days, the Americans always appeared to be in charge of what was going on in the prison. They gave orders and directions to the Pakistani jailers about various things and these orders and directions were obeyed. If the Americans were unhappy about the answers I gave on any particular day, they would order the Pakistanis to continue questioning me after they left. This meant that I would be subject to more physical abuse, threats, and that I would not be permitted to sleep until they finished with me.

112. Even when I was returned to My Cell the noise made it very difficult to sleep. My sleep would be regularly disturbed by being woken up by guards throughout the night. I would

have to get out of bed and then later allowed to go back to sleep. As a result, I was always extremely tired, never became rested, and was never able to think straight.

113. This first group of Americans never read me any sort of statement outlining any supposed legal rights. They never advised me as to any legal basis for my detention. They never allowed me to contact a lawyer, or advised me of any right to do so. They did not tell me that I had a right to remain silent or that my answers to their questions could be used against me in a legal proceeding. Although they all knew that I was Canadian, I was never invited or permitted to call the Canadian Embassy.

114. Throughout the 17 days of continuous interrogations by the Americans, at least one of my Pakistani abusers was always present. Sometimes they appeared bored because of the repetitive nature of the questioning. I was not aware of any Canadians being present.

115. Other than one slap on the face described below, the Americans did not physically abuse or torture me themselves. However, I was still repeatedly being beaten and threatened throughout these 17 days by the Pakistanis. Sometimes when the Americans were not happy with the answers I was giving, they would order the Pakistanis to keep questioning me, and I would then be beaten by the Pakistanis. The Pakistanis would then slap, hit and threaten me until I promised to give the better answers.

116. The Americans themselves did make serious threats against both myself and my sister. On many occasions when they were not satisfied with my answers, they stated that if I did not tell them what they wanted to hear, they would send me to prisons they knew about in Egypt or Uzbekistan, which they told me would make the prison I was currently in seem like a five star hotel. They said things like: "*You know what they do there*…", which I took as a threat that I would be raped. They also said that if I did not cooperate, they would have my sister Zaynab arrested, "*and have exactly the same things done to her as were done to you*" or words to that effect.

117. Nothing upset me more than the threats that they would do to my sister what they did to me. That was always a soft spot for me and they appeared to be well aware of that since they kept coming back and repeating this particular threat.

118. The Americans would often try to induce me to give answers by saying that "*If you give us something big, we can get you out of here*" or words to that effect. I wanted so much to get out of there that I decided to tell them whatever answers I thought would make them happy.

119. Generally, my approach was to make-up answers to the Americans which said that I was involved in various things they suggested, but trying to minimize my own role. That way, I hoped to satisfy them, but not anger them enough to send me to Egypt, Uzbekistan, or Cuba.

120. Throughout the interrogations, the Americans kept notes of what I was saying. I do not know if the interrogations were videotaped, but there was a video camera in the room.

121. The American interrogators made it clear to me that they had been informed by the Pakistanis of the previous answers I had given to them. If I ever gave an answer that was inconsistent, they would say that I had already told the Pakistanis something different, and so I must have been lying.

122. I came to understand very quickly that I needed to try to be consistent in my answers. When my answers to questions changed in a way that they did not like, they would point out the fact that I was being inconsistent, call me a liar, and scream threats at me. As a result, they were often able to get me to repeat the same statements multiple times, including statements which were untrue.

123. There were usually 3 or 4 Americans present throughout the interrogation sessions, but never less than 2. During their interrogations, I sat on a stool with my hands and legs shackled. The Americans confined themselves to asking or screaming questions and threatening me.

124. These interrogations took place in a new room that was sound-proof and had a camera. On the first day, there were 3 white Americans and 1 Pakistani. Two of the Americans were male and the other American who appeared to be the most senior was female. The Americans never disclosed their actual identity. However, at one point one of them suggested that I had been using some sort of code and said that "*we spies do the same things as you terrorists*" or words to that effect. From this I believe that these Americans were intelligence agents, probably with the CIA.

125. Throughout the 17 days, I saw 6 different Americans. The combination of people I saw on each given day constantly changed.

126. It became obvious to me that I needed to tell the Americans whatever they wanted to hear in order to minimize abuse, and to have any chance of staying alive or getting out of the Pakistani prison. Sometimes I felt that anything would be better than remaining in that prison, including being taken to Cuba. Nearing the end of the 17 days, one of the Americans actually told me that it would not be long before I would be sent to a "normal prison". I thought that this might happen if I did all I could to tell them what they wanted to hear.

127. For at least two full days, possibly three, the self-described "spies" asked me about various people and asked me where they were located. They gave me a list of about 18 names and wanted to know who I knew and what their responsibilities were. I was not familiar with the majority of the people on this list.

128. Some of the names on their list were people I did know about. One was an individual named Hamza Al Jowfi. He was an acquaintance of my father's and I had seen them together. When they asked me who he was I said I only knew him as being a friend of my father. They said, "Come on, you know that he supplies weapons to Al Qaeda." I suspect that this statement was untrue. If it is true, I had not heard this until they told me.

129. To the best of my recollection, the subject of me buying weapons and selling them to Al Jowfi first arose about 3 or 4 days into the interrogations by the "spies", which was about 7

or 8 days after my initial arrest. I recall that at about this time, one of the "spies" said that they had a list of weapons that my friends had told them that I had bought and sold. They did not let me see any such list, and I suspect now that there was no such list. In any event however, this suggestion that I had bought and sold weapons was totally untrue. At first, I told them that I did not buy or sell weapons, and that I was kept busy enough buying supplies for my family.

130. When I told them that I did not buy and sell weapons, they said things like, "How can it be that everyone is lying about you?" I was crying and kept saying, "When I tell you the truth you don't believe me."

131. Eventually, at some point, I told these people that I had in fact sold some weapons to Al Jowfi. In doing so, I tried to make up a story that minimized my involvement in such activities, but which would still make them happy. This was just one of many untrue statements I made which were the product of my mistreatment.

132. At some point, I recall that I even told the Americans that Al Jowfi supplied Al Qaeda with about 90% of its weapons. Even the Americans must know that this statement was completely untrue. I simply said this in order to make it seem that I was providing them with important information.

133. The Americans also had me confirm the statements I had made regarding the fictional plot to assassinate the Prime Minister of Pakistan. I think they must have known that there was no such plot.

134. On another occasion, the Americans told me that my brother Abdurahman had told them that our father was responsible for raising militia in Logar, and that I was his second in command. At first I told them the truth, that is, that this was not true, that I was only my father's driver, and that I knew nothing about any such activities. Eventually, when they threatened me and called me a liar, I said that the stuff about raising militia was true. As far as I am aware, there is no truth to these allegations.

135. On still another occasion during the 17 days of interrogations, I recall that one of the Americans said "*One of your friends told us that you once said that you transported hydrogen peroxide*", or words to that effect. I was afraid of denying this, and so I said that I once transported some barrels to Al Jowfi but did not purchase them for him. When I made these statements, I had no idea that this substance could be used to make explosives or landmines. I knew that hydrogen peroxide was sold in small orange bottles in Pakistan and was used as a disinfectant for cleaning wounds. I had seen hydrogen peroxide used for this purpose. When you pour it on a wound, it goes white and makes bubbles. Since I didn't know that this substance could be used to make explosives, I did not see any point in denying the allegation.

136. The Americans even asserted on many occasions that I was involved in planning the Egyptian Embassy bombings in 1995. This of course was absurd. I was only 14 years old when those bombings happened.

137. There was one American who particularly frightened me. He was a white man with dark features and was only about 5 feet and 6 inches tall. He was much more arrogant than the other Americans and was much less patient. One day near the end of these initial interrogation sessions, he became extremely angry at me and began screaming in my face, saying: "*You're a lying fuckin' bastard and you're not giving us anything, and we're going to bring in your sister!*" At this point he was trying to get me to give them someone's phone number that I did not know. He then slapped me hard across the face and I was crying uncontrollably. Then one of the Americans who was an Asian woman and who appeared to be in charge said, "That's enough for today." The next day, the man was friendlier and apologized for hitting me.

138. The Americans had me repeat the same things many times. For the last three days or so of their interrogations, they went over everything I had told them before and got me to say everything all over again several times. Whenever I said something that was inconsistent

with what I had said earlier they would say "*That's not what you told us before*", and then I would just affirm whatever they said I had told them before.

13 Months of Arbitrary Detention in Raoulpindi

139. After the first 20 days of interrogations by the Pakistanis and Americans, I was taken to a prison in Raoulpindi where the Pakistanis detained me for more than 13 months.

140. During the 13 months of imprisonment in Raoulpindi, I was never given a lawyer, or access to a telephone. I was never brought before a Court. I was never charged with any offence or given any reason for my detention. I was never allowed to contact my family or the media.

141. The cell I stayed in was about 8 feet by 6 feet. Once again, it was in the basement. There was no washbasin or toilet, so I was taken to the washroom 3 times a day. These washroom breaks were the only time I got out of my cell each day. The cell was very hot. There was no electricity in the cell. There was some light that came from the hallway, through the barred door, which provided some light after dark. The only natural light came from a small window at the top of a high wall. I slept on a matt that was located on the cell floor. The entire time I was there, I was kept in solitary confinement.

142. While there, the Pakistanis and/or Americans would interrogate me from time to time by either coming to Raoulpindi or having me transported back to Islamabad. These interrogations happened 2 or 3 times per month or so. Otherwise, I only saw Pakistani guards at the jail.

143. I was not allowed out of my cell to exercise at all. It was often very dark in the cell and so after days of not being allowed out, I would become very frustrated and start crying and yelling. As had occurred in the previous prison, the Pakistani guards would wake me up throughout the night in order to deprive me of sleep.

144. I was fed 3 times a day. Typically, I would get bread and tea for breakfast, 2 pita breads and a small portion of stew served in a disposable coffee cup for lunch, and stew again for supper. I would also get either an apple or a banana 3 or 4 times a week. At every meal I was provided with a 250-millimetre bottle of water that was filled up with water from the washroom. I lost a lot of weight during the 14 months.

145. Even though the beatings and threats came less regularly than in the early days after my arrest, they still occurred. If I ever did anything to upset the guards they would beat me with a hard-rubber paddle or utter threats about raping me. I would often overhear screams from other prisoners being beaten. The whole experience made it so that I was always terrified about what would happen next. Despite on occasion being allowed to communicate with other prisoners, for the most part I was punished severely if I ever attempted to speak with anyone. There were no visitors allowed in my cell at all.

146. While in the prison I would repeatedly ask for information about my family, a lawyer and the Canadian Embassy. When I made requests for a lawyer the guards laughed out loud. The guards ignored my questions about my family. When I asked about the Canadian Embassy they told me that they were speaking with them but that the Canadian Embassy was ignoring me.

147. While in prison, I tried to keep track of time by praying daily. That said, over time, days began to blur together into weeks and months. At first I began scratching small marks on the walls to try and keep track of the days. Then later I began making a small scratch once per week. This was the only way I had to keep track of time.

First Visit with Canadians

148. It was not until about 3 or 4 months into my detention, around January or February, 2005, that I saw some individuals from the Canadian Embassy. Anytime I met with the Canadian Embassy there were always Pakistani and Canadian intelligence officials present. The RCMP and CSIS never interrogated me at the same time and there was always a Pakistani official

present at all interrogations. There were never any Americans present when I saw the Canadians. The Canadian Embassy officials were never present for any interrogations. They would come with the others and then leave the CSIS agents to conduct interrogations.

149. Prior to the first visit with Canadian consular officials in Islamabad I-8, my jailers dressed me in civilian clothes. I was then taken to the interrogation room in Raoulpindi, stripped naked, and checked for bruises. I then had to put the civilian clothes back on. I was warned by the Pakistanis about what not to say, including asking for my family, a lawyer or any mention of the abuse I had received. While in the jeep, my legs were shackled, my eyes were blindfolded, and my head hooded. I was then driven in a jeep for about 20 minutes to a house located somewhere in Islamabad I-8.

150. Once we arrived, I was once again taken down a flight of stairs. Once inside my eyes were uncovered and I saw that I was in a fancy room in the basement. The room was about 20 feet by 15 feet. There was a 2-metre long boardroom desk in the middle with leather couches all around it. There was a marble floor with a nice Persian rug on it and on one side of the room there was a TV and a gas fireplace.

151. At this time, Major #2 told me that the people from the Canadian Embassy would be there shortly. Soon after, I heard cars pulling up to the building and then people coming down the stairs. There were 2 people from CSIS, one who was based in Islamabad and was always present during any consular visit. He was short, bald and around 40 ("CSIS #1"). The other guy's name was Bob and he was also around 40 years old. Bob was 6 feet tall and looked like he worked out. CSIS #1 referred to Bob as being the boss. They were wearing civilian clothes and never introduced themselves as members of CSIS. Two individuals from the Canadian Embassy accompanied the CSIS people. One was from Ottawa ("CE #1"). He was around 45 years old, had dark hair and was between 5 feet 8 inches. The other man who was stationed in Pakistan appeared to be South American ("CE #2").

152. On the first visit with Canadian consular officials, there were 3 Pakistani officials present. These included the Colonel from before, Major #2 and another Major ("Major #3") whom I had not met yet.

153. The Embassy officials asked me some general questions about whether I considered myself to be Canadian, whether I wanted to go back to Canada and how I was being treated up to that point. The questions on my treatment were cursory in nature, with no real inquiry about my treatment by the Pakistani jailers. At all times during the questioning, the Pakistani officials were in close proximity and so I was unable to communicate my mistreatment to the Canadian officials.

154. By this point, it must have been obvious to the Canadians that I had never been charged with any offence, had never been given access to a lawyer, and had never been brought before any Court. Yet, they did not ask me about any of these things, nor did they ask me what the prison conditions were like, or whether I would like to see a doctor. I did tell them that the food was really poor and asked if they could bring me some food. The Pakistani jailers stated that it would not be allowed. I did make some mention of my family, but I never communicated that I wanted to contact them, nor was I ever asked that question.

155. At one point I told them that I was being regularly questioned by the Americans. I asked them whether I had to talk to them. One of the Canadian Embassy officials told me that he could not advise me about that.

156. CE #1 did all of the talking while CE #2 just sat and smiled. As they were leaving, CE #1 told me that CE #2 would help as much as he could and that they would try to meet regularly.

157. After the Embassy officials and a couple others left the room, it was only Bob from CSIS and Major #3 remaining. They ignored me and spoke with each other for a few minutes. Within about 5 minutes, 2 more CSIS agents came in. One of them named Mike was the one who I had spoken to on the phone in Islamabad, just prior to my arrest. The

other agent was someone I had not met before ("CSIS #3"). Mike and CSIS #3 took notes while Bob asked me questions.

158. Bob never asked any questions with respect to contacting my family or a lawyer, nor were there any discussions about my treatment in prison. CSIS also never told me that I did not have to answer their questions if I did not want to. I was given some coffee and water, but I was not given any food. The questioning lasted for hours. Bob asked some questions about who I knew in Canada, but otherwise the questions were very similar to those questions that had already been asked to me by the Pakistanis and Americans.

159. Bob also asked about other Canadian Muslims, such as, Arar, Ali Hindi, Ahmati, and Ahmed Amaralte, who were individuals that had been held in Syria. He asked me whether I thought that they had been tortured. I used the opportunity to indirectly tell him of my treatment in the presence of my Pakistani jailers by saying "that anyone jailed for this reason in a third world country is tortured". I had hoped he would understand the message I was sending him about my treatment, but he ignored my answer. I was never asked how I was being treated, whether my legal rights were being observed, or whether I wished to see a doctor.

160. I told CSIS that I would like to go home and finish the questioning when we got back to Canada. CSIS offered to help me get home and help my family with money if I would help them. They also told me that it was policy to hold onto my father's money even though he had died. They also told me that the Pakistanis would not agree to me writing a letter to my family. The Pakistanis told me not to say that I wanted to have the Canadians contact my family, because they did not want the media to know.

161. On the second day of the CSIS interview, the same people showed up, and the questioning was held in the same room in the presence of one of my Pakistani abusers. On this day, the questions asked by CSIS were very similar to the questions asked by the Pakistanis and Americans before. It actually appeared that the CSIS officials had spoken to the Pakistanis and Americans in preparation for this meeting. The topics covered included

weapons, training, and the assassination attempt on a high-ranking Pakistani official. After this meeting was over I was driven back to Raoulpindi and I did not see another Canadian official for 2 months.

2nd Visit Consular visit with CSIS agents

162. In mid March or April, 2005, I was taken back to Islamabad I-8. This meeting took place in the same building, but in a different room.

163. On this occasion, CSIS only interviewed me for about 5 to 10 minutes. During this brief time, CSIS #1 asked me if I knew someone named Dennis Edney and whether I had hired him to be my lawyer. Of course, as they were well aware, I had not had any ability to retain Mr. Edney or any other lawyer, and so I said that I did not know any lawyer named Dennis Edney. CSIS #1 did not tell me that my family had already retained Mr. Edney to act for me. He did not tell me that Mr. Edney was making inquiries with the government of Canada as to my whereabouts, nor that Mr. Edney was attempting to secure my freedom from wherever I was being held. He did not provide me with Mr. Edney's contact information, nor with any means to contact Mr. Edney.

164. CSIS also asked whether my family was supporting me or whether I had my own assets.

165. I told CSIS about the bad conditions of the prison and that I had been getting dizzy and that my heart was hurting.

RCMP Interrogations

166. The next day, Sgt. Konrad Shourie from the RCMP and two other RCMP officers met me at Islamabad I-8. CSIS #1 was also present. He left when the RCMP started asking questions. Unlike the interviews with CSIS and the consular officials, I was brought into these interviews wearing the hood over my head.

167. The questions from the RCMP lasted three days, and Sgt. Shourie did all the talking. The other two RCMP officers were younger white men who I never saw again after this meeting. One of the men was taking notes of what I was saying and the other was taking notes of my reactions.

168. The RCMP did not provide me with any kind of advice or notice about my legal rights. They did not offer to provide me with a lawyer, they did not explain the reasons for my detention, they did not tell me I had a right to remain silent, and they did not advise me that I had a right to be brought before a court. The RCMP did not ask me about my treatment or my welfare, and did not offer to send messages to my family or the media. I did not ask about any of these things because, as always, there was a Pakistani official present. I did not believe I had any choice but to speak to the RCMP.

169. The RCMP did not tell me that my family had already retained Mr. Edney to act as my lawyer, nor that Mr. Edney was prepared to provide legal advice and services to me free of charge.

170. I was informed by Sgt. Shourie that my family knew that I had been captured, but that they did not know where I was. I later found out that this was untrue.

171. Sgt. Shourie was much less polite and pleasant in Pakistan as compared with his later interview with me at Pearson Airport in Toronto. Throughout the course of the first 2 days, I estimate that he screamed at me: "*You fucking little bullshit liar!*" or words to that effect some 10 to 15 times. He adopted a more pleasant approach on the last day.

172. It was clearly apparent that Sgt. Shourie had been in communication with CSIS, the Americans and/or the Pakistanis, and had been provided with materials from some or all of them. He reminded me that I had told CSIS that I would speak to other agencies. He also had a thick file that he would sometimes refer to.

173. Sgt. Shourie asked me many of the same questions that had been asked by CSIS, the Americans and the Pakistanis, and he knew when my answers were inconsistent with ones I had given previously. Once, when I told him that I actually knew nothing about any supposed plot to assassinate the Prime Minister of Pakistan, he became angry and threatening, shouting: "*That's not what you told the Pakistanis! See, we have done our homework!*".

174. At one point, Sgt. Shourie demanded that I admit that I had sold weapons to Al Jowfi knowing that he was an arms procurer for Al Qaeda. I told him that I did not do this, which was the truth. He then began referring to his documents and said: "*That's not what you told the Pakistanis!*"

175. Another time, Sgt. Shourie said: "*What about all these other things you were helping Al Jowfi with?*". I said that I wasn't helping Al Jowfi with anything, which was the truth. He then said, "*That's not what you told them*," and motioned to the Pakistani official in the room.

176. Sgt. Shourie told me that if I just co-operated I would not get into trouble and that I would be able to go home. It was at this point that I started giving Sgt. Shourie the answers he wanted in the hope that he would help me get home.

177. Sgt. Shourie made various promises to me in an effort to get me to provide him with something that the other interrogators had not already obtained. At one point he said, "*If you give me something new, you can get out of here and go back to Canada. You're still young and you can start a new life*" or words to that effect.

178. Sgt. Shourie also used subtle threats during his questioning of me. He reminded me that he knew that I had helped Pakistani intelligence arrest my friend, Abdurahman, and that I would not want word of this co-operation getting out. Sgt. Shourie was very intimidating and frightening. He made it very clear to me that he was in control of my life and had the power to get me home or leave me in Pakistan if he wanted.

179. At the end of the interrogation, Sgt. Shourie asked me what type of chocolate I liked. My favourite chocolate bar, Coffee Crisp, was delivered to me 2 months later. Just before he left, I asked to speak with the Canadian Embassy, but Sgt. Shourie simply replied, "*You already did*".

3rd Visit with Canadian Officials

180. In May or June, 2005, I was brought from Raoulpindi to Islamabad in order to meet with CSIS. The meeting took place in the same room as the second meeting. As always, there was a Pakistani jailer present who had participated in my torture. There were 3 individuals from CSIS present, Bob from Montreal, Mike from Toronto and a local man. When I was brought into the room where the CSIS agents were present, I was still hooded. Just prior to taking it off I heard someone outside the room asked, "*Do you want the hood to be kept on or is this official?*" Once the Pakistani Official removed the hood, I could see all the men from CSIS.

181. CSIS then said that they wanted to take me to Canada to answer more questions, but that I would not be able to see my family. They told me that they would take me to a cabin so that I could go fishing and do other fun things. Bob said that if I were to see my mother then the media and lawyers would get involved and this was not in my best interests. Bob told me that "*lawyers just want money and they won't help you*". They did not tell me that my family had already retained Mr. Edney to try and help me.

182. Again, I was not provided with any advice or notice as to any of my legal rights.

183. The second day of this visit from CSIS was in Raoulpindi. Mike started to ask me more questions despite my protest that I would rather answer the questions when we arrived back in Canada. When they completed their questioning, they took my measurements. Once the meeting ended, the local CSIS officer said that "*it would all be over in 2-3 weeks*". Before they left they told me that the questioning would continue once we reached Canada.

184. After a week had passed, the local CSIS agent visited me. He reassured me that they had not forgotten about me and that I would be leaving within a couple weeks. I did not see anyone for at least a couple months after that.

Visit from Americans – July/August 2005

185. In about July or August, 2005, I was taken again to Islamabad I-9 for more interviews. This time they were conducted by 2 FBI agents. The Pakistani Colonel who had been involved in my torture was present throughout these interviews. The more senior officer's name was Gregory T. Hughes, Special Agent, Boston Division. There was also another American with him, Special Agent Nace. These were the same two people who later interviewed me at the Delta Hotel shortly following my return to Canada.

186. There was a camera in the room, but I am not sure whether it was taping.

187. By this point in time, I had been imprisoned for 9 or 10 months without ever having been charged with anything, or brought before a court, or allowed to contact a lawyer, my family or the media. On those occasions where my jailers considered my behaviour to be unco-operative, I had been beaten and tortured. It was, of course, clear and obvious to me at this point in time that I had no practical ability to exercise any legal rights, such as the right to consult with a lawyer.

188. Before the interrogations by S.A. Hughes, I was asked to sign some typed papers that stated I was speaking voluntarily, and that whatever I said could be used against me. The papers did not advise me of any rights that I had under Pakistani law or international law since the Americans knew that the Pakistanis would not allow me to exercise any such rights. I still do not know what legal rights I had under Pakistani domestic law or under international law.

189. When I asked S.A. Hughes what would happen to me if I did not sign the papers, he replied that "*It would be trouble for you. I'm not threatening you, but it would be trouble for you.*" The Pakistani Colonel was present and watching me at this time. When I signed the paper, I of course knew that if I asked to consult with a lawyer, this request would obviously be

denied. Throughout the previous 9-10 months, when I had asked to contact a lawyer, the Pakistani officials had laughed out loud.

190. After I signed the paper, the FBI began to ask the same questions that had already been put to me countless times in previous interviews. In particular, they asked me the same things which had been asked by the other Americans who had described themselves as "spies". I believe the subjects were also raised in the same order.

191. The FBI did not openly threaten me or physically abuse me. However, S.A. Hughes was careful to ensure that he got me to repeat the same answers I had given to previous interrogators who did threaten and torture me. He had a file full of papers with him that he was always flipping through and looking at. When I said anything inconsistent, S.A. Hughes would look angry and start pacing around the room. He would then say, "*We want to help you but you have to tell us the truth. You have to help us so we can help you.*" By this time, I had heard the same questions so many times that I knew most of what I had to say in order to appear consistent.

192. They also asked me if I would be willing to testify against Omar Maati who had not been arrested and who I was unfamiliar with. I said that I would tell them whatever they wanted to hear, if it meant getting me out of a Pakistan prison.

193. I was interrogated by the FBI for 3 days straight, 12 hours each day. I was shackled and cuffed for the entire time, and sitting on a stool in an interrogation room. During these interrogations, I felt sleep deprived, helpless, anxious, and scared. I was also extremely hungry. Each day I was given two breaks where I would be fed a bit of yogurt and bread.

194. Again, I made several statements to the FBI which were untrue, but which I had been coerced out of me during previous interrogations. These untrue statements included statements that I had sold arms to Al Qaeda and transported hydrogen peroxide to Al Jowfi. By this time, I thought that there was no point in denying statements that I had already made to many people

many times before. I knew that if I said anything inconsistent, this would anger the Americans, which in turn would anger the Pakistani jailers watching the interrogations.

195. I believe that it was during these interrogations by the FBI that I was being asked many questions about Osama Bin Laden, and at one point I used the word "Saint" to describe him. At the time, I was being asked once again to explain what Osama Bin Laden was like, and I was trying to think of an English word which meant a prominent religious leader who lived very poorly and modestly. I did not ever say that I agreed with Osama Bin Laden's ideology. Although I do believe that Muslims should live together in one country, I do not believe in the killing of any civilians for this purpose. My family and I worked all our lives to relieve the suffering of refugees and orphans. We did not believe in creating more refugees and orphans.

196. It may have also been during these interrogations that I referred to the events of September the 11th as "amazing" or words to that effect. I simply meant that the events of that date were stunning and shocking. I did not say that I in any way agreed with or supported the attacks and killings that occurred on that date. Certainly neither myself nor any of the members of my family had any knowledge of, or involvement in those attacks. As stated earlier, I do not support or believe in terrorism or the killing of civilians.

Meeting with Canadian Embassy and CSIS – September 2005

197. In about September, 2005, I was taken to Islamabad I-8 to see the local CSIS official, a consular official from the Embassy, and two Pakistani officers. I told them that I had met with the FBI and that I had signed the paper because I had no choice.

198. At this meeting, I was told that the United States was offering me 2 years if I testified against Omar Maati, who had not been arrested yet. I expressed some concern that I did not want to go to the United States because I worried about being sent on to a country like Egypt, Uzbekistan or Cuba, and that in any event I did not know Omar Maati. CSIS assured me that

the United States would not be allowed to do that and that I should be prepared to answer for the crimes they said I had committed.

199. With the Pakistani officials present, I was unable to ask about my family, because they threatened to beat me if I had. I told the Canadians that the food at the prison was bad, that I could not sleep and that I had chest pain, but nevertheless they sent me back with the Pakistani guards. No offer of medical or other assistance was given. At the end of the meeting, I was reassured again that I would be heading home soon.

Meeting with Canadian Embassy and CSIS – November 2005

200. In mid November, 2005 I was brought to Islamabad I-8 where I met Embassy officials and CSIS representatives. I was unchained, asked how I was keeping and asked whether I still wanted to go to Canada. I assured them that I did.

201. After that meeting, about a week passed before someone from CSIS brought clothes for me and then I was taken back to Raoulpindi. I was told at that time that I might be prosecuted and that I should use my life for good in the future. I was also told that I would be travelling with two people from the embassy and that I should not make any problems for them in Manchester, England.

Returning to Canada

202. On or about December 2, 2005, I was given street clothes to wear. I was blindfolded, hooded, chained and then driven to the airport. At the airport, I was detained in the car until about 5 minutes before the flight. At which time, they removed the chains, blindfold and hood and told me to "*act like a Canadian*". I was introduced to two Canadians Leila and Martin, from the Canadian Embassy, who were to be responsible for escorting me to Canada.

203. The flight left at 6:00 a.m. from Islamabad and arrived in Manchester 8 hours later. Once I arrived in Manchester, England, other Embassy officials met us. During the 2-hour stopover,

I was watched over by these Embassy officials in a private room until the next flight boarded. The next flight, from Manchester to Toronto, was also approximately 8 hours.

204. Upon arriving in Toronto, I was held on the plane until all the other passengers were off, then I was finally allowed to exit the plane with the Canadian Embassy officials at my side. I was met at the end of the catwalk by a large group of police and security people. The men were carrying guns and had bullet proof vests.

205. The people from the Canadian Embassy told me that I was not under arrest, but that the RCMP just wanted to talk to me. Given the show of force they were making, I felt like I had no choice but to co-operate with the RCMP. They told me that they would wait for me and then they left. I was quite disappointed that they just left me to be questioned further, as I had thought that I would finally be going home as promised.

206. The security guards then escorted me to a closed customs area where I met Sgt. Shourie. He told me that he wanted to talk to me in a nearby room. Despite Sgt. Shourie assuring me I was not under arrest, I did not believe I had any choice to walk away from him or to simply leave the airport while surrounded by all the security. I initially told Sgt. Shourie that I just wanted to go home. He persisted that he just wanted to ask me a few questions and that it would not take long at all.

207. Since leaving Pakistan, I had been experiencing a great sense of relief in that I would soon be reunited with my family. However, once I was put in the room with Sgt. Shourie, I started to realize that no one knew I was in Canada, so I was afraid that I might be sent back to Pakistan, or to the United States, or that I could suddenly disappear without ever seeing my family. There was nothing I wanted more than to just go home and see my family. I did not wish to jeopardize any possibility of that.

208. Sgt. Shourie then escorted me into a room where a video camera was set up and where Tarek, another RCMP officer, was sitting. The room door was then closed and the interview and questioning was conducted over the next 5 hours or so. Unlike his approach in Pakistan, Sgt.

Shourie was very pleasant during this interview. Despite the length of the interview, I did not complain, but rather tried my best to stay very pleasant and co-operative.

209. By this time, I had been taken over and over exactly the same subject areas of Sgt. Shourie's questions so many times and with so many people that my answers were close to being automatic. I knew of course that Sgt. Shourie knew what statements I had made previously to many other people including himself. On some points, the idea of telling the actual truth did not even occur to me. I simply remembered what answers I had given many, many times previously and just repeated them yet again.

210. There were no new questions asked or subject matters raised by Sgt. Shourie which had not previously been raised by him during my detention in Pakistan. He did not tell me that he had discovered any new evidence in the meantime.

211. During the interview at Pearson Airport, the people from the Canadian Embassy once came into the room, but Sgt. Shourie became angry and told them to leave. Sgt. Shourie got upset with them and told them that he was going to report them, because they should not be interfering with the interview. The Canadian Embassy left without a word of assistance to me.

212. Sgt Shourie would not let me leave on my own at the end of the questioning. He insisted that both he and Tarek drop me off at my grandmother's house. When I arrived, my family was shocked and excited to see me. They had received no information about me from anyone, including the Department of Foreign Affairs, and they had no idea that I was being sent home. I believed I had survived my ordeal and was finally home.

December 4, 2005 – Interview with FBI at the Delta Hotel in Toronto

213. On the morning of December 4, 2005, being the next morning after my arrival at my grandmother's house, Cst. Tarek called my grandmother's house to inform me that Sgt. Shourie wanted to meet me right away at the Burger King nearby. I could not believe that

after less than 24 hours, I was already being called upon for yet another interview. I decided to go to meet him accompanied by my handicapped young brother, Kareem.

214. When we met Sgt. Shourie, he told that the FBI was waiting at a nearby Delta hotel to speak with me. I was then told by Sgt. Shourie to take Kareem home before going to the meeting. Sgt. Shourie accompanied both me and Kareem on foot to my house while Cst. Tarek followed in a car. My mother told Sgt. Shourie that she did not want me going to see the FBI. This made Sgt. Shourie upset. He told her that it is my choice but that it would be much better if I just went. Sgt. Shourie also told my mother that she could not be involved in the meeting.

215. Despite being told it was my choice, I did not believe I had any choice. I also believed I would never escape the power of these people who were working together. After only being home for 1 day, Sgt. Shourie was already back in my life and in my home, and I was afraid that I would be sent to Pakistan or worse. This situation upset my mother terribly. I could not stand to see the trouble I had brought to my family and decided to go along with Sgt. Shourie.

216. Prior to meeting with the FBI, I was frisked by Sgt. Shourie. He then set up a video camera and videotaped the interview. Then both Sgt. Shourie and the FBI agents advised me of my legal rights.

217. The FBI agents who were present at this interview were the very same FBI agents who had interrogated me in Pakistan in July or August, 2005. They were S.A. Hughes and S.A. Nace.

218. Throughout this interview, the FBI agents were pleasant to me. Once again, they asked me to talk about all the same things that I had gone over in Pakistan more times and with more people than I could possibly count. I knew what had been said during all my previous interrogations, and I knew that they knew the same thing.

219. It quickly became clear that the FBU agents were not trying to learn anything new. They were just getting me to repeat all the same things all over again. There was one exception to this. In Pakistan, that had asked me about how Pakistani Intelligence or the ISI operated in the region. Since there had been Pakistanis present in Pakistan, I had not told them what I knew about the ISI. At this interview, I talked a bit about the ISI and their corrupt practices. The interview then turned into a re-enactment of the previous interview for the camera.

220. One final time, throughout this interview, I tried to recite the previous statements I had made to so many people so many times over the previous 14 months. The FBI made this easy. They actually did not ask me questions so much as just remind me what I had previously said to them in Pakistan, and then ask me to say those same things again. I believe that the following introductory remarks are accurately reflected in the transcript:

> GN: And take us back to, and, and I know that a lot of these things you've talked about so many times that its probably, ah, it gets, ah, stale for you to keep talking about, but, ah, I, I, don't wanna… we don't have to rehash everything that we did…
>
> AK: Ah, huh.
>
> GN: … in the previous interviews, okay…
>
> AK: Ah, huh.
>
> GN: …we don't, we don't have to go through everything. We wanna, we do wanna clarify a few points, and, and to talk about some of them. But, um,… so your father was in a compound, and, ah, Where was this? Where was the compound?

221. As is clear from the transcript, the FBI interview at the Delta Hotel was nothing more than a re-enactment of all my previous interrogations for the camera. The questions put to me would always refer back to those previous interrogations with words like: "*and I know that we've been through this before but…*" and "*Now, when we talked last time you said…*" and "*um, and we talked before about, ah…*" and "*…we've already talked…*" and "*…and we talked about how…*" and "*remember before you said…*" and "*But last time you gave, I mean, you gave us an estimate…*" and "*I think before you were mentioning somewhere in the area of about twenty thousand…*" and "*…walk me through it again just so I'm clear*" and "*Remember you had to give someone money*" and "*remember you said it was unstable*

right?", and "*You, ah, before, were telling us how it was done…*" and "*I, I think we talked about…*" and "*That's right, you said that it, it was a box…*" and "*but before you were saying…*" and "*you mentioned before…*" and "*the thing you mentioned that we're trying to clarify is…*".

222. As always, it was made clear to me throughout the interview that the FBI agents were not going to allow me to deviate from their script. Early in the interview, when I said something that they thought was different from what I had previously said about the purpose of the attack that killed my father, they said: "*Well, when you talked to us before, you said that they actually allowed AL, ah, AL-JOWFI to, to leave…*". Similarly, later in the interview, I denied being involved in the fictional plot to assassinate the Pakistani Prime Minister and they said "*Well, that's not what you told us before.*"

223. When I was unable to remember and recite all of the key details that they particularly wanted me to say, the FBI agents would just feed me those details and ask me to confirm them:

> GN: Ah, and then the, ah, okay, ah, so then… when's the next time that you dealt with AL-JOWFI? We, we talked about that before. Um, and this was, ah… (pause)… in two thousand, ah, three…
>
> […]
>
> GN: But before you were saying they were going to AL JOWFI, who was using them for…
>
> […]
>
> GN: …or something, but I know, ah, before you mentioned that AL JOWFI provided, you thought, probably ninety percent of AL QAEDA's weapons…
>
> […]
>
> GN: And we were comparing that to, um… I think you said you were really only…
>
> AK: About maybe…
>
> GN: … involved maybe for six months of the, of the weapons that you bought.

224. Eventually, the questioning ended and I was able to go home. I was arrested a few days later.

225. I make this Affidavit in support of the Notice of Motion filed concurrently herewith, and such further and other relief as this Honourable Court may deem just and appropriate.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this ___ day of _____, 2006.	)	
_____	)	_____
A NOTARY PUBLIC IN AND FOR THE PROVINCE OF ALBERTA	)	ABDULLAH KHADR

Court File No. EX0037/05

ONTARIO SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED IN TORONTO

BETWEEN:

UNITED STATES OF AMERICA

Extradition Partner

- and -

ABDULLAH KHADR

Person Sought

AFFIDAVIT

Deponent: ABDULLAH KHADR
Sworn: August ___, 2006

PARLEE McLAWS LLP
Barristers & Solicitors
Patent & Trade-Mark Agents
1500, 10180 – 101 Street
Edmonton, AB T5J 4K1
Attention: Nathan Whitling
Telephone: (780) 423-8658
Facsimile: (780) 423-2870

File Number: 798-18/NJW

102H3S

Time of Request: Sunday, September 23, 2007 15:27:02 EST
Client ID/Project Name:
Number of Lines: 58
Job Number: 1822:49219134

Research Information

Service: Terms and Connectors Search
Print Request: Current Document: 51
Source: News, Most Recent 90 Days (English, Full Text)
Search Terms: omar w/2 khadr and dion

Send to: KUEBLER, WILLIAM
DOD OFFICE OF GENERAL COUNSEL
1155 DEFENSE PENTAGON RM 5A689
WASHINGTON, DC 20301-1155

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September 19, 2007 Wednesday

SECTION: NATIONAL NEWS; POLITICS; Pg. A4

LENGTH: 599 words

HEADLINE: Dion takes on Khadr issue, plans to meet suspect's lawyers

BYLINE: COLIN FREEZE

BODY:

With other controversies freshly brewing, Opposition Leader Stéphane Dion is to meet today with American military lawyers acting for a suspect held in Guantanamo Bay - signalling the Liberals' growing interest in an issue long viewed as too volatile for any Canadian political leader to touch.

Omar Khadr, a Canadian citizen who turns 21 today inside the U.S. military prison in Cuba, was arrested in Afghanistan as a 15-year-old militant. Accused of being an al-Qaeda fighter and killing an American soldier during a battle, he has spent five years awaiting trial.

Despite Mr. Khadr's youth and growing international condemnation of the U.S. prison experiment often known simply as "Gitmo," Canada has been reluctant to publicly criticize the prison camp or lobby for Mr. Khadr's release to face due process at home.

The position partly flows from the gravity of the U.S. allegations against Mr. Khadr - past charges have included "murder" - and partly because members of his fundamentalist family are notorious for links to al-Qaeda figures.

Arabs by heritage and Canadians by citizenship, the Khadrs have mostly lived in Pakistan and Afghanistan. In 1995, the patriarch of the clan was held in Pakistan under suspicion of financing a deadly embassy bombing.

Under public pressure from the Canadian news media, Prime Minister Jean Chrétien raised the issue of Mr. Khadr's rights with his Pakistani counterpart during a Team Canada trade mission.

The Liberals have been criticized for this intervention ever since. Mr. Khadr was let go, only to be listed by United Nations as a key Osama bin Laden associate after the 9/11 attacks. The Pakistani Army killed him in a 2003 battle.

Mr. Dion, now weathering criticism for failing to win a seat during this week's by-elections, last month spoke out about the Khadr case by describing Prime Minister Stephen Harper as the only Western leader not to go to bat for the rights of a citizen held in Gitmo.

The Liberal Leader is set to meet Mr. Khadr's U.S. military lawyers at the Royal York Hotel in Toronto this morning, and make statements about his impressions afterward.

U.S. Lieutenant-Commander William Kuebler, the military lawyer who contacted Mr. Dion to the arrange the meeting, said he is "very encouraged" by the Opposition Leader's interest.

"The political process is finally starting to engage, as Canadians grow frustrated with the treatment of a fellow citizen," he said, adding, "I hope he [Mr. Dion] takes away a consequent appreciation of the essentialness of the Canadian government stepping up."

Fissures have also developed within the Khadr legal team, with the Canadian lawyers who have represented Mr. Khadr for five years complaining that they have been snubbed - only the U.S. military lawyer appointed to the case this summer is to meet Mr. Dion.

"Here we have Canadian politicians choosing to speak to an American military lawyer who is not Omar's chosen lawyer ... and who was appointed by the same U.S. authority that gave us Guantanamo Bay and all its horrors," Dennis Edney, who represents several members of the Khadr family, said in an interview last night.

Members of the Khadr family say they are planning to be present at the hotel.

A U.S. soldier who lost an eye in the battle said he's disturbed that the case is becoming a political issue. "He has a better chance of being brought to justice in Guantanamo Bay than he would under the Canadian system," said Layne Morris in a phone interview. "You don't want this kid running around Canada waiting for the next *jihad* .... This kid made his decisions in life."

LOAD-DATE: September 19, 2007

********** Print Completed **********

Time of Request: Sunday, September 23, 2007 15:27:02 EST

Print Number: 1822:49219134
Number of Lines: 58
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Send To: KUEBLER, WILLIAM
DOD OFFICE OF GENERAL COUNSEL
1155 DEFENSE PENTAGON RM 5A689
WASHINGTON, DC 20301-1155

HOTLINE BUZZ

RSS FEED

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Wednesday, October 17, 2007

US military counsel violating Guantanamo client's rights: Canadian Khadr lawyer

8:33 AM ET

Dennis Edney [Canadian defence counsel for Canadian Guantanamo detainee Omar Khadr]: "You may not be aware that **Omar Khadr** has, verbally and in writing, asserted his right to be represented by his Canadian counsel and not to be represented by any U.S. military counsel.

The Military Commission rules provide for a military lawyer to represent Omar Khadr. Mr. Khadr can choose not to be assisted by the military appointed lawyer and represent himself. In that situation, the military lawyer remains in a "stand down" mode. By purporting to speak on behalf of Omar Khadr to the media and participating in the legal process absent authority to do so, a legal fiction is being created that military counsel [Lt. Commander William Kuebler] is authorized to represent Omar Khadr. In doing so, military counsel is denying Omar Khadr's fundamental right to counsel of choice. He is also interfering in the sacrosanct solicitor/ client relationship between Canadian counsel and client.

As the U.S. Supreme Court said in recognizing this right, "In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing a counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber".

The very fact the military lawyer is appointed by the same authority that is adverse in interest to Omar Khadr creates obvious conflict difficulties. Conflict takes many forms. How can the military officer purport to be independent when he swears and oath of loyalty to the military authority, its rules and regulations which deny his fundamental rights, the rule of law while at the same time swearing a loyalty to uphold the rights of the client. The duty of loyalty extends beyond the use and abuse of confidential information and includes a duty to avoid conflicts of interest.

Further, Omar Khadr is facing criminal/ terrorist related charges. He is

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ARCHIVE

Hotline has a monthly arc legal news comments.

entitled to competent and effective legal representation. Commander Kuebler cannot be said to be acting in Omar Khadr's best interest when he has no legal or trial experience in the area of law in which Omar faces life imprisonment. His legal background is in the area of tax law."

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BF MAPSTATS

[redacted]

From: [redacted]
Sent: Thursday, October 25, 2007 4:48 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Ruling - 24 October 2007 Defense Request for Delay - US v. Khadr
Follow Up Flag: Follow up
Flag Status: Green

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

v/r
[redacted]
Attorney Advisor
Military Commissions Trial Judiciary
[redacted]

From: [redacted]
Sent: Thursday, October 25, 2007 4:39 PM
To: [redacted]
Subject: Ruling - 24 October 2007 Defense Request for Delay - US v. Khadr

[redacted]

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

COL Brownback

Counsel in the case of US v. Khadr,

1. References:

    a. Summary of Ex Parte Telephone Conference Call on 24 October 2007.
    b. Email, MAJ Groharing, 25 October 2007.
    c. Appellate Exhibit 030 - Granting in part Defense Request for Delay.
    d. Appellate Exhibit 034 - Denying the Defense Request to Hold the Proceedings in Abeyance.

2. The commission has considered the references and the pertinent provisions of the M.C.A., the

M.M.C., the Rules of Court, and the DoD Trial Regulation. The commission did not give any weight to paragraph 2 of Reference 1b.

3. The defense request for delay is denied. The commission finds that the public interest in holding a session which will:

a. Allow Mr. Khadr to state on the record his desires concerning counsel, and,
b. Comply with the requirements of R.M.C. 707, and,
c. Permit the commission to fulfill the directive of the Court of Military Commission Review (AE 26)

outweighs the matters presented by the defense in its request. In making this finding, the commission notes that by 8 November 2007, it will be more than five (5) months since Mr. Khadr has appeared in court.

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

From: [redacted]
Sent: Thursday, October 25, 2007 4:29 PM
To: [redacted]
Cc: [redacted]
Subject: RE: R.M.C. 802 Summary With Attachments - 24 October 2007 - US v. Khadr

Sir,

1. The government opposes the defense request for continuance.

2. As an initial matter it appears it was unnecessary to conduct the 802 session without the government's participation. In fact, the government could have addressed our positions on the present issue for the court and defense counsel at that time. All parties would have been better served if the government had the opportunity to participate in the discussions.

3. The current request for delay is the latest in a series of defense requests filed from the initial referral of charges in this case.

a. Lieutenant Commander Kuebler was detailed to represent the accused as assistant counsel on 22 February 2007.

b. On 25 April 2007, the Military Judge scheduled the arraignment for 7 May 2007 in United States v. Khadr. The following day, Lieutenant Colonel Vokey requested a delay until 6 June 2007. The request for delay was granted until 4 June 2007.

c. On 30 May 2007, LtCol Vokey was excused as the accused's detailed defense counsel as a result of reference (f) in the military judge's email below. It is unclear whether the accused was ever advised that Lieutenant Commander Kuebler also represented the accused from 22 February 2007 until 24 May 2007 when the accused signed reference (f), or whether Lieutenant Commander Kuebler ever met with the accused prior to 24 May 2007.

d. During the RMC 802 conferences held at Guantanamo Bay on 3 and 4 June 2007, the defense detailed their inability to form an attorney client relationship with Omar Khadr. Prior to the hearing on 4 June 2007, the defense requested that the proceedings be significantly delayed to allow counsel to establish an attorney client relationship.

e. On 4 July 2007, the government filed an appeal of the Military Judge's 4 June 2007 dismissal and 29 June 2007 denial of the government's motion to reconsider.

f. On 11 July 2007, the Court of Military Commission Review issued a briefing order requiring the defense to file a response to the government's brief by 18 July 2007. The defense immediately filed a request for delay, requesting an additional two weeks to reply to the government brief.

g. Following the 24 September 2007 decision by the Court of Military Commission Review, the Military Judge set the arraignment of the accused for 7 October. The following day, the defense requested a continuance of the arraignment to the week of 5 November 2007. This request was granted, delaying the hearing until 8 November 2007.

h. On 10 October 2007, the Defense requested the Military Judge hold the proceedings in abeyance, pending a decision on their appeal filed in the D.C. Circuit. The Military Judge denied that request.

4. The attachments in the email below appear to have been submitted to support a claim that Lieutenant Commander Kuebler has not yet formed an attorney client relationship with the accused. Of course, running contrary to that claim is the history of this case to date which includes several requests for continuances – some to allow for additional meetings between counsel and the accused, multiple requests for various types of relief filed by LCdr Kuebler, as well as LCdr Kuebler's representation of the accused (through pleadings and/or appearances) before this court, the CMCR, and the D.C. Circuit.

5. The government shares the Military Judge's concern reflected in his 15 Oct 2007 email: "The commission has a great concern with the fact that Mr. Khadr has not stated on the record in open court his desires concerning counsel. That is a matter which must be addressed on the record as soon as possible."

6. The Military Commissions Act, the Manual for Military Commissions, and the Regulation for Trial by Military Commission provide the accused with a right to one military defense counsel. Lieutenant Commander Kuebler is his detailed defense counsel, and Lieutenant Commander Kuebler's continued participation in this case fully satisfies Khadr's rights to counsel under the MCA and the MMC. In the event the accused does not choose to accept that representation, he can seek to represent himself as allowed under the MCA. If he chooses to represent himself, he can do this with or without the assistance of his detailed counsel and foreign attorney consultants.

7. The government believes that the circumstances suggested by defense counsel in the attachments to the court's email below – rather than supporting a request for further delay – support convening the next session of this trial as soon as possible in order to resolve this issue. The government submits that – absent an on-the-record clarification by the accused – the court and the parties will likely find themselves in this very same position in the future if, in fact, another continuance is granted. Pursuant to the rules cited above, the accused has certain options at this point regarding his representation. The history involving Mr. Khadr indicates that he is very well aware of issues relating to his representation by counsel. Accordingly, the government proposes that, at the 8 November session, to the extent that it is necessary at that time, the court should make the accused aware of his options regarding his representation (including self-representation), and the case should proceed to trial pursuant to Rule 707. It appears that the accused and defense counsel may not like the options at this stage; however, that is not cause to delay this matter any further. The accused and his counsel have had more than enough time to address this issue – at least to the extent necessary to allow the process now to move forward, at last.

8. The government respectfully requests the Military Judge deny the defense request for continuance. The interests of justice should not be frustrated by additional delays on the requested grounds.

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

From: [redacted]
Sent: Thursday, October 25, 2007 9:40 AM
To: [redacted]
Cc: [redacted]
Subject: FW: Request for Continuance

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

v/r
[redacted]
Attorney Advisor
Military Commissions Trial Judiciary
[redacted]

From: [redacted]
Sent: Thursday, October 25, 2007 9:23 AM
To: [redacted]
Subject: Request for Continuance

[redacted]

1. Note the change in the subject line.
2. Please advise the parties and other interested persons that the government has until 1630, 25 October 2007, to respond to the defense request for a continuance.

COL Brownback

From: [redacted]
Sent: Thursday, October 25, 2007 9:16 AM
To: [redacted]
Cc: [redacted]
Subject: RE: R.M.C. 802 Summary With Attachments - 24 October 2007 - US v. Khadr

Sir,

The government requests a delay until 1600 today to file our response.

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

From: [redacted]
Sent: Wednesday, October 24, 2007 5:48 PM
To: [redacted]
Cc: [redacted]
Subject: RE: R.M.C. 802 Summary With Attachments - 24 October 2007 - US v. Khadr

COL Brownback has directed that the government response, if any, to the defense request for a continuance, contained in paragraph 6 of the Summary of 24 Oct 07 RMC 802 Telephone Call, is due NLT 1200 hours on 25 October 2007.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

[redacted]

From: [redacted]
Sent: Wednesday, October 24, 2007 17:35
To: [redacted]
Cc: [redacted]
Subject: FW: R.M.C. 802 Summary With Attachments - 24 October 2007 - US v. Khadr

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

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Wednesday, October 24, 2007 17:14
To: [redacted]
Cc: [redacted]
Subject: R.M.C. 802 Summary With Attachments - 24 October 2007 - US v. Khadr

[redacted]

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

COL Brownback

Counsel in the case of US v. Khadr,

1. Reference is made to:

    a. Document, 24 Oct 07 Summary of 24 Oct 07 RMC 802 Telephone Call, attached.
    b. 20 August 2007, affidavit, LCDR Kuebler, attached.
    c. Globe and Mail article, 19 September 2007, attached.
    d. Blogshot, Jurist, 17 October 2007, attached.
    e. Undated affidavit of Abdullah Khadr, attached.
    f. Writing, 30 October 2006 and 24 May 2007, Omar Khadr, attached.

g. Memorandum, Susan Crawford, 17 May 2007, Designation of Foreign Consultants, attached.

h. Affidavit, Mr. Edney, 17 May 2007, attached.

i. Affidavit, Mr. Whitling, 13 May 2007, attached.

2. References 1b thru 1f were provided to the military judge by email at 1033, 24 October 2007. References 1a and 1g thru 1h were provided to the military judge by email at 4:41 PM, 24 October 2007.

3. The military judge adopts reference 1a as the summary required by R.M.C. 802.

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

Summary of Ex Parte Telephone Conference Call on 24 Oct 2007 ICO U.S. v. Omar Khadr

Parties: COL Peter Brownback, Military Judge
LCDR William Kuebler, Detailed Defense Counsel
Mr. Michael Berrigan, Deputy Chief Defense Counsel
[redacted]

1. LCDR Kuebler sent the following items to the military judge this morning:

a. 20 August 2007 affidavit of LCDR Kuebler

b. Affidavit of Abdullah Khadr

c. Globe and Mail article of 19 September 2007

d. Copy of "Jurist" internet entry of 17 October 2007

e. Memo of Omar Khadr of 24 May 2007.

2. LCDR Kuebler reviewed matters that occurred at GTMO on 3 Jun at the RCM 802 Session and on 4 Jun at the Arraignment Hearing.

3. LCDR Kuebler related divergence between himself and Mr. Dennis Edney. There is a conflict of roles and responsibilities. During this telephone conference, LCDR Kuebler referenced the documents mentioned in paragraph 1. Mr. Berrigan raised additional matters concerning possible conflicts of interest arising in connection with Mr. Edney's participation in this case.

4. LCDR Kuebler stated he wants to meet with Omar Khadr with Ms Rebecca Snyder and Mr. Nathan Whitling in advance of the arraignment. He hopes this will maximize the chance that Mr. Khadr accepts them as his defense team if Mr. Edney is unable to participate as a foreign attorney consultant.

5. Mr. Berrigan pointed out personnel and systemic problems involving lack of military counsel in the Office of the Chief Defense Counsel and the ability of an accused to discharge detailed counsel. He is concerned with the possibility that Omar Khadr may demand to be given another detailed defense counsel.

6. LCDR Kuebler requested a delay from 8 Nov 07 to on or about 6 Dec 07. He wants to travel to GTMO with Ms Snyder and Mr. Whitling the week of 5 November.

7. LCDR Kuebler offered additional matters in support of his request for a continuance. LCDR Kuebler noted his duties as Detailed Appellate counsel and noted upcoming

deadlines in District of Columbia Circuit Court of Appeals litigation. The deadlines require submission of matters on 31 Oct 07 and 2 Nov 07.

8. Judge Brownback will consider matters addressed and will answer requests by 1200 hours on 25 Oct 07.

9. LCDR Kuebler was asked to determine which portions of this summary cannot be released to the Government.

Court File Number: A-184-06

FEDERAL COURT OF APPEAL

BETWEEN :

OMAR AHMED KHADR

Appellant
(Respondent on the Motion)

- and -

THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA,
THE MINISTER OF FOREIGN AFFAIRS,
THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE, and
THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Respondents
(Applicants on the Motion)

AFFIDAVIT OF LT. CDR. WILLIAM KUEBLER

I, Lieutenant Commander William C. Kuebler, of the United States Navy, am the detailed defense counsel for Mr. Omar Ahmed Khadr ("Omar") and as such have personal knowledge of the matters hereinafter deposed to save and except where stated to be on information and belief.

1. I, along with Mr. Dennis Edney and Mr. Nathan Whitling, act as defense counsel for Omar in the military commission prosecution of *United States of America v. Omar Khadr*. I am Omar's detailed defense counsel before the military commission convened in Guantanamo Bay, Cuba, and his Appellate Defense Counsel before the Court of Military Commission Review ("CMCR").[1]

---

[1] I am also Omar's counsel of record in proceedings before the U.S. Court of Appeals for the District of Columbia Circuit and will so act in proceedings before the U.S. Supreme Court. I anticipate moving the admission of Messrs. Edney and Whitling to appear pro hac vice in connection with both proceedings.

2. On information and belief, Omar was first captured following a battle near Khost, Afghanistan, in July of 2002. He was then 15 years of age. Within several months of his capture, Omar was taken by U.S. forces to the detention facility located at Guantanamo Bay, Cuba, and has been detained there ever since.

3. I am advised by Mr. Whitling and do verily believe that Mr. Edney and Mr. Whitling were first retained by Omar's family to act as Omar's legal counsel in approximately November of 2003. Since that time, Mr. Edney and Mr. Whitling have acted as Omar's counsel in proceedings in both Canada and the United States.

4. On information and belief, since his first meetings with American lawyers, in November of 2004, Omar expressed a wish to receive visits from Mr. Edney and Mr. Whitling.

5. On May 17, 2007, Mr. Edney and Mr. Whitling were first appointed as "Foreign Attorney Consultants" for Omar. Attached to this my Affidavit and marked as Exhibit A is a copy of the letter confirming this appointment signed by Susan J. Crawford, Convening Authority for Military Commissions.

6. Following their appointment as Foreign Attorney Consultants, Mr. Edney and Mr. Whitling were first permitted to visit with Omar on May 24, 2007. At that time, Omar provided written confirmation of his wish to dismiss all his U.S. lawyers and to prohibit them from acting for him. He also provided written confirmation that he would only accept Mr. Edney and Mr. Whitling as his lawyers. Attached to this my Affidavit and marked as Exhibit B is a copy of this written statement from Omar. Subsequent to these events, on or about 5 June 2007, Omar consented to my representation.

7. As a result of the legal services provided by Mr. Edney and Mr. Whitling to Omar in the past, as well as their relationship with Omar's family, they are uniquely positioned to maintain an attorney-client relationship with Omar.

8. On 3 June 2007, during a pre-trial conference with Col. Peter Brownback, the Military Judge assigned to Omar's case, I advised the commission that we will seek to have Mr. Edney and Mr. Whitling participate as "associate" or "assistant" defense counsel at trial (the Military

Commissions Act requires a civilian defense counsel to be (1) a U.S. citizen and (2) a member of the bar of the bar of a U.S. federal court or the highest court of a state of the United States). This will likely take the form of a motion to admit Messrs. Edney and Whitling to appear before the military commission, in substance, as "pro hac vice" counsel, subject to my supervision. Messrs. Edney and Whitling are currently so admitted before the Court of Military Commission Review, the rules for which contain a provision expressly providing for foreign counsel to appear pro hac vice. Counsel for the Prosecution has indicated that they do not expect to object to Mr. Edney and Mr. Whitling acting as counsel on this basis before the military commission, if and when proceedings resume therein.

9. On June 4, 2007, Mr. Edney and Mr. Whitling attended the military commission at Guantanamo Bay and sat with me at the defense table, where defense counsel for the accused would sit, and addressed the commission on the record. On that date, Col. Brownback dismissed the prosecution without prejudice. This decision is now under appeal, and oral argument is scheduled before the Court of Military Commission Review on August 24, 2007. I have moved to admit Mr. Edney and Mr. Whitling to appear and act as Omar's counsel in connection with that appeal *pro hac vice*, which motion the court granted. A copy of the order granting the motion is attached as Exhibit C. Mr. Whitling is expected to argue the merits of the government's appeal.

10. Col. Brownback's decision does not entail the end of Omar's prosecution and does not pertain to his release from custody. This decision identifies a jurisdictional defect which the government can and likely will cure if found to be necessary. I am confident that the prosecution of Omar will continue whether or not Col. Brownback's decision is affirmed on appeal.

11. There is no funding available in the United States for Mr. Edney and Mr. Whitling to act as counsel in the military commission proceedings. However, I have recently received confirmation from the National Association of Criminal Defense Lawyers that funding in the amount of $10,000 has been made available for reasonable travel costs for Mr. Edney and Mr. Whitling in relation to this prosecution.

12. I am advised by Mr. Edney and Mr. Whitling and do verily believe that neither of them will be able to act as Omar's defense counsel at trial or appeal before the military commission or other courts or tribunals without a reasonable level of funding for their services.

13. My appointment as detailed defense counsel does not in and of itself establish the existence of an attorney-client relationship between myself and Omar. Although Omar has consented to my representation, this is due principally to the efforts of Mr. Edney and Mr. Whitling. Their participation and involvement as defense counsel in the prosecution, and related appeals and reviews, is essential to my ability to maintain an attorney-client relationship with Omar.

14. If Omar is unable to be represented by Mr. Edney and Mr. Whitling, it appears that Omar will not agree to have me act as his lawyer. Instead, he will likely either choose to represent himself or will refuse to participate in the proceedings altogether. Since Omar has no legal training, and no ability to defend himself in a prosecution, this would constitute a denial of Omar's right to counsel and would result in an unfair prosecution. It is therefore my view that the ability of Mr. Edney and Mr. Whitling to jointly represent Omar with me is essential to the fairness of this prosecution.

15. This Affidavit is sworn in the City of Washington, District of Columbia and has been executed in the manner required by the Courts of this jurisdiction for the admission of Affidavit evidence.

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)
)
) LT. CDR. WILLIAM C. KUEBLER

Subscribed to & Sworn Before me

THOMAS ROUGHNEEN
ATTORNEY-AT-LAW, NJ.
AUTHORITY 10 U.S.C. 1044(a)

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

CONVENING AUTHORITY

MAY 17 2007

MEMORANDUM FOR LCDR William C. Kuebler, Detailed Defense Counsel for Omar Khadr

SUBJECT: *U.S. v. Khadr*: designation of Mr. Dennis Edney and Mr. Nathan Whitling as foreign consultants

Pursuant to R.M.C. 506 and Chapter 9-6 of the Regulation for Trial by Military Commissions, I hereby authorize the above named individuals to serve as Foreign Consultants in the case of *U.S. v. Khadr* subject to the following conditions: (1) The consultants are not experts for the defense team; (2) they are not compensated by the U.S. Government; (3) they must be attorneys; (4) they must be personally retained or released by Mr. Khadr; (5) they must have the appropriate security clearance; and (6) they sign the attached "Affidavit and Agreement by Foreign Consultant."

As members of the Khadr defense team, Mr. Edney and Mr. Whitling are subject to the requirements of the Military Commissions Act of 2006, Pub. L. No. 109-366 (M.C.A.), the Manual for Military Commissions (M.M.C.) and the Regulation for Trial by Military Commissions (Regulation) to the same extent as detailed and civilian defense counsel, specifically including Chapters 9 and 18 of the Regulation and to the terms specified in Figure 9.2 therein.

This memorandum does not provide Messrs. Edney and Whitling with any right or privilege not articulated in the M.C.A., M.M.C., and Regulation. DoD Regulation 5200.2-R (Personnel Security Program) and DoD Regulation 5220.22-M (National Industrial Security Program Operating Manual) provide further requirements for obtaining security clearances for non-U.S. citizens; DoD Directive 5230.20 (Visits, Assignments and Exchanges of Foreign Nationals) regulates visits by Mr. Edney and Mr. Whitling to the United States Government facilities.

Messrs. Edney and Whitling must each sign the attached "Affidavit and Agreement by Foreign Consultant" and provide copies to my legal advisor before this memorandum becomes effective.

Susan J. Crawford
Convening Authority
for Military Commissions

cc. Chief Defense Counsel
Chief Prosecutor

Printed on Recycled Paper

30. Oct. 2006

I Omar. A. Khadr withdrow every /all / any lawyer from representing me in Habeas Corpus, Military Commission or any form of U.S Courts, And do not allow any body to do any thing on my behalf in any way in any form of U.S Court or military Commission.
And donot allow any U.S lawyer to do any thing on my behalf and pull all my atharaizations that I have given them

Omar Ahmed Khadr
Omar A. Khadr

May 24, 2007

I Omar A. Khadr confirm my decision above.

I dismiss all lawyers, including:

Lt. Col. Colby Vokey, Capt. John Merriam, Muneer Ahmad, Richard Wilson and Kristine Huskey

and anybody else from doing anything on my behalf except Dennis Edney and Nathan Whitling.

EXHIBIT B

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES OF AMERICA	**CMCR CASE NO. 07-001**
v.	**MILITARY COMMISSION**
OMAR AHMED KHADR	**RULING ON MOTIONS AND BRIEFING ORDER DATE: 13 JULY 2007**

Upon consideration of the various Motions submitted by both the Government (Appellant) and the Defense Team for Mr. Khadr (Appellee), filed with this Court on 11 and 12 July 2007 concerning the pending Government appeal, the rulings as itemized below are entered.

Additionally, as confusion has been generated concerning the briefing timelines required by this Court's Rules of Practice in regard to a Government appeal, a revised and final Briefing Order is provided for the parties below. *See* Rule of Practice 21(a). This Briefing Order supersedes that issued by the Clerk of Court on 11 July 2007. Additional guidance shall be published by the Clerk of Court on a later date clarifying our Rules of Practice in this regard.

ORDERED:

Defense Motions:

1. Motion for Emergency Relief (Continuance to 3 August 2007) – **GRANTED** (as modified by Briefing Order below) on 12 July 2007.
2. Motion to Attach Documents in Support of Motion for Emergency Relief – **GRANTED** on 12 July 2007.
3. Motion to Admit Foreign Attorneys Edney and Whitling As Counsel *Pro Hac Vice* – **GRANTED** on 12 July 2007.
4. Motion to Waive Specific Requirements in CMCR Rule of Practice 8(A) for Foreign Attorneys (Edney and Whitling) – **GRANTED** on 12 July 2007.

Government Motion:

1. Motion for Continuance (Enlargement of Time) to 19 July 2007 to File Additional Briefing – **GRANTED** (as modified by Briefing Order below) on 13 July 2007.

Briefing Order for Government Appeal:

1. The Government's supplemental brief on the matter under appeal shall be due not later than 23 July 2007 [note: this expands period originally requested/granted above].

2. The Defense's brief in response on the matter under appeal shall be due not later than 13 August 2007 [note: this expands period originally requested/granted above].
3. Any Government reply brief to the Defense's brief in response shall be due not later than 17 August 2007. If the Government does not intend to file a reply brief, they shall notify the Court of that fact as soon as possible after receipt of the Defense brief in response.
4. Oral argument, if requested/ordered, shall be held within 10 days of receipt of any Government answer brief filed on 17 August 2007. If the Government elects not to file an answer brief, oral argument, if requested/ordered, shall be held within 10 days of receipt of the Defense's brief in response, or notice of the Government's election not to file such an answer, whichever occurs first.

Absent extraordinary circumstances, no further enlargements of time shall be granted in regard to the matter currently before the Court.

JOHN W. ROLPH
Deputy Chief Judge

AFFIDAVIT AND AGREEMENT BY FOREJGN **CONSULTANT**

to the Military Commissions Act of2006, Pub. L. No. 109-366, 120 Stat. 2600, *codified in part at* 10 U.S.c. § 948a. *et seq.,* thc Manual for Military Commissions promulgated January 18,2007, and Chapter 9-6 of the Regulation for Trial by Military Commissions, [LOCAL FOREIGN], make this Affidavit and Agreement for the purposes of serving as a foreign consultant in the military commission of Omar Khadr.

1. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

   A. I have read and understand the Secretary's Manual for Military Commissions, and all other Military Regulations, Orders, Instructions and Directives applicable to trial by military commissions. 1 will read all amendments, rescissions or promulgations pertinent to the aforementioned.

   B. I am aware that my qualification as a foreign consultant does not guarantee my access to any information subject to the national security privilege under 10 U.S.C. § 949d(t).

U. Agreements. I hereby agree to comply with all aspects of the M.e.A. the M.M.C., the Regulation for Trial by Military Commissions, in particular and without limitation, to the conditions articulated in Chapter 9, Figure 9.2, and Chapter 18. Further, I agree to comply with any Court Rules prescribed by the Military Conmission Trial Judiciary or the presiding military judge including rules of court governing proceedings.

I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as a foreign consultant or Mr. Khadr.

/s/

Print Name: [illegible]

Address: [illegible]

Date: [illegible]

STATE OF Ontario, Canada)

COUNTY OF Toronto)

Sworn to and subscribed before me, by [illegible], this 11th day of May, 2007

Notary [illegible]

My commission expires: [illegible]

August 13, 2007

NATHAN J. WHITLING
DIRECT DIAL (780) 423-8658
EMAIL: nwhitling@parlee.com
OUR FILE #. 62695-3/NJW

VIA FACSIMILE

Convening Authority's Office

Attention: Jason Foster

Dear Sir:

Re: USA v. Khadr

Please find enclosed one Affidavit and Agreement by Foreign Consultant. I also enclose for your reference the letter confirming foreign attorney approval dated May 17, 2007.

Yours truly,

PARLEE McLAWS LLP

Per: NATHAN J. WHITLING

NJW/ab
Encls.

cc: Lt. Cmdr. William Kuebler

{E3354825.DOC.1}

AFFIDAVIT AND AGREEMENT BY FOREIGN CONSULTANT

Pursuant to the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *codified in part at* 10 U.S.C. § 948a. *et seq.*, the Manual for Military Commissions promulgated January 18, 2007, and Chapter 9-6 of the Regulation for Trial by Military Commissions, I [Nathan Whiting], make this Affidavit and Agreement for the purposes of serving as a foreign consultant in the military commission of Omar Khadr.

I. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:

A. I have read and understand the Secretary's Manual for Military Commissions, and all other Military Commissions Regulations, Orders, Instructions and Directives applicable to trial by military commissions. I will read all amendments, rescissions or promulgations pertinent to the aforementioned.

B. I am aware that my qualification as a foreign consultant does not guarantee my access to any information subject to the national security privilege under 10 U.S.C. § 949d(f).

II. Agreements. I hereby agree to comply with all aspects of the M.C.A. the M.M.C., the Regulation for Trial by Military Commissions, in particular and without limitation, to the conditions articulated in Chapter 9, Figure 9.2, and Chapter 18. Further, I agree to comply with any Court Rules prescribed by the Military Commission Trial Judiciary or the presiding military judge including rules of court governing proceedings.

I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as a foreign consultant or for Mr. Khadr.

/s/

Print Name: Nathan Whiting

Address: 1500, 10180 - 101 Street

Edmonton, Alberta

Date: August 13, 2007

Province
~~STATE~~ OF ALBERTA)
Country
~~COUNTY~~ OF CANADA)

Sworn to and subscribed before me, by Nathan Whiting, this 13th day of August, 2007.

Notary David P. Wedge
Barrister & Solicitor

My commission expires: Now, being a barrister - solicitor.

30. Oct. 2006

I Omar. A. Khadr withdrow every /all / any lawyer from representing me in Habeas Corpus, Military Commission or any form of U.S Courts, And do not allow any body to do any thing on my behalf in any way in any form of U.S Court or military Commission.
And donot allow any U.S lawyer to do any thing on my behalf and pull all my atharaizations that i have given them

Omar Ahmed. Khadr
Omar A. Khadr

May 24, 2007

I Omar A. Khadr confirm my decision above.

I dismiss all lawyers, including:

Lt. Col. Colby Vokey, Capt. John Merriam, Muneer Ahmad, Richard Wilson and Kristine Huskey

and anybody else from doing anything on my behalf except Dennis Edney and Natha Whitling.

Omar A. Khadr

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

CONVENING AUTHORITY

MAY 17 2007

MEMORANDUM FOR LCDR William C. Kuebler, Detailed Defense Counsel for Omar Khadr

SUBJECT: *Us. v. Khadr:* designation of Mr. Dennis Edney and Mr. Nathan Whitling as foreign consultants

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As members of the Khadr defense team, Mr. Edney and Mr. Whitling are subject to the requirements of the Military Commissions Act of 2006, Pub. L. No. 109-366 (M.C.A.), the Manual for Military Commissions (M.M.C.) and the Regulation for Trial by Military Commissions (Regulation) to the same extent as detailed and civilian defense counsel, specifically including Chapters 9 and 18 of the Regulation and to the terms specified in Figure 9.2 therein.

This memorandum does not provide Messrs. Edney and Whitling with any right or privilege not articulated in the M.C.A., M.M.C., and Regulation. DoD Regulation 5200.2-R (Personnel Security Program) and DoD Regulation 5220.22-M (National Industrial Security Program Operating Manual) provide further requirements for obtaining security clearances for non-U.S. citizens; DoD Directive 5230.20 (Visits, Assignments and Exchanges of Foreign Nationals) regulates visits by Mr. Edney and Mr. Whitling to the United States Government facilities.

Messrs. Edney and Whitling must each sign the attached "Affidavit and Agreement by Foreign Consultant" and provide copies to my legal advisor before this memorandum becomes effective.

Susan J. Crawford
Convening Authority
for Military Commissions

cc. Chief Defense Counsel
Chief Prosecutor

Printed on Recycled Paper

Action No.: EX0037/05
Deponent: Abdullah Khadr
Date Sworn: ___ day of _____, 2006

SUPERIOR COURT OF JUSTICE

(TORONTO REGION)

BETWEEN :

THE UNITED STATES OF AMERICA

Extradition Partner

- and -

ABDULLAH AHMED KHADR aka ABU BAKR

Person Sought

AFFIDAVIT OF ABDULLAH KHADR

I, ABDULLAH KHADR, of the City of Scarborough, in the Province of Ontario, MAKE OATH AND SAY THAT:

1. I am the Person Sought in this proceeding and as such have personal knowledge of the matters hereinafter deposed to, except where stated to be based on information and belief, in which case I verily believe the same to be true.

General Background

2. I was born in Canada on April 30, 1981. I am a Canadian citizen.

3. I lived in Canada for the first 3.5 years of my life before my family and I moved to Pakistan. Over the next 13 years, my family and I moved back and forth between Pakistan and Canada. The last time we moved to Pakistan was in early 1998.

4. My formal education ended when I moved to Pakistan in 1998 at which point I had completed grade 8.

5. My family and I lived in a house in Peshower, Pakistan. We later relocated to Afghanistan in 1999 because that was where many of my father's charitable projects were located.

6. At this time, my family and I lived in a small Arab community, Nazim Jihad. Given the small size of the Arab community, everyone in the community knew everyone else. It was not unusual for the entire community to be invited to Ramadan celebrations, weddings and the like.

7. Arab people were a minority in both Afghanistan and Pakistan, and were considered foreigners and "guests".

My Father – Ahmed Said Khadr

8. My father, Ahmed Said Khadr, was a computer engineer trained in Canada who devoted his life to alleviating the suffering of underprivileged people in Pakistan and Afghanistan. He worked tirelessly and provided practical help by establishing schools, orphanages and mobile dispensaries.

9. I am aware of assertions published in the media that my father was a member of Al Qaeda. I am aware that some media stories have even asserted that he was a "founder" or a "financier" of Al Qaeda. All of these statements are false.

10. During his years in Afghanistan and Pakistan, my father worked for two charitable organizations, Human Concern International (HCI) and Health and Education Project (HEP). Both of these organizations provided essential support and services to the underprivileged.

11. As discussed in greater detail below, my father's activities with HCI and HEP included fundraising, including fundraising in Canada. As far as I am aware, not one penny of the money he raised was provided to Al Qaeda or used for any purpose other than the charitable purposes for which it was collected.

12. The suggestion that my father was a financier for Al Qaeda is absurd. It is common knowledge that Osama Bin Laden is an extremely wealthy individual controlling millions of dollars of his own, and that money for Al Qaeda is raised from rich people in Saudi Arabia. The amounts of money raised and spent by my father in his charitable work were so small that they would not have been of any interest to Al Qaeda, even if my father was inclined to be a "financier" for them.

13. My father was only driven to provide humanitarian help to the most vulnerable. He also wished that Muslims had better control of their own natural resources in order to educate and feed its people. He would often say, "We are the richest in resources, however we are the poorest".

14. From 1985 to 1995, my father worked with HCI, a Canadian federally registered charitable organization which was established to help alleviate suffering through sustained development projects and emergency relief programs that foster self- reliance and preserve human dignity. My father was the Regional Director of HCI Pakistan.

15. My father's work with HCI dealt primarily with projects for the assistance of refugees in Afghanistan and Pakistan who had been displaced by the war with the former USSR. Those 14 years of war left some 300,000 widows, 600,000 disabled, and 1,000,000 orphans.

16. In approximately 1994 or 1995, HCI and my father were appointed by the World Food Project to administer a major project involving the development of olive farms and a pickling factory. The funding for this project was approximately $2 million and it was one of the largest projects in Afghanistan. Attached to this my Affidavit and marked as Exhibit A are a number of family photographs of the olive farms, factory, workers, and administrators involved in this HCI project.

17. A number of Agriculture and Irrigation Projects were also established in conjunction with the United Nations Development Program. My father also worked with such international aid

organizations as the World Health Organization, the International Committee of the Red Cross, CARE International, the European Union, and UNESCO.

18. Some of my father's other activities with HCI were:

- Five (5) clinics and two (2) hospitals were established in Peshower at different Afghani refugee camps.
- Schools and vocational institutes, emergency mobile clinic were established at Pakistan border with Afghanistan.
- Aid giving centres, under the name of "Hope Village" at Akora Khattak, were established to include clinics, schools, and mosque.
- Vocational centres for needy women, disabled persons and refugees for learning and manufacturing leather goods, carpet weaving and sewing were established under the name of "Hope Village" near Peshawar.
- A hospital under the name of Makkah Mukaram Hospital was established to care for thousands of orphans.

19. In 1991, while my father was supervising the construction of irrigation canals on behalf of the World Food Program, a person walking nearby him stepped on a land mine which must have been planted during the war with the USSR. My father's hand was nearly lost, and was simply hanging by a piece of skin. It was reattached, but my father never had use of it again. Also, a piece of shrapnel passed through his buttock and out his stomach. This accident caused him to return to Canada and remain in a hospital for about 2 years. Once he returned to Afghanistan in 1993, my father required help getting around, but still carried on with most of his daily routine. These injuries presented serious difficulties for my father for the rest of his life.

20. On November 19, 1995, suicide bombings occurred at the Egyptian embassy in Islamabad, Pakistan. Some 16 people were killed in this incident.

21. On December 3, 1995, my father and three other HCI employees were arrested by officials of the Government of Pakistan and held for approximately 4 months. It is my information and belief that my father was simply picked up because he was the eldest Egyptian in Pakistan

and was presumed to know something about the bombings. Eventually, following intervention from Prime Minister Jean Chretien, he was released, and all charges against him pertaining to this incident were dropped.

22. Out of concern for its ability to continue its charitable work, HCI retained the services of Mr. Marc R. Duguay, a Canadian Barrister and Solicitor, to attend at HCI's offices in Pakistan and to conduct an independent review of HCI's operations and my father's arrest. Mr. Duguay conducted a thorough review of all of HCI's files, interviewed all available witnesses, and concluded that there was no evidence linking my father or HCI to the bombings, nor was there any evidence of any wrongdoing, unethical or illegal acts of any nature under any circumstances. Attached to this my Affidavit and marked as Exhibit B is a copy of Mr. Duguay's report dated July 22, 1996.

23. HCI did all it could to support my father throughout his ordeal. However, HCI was concerned about the negative public perception associated with the charges in Pakistan, and feared that these problems might affect its charitable fundraising. HCI therefore decided to cut ties with my father and to replace him. My father and HCI then parted on good terms.

24. HCI continues to flourish today. It advances many charitable causes throughout the Middle East. Its head office is located at 877 Shefford Road, Gloucester, Ontario, K1J 8H9. Its telephone number is (613) 742-5948 and its facsimile number is (613) 742-7733. Attached to this my Affidavit and marked as Exhibit C is a copy of a recent 25th Anniversary Report prepared by HCI detailing its history of charitable work, including the years when my father was Executive Director. This report reproduces copies of letters from the Prime Minister of Canada, the Premier of Ontario and many other distinguished people congratulating HCI on its distinguished history.

25. After leaving HCI in 1995 or 1996, my father began to operate a charitable organization called Health and Education Projects International (HEP). HEP was incorporated under the *Canada Corporations Act*. It had a registered office in Canada at 1783 Marquis Avenue,

Gloucester, Ontario, K1J 8L5. It had a mailing address at P.O. Box 880, University Town, Peshawar, Pakistan.

26. In 1998, I began working with my father on HEP's charitable projects. In doing so, I became familiar with HEP's charitable facilities and operations.

27. I am aware of allegations contained in a book and elsewhere that HEP had no legitimate charitable operations and was simply a "front" for funnelling money to Al Qaeda. This is completely false.

28. Attached to this my Affidavit and marked as Exhibit D are HEP's Financial Accounts for the fiscal year ending March 31, 2000, prepared by Iftikhar Ali & Co., Chartered Accountants. The following entries reflect an accurate summary of HEP's operations and operating costs for that fiscal year:

7 - PROJECTS OPERATING COST

Kabul Sick Children (Indira Ghandi)	178,169.00	3,316.00
Baghlan Girls School	12,554.00	234.00
Jalalabad Orphanage	207,700.00	3,866.00
Khost Vocation Center	24,959.00	465.00
Laghman Girls School	80,578.00	1,500.00
Logar Orphanage	121,976.00	2,270.00
Wardak Orphanage	67,333.00	1,253.00
Widows & Orphans	36,371.00	677.00
School Assistance	48,888.00	910.00
Relief Materials Container (C & F)	161,194.00	3,000.00
Feeding (Zakat, Zabiha, Aqiqa & Emergency	976,093.00	18,166.00
Jalalabad Farm	1,007.00	19.00
	1,916,822.00	35,674.00

29. As HEP's Financial Accounts indicate, our single largest facility was the orphanage in Jalalabad, which operated out of a building which also housed HEP's main office. We had approximately 300 boys at this orphanage. Attached to this my Affidavit and marked as Exhibit E are family photographs of the Jalalabad orphanage and office, including

photographs of the children who were cared for at this facility. I took many of these photographs.

30. HEP also operated an orphanage for boys in Wardak, Afghanistan. We were also able to care for girls at this orphanage for a brief time. Attached to this my Affidavit and marked as Exhibits F are copies of family photographs of the Wardak orphanage and the children cared for at this orphanage.

31. HEP also operated a Girls' School in Laghman for approximately 300 girls. Attached to this my Affidavit and marked as Exhibit G are copies of family photographs of the Laghman Girls School being constructed and when it was completed.

32. HEP also operated the Baghlan Girls School for about 150 girls. Attached to this my Affidavit and marked as Exhibits H are copies of family photographs of this facility.

33. Our activities in Jalalabad including vocational training for the handicapped. Our program included training in sewing, and the participants would receive their own sewing machine at the end of the program. Attached to this my Affidavit and marked as Exhibits I are family photographs of this program.

34. HEP also operated an orphanage in Logar. We had about 50 boys at this orphanage. Attached to this my Affidavit and marked as Exhibit J are copies of this facility and some of the children registered there.

35. Each orphanage was in a different province and so my job required a lot of travelling. It was a major responsibility to keep everything running smoothly and so it took up a great deal of my time between 1998 and 2001.

36. Some of HEP's other activities included:

- Medical instruments and supplies were provided to Kabul Children's Hospital and Malalai Females Hospital, Kabul;

- Baby formula and dried milk was provided by donations from Bahrain were supplied to the Minister of Public in Kabul to be distributed to the infants and children at Kabul Sick Children's Hospital;
- Funds were provided for the running of the Jalalabad Public Health Hospital, University Hospital, and Faternah Al Zahraa Children and Females Hospital;
- HEP arranged for emergency feedings including the distribution of flour, rice and oil to hundreds of orphans, widows, disabled and needy government employees;
- Vocational Centers for women and disabled persons in several places throughout Afghanistan.

37. It was my responsibility to generally oversee the hospital and the 3 orphanages in Laghman, Jalalabad and Logar. There were approximately 20 to 25 teachers at these orphanages. The teachings dealt with general education like reading, writing and arithmetic. There was no anti-American indoctrination or any dogma of any kind.

38. My main duties were to ensure that the orphanages were running properly. Also, if my father was too busy, I would pick up the money from the bank and deliver it to the orphanages. The money would be used to pay for necessary supplies, the salaries of the teachers, and a small allowance to the children which was to be given to the family that was taking care of them. On occasion I would also bring clothes, gifts, or food.

39. Operating HEP's charitable facilities in Afghanistan presented many serious difficulties. Ensuring the everyday running of these projects required my father to establish friendly relationships with many individuals and groups with different backgrounds and ideologies who had influence in the areas where our charitable projects were located. This included dealing with groups who were ideologically opposed to each other including the Northern Alliance, the Taliban, Osama Bin Laden, Pakistani Intelligence and many political members of the Arab Muslim community. My father did not enter into these relationships for ideological purposes, but rather out of necessity to further his charitable objectives.

40. In particular, providing education to girls at our orphanages was extremely difficult and controversial under the Taliban regime. My father had difficulties with the Taliban when the

orphanage in Laghman first opened since the Taliban disliked the idea of providing education to girls. However, my father firmly believed that girls had a right to receive education. Despite pressure from the Taliban, my father was able to use his skills to prevent the Taliban from interfering with the girls' ongoing education. He obtained a letter from Taliban leaders that instructed its members to leave my father and the orphanage alone.

41. One of many powerful people in the region that my father had contact with was Osama Bin Laden. Osama Bin Laden provided money to some of the same hospitals as my father and also supported certain agricultural projects in Afghanistan. To my knowledge, my father had no involvement with Al Qaeda or any of Osama Bin Laden's terrorist activities.

42. At one time during our family's time in Afghanistan, we lived in a community of Arab people which was adjacent to a compound or community of Osama Bin Laden. We simply lived in this area so that we could live near other members of the Arab community. We had no involvement or affiliation with Osama Bin Laden, Al Qaeda, or any terrorist or extremist ideology.

43. Also, one of HEP's orphanages was located in the Northern Alliance territory, so it was necessary for my father to build relationships with the leaders of the Northern Alliance.

44. My father often felt frustrated by all of the internal fighting and bickering that occurred in Pakistan and Afghanistan amongst the various tribal warlords and politicians. He was often called upon to mediate negotiations between rival groups in an attempt to establish peace, which in turn would allow his humanitarian projects to continue. Since my father did charitable work, and since he was not associated with any group, faction, or organization, he was seen as a neutral and trusted person.

45. My father never involved his children in his efforts to mediate political disputes, and never spoke with us about any kind of ideology. As far as I am aware, he was only interested in advancing his humanitarian projects. Occasionally, I would voice my desire to do other

things, such as start my own business. My father dissuaded me from that course insisting the relief work we were doing was more important.

46. By 2000, my father was becoming progressively weaker as a result of his injuries in 1991. He had no use of his hand. He was seriously restricted as to how much travelling he was able do. He began to rely more and more upon me in the running of the various projects.

47. Throughout this period, my family lived exclusively on money which was paid to my father as a disability pension which had been maintained as part of his former employment in Canada, and which he had been entitled to as a result of his accident in 1991. This pension paid him about $3,000 per month. Of this money, our family spent about $600 to $700 per month on our living expenses and try to save what we had left in a savings account at the Scotia Bank in Canada. It is my understanding that there is about $35,000 in this account, but that it has now been frozen by the Canadian government. Insofar as I am aware, all of the money in this account was derived from my father's disability pension, and not from any illegitimate source.

48. I know that my father was extremely careful in ensuring that the money he raised for charitable purposes was only used for those charitable purposes. For example, when our family used the office's car to go shopping, my father always ensured that the gas was paid for or replaced out of our own money.

49. Just prior to September 11, 2001, while crossing the border from Afghanistan to Pakistan, my father ran into trouble with certain Pakistani officials. These officials demanded a share of the charitable funding my father was receiving from international relief organizations. My father refused to pay this bribe. The Pakistani officials then beat up my mother and attempted to kidnap my father. They also refused to return my father's passport until he agreed to their bribe which made it very difficult for him to get around. It was about a month after this incident that the Pakistani authorities placed his name on the UN list of people who were allegedly supporting Taliban.

Attending Camp at 13 Years of Age

50. In 1994, when I was only 13 years of age, I was sent to a camp with my younger brother Abdurahman. As discussed in greater detail below, people have suggested to me that I actually ran this camp and that since I attended this camp when I was 13, I have been trained to be a terrorist. These assertions are false.

51. The camp I attended was not run by, or in any way affiliated with, Al Qaeda or any other terrorist organization.

52. Attending a camp of this nature was a normal thing in our culture which most children did at that age. Many Muslims in this part of the world believe that all males should receive basic training when they are young in case they are required to defend themselves. There is a Muslim prophet saying, "Teach your kids how to shoot, how to ride horses and how to swim". Believing in this saying does not mean that you are a terrorist.

53. The camp, which lasted 2 months, was located in Afghanistan. At the camp, we were involved in various activities including hiking, volleyball, soccer, fishing, praying, fasting, swimming and basic training. The basic training component of the camp involved learning about guns and explosives. I never learned how to make explosives, only how to use them.

54. There was no anti-American indoctrination, or dogma or ideology of any kind taught at this camp.

55. I enjoyed most of the activities in this camp, particularly fishing and cooking. That said, I have never been interested in the hiking as I do not like much physical activity or soldiering.

56. The military component of the camp was the only time I ever received such training. I have never been interested in being a soldier or involving myself in politics. I am not a violent person.

Situation Post September 11th, 2001

57. After September 11, 2001, the Americans came and occupied Afghanistan. Once the Taliban fell in October of 2001, all of our orphanages and hospitals closed because people had to try to find some place safe to go. It was at that time that I stopped working.

58. All of the Arab people in Afghanistan, including our family, fled from the Americans and allied forces after the fall of the Taliban. At this time, our family was living in Logar, Afghanistan. There were only about 5 or 6 Arab families in that province at the time and all of them fled from the Americans. We knew that the Americans were arresting Arab people who had no political involvement and sending them to places like Guantanamo Bay, Cuba. We fled even though we knew that we had not done anything wrong.

59. We received no assistance from Al Qaeda or any other organization in fleeing from the Americans. We simply fled as a family in the car we had.

60. During this time, life became very difficult for my family. Travel became increasingly dangerous in Afghanistan, so we and many other refugees fled to he mountains along the border between Pakistan and Afghanistan. We were essentially trapped here since my father was still out of favour with Pakistani Intelligence and the Americans were occupying Afghanistan.

61. We lived in a small village in the mountains called Mentay for approximately 2 years. Throughout this time, I was responsible as the oldest son to care for my family. I would do the shopping, chop wood and get water out of the well. I also spent a lot of time reading and playing on my father's computer. There was not much else for us to do. The various humanitarian projects such as the running of hospitals and orphanages were all closed down when the Northern Alliance overthrew the Taliban government.

62. By this time, my father's disability was becoming so severe that he required our physical assistance to get around. He kept reminding me that my only focus during this difficult time was taking care of the family.

63. I later learned of the death of my father in October of 2003. I was told by some locals that the village that he and my youngest brother were in had been bombed by Pakistani and American airplanes.

Dealings with Canadian Embassy Officials prior to Arrest

64. After my father's death, my family and I moved to Islamabad, Pakistan, where we could get assistance from friends. While in Islamabad, I did not work. My family and I lived off the little money left by my father and the support of friends.

65. While living in Islamabad, my sister and mother went at least twice a week to the Canadian Embassy for assistance in determining the status of my youngest brother Kareem who had gone missing with my father. We also sought Embassy assistance in being repatriated back to Canada.

66. On or about April 22, 2004, my mother and sister provided the Canadian Embassy with our passports for renewal. They were advised to return a week later. On returning to the Embassy, Canadian officials refused to renew our passports or to return the original ones. As a result, we found ourselves stateless and subject to arrest under Pakistani law for staying in Pakistan without travelling documents.

67. My mother and sister then retained the services of the law firm Hasmat Habib Law Associates, in early 2004, to assist them in obtaining a renewal of the passports from the Canadian Embassy, in Islamabad, without success. Attached to this my Affidavit and marked as Exhibit K is a copy of materials filed by this firm with the Supreme Court of Pakistan.

68. It was at this time that I was contacted by someone who identified himself as "Michael" from the Canadian Security Intelligence Service or "CSIS". During a phone conversation we had, he offered to help me return to Canada if I could provide him with information. It was shortly after that discussion that I was picked up by Pakistani intelligence officials. As discussed in greater detail below, I later met "Michael" while being detained in prison by Pakistani intelligence as he was part of the CSIS contingent who interrogated me for several days.

Arrest in Islamabad, Pakistan on or about October 15th, 2004

69. I was arrested in Islamabad, Pakistan on or about October 15, 2004, at approximately 4:00 p.m. At the time of the arrest I was picked up at a street crossing in Islamabad, with two young friends of mine. The car I was in was surrounded by men speaking Urdu. After a brief conversation with the one man, another man opened the door, reached inside and punched me hard in the face with a closed fist. My friends and I were then taken out of the car and placed in a Land Cruiser with government plates.

70. Once inside the Land Cruiser the men frisked me and took my watch and mobile phone. My hands were then cuffed behind me and my eyes were covered with both a blindfold and hood, which remained on my head for at least the next 24 hours. There were a total of 7 of us in the vehicle including my friends. It was at this point that I asked them who they were and where I was going. One of the men simply said, "you will know". I was terrified and confused. I had no idea why this was happening to me.

Arriving at Islamabad I-9

71. After being in the vehicle for about 5 minutes I was taken to a building that I later found out was the 2 or 3 story prison in Islamabad I-9.

72. Once we arrived at the prison, the men shackled my legs and started hitting me with what felt like a hard-rubber stick or paddle. They also kicked me on the backside to get me to move towards the prison. I was unable to identify exactly what the object was or who was actually

hitting and kicking me because my eyes were covered. I was then separated from my friends and forced down a set of stairs into a basement. That was the last time I saw either of my friends.

Basement of the Prison

73. As soon as I arrived, I was placed in a room ("My Cell"), and I was searched. The men took away my belt and the money in my pockets. One of the men then held me, while another removed the hood and blindfold just long enough to take my photograph. After my photograph was taken, one of the men yelled at me to remain where I was standing. They then left the room.

74. While in My Cell, I was forced to stand facing the wall. I was still blindfolded, hooded, handcuffed and shackled. I knew I was facing the wall because a couple of times when I became tired and began to slouch, a guard would come into the room and hit me with the hard-rubber paddle on the back of my head causing the front of my head to hit the wall. After threatening me, and ordering me to stand straight, he would leave the room again.

1st Interrogation

75. After standing in My Cell for about an hour I was forcefully taken to another room down the hall ("Room #1). I was still blindfolded, hooded, handcuffed and shackled. When I first entered the Room #1, I was stripped completely naked other than my shirt hanging off my cuffs and the hood on my head. This made me feel completely defenceless and vulnerable. I was becoming even more terrified, and I thought to myself that I would do whatever I could to co-operate with these people and to satisfy them.

76. Then the interrogations started. The men began to scream curses at me in English and make terrible threats. A lot of their questions started with "*I will kill you!*" or "*I will fuck you!*". This terrified me, particularly since I could not see what was going on, since I was standing

naked, and since I never knew what would happen next. Based on the sounds of things going on around me, I could tell that there were at least 2 people in the room.

77. Throughout this first interrogation, my Pakistani interrogators, who never identified themselves, asked me questions about who I was, where I was from, questions about my family, my knowledge of Al Qaeda and so on. The questions were not continuous. They would ask me a bunch of questions and then leave the room for awhile. When they came back they often asked me very similar questions hoping that I would change my answers. When the interrogators were not in the room, someone else was present and watching me, to ensure that I remained in the same position. If I made any move at all, I would be struck with the hard-rubber paddle. Throughout my entire time in this room, I was not allowed to sit down or to go to the washroom.

78. Throughout the interrogation, if I did not know the answer to a question or if I began to slouch from standing so long someone would hit me with the hard-rubber paddle. I tried my best not to slouch, but as I became more and more exhausted, it became more and more difficult for me to remain standing straight.

79. During this first interrogation, one of the interrogators with really big hands grabbed my testicles and squeezed them hard in his clenched fist, while continuing to shout the same questions at me. This caused me horrible pain. This same action was repeated another time later when no questions were being asked.

80. My interrogators then began threatening to put a stick in my rectum. Then one of them began to insert the stick in the area of my rectum, but then stopped and began hitting my testicles and shouting "*I'm going to fuck you dry!*". This terrified me.

81. They then made more threats and asked me some more questions. I was unable to give them answers they wanted. They then shouted at me to bend over. They proceeded to hit me repeatedly on my backside with the hard-rubber paddle. I was then told to kneel with my

chest to my thighs. They then proceeded to penetrate my rectum with a stick. I was in a state of complete shock.

82. This interrogation in Room #1 went on for approximately 2 to 3 hours. At no point did my interrogators ever indicate to me who they were. Any attempt on my part to request to speak to the Canadian Embassy or ask any questions whatsoever, only angered them and led to more severe beatings. All of my requests to be given an opportunity to pray were refused and therefore during the beatings I would repeatedly say, "With God I am fasting", referring to Ramadan.

Back to My Cell

83. After the first portion of the interrogation, I was taken back to what I think was My Cell. One of the men gave me some water and a biscuit to break my fast. Again I requested to pray, but they told me to continue to stand and wait in the corner.

84. During this time period I was not asked any questions. However a guard continued to watch over me. In order to prevent myself from collapsing, I leaned my forehead against the wall for support. I once collapsed on the floor, at which point, the guard allowed me to sit for a couple of minutes before forcing me to stand up again. I was forced to remain standing in My Cell throughout the night. I was still blindfolded, hooded, handcuffed, and shackled.

2nd Interrogation

85. After standing and waiting for a very long time, my jailers came and gave me some tea and a biscuit. I presumed it was morning.

86. I was then taken to another interrogation room ("Room #2") that was just down the corridor. I believe it was a different room because it was further down the hall than Room #1, but I cannot be certain of this. Except for the brief moment when my photograph was taken, I had been blindfolded and hooded since being put into the Land Cruiser.

87. During this interrogation, I was still forced to stand, but this time I was facing my interrogators. There were either 3 or 4 men in the room but only one questioned me while another would hit me on the head. The person speaking initially asked me some of the same questions and then asked me more specific questions about my father, Abdurahman, and certain others like Sheikh Iessa, Omar Ahmati and a Dr. Amin. He specifically wanted to know what knowledge I had about the whereabouts of Dr. Amin whose number they said was on my mobile phone. I told the men that I did not know any Dr. Amin and that I had only received the mobile phone the day prior and the only call I had made was to my sister Zaynab.

88. It appeared that these men were most interested in some sort of a plot to kill a Pakistani official. They told me that someone I knew was a conspirator and for that reason I must have known what was going on. I knew nothing whatsoever about any such plot and I still do not know if there ever was such a plot.

89. This interrogation lasted for about 2 or 3 hours at which time I was taken to another room again. I think I was returned to My Cell.

90. Once again I was ordered to keep standing. As was the case before, I was still not allowed to pray or go to the washroom. As it had been so long, urine began to run down my leg onto the floor.

3rd Interrogation

91. After making me stand and wait in My Cell for a few more hours, they came back and took me to Room #2 again. Here they interrogated me for about 2 more hours. I was becoming overwhelmingly tired. Once again, they asked me questions, many of which were repeated from before and later repeated by the CIA, FBI, RCMP, and CSIS. I thought to myself that I had to tell them anything they wanted to hear, or else this treatment would continue to get worse and worse.

92. After this interrogation, I was returned to what I think was My Cell and finally allowed to sit on the floor. I was also given something small to eat. I sensed it was night time again.

Description of Rooms

93. My Cell was an 8 by 8 square concrete room with no toilet. The only light in the cell came from a small window (about 1 foot high and 3 feet wide) at the top of the wall facing outside. After the sun went down, the cell was pitch black. The concrete floor was filthy with dirt. There was a small matt in the room for me to sleep on. I was not given any blankets. I was given one water bottle each day, which I used as a toilet sometimes after I finished drinking from it. There were beetles or cockroaches everywhere. The cell was closed off from the corridor by two doors. The door closest to the interior of the cell was made of steel bars. On the other side of that door, there was also a solid steel door that had a little window that could only be opened from the outside.

94. Room #1 was also a concrete room with a concrete floor. It appeared to be sound-proof. There were no windows and the room was illuminated by fluorescent lights. There was a wooden desk and cupboard. There was also a camera. Other than the placement of the cupboard, Room #2 was similar to Room #1.

Day Two of Interrogations

95. After approximately 24 hours from the time I first arrived, guards came for me and took me back to what I think was Room #2. It was at this point that they removed my hood and blindfold. After this, my eyes were not covered while I was in any of the rooms or My Cell. But whenever I was moved from one room to another, my eyes were always covered.

96. When my eye covering was finally removed, I saw that my torturers were 3 Pakistani men who were sitting on chairs facing me. One man, whom I found out later administered most of the beatings, was a Major ("Major #1"). He was approximately 6 feet tall with dark features.

He was skinny and smoked a lot. Another guy, who was a Colonel, was approximately 5 feet 8 inches. He also had dark features, but was a much stockier man. The third person was also a Major ("Major #2"). He had studied in Canada. He later pretended to be friendly to me and he often apologized for the way they had treated me. He was always apologetic and friendly when the other men were not around. The reason I knew their titles was because I either overheard them in conversation or I found out later from CSIS.

97. In this room, I continued to be shackled and handcuffed. I was ordered to remain standing. To this day, I continue to have problems with my feet because of all the standing I was forced to do. My torturers did not appear to carry any guns. There was, however, always a guard just outside that patrolled the corridor with a gun.

98. The questions at this interrogation were very similar to the questions I had already been asked. Again they asked me questions about my father, my supposed Al Qaeda connections, my father's acquaintances, the assassination attempt on a Pakistani official, my supposed familiarity with weapons, and my supposed terrorist involvement. This carried on for about 5 to 6 hours during which I was continually hit on the head when they did not like my answer. I was constantly threatened.

99. At one point, they forced me to tell them my e-mail addresses and passwords. I told them about both a Hotmail e-mail account I had and also a Yahoo e-mail account. They also asked me about a friend of mine named Abdurahman. (This is not my brother of the same name.)

100. One of the main subjects the Pakistanis kept asking me about was my supposed involvement in some sort of plot to assassinate a Pakistani government official. They told me that my friends were involved in such a plot and that therefore I must have been involved. As a result of what they did to me, I eventually told them that I did know about such a plot, but that I was not involved in it. I just made up a government official, and said it was the Prime Minister. This was completely untrue. It was also clear to me that the Pakistanis knew that these statements were untrue since I was never charged with being involved in such a plot.

101. Later, I was returned to My Cell and finally given an opportunity to sleep. I was also provided with orange pants and a shirt to wear. Despite being allowed to sleep, the guards would disturb my sleep by waking me up every little while. I would be forced to stand up, and then allowed to go back to sleep.

102. After a couple hours of sleep, the guards came back in and told me that they had sent an e-mail message to Abdurahman from my e-mail account asking him to meet me. They told me that their plan was to take me to Peshower, and to have me sit in a car and wait for Abdurahman to arrive. If, at anytime, I gave any indication that I was in their custody they said that they would arrest my sister Zaynab and do to her what they had done to me. I had no choice but to do what they said. I did not want them to harm my sister.

103. I also spoke with a Brigadier who told me that if I told him something new that I had not told anyone else, he would try to help me get out of that place.

104. After speaking with the Brigadier they took me back to My Cell. I was given some bread and stew to break my fast. I stood and prayed. The cell was very cold and my request for a blanket was denied. This was the first time since I had been arrested that I was allowed to sleep for an extended period of time.

Day 3

105. When I woke up, I noticed that there was blood on the ground. As a result of the beatings that I had received on my head, my right ear was bleeding. It continued to bleed for around a month after that. My ear still hurts if water gets into it.

106. That morning, I was taken to Peshower in a Land Cruiser by someone I later found out to be a Major. He was accompanied by a guard. Once in Peshower, I was put into a smaller car and we waited. After a short time, my friend Abdurahman approached the car. When he did so, he was arrested. That night I was driven back to the prison without my eyes being

covered, so no one seeing the car would get suspicious. It was at this time that I was able to determine that I was being detained somewhere in Islamabad I-9.

107. I was ashamed at the trouble I had gotten my friend into. To my knowledge, he was not politically involved, and there was no legitimate reason for his arrest. I never saw him again.

17 Days of Interrogations by Americans

108. I was allowed to sleep throughout the night. The next morning the Americans arrived.

109. I had been arrested on the first day of Ramadan. When the Americans had finished questioning me and I was transferred to another prison, there was 10 days left in Ramadan. From this I believe that my first period of interrogation by the Americans lasted 17 days.

110. These initial 17 days of interrogation sessions by the Americans would always last from at least 10:00 p.m. to 3:00 a.m. Then they would typically come get me for more questioning at 7:00 or 8:00 a.m. and continue the questioning to 5:00 or 6:00 p.m. Then I would sleep until about 9:00 p.m. and the interrogations would begin again at about 10:00 p.m. On at least one day, the questioning continued all night and into the next day without me being allowed to sleep at all.

111. During the 17 days, the Americans always appeared to be in charge of what was going on in the prison. They gave orders and directions to the Pakistani jailers about various things and these orders and directions were obeyed. If the Americans were unhappy about the answers I gave on any particular day, they would order the Pakistanis to continue questioning me after they left. This meant that I would be subject to more physical abuse, threats, and that I would not be permitted to sleep until they finished with me.

112. Even when I was returned to My Cell the noise made it very difficult to sleep. My sleep would be regularly disturbed by being woken up by guards throughout the night. I would

have to get out of bed and then later allowed to go back to sleep. As a result, I was always extremely tired, never became rested, and was never able to think straight.

113. This first group of Americans never read me any sort of statement outlining any supposed legal rights. They never advised me as to any legal basis for my detention. They never allowed me to contact a lawyer, or advised me of any right to do so. They did not tell me that I had a right to remain silent or that my answers to their questions could be used against me in a legal proceeding. Although they all knew that I was Canadian, I was never invited or permitted to call the Canadian Embassy.

114. Throughout the 17 days of continuous interrogations by the Americans, at least one of my Pakistani abusers was always present. Sometimes they appeared bored because of the repetitive nature of the questioning. I was not aware of any Canadians being present.

115. Other than one slap on the face described below, the Americans did not physically abuse or torture me themselves. However, I was still repeatedly being beaten and threatened throughout these 17 days by the Pakistanis. Sometimes when the Americans were not happy with the answers I was giving, they would order the Pakistanis to keep questioning me, and I would then be beaten by the Pakistanis. The Pakistanis would then slap, hit and threaten me until I promised to give the better answers.

116. The Americans themselves did make serious threats against both myself and my sister. On many occasions when they were not satisfied with my answers, they stated that if I did not tell them what they wanted to hear, they would send me to prisons they knew about in Egypt or Uzbekistan, which they told me would make the prison I was currently in seem like a five star hotel. They said things like: "*You know what they do there*…", which I took as a threat that I would be raped. They also said that if I did not cooperate, they would have my sister Zaynab arrested, "*and have exactly the same things done to her as were done to you*" or words to that effect.

117. Nothing upset me more than the threats that they would do to my sister what they did to me. That was always a soft spot for me and they appeared to be well aware of that since they kept coming back and repeating this particular threat.

118. The Americans would often try to induce me to give answers by saying that "*If you give us something big, we can get you out of here*" or words to that effect. I wanted so much to get out of there that I decided to tell them whatever answers I thought would make them happy.

119. Generally, my approach was to make-up answers to the Americans which said that I was involved in various things they suggested, but trying to minimize my own role. That way, I hoped to satisfy them, but not anger them enough to send me to Egypt, Uzbekistan, or Cuba.

120. Throughout the interrogations, the Americans kept notes of what I was saying. I do not know if the interrogations were videotaped, but there was a video camera in the room.

121. The American interrogators made it clear to me that they had been informed by the Pakistanis of the previous answers I had given to them. If I ever gave an answer that was inconsistent, they would say that I had already told the Pakistanis something different, and so I must have been lying.

122. I came to understand very quickly that I needed to try to be consistent in my answers. When my answers to questions changed in a way that they did not like, they would point out the fact that I was being inconsistent, call me a liar, and scream threats at me. As a result, they were often able to get me to repeat the same statements multiple times, including statements which were untrue.

123. There were usually 3 or 4 Americans present throughout the interrogation sessions, but never less than 2. During their interrogations, I sat on a stool with my hands and legs shackled. The Americans confined themselves to asking or screaming questions and threatening me.

124. These interrogations took place in a new room that was sound-proof and had a camera. On the first day, there were 3 white Americans and 1 Pakistani. Two of the Americans were male and the other American who appeared to be the most senior was female. The Americans never disclosed their actual identity. However, at one point one of them suggested that I had been using some sort of code and said that "*we spies do the same things as you terrorists*" or words to that effect. From this I believe that these Americans were intelligence agents, probably with the CIA.

125. Throughout the 17 days, I saw 6 different Americans. The combination of people I saw on each given day constantly changed.

126. It became obvious to me that I needed to tell the Americans whatever they wanted to hear in order to minimize abuse, and to have any chance of staying alive or getting out of the Pakistani prison. Sometimes I felt that anything would be better than remaining in that prison, including being taken to Cuba. Nearing the end of the 17 days, one of the Americans actually told me that it would not be long before I would be sent to a "normal prison". I thought that this might happen if I did all I could to tell them what they wanted to hear.

127. For at least two full days, possibly three, the self-described "spies" asked me about various people and asked me where they were located. They gave me a list of about 18 names and wanted to know who I knew and what their responsibilities were. I was not familiar with the majority of the people on this list.

128. Some of the names on their list were people I did know about. One was an individual named Hamza Al Jowfi. He was an acquaintance of my father's and I had seen them together. When they asked me who he was I said I only knew him as being a friend of my father. They said, "Come on, you know that he supplies weapons to Al Qaeda." I suspect that this statement was untrue. If it is true, I had not heard this until they told me.

129. To the best of my recollection, the subject of me buying weapons and selling them to Al Jowfi first arose about 3 or 4 days into the interrogations by the "spies", which was about 7

or 8 days after my initial arrest. I recall that at about this time, one of the "spies" said that they had a list of weapons that my friends had told them that I had bought and sold. They did not let me see any such list, and I suspect now that there was no such list. In any event however, this suggestion that I had bought and sold weapons was totally untrue. At first, I told them that I did not buy or sell weapons, and that I was kept busy enough buying supplies for my family.

130. When I told them that I did not buy and sell weapons, they said things like, "How can it be that everyone is lying about you?" I was crying and kept saying, "When I tell you the truth you don't believe me."

131. Eventually, at some point, I told these people that I had in fact sold some weapons to Al Jowfi. In doing so, I tried to make up a story that minimized my involvement in such activities, but which would still make them happy. This was just one of many untrue statements I made which were the product of my mistreatment.

132. At some point, I recall that I even told the Americans that Al Jowfi supplied Al Qaeda with about 90% of its weapons. Even the Americans must know that this statement was completely untrue. I simply said this in order to make it seem that I was providing them with important information.

133. The Americans also had me confirm the statements I had made regarding the fictional plot to assassinate the Prime Minister of Pakistan. I think they must have known that there was no such plot.

134. On another occasion, the Americans told me that my brother Abdurahman had told them that our father was responsible for raising militia in Logar, and that I was his second in command. At first I told them the truth, that is, that this was not true, that I was only my father's driver, and that I knew nothing about any such activities. Eventually, when they threatened me and called me a liar, I said that the stuff about raising militia was true. As far as I am aware, there is no truth to these allegations.

135. On still another occasion during the 17 days of interrogations, I recall that one of the Americans said "*One of your friends told us that you once said that you transported hydrogen peroxide*", or words to that effect. I was afraid of denying this, and so I said that I once transported some barrels to Al Jowfi but did not purchase them for him. When I made these statements, I had no idea that this substance could be used to make explosives or landmines. I knew that hydrogen peroxide was sold in small orange bottles in Pakistan and was used as a disinfectant for cleaning wounds. I had seen hydrogen peroxide used for this purpose. When you pour it on a wound, it goes white and makes bubbles. Since I didn't know that this substance could be used to make explosives, I did not see any point in denying the allegation.

136. The Americans even asserted on many occasions that I was involved in planning the Egyptian Embassy bombings in 1995. This of course was absurd. I was only 14 years old when those bombings happened.

137. There was one American who particularly frightened me. He was a white man with dark features and was only about 5 feet and 6 inches tall. He was much more arrogant than the other Americans and was much less patient. One day near the end of these initial interrogation sessions, he became extremely angry at me and began screaming in my face, saying: "*You're a lying fuckin' bastard and you're not giving us anything, and we're going to bring in your sister!*" At this point he was trying to get me to give them someone's phone number that I did not know. He then slapped me hard across the face and I was crying uncontrollably. Then one of the Americans who was an Asian woman and who appeared to be in charge said, "That's enough for today." The next day, the man was friendlier and apologized for hitting me.

138. The Americans had me repeat the same things many times. For the last three days or so of their interrogations, they went over everything I had told them before and got me to say everything all over again several times. Whenever I said something that was inconsistent

with what I had said earlier they would say "*That's not what you told us before*", and then I would just affirm whatever they said I had told them before.

13 Months of Arbitrary Detention in Raoulpindi

139. After the first 20 days of interrogations by the Pakistanis and Americans, I was taken to a prison in Raoulpindi where the Pakistanis detained me for more than 13 months.

140. During the 13 months of imprisonment in Raoulpindi, I was never given a lawyer, or access to a telephone. I was never brought before a Court. I was never charged with any offence or given any reason for my detention. I was never allowed to contact my family or the media.

141. The cell I stayed in was about 8 feet by 6 feet. Once again, it was in the basement. There was no washbasin or toilet, so I was taken to the washroom 3 times a day. These washroom breaks were the only time I got out of my cell each day. The cell was very hot. There was no electricity in the cell. There was some light that came from the hallway, through the barred door, which provided some light after dark. The only natural light came from a small window at the top of a high wall. I slept on a matt that was located on the cell floor. The entire time I was there, I was kept in solitary confinement.

142. While there, the Pakistanis and/or Americans would interrogate me from time to time by either coming to Raoulpindi or having me transported back to Islamabad. These interrogations happened 2 or 3 times per month or so. Otherwise, I only saw Pakistani guards at the jail.

143. I was not allowed out of my cell to exercise at all. It was often very dark in the cell and so after days of not being allowed out, I would become very frustrated and start crying and yelling. As had occurred in the previous prison, the Pakistani guards would wake me up throughout the night in order to deprive me of sleep.

144. I was fed 3 times a day. Typically, I would get bread and tea for breakfast, 2 pita breads and a small portion of stew served in a disposable coffee cup for lunch, and stew again for supper. I would also get either an apple or a banana 3 or 4 times a week. At every meal I was provided with a 250-millimetre bottle of water that was filled up with water from the washroom. I lost a lot of weight during the 14 months.

145. Even though the beatings and threats came less regularly than in the early days after my arrest, they still occurred. If I ever did anything to upset the guards they would beat me with a hard-rubber paddle or utter threats about raping me. I would often overhear screams from other prisoners being beaten. The whole experience made it so that I was always terrified about what would happen next. Despite on occasion being allowed to communicate with other prisoners, for the most part I was punished severely if I ever attempted to speak with anyone. There were no visitors allowed in my cell at all.

146. While in the prison I would repeatedly ask for information about my family, a lawyer and the Canadian Embassy. When I made requests for a lawyer the guards laughed out loud. The guards ignored my questions about my family. When I asked about the Canadian Embassy they told me that they were speaking with them but that the Canadian Embassy was ignoring me.

147. While in prison, I tried to keep track of time by praying daily. That said, over time, days began to blur together into weeks and months. At first I began scratching small marks on the walls to try and keep track of the days. Then later I began making a small scratch once per week. This was the only way I had to keep track of time.

First Visit with Canadians

148. It was not until about 3 or 4 months into my detention, around January or February, 2005, that I saw some individuals from the Canadian Embassy. Anytime I met with the Canadian Embassy there were always Pakistani and Canadian intelligence officials present. The RCMP and CSIS never interrogated me at the same time and there was always a Pakistani official

present at all interrogations. There were never any Americans present when I saw the Canadians. The Canadian Embassy officials were never present for any interrogations. They would come with the others and then leave the CSIS agents to conduct interrogations.

149. Prior to the first visit with Canadian consular officials in Islamabad I-8, my jailers dressed me in civilian clothes. I was then taken to the interrogation room in Raoulpindi, stripped naked, and checked for bruises. I then had to put the civilian clothes back on. I was warned by the Pakistanis about what not to say, including asking for my family, a lawyer or any mention of the abuse I had received. While in the jeep, my legs were shackled, my eyes were blindfolded, and my head hooded. I was then driven in a jeep for about 20 minutes to a house located somewhere in Islamabad I-8.

150. Once we arrived, I was once again taken down a flight of stairs. Once inside my eyes were uncovered and I saw that I was in a fancy room in the basement. The room was about 20 feet by 15 feet. There was a 2-metre long boardroom desk in the middle with leather couches all around it. There was a marble floor with a nice Persian rug on it and on one side of the room there was a TV and a gas fireplace.

151. At this time, Major #2 told me that the people from the Canadian Embassy would be there shortly. Soon after, I heard cars pulling up to the building and then people coming down the stairs. There were 2 people from CSIS, one who was based in Islamabad and was always present during any consular visit. He was short, bald and around 40 ("CSIS #1"). The other guy's name was Bob and he was also around 40 years old. Bob was 6 feet tall and looked like he worked out. CSIS #1 referred to Bob as being the boss. They were wearing civilian clothes and never introduced themselves as members of CSIS. Two individuals from the Canadian Embassy accompanied the CSIS people. One was from Ottawa ("CE #1"). He was around 45 years old, had dark hair and was between 5 feet 8 inches. The other man who was stationed in Pakistan appeared to be South American ("CE #2").

152. On the first visit with Canadian consular officials, there were 3 Pakistani officials present. These included the Colonel from before, Major #2 and another Major ("Major #3") whom I had not met yet.

153. The Embassy officials asked me some general questions about whether I considered myself to be Canadian, whether I wanted to go back to Canada and how I was being treated up to that point. The questions on my treatment were cursory in nature, with no real inquiry about my treatment by the Pakistani jailers. At all times during the questioning, the Pakistani officials were in close proximity and so I was unable to communicate my mistreatment to the Canadian officials.

154. By this point, it must have been obvious to the Canadians that I had never been charged with any offence, had never been given access to a lawyer, and had never been brought before any Court. Yet, they did not ask me about any of these things, nor did they ask me what the prison conditions were like, or whether I would like to see a doctor. I did tell them that the food was really poor and asked if they could bring me some food. The Pakistani jailers stated that it would not be allowed. I did make some mention of my family, but I never communicated that I wanted to contact them, nor was I ever asked that question.

155. At one point I told them that I was being regularly questioned by the Americans. I asked them whether I had to talk to them. One of the Canadian Embassy officials told me that he could not advise me about that.

156. CE #1 did all of the talking while CE #2 just sat and smiled. As they were leaving, CE #1 told me that CE #2 would help as much as he could and that they would try to meet regularly.

157. After the Embassy officials and a couple others left the room, it was only Bob from CSIS and Major #3 remaining. They ignored me and spoke with each other for a few minutes. Within about 5 minutes, 2 more CSIS agents came in. One of them named Mike was the one who I had spoken to on the phone in Islamabad, just prior to my arrest. The

other agent was someone I had not met before ("CSIS #3"). Mike and CSIS #3 took notes while Bob asked me questions.

158. Bob never asked any questions with respect to contacting my family or a lawyer, nor were there any discussions about my treatment in prison. CSIS also never told me that I did not have to answer their questions if I did not want to. I was given some coffee and water, but I was not given any food. The questioning lasted for hours. Bob asked some questions about who I knew in Canada, but otherwise the questions were very similar to those questions that had already been asked to me by the Pakistanis and Americans.

159. Bob also asked about other Canadian Muslims, such as, Arar, Ali Hindi, Ahmati, and Ahmed Amaralte, who were individuals that had been held in Syria. He asked me whether I thought that they had been tortured. I used the opportunity to indirectly tell him of my treatment in the presence of my Pakistani jailers by saying "that anyone jailed for this reason in a third world country is tortured". I had hoped he would understand the message I was sending him about my treatment, but he ignored my answer. I was never asked how I was being treated, whether my legal rights were being observed, or whether I wished to see a doctor.

160. I told CSIS that I would like to go home and finish the questioning when we got back to Canada. CSIS offered to help me get home and help my family with money if I would help them. They also told me that it was policy to hold onto my father's money even though he had died. They also told me that the Pakistanis would not agree to me writing a letter to my family. The Pakistanis told me not to say that I wanted to have the Canadians contact my family, because they did not want the media to know.

161. On the second day of the CSIS interview, the same people showed up, and the questioning was held in the same room in the presence of one of my Pakistani abusers. On this day, the questions asked by CSIS were very similar to the questions asked by the Pakistanis and Americans before. It actually appeared that the CSIS officials had spoken to the Pakistanis and Americans in preparation for this meeting. The topics covered included

weapons, training, and the assassination attempt on a high-ranking Pakistani official. After this meeting was over I was driven back to Raoulpindi and I did not see another Canadian official for 2 months.

2nd Visit Consular visit with CSIS agents

162. In mid March or April, 2005, I was taken back to Islamabad I-8. This meeting took place in the same building, but in a different room.

163. On this occasion, CSIS only interviewed me for about 5 to 10 minutes. During this brief time, CSIS #1 asked me if I knew someone named Dennis Edney and whether I had hired him to be my lawyer. Of course, as they were well aware, I had not had any ability to retain Mr. Edney or any other lawyer, and so I said that I did not know any lawyer named Dennis Edney. CSIS #1 did not tell me that my family had already retained Mr. Edney to act for me. He did not tell me that Mr. Edney was making inquiries with the government of Canada as to my whereabouts, nor that Mr. Edney was attempting to secure my freedom from wherever I was being held. He did not provide me with Mr. Edney's contact information, nor with any means to contact Mr. Edney.

164. CSIS also asked whether my family was supporting me or whether I had my own assets.

165. I told CSIS about the bad conditions of the prison and that I had been getting dizzy and that my heart was hurting.

RCMP Interrogations

166. The next day, Sgt. Konrad Shourie from the RCMP and two other RCMP officers met me at Islamabad I-8. CSIS #1 was also present. He left when the RCMP started asking questions. Unlike the interviews with CSIS and the consular officials, I was brought into these interviews wearing the hood over my head.

167. The questions from the RCMP lasted three days, and Sgt. Shourie did all the talking. The other two RCMP officers were younger white men who I never saw again after this meeting. One of the men was taking notes of what I was saying and the other was taking notes of my reactions.

168. The RCMP did not provide me with any kind of advice or notice about my legal rights. They did not offer to provide me with a lawyer, they did not explain the reasons for my detention, they did not tell me I had a right to remain silent, and they did not advise me that I had a right to be brought before a court. The RCMP did not ask me about my treatment or my welfare, and did not offer to send messages to my family or the media. I did not ask about any of these things because, as always, there was a Pakistani official present. I did not believe I had any choice but to speak to the RCMP.

169. The RCMP did not tell me that my family had already retained Mr. Edney to act as my lawyer, nor that Mr. Edney was prepared to provide legal advice and services to me free of charge.

170. I was informed by Sgt. Shourie that my family knew that I had been captured, but that they did not know where I was. I later found out that this was untrue.

171. Sgt. Shourie was much less polite and pleasant in Pakistan as compared with his later interview with me at Pearson Airport in Toronto. Throughout the course of the first 2 days, I estimate that he screamed at me: "*You fucking little bullshit liar!*" or words to that effect some 10 to 15 times. He adopted a more pleasant approach on the last day.

172. It was clearly apparent that Sgt. Shourie had been in communication with CSIS, the Americans and/or the Pakistanis, and had been provided with materials from some or all of them. He reminded me that I had told CSIS that I would speak to other agencies. He also had a thick file that he would sometimes refer to.

173. Sgt. Shourie asked me many of the same questions that had been asked by CSIS, the Americans and the Pakistanis, and he knew when my answers were inconsistent with ones I had given previously. Once, when I told him that I actually knew nothing about any supposed plot to assassinate the Prime Minister of Pakistan, he became angry and threatening, shouting: "*That's not what you told the Pakistanis! See, we have done our homework!*".

174. At one point, Sgt. Shourie demanded that I admit that I had sold weapons to Al Jowfi knowing that he was an arms procurer for Al Qaeda. I told him that I did not do this, which was the truth. He then began referring to his documents and said: "*That's not what you told the Pakistanis!*"

175. Another time, Sgt. Shourie said: "*What about all these other things you were helping Al Jowfi with?*". I said that I wasn't helping Al Jowfi with anything, which was the truth. He then said, "*That's not what you told them*," and motioned to the Pakistani official in the room.

176. Sgt. Shourie told me that if I just co-operated I would not get into trouble and that I would be able to go home. It was at this point that I started giving Sgt. Shourie the answers he wanted in the hope that he would help me get home.

177. Sgt. Shourie made various promises to me in an effort to get me to provide him with something that the other interrogators had not already obtained. At one point he said, "*If you give me something new, you can get out of here and go back to Canada. You're still young and you can start a new life*" or words to that effect.

178. Sgt. Shourie also used subtle threats during his questioning of me. He reminded me that he knew that I had helped Pakistani intelligence arrest my friend, Abdurahman, and that I would not want word of this co-operation getting out. Sgt. Shourie was very intimidating and frightening. He made it very clear to me that he was in control of my life and had the power to get me home or leave me in Pakistan if he wanted.

179. At the end of the interrogation, Sgt. Shourie asked me what type of chocolate I liked. My favourite chocolate bar, Coffee Crisp, was delivered to me 2 months later. Just before he left, I asked to speak with the Canadian Embassy, but Sgt. Shourie simply replied, "*You already did*".

3rd Visit with Canadian Officials

180. In May or June, 2005, I was brought from Raoulpindi to Islamabad in order to meet with CSIS. The meeting took place in the same room as the second meeting. As always, there was a Pakistani jailer present who had participated in my torture. There were 3 individuals from CSIS present, Bob from Montreal, Mike from Toronto and a local man. When I was brought into the room where the CSIS agents were present, I was still hooded. Just prior to taking it off I heard someone outside the room asked, "*Do you want the hood to be kept on or is this official?*" Once the Pakistani Official removed the hood, I could see all the men from CSIS.

181. CSIS then said that they wanted to take me to Canada to answer more questions, but that I would not be able to see my family. They told me that they would take me to a cabin so that I could go fishing and do other fun things. Bob said that if I were to see my mother then the media and lawyers would get involved and this was not in my best interests. Bob told me that "*lawyers just want money and they won't help you*". They did not tell me that my family had already retained Mr. Edney to try and help me.

182. Again, I was not provided with any advice or notice as to any of my legal rights.

183. The second day of this visit from CSIS was in Raoulpindi. Mike started to ask me more questions despite my protest that I would rather answer the questions when we arrived back in Canada. When they completed their questioning, they took my measurements. Once the meeting ended, the local CSIS officer said that "*it would all be over in 2-3 weeks*". Before they left they told me that the questioning would continue once we reached Canada.

184. After a week had passed, the local CSIS agent visited me. He reassured me that they had not forgotten about me and that I would be leaving within a couple weeks. I did not see anyone for at least a couple months after that.

Visit from Americans – July/August 2005

185. In about July or August, 2005, I was taken again to Islamabad I-9 for more interviews. This time they were conducted by 2 FBI agents. The Pakistani Colonel who had been involved in my torture was present throughout these interviews. The more senior officer's name was Gregory T. Hughes, Special Agent, Boston Division. There was also another American with him, Special Agent Nace. These were the same two people who later interviewed me at the Delta Hotel shortly following my return to Canada.

186. There was a camera in the room, but I am not sure whether it was taping.

187. By this point in time, I had been imprisoned for 9 or 10 months without ever having been charged with anything, or brought before a court, or allowed to contact a lawyer, my family or the media. On those occasions where my jailers considered my behaviour to be unco-operative, I had been beaten and tortured. It was, of course, clear and obvious to me at this point in time that I had no practical ability to exercise any legal rights, such as the right to consult with a lawyer.

188. Before the interrogations by S.A. Hughes, I was asked to sign some typed papers that stated I was speaking voluntarily, and that whatever I said could be used against me. The papers did not advise me of any rights that I had under Pakistani law or international law since the Americans knew that the Pakistanis would not allow me to exercise any such rights. I still do not know what legal rights I had under Pakistani domestic law or under international law.

189. When I asked S.A. Hughes what would happen to me if I did not sign the papers, he replied that "*It would be trouble for you. I'm not threatening you, but it would be trouble for you.*" The Pakistani Colonel was present and watching me at this time. When I signed the paper, I of course knew that if I asked to consult with a lawyer, this request would obviously be

denied. Throughout the previous 9-10 months, when I had asked to contact a lawyer, the Pakistani officials had laughed out loud.

190. After I signed the paper, the FBI began to ask the same questions that had already been put to me countless times in previous interviews. In particular, they asked me the same things which had been asked by the other Americans who had described themselves as "spies". I believe the subjects were also raised in the same order.

191. The FBI did not openly threaten me or physically abuse me. However, S.A. Hughes was careful to ensure that he got me to repeat the same answers I had given to previous interrogators who did threaten and torture me. He had a file full of papers with him that he was always flipping through and looking at. When I said anything inconsistent, S.A. Hughes would look angry and start pacing around the room. He would then say, "*We want to help you but you have to tell us the truth. You have to help us so we can help you.*" By this time, I had heard the same questions so many times that I knew most of what I had to say in order to appear consistent.

192. They also asked me if I would be willing to testify against Omar Maati who had not been arrested and who I was unfamiliar with. I said that I would tell them whatever they wanted to hear, if it meant getting me out of a Pakistan prison.

193. I was interrogated by the FBI for 3 days straight, 12 hours each day. I was shackled and cuffed for the entire time, and sitting on a stool in an interrogation room. During these interrogations, I felt sleep deprived, helpless, anxious, and scared. I was also extremely hungry. Each day I was given two breaks where I would be fed a bit of yogurt and bread.

194. Again, I made several statements to the FBI which were untrue, but which I had been coerced out of me during previous interrogations. These untrue statements included statements that I had sold arms to Al Qaeda and transported hydrogen peroxide to Al Jowfi. By this time, I thought that there was no point in denying statements that I had already made to many people

many times before. I knew that if I said anything inconsistent, this would anger the Americans, which in turn would anger the Pakistani jailers watching the interrogations.

195. I believe that it was during these interrogations by the FBI that I was being asked many questions about Osama Bin Laden, and at one point I used the word "Saint" to describe him. At the time, I was being asked once again to explain what Osama Bin Laden was like, and I was trying to think of an English word which meant a prominent religious leader who lived very poorly and modestly. I did not ever say that I agreed with Osama Bin Laden's ideology. Although I do believe that Muslims should live together in one country, I do not believe in the killing of any civilians for this purpose. My family and I worked all our lives to relieve the suffering of refugees and orphans. We did not believe in creating more refugees and orphans.

196. It may have also been during these interrogations that I referred to the events of September the 11th as "amazing" or words to that effect. I simply meant that the events of that date were stunning and shocking. I did not say that I in any way agreed with or supported the attacks and killings that occurred on that date. Certainly neither myself nor any of the members of my family had any knowledge of, or involvement in those attacks. As stated earlier, I do not support or believe in terrorism or the killing of civilians.

Meeting with Canadian Embassy and CSIS – September 2005

197. In about September, 2005, I was taken to Islamabad I-8 to see the local CSIS official, a consular official from the Embassy, and two Pakistani officers. I told them that I had met with the FBI and that I had signed the paper because I had no choice.

198. At this meeting, I was told that the United States was offering me 2 years if I testified against Omar Maati, who had not been arrested yet. I expressed some concern that I did not want to go to the United States because I worried about being sent on to a country like Egypt, Uzbekistan or Cuba, and that in any event I did not know Omar Maati. CSIS assured me that

the United States would not be allowed to do that and that I should be prepared to answer for the crimes they said I had committed.

199. With the Pakistani officials present, I was unable to ask about my family, because they threatened to beat me if I had. I told the Canadians that the food at the prison was bad, that I could not sleep and that I had chest pain, but nevertheless they sent me back with the Pakistani guards. No offer of medical or other assistance was given. At the end of the meeting, I was reassured again that I would be heading home soon.

Meeting with Canadian Embassy and CSIS – November 2005

200. In mid November, 2005 I was brought to Islamabad I-8 where I met Embassy officials and CSIS representatives. I was unchained, asked how I was keeping and asked whether I still wanted to go to Canada. I assured them that I did.

201. After that meeting, about a week passed before someone from CSIS brought clothes for me and then I was taken back to Raoulpindi. I was told at that time that I might be prosecuted and that I should use my life for good in the future. I was also told that I would be travelling with two people from the embassy and that I should not make any problems for them in Manchester, England.

Returning to Canada

202. On or about December 2, 2005, I was given street clothes to wear. I was blindfolded, hooded, chained and then driven to the airport. At the airport, I was detained in the car until about 5 minutes before the flight. At which time, they removed the chains, blindfold and hood and told me to "*act like a Canadian*". I was introduced to two Canadians Leila and Martin, from the Canadian Embassy, who were to be responsible for escorting me to Canada.

203. The flight left at 6:00 a.m. from Islamabad and arrived in Manchester 8 hours later. Once I arrived in Manchester, England, other Embassy officials met us. During the 2-hour stopover,

I was watched over by these Embassy officials in a private room until the next flight boarded. The next flight, from Manchester to Toronto, was also approximately 8 hours.

204. Upon arriving in Toronto, I was held on the plane until all the other passengers were off, then I was finally allowed to exit the plane with the Canadian Embassy officials at my side. I was met at the end of the catwalk by a large group of police and security people. The men were carrying guns and had bullet proof vests.

205. The people from the Canadian Embassy told me that I was not under arrest, but that the RCMP just wanted to talk to me. Given the show of force they were making, I felt like I had no choice but to co-operate with the RCMP. They told me that they would wait for me and then they left. I was quite disappointed that they just left me to be questioned further, as I had thought that I would finally be going home as promised.

206. The security guards then escorted me to a closed customs area where I met Sgt. Shourie. He told me that he wanted to talk to me in a nearby room. Despite Sgt. Shourie assuring me I was not under arrest, I did not believe I had any choice to walk away from him or to simply leave the airport while surrounded by all the security. I initially told Sgt. Shourie that I just wanted to go home. He persisted that he just wanted to ask me a few questions and that it would not take long at all.

207. Since leaving Pakistan, I had been experiencing a great sense of relief in that I would soon be reunited with my family. However, once I was put in the room with Sgt. Shourie, I started to realize that no one knew I was in Canada, so I was afraid that I might be sent back to Pakistan, or to the United States, or that I could suddenly disappear without ever seeing my family. There was nothing I wanted more than to just go home and see my family. I did not wish to jeopardize any possibility of that.

208. Sgt. Shourie then escorted me into a room where a video camera was set up and where Tarek, another RCMP officer, was sitting. The room door was then closed and the interview and questioning was conducted over the next 5 hours or so. Unlike his approach in Pakistan, Sgt.

Shourie was very pleasant during this interview. Despite the length of the interview, I did not complain, but rather tried my best to stay very pleasant and co-operative.

209. By this time, I had been taken over and over exactly the same subject areas of Sgt. Shourie's questions so many times and with so many people that my answers were close to being automatic. I knew of course that Sgt. Shourie knew what statements I had made previously to many other people including himself. On some points, the idea of telling the actual truth did not even occur to me. I simply remembered what answers I had given many, many times previously and just repeated them yet again.

210. There were no new questions asked or subject matters raised by Sgt. Shourie which had not previously been raised by him during my detention in Pakistan. He did not tell me that he had discovered any new evidence in the meantime.

211. During the interview at Pearson Airport, the people from the Canadian Embassy once came into the room, but Sgt. Shourie became angry and told them to leave. Sgt. Shourie got upset with them and told them that he was going to report them, because they should not be interfering with the interview. The Canadian Embassy left without a word of assistance to me.

212. Sgt Shourie would not let me leave on my own at the end of the questioning. He insisted that both he and Tarek drop me off at my grandmother's house. When I arrived, my family was shocked and excited to see me. They had received no information about me from anyone, including the Department of Foreign Affairs, and they had no idea that I was being sent home. I believed I had survived my ordeal and was finally home.

December 4, 2005 – Interview with FBI at the Delta Hotel in Toronto

213. On the morning of December 4, 2005, being the next morning after my arrival at my grandmother's house, Cst. Tarek called my grandmother's house to inform me that Sgt. Shourie wanted to meet me right away at the Burger King nearby. I could not believe that

after less than 24 hours, I was already being called upon for yet another interview. I decided to go to meet him accompanied by my handicapped young brother, Kareem.

214. When we met Sgt. Shourie, he told that the FBI was waiting at a nearby Delta hotel to speak with me. I was then told by Sgt. Shourie to take Kareem home before going to the meeting. Sgt. Shourie accompanied both me and Kareem on foot to my house while Cst. Tarek followed in a car. My mother told Sgt. Shourie that she did not want me going to see the FBI. This made Sgt. Shourie upset. He told her that it is my choice but that it would be much better if I just went. Sgt. Shourie also told my mother that she could not be involved in the meeting.

215. Despite being told it was my choice, I did not believe I had any choice. I also believed I would never escape the power of these people who were working together. After only being home for 1 day, Sgt. Shourie was already back in my life and in my home, and I was afraid that I would be sent to Pakistan or worse. This situation upset my mother terribly. I could not stand to see the trouble I had brought to my family and decided to go along with Sgt. Shourie.

216. Prior to meeting with the FBI, I was frisked by Sgt. Shourie. He then set up a video camera and videotaped the interview. Then both Sgt. Shourie and the FBI agents advised me of my legal rights.

217. The FBI agents who were present at this interview were the very same FBI agents who had interrogated me in Pakistan in July or August, 2005. They were S.A. Hughes and S.A. Nace.

218. Throughout this interview, the FBI agents were pleasant to me. Once again, they asked me to talk about all the same things that I had gone over in Pakistan more times and with more people than I could possibly count. I knew what had been said during all my previous interrogations, and I knew that they knew the same thing.

219. It quickly became clear that the FBU agents were not trying to learn anything new. They were just getting me to repeat all the same things all over again. There was one exception to this. In Pakistan, that had asked me about how Pakistani Intelligence or the ISI operated in the region. Since there had been Pakistanis present in Pakistan, I had not told them what I knew about the ISI. At this interview, I talked a bit about the ISI and their corrupt practices. The interview then turned into a re-enactment of the previous interview for the camera.

220. One final time, throughout this interview, I tried to recite the previous statements I had made to so many people so many times over the previous 14 months. The FBI made this easy. They actually did not ask me questions so much as just remind me what I had previously said to them in Pakistan, and then ask me to say those same things again. I believe that the following introductory remarks are accurately reflected in the transcript:

> GN: And take us back to, and, and I know that a lot of these things you've talked about so many times that its probably, ah, it gets, ah, stale for you to keep talking about, but, ah, I, I, don't wanna… we don't have to rehash everything that we did…
>
> AK: Ah, huh.
>
> GN: … in the previous interviews, okay…
>
> AK: Ah, huh.
>
> GN: …we don't, we don't have to go through everything. We wanna, we do wanna clarify a few points, and, and to talk about some of them. But, um,… so your father was in a compound, and, ah, Where was this? Where was the compound?

221. As is clear from the transcript, the FBI interview at the Delta Hotel was nothing more than a re-enactment of all my previous interrogations for the camera. The questions put to me would always refer back to those previous interrogations with words like: "*and I know that we've been through this before but…*" and "*Now, when we talked last time you said…*" and "*um, and we talked before about, ah…*" and "*…we've already talked…*" and "*…and we talked about how…*" and "*remember before you said…*" and "*But last time you gave, I mean, you gave us an estimate…*" and "*I think before you were mentioning somewhere in the area of about twenty thousand…*" and "*…walk me through it again just so I'm clear*" and "*Remember you had to give someone money*" and "*remember you said it was unstable*

right?", and "*You, ah, before, were telling us how it was done…*" and "*I, I think we talked about…*" and "*That's right, you said that it, it was a box…*" and "*but before you were saying…*" and "*you mentioned before…*" and "*the thing you mentioned that we're trying to clarify is…*".

222. As always, it was made clear to me throughout the interview that the FBI agents were not going to allow me to deviate from their script. Early in the interview, when I said something that they thought was different from what I had previously said about the purpose of the attack that killed my father, they said: "*Well, when you talked to us before, you said that they actually allowed AL, ah, AL-JOWFI to, to leave…*". Similarly, later in the interview, I denied being involved in the fictional plot to assassinate the Pakistani Prime Minister and they said "*Well, that's not what you told us before.*"

223. When I was unable to remember and recite all of the key details that they particularly wanted me to say, the FBI agents would just feed me those details and ask me to confirm them:

> GN: Ah, and then the, ah, okay, ah, so then… when's the next time that you dealt with AL-JOWFI? We, we talked about that before. Um, and this was, ah… (pause)… in two thousand, ah, three…
>
> […]
>
> GN: But before you were saying they were going to AL JOWFI, who was using them for…
>
> […]
>
> GN: …or something, but I know, ah, before you mentioned that AL JOWFI provided, you thought, probably ninety percent of AL QAEDA's weapons…
>
> […]
>
> GN: And we were comparing that to, um… I think you said you were really only…
>
> AK: About maybe…
>
> GN: … involved maybe for six months of the, of the weapons that you bought.

224. Eventually, the questioning ended and I was able to go home. I was arrested a few days later.

225. I make this Affidavit in support of the Notice of Motion filed concurrently herewith, and such further and other relief as this Honourable Court may deem just and appropriate.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this ___ day of _____, 2006.	)	
_____	)	_____
A NOTARY PUBLIC IN AND FOR THE PROVINCE OF ALBERTA	)	ABDULLAH KHADR

Court File No. EX0037/05

ONTARIO SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED IN TORONTO

BETWEEN:

UNITED STATES OF AMERICA

Extradition Partner

- and -

ABDULLAH KHADR

Person Sought

AFFIDAVIT

Deponent: ABDULLAH KHADR
Sworn: August ___, 2006

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September 19, 2007 Wednesday

SECTION: NATIONAL NEWS; POLITICS; Pg. A4

LENGTH: 599 words

HEADLINE: Dion takes on Khadr issue, plans to meet suspect's lawyers

BYLINE: COLIN FREEZE

BODY:

With other controversies freshly brewing, Opposition Leader Stéphane Dion is to meet today with American military lawyers acting for a suspect held in Guantanamo Bay - signalling the Liberals' growing interest in an issue long viewed as too volatile for any Canadian political leader to touch.

Omar Khadr, a Canadian citizen who turns 21 today inside the U.S. military prison in Cuba, was arrested in Afghanistan as a 15-year-old militant. Accused of being an al-Qaeda fighter and killing an American soldier during a battle, he has spent five years awaiting trial.

Despite Mr. Khadr's youth and growing international condemnation of the U.S. prison experiment often known simply as "Gitmo," Canada has been reluctant to publicly criticize the prison camp or lobby for Mr. Khadr's release to face due process at home.

The position partly flows from the gravity of the U.S. allegations against Mr. Khadr - past charges have included "murder" - and partly because members of his fundamentalist family are notorious for links to al-Qaeda figures.

Arabs by heritage and Canadians by citizenship, the Khadrs have mostly lived in Pakistan and Afghanistan. In 1995, the patriarch of the clan was held in Pakistan under suspicion of financing a deadly embassy bombing.

Under public pressure from the Canadian news media, Prime Minister Jean Chrétien raised the issue of Mr. Khadr's rights with his Pakistani counterpart during a Team Canada trade mission.

The Liberals have been criticized for this intervention ever since. Mr. Khadr was let go, only to be listed by United Nations as a key Osama bin Laden associate after the 9/11 attacks. The Pakistani Army killed him in a 2003 battle.

Mr. Dion, now weathering criticism for failing to win a seat during this week's by-elections, last month spoke out about the Khadr case by describing Prime Minister Stephen Harper as the only Western leader not to go to bat for the rights of a citizen held in Gitmo.

The Liberal Leader is set to meet Mr. Khadr's U.S. military lawyers at the Royal York Hotel in Toronto this morning, and make statements about his impressions afterward.

U.S. Lieutenant-Commander William Kuebler, the military lawyer who contacted Mr. Dion to the arrange the meeting, said he is "very encouraged" by the Opposition Leader's interest.

"The political process is finally starting to engage, as Canadians grow frustrated with the treatment of a fellow citizen," he said, adding, "I hope he [Mr. Dion] takes away a consequent appreciation of the essentialness of the Canadian government stepping up."

Fissures have also developed within the Khadr legal team, with the Canadian lawyers who have represented Mr. Khadr for five years complaining that they have been snubbed - only the U.S. military lawyer appointed to the case this summer is to meet Mr. Dion.

"Here we have Canadian politicians choosing to speak to an American military lawyer who is not Omar's chosen lawyer ... and who was appointed by the same U.S. authority that gave us Guantanamo Bay and all its horrors," Dennis Edney, who represents several members of the Khadr family, said in an interview last night.

Members of the Khadr family say they are planning to be present at the hotel.

A U.S. soldier who lost an eye in the battle said he's disturbed that the case is becoming a political issue. "He has a better chance of being brought to justice in Guantanamo Bay than he would under the Canadian system," said Layne Morris in a phone interview. "You don't want this kid running around Canada waiting for the next *jihad* .... This kid made his decisions in life."

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Wednesday, October 17, 2007

US military counsel violating Guantanamo client's rights: Canadian Khadr lawyer

8:33 AM ET

Dennis Edney [Canadian defence counsel for Canadian Guantanamo detainee Omar Khadr]: "You may not be aware that **Omar Khadr** has, verbally and in writing, asserted his right to be represented by his Canadian counsel and not to be represented by any U.S. military counsel.

The Military Commission rules provide for a military lawyer to represent Omar Khadr. Mr. Khadr can choose not to be assisted by the military appointed lawyer and represent himself. In that situation, the military lawyer remains in a "stand down" mode. By purporting to speak on behalf of Omar Khadr to the media and participating in the legal process absent authority to do so, a legal fiction is being created that military counsel [Lt. Commander William Kuebler] is authorized to represent Omar Khadr. In doing so, military counsel is denying Omar Khadr's fundamental right to counsel of choice. He is also interfering in the sacrosanct solicitor/ client relationship between Canadian counsel and client.

As the U.S. Supreme Court said in recognizing this right, "In the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing a counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber".

The very fact the military lawyer is appointed by the same authority that is adverse in interest to Omar Khadr creates obvious conflict difficulties. Conflict takes many forms. How can the military officer purport to be independent when he swears and oath of loyalty to the military authority, its rules and regulations which deny his fundamental rights, the rule of law while at the same time swearing a loyalty to uphold the rights of the client. The duty of loyalty extends beyond the use and abuse of confidential information and includes a duty to avoid conflicts of interest.

Further, Omar Khadr is facing criminal/ terrorist related charges. He is

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entitled to competent and effective legal representation. Commander Kuebler cannot be said to be acting in Omar Khadr's best interest when he has no legal or trial experience in the area of law in which Omar faces life imprisonment. His legal background is in the area of tax law."

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UNITED STATES OF AMERICA	}	**D-004** **Ruling on Defense Motion for a Fair Status Determination Hearing** **07 November 2007**
v **OMAR AHMED KHADR** a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khahi"	}	

1. The Commission has considered the defense defense Motion for a Fair Status Determination Hearing (D-004) and the government response. The Commission also considered the government email of 11:44 AM, 7 November 2007. The Commission has also considered the various orders directing the session on 8 November 2007 and specifically the portions of those orders involving the extent of the threshold/initial determination of status hearing.

2. The Commission notes that it directed the parties to advise the Commission of the matters upon which each party would rely for the initial determination. Neither party gave the Commission any notice that it would rely on the testimony of a witness.

3. The Commission dismissed the charges on 4 June 2007 and confirmed that ruling on 29 June 2007(See AE 016 and AE 024.). In the course of the ruling, the Commission determined that an accused has a right to know that the court trying him has jurisdiction over him – before the trial proceeds.

4. In its decision, the Court of Military Commission Review (CMCR) generally stated, that the government's "facial compliance … with all the pre-referral criteria contained in the Rules for Military Commissions, combined with an unambiguous allegation in the (charges and specifications in this case) … entitled the military commission to initially and properly exercise *prima facie* personal jurisdiction over the accused until such time as … jurisdiction was challenged by a motion to dismiss for lack thereof, or proof of jurisdiction was lacking on the merits." Based on this determination, the CMCR ruled that the military judge erred in dismissing the charges in this case and returned the case to the military judge to "conduct all proceedings necessary to determine the military commission's jurisdiction over Mr. Khadr."

5. In D-004, the defense concedes that the CMCR ruling on 24 September 2007 establishes, for the purpose of this case, that there is *prima facie* jurisdiction over the accused. Consequently, the necessity for making an initial or threshold determination in

order to establish for the accused that he is before a court which has jurisdiction over him is eliminated.

6. The Commission recognizes that the defense has appealed the CMCR ruling to the DC Circuit and, in that appeal; the defense is propounding the same line of reasoning which the Commission used in making its ruling on 4 June 2007. However, the defense's concession as to the *prima facie* jurisdiction over the accused is directed to the trial level, not to the appellate court. There is nothing improper in the defense acknowledging the law of the case at the Commission level, while simultaneously attempting to change the law at the appellate level.

7. Reviewing the CMCR ruling, the Commission has determined that, in the absence of a defense motion to dismiss for lack of jurisdiction, there is no challenge to the jurisdiction of the commission. Consequently, there is no need for a preliminary hearing on the Unlawful Enemy Combatant status of the accused.

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

[redacted]

From: [redacted]
Sent: Wednesday, November 07, 2007 4:29 PM
To: [redacted]
Subject: FW:

Importance: High

-----O
From: [redacted]
Sent
To: [redacted]

Sir,

1. One issue remains unresolved. Although the military judge initially raised a jurisdictional objection sua sponte, the defense has since adopted that objection and has defended it in this and other courts. Following this Court's 4 June 2007 ruling, the defense has repeatedly argued—before this Court and the Court of Military Commission Review—that Khadr is not an "unlawful enemy combatant," and as of this writing, the defense continues to maintain that same position in a pending petition for review in the D.C. Circuit. Accordingly, even if this Court were to now withdraw its initial objection, the defense should now make clear whether they are also withdrawing their repeated objections on this issue. Of course, the United States believes that this issue is now ripe for hearing and decision, and if the defense now wants to withdraw its challenge of the "threshold" jurisdictional question for which the 8 November hearing was convened to address, the Court should consider such withdrawal as a recognition of personal jurisdiction at this time. To the extent the defense does not want to waive its challenge to the fact that Khadr is an "unlawful enemy combatant" under the MCA, the government urges that the 8 November proceeding should proceed, as scheduled, on that narrow factual issue.

V/r

Captain Petty

UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	**PROSECUTION RESPONSE** **To Defense Motion for a Fair Status Determination Hearing** November 6, 2007

1. Timeliness: The Prosecution response is filed within the timelines required by Rule 3(6)(b)(1) of the Military Commission Rules of Court (May 4, 2007).

2. Relief Sought: The Prosecution respectfully requests that the Military Judge deny the Defense's motion in its entirety and proceed in accordance with the Military Judge's 27 September 2007 Ruling on Defense Request to Vacate or Request a Continuance, which granted a continuance until no later than 1100hrs, 8 November 2007.

3. Facts:

The Government stipulates to the facts in the Defense motion, except the following clause from paragraph 3(f): "In light of these deficiencies in the procedure for adjudicating Mr. Khadr's status…."

4. Law and Argument:

A. The Defense is requesting relief that is outside the parameters of the CMCR decision and the Military Judge's orders.

Based upon the pleadings in this case, the Military Commission is entitled to exercise prima facie personal jurisdiction over the accused "until such time as that jurisdiction [is] challenged by motion to dismiss for lack thereof…." U.S. v. Khadr, 24 September 2007, Court of Military Commission Review, at 21. The Prosecution interprets the Military Judge's sua sponte

motion raised at the RMC 802 conference on 3 June 2007 and the e-mail of 25 September 2007 as such a challenge to personal jurisdiction over the accused.

The Defense asks that the Judge either withdraw this challenge, or modify the procedure of the initial/threshold determination. In so doing, the Defense is asking for procedures and rules allowing for what it calls "fundamental norms of due process." As the hearing is now envisioned, the accused will be receiving all the fundamental norms of due process for a pre-trial hearing of this nature, and actually more process than is due in these circumstances.

First, the accused will receive all of the due process that is required at a pre-trial hearing. The accused has the right to counsel (and two designated foreign consultants), there will be a verbatim record of the hearing, the accused will have the right to appeal a final ruling of the court, and the hearing will be presided over by a neutral and detached military judge.

As far as the rules of evidence are concerned, the CMCR made it clear that the rules of evidence are relaxed at this hearing. The Court stated: "Mil. Comm. R. Evidence 104(a) makes it clear that the military judge, when deciding preliminary questions relating to determining a military commission's jurisdiction, is not bound by the rules of evidence, except those with respect to privileges." U.S. v. Khadr, 24 September 2007, Court of Military Commission Review, note 32, at 19 (citing Manual For Courts-Martial, United States, Mil. R. Evid. 104(a)).

Second, the Defense's reliance on international law is misplaced. To begin, Defense counsel mistakenly cites the Geneva Conventions as a source of rights before the Military Commission. The Military Commissions Act clearly states that "No person may invoke the Geneva Conventions or any protocols thereto in any…proceeding to which the United States…is a party as a source of rights in any court of the United States or its States or territories." 10 U.S.C. SEC. 5

Furthermore, the Geneva provisions cited by the Defense to either hold this hearing in another forum, or to increase his rights carry one large caveat. These provisions are not invoked "until and unless [the accused has] been determined by a competent tribunal not to be prisoner-of-war." Defense 2 November 2007 Motion, at 2. The Combatant Status Review Tribunal in this case has already determined that Omar Khadr is an enemy combatant, which, according to the CSRT regulations, instantly precludes his treatment as a prisoner of war under the third Geneva Convention.

More interestingly, the Defense misunderstands their ability to challenge the Government evidence at the 8 November hearing. The definition of lawful combatant in the MCA, 10 U.S.C. § 948a(2), contains the same elements as found in Article 4 of the third Geneva Convention, which defines who qualifies as a prisoner of war. To contest the Government's claim that Omar Khadr is an unlawful enemy combatant is to do exactly what the Defense seeks – attempt to challenge his ability to be tried before a military commission. In the procedures outlined by the Military Judge, the Defense has already been granted the scope of rights and challenges that it is requesting. The following section details those rights.

B. The Government categorically opposes the "rights" and the scope of argument that Defense counsel claims are due their client at a pre-trial jurisdictional hearing.

The Defense erroneously requests an expansion of the scope of the 8 November initial/threshold determination hearing. The Military Judge has explained the objectives of this hearing in the course of multiple orders and rulings.

In an e-mail dated 25 September 2007, 1556hrs, the Military Judge set the parameters of the initial/threshold determination hearing. Specifically, paragraph 9 states, "The parties are advised that matters presented, both factual and legal, concerning the issue of designation as an

UEC, must be focused specifically on whether or not the accused meets the definition of UEC as established by the MCA (10 USC 948a(1)). This threshold or initial determination is solely for the commission to decide whether or not there is MCA-jurisdiction over the accused. Other matters which might affect jurisdiction (i.e., international law, constitutional law, criminal law) will not be heard in conjunction with this threshold or initial determination of jurisdiction."

On 27 September 2007, 1816hrs, the Military Judge ruled on the Defense Motion to Vacate or Request a Continuance. In doing so, the Military Judge specifically noted in paragraph 5(a) that "[i]n making its ruling on the defense request, the Commission is giving no weight to the supplement paragraph starting "With respect to the legal component, the defense…." The Commission will determine the scope of the proceeding following the arraignment. Any limitation will not affect the ability of the defense to present matters in conjunction with an ordered motion schedule."

Once again, in an e-mail sent by the Military Judge on 10 October 2007, 0939hrs, the parameters of the UEC hearing were set. In paragraph 5 the Military Judge references 10 U.S.C. § 948d(a) of the MCA and also to the CMCR Order of 24 SEP 2007. He states specifically that, "The prosecution must be prepared to demonstrate that the commission has initial or threshold jurisdiction over Mr. Khadr as "an alien unlawful enemy combatant", IAW 948d(a). The defense may present matters to rebut any such demonstration." E-mail sent by the Military Judge at 0939hrs, 10 October 2007, para. 5(b), (c).

The limits of the jurisdictional hearing were once again spelled out in an e-mail sent on 15 OCT 07, 0958hrs. In the process of denying the Defense Request to Hold Proceedings in Abeyance, the Military Judge wrote that "Counsel appear to have a misunderstanding of what this determination might entail or what it might exclude. This determination will be focused

solely on 948d(a) of the M.C.A. This determination will not address other possible motions or attacks upon the jurisdiction of the commission. Counsel for both sides will be free, following the initial or threshold determination, to make motions concerning the jurisdiction of the commission over Mr. Khadr and whatever other motions they might choose to make."

There can be no mistake that the scope of the pre-trial personal jurisdiction determination hearing will be limited. It must focus on the factual matters that either establish or rebut the jurisdictional requirements found in 10 U.S.C. § 948d, as defined in § 948a(1)(A)(i) or (ii). The Judges e-mails above confirm as much.

C. The Government remains prepared to prove that the accused is an alien unlawful enemy combatant.

The Government was and remains prepared to offer evidence to prove that the accused is an alien unlawful enemy combatant, does not enjoy the protections of the Geneva Conventions (except those enshrined in the Military Commissions Act, Rules, and Regulations, particularly the broad range of due process rights afforded to the accused at every stage of the Military Commissions process), and is not entitled to special considerations because of his age.

Furthermore, the Government has expended a great deal of time, energy, and resources to prepare for this hearing based on the Military Judge's direction provided on 25 September 2007. The Defense has had equal time to prepare and the Military Judge should hear evidence and make a determination whether the court has personal jurisdiction over the accused.

5. Conclusion:

The Government opposes the Defense request to broaden the scope of argument and rights available the accused at the scheduled pre-trial jurisdictional hearing. The Government has established prima facie jurisdiction over the accused. In the event the Military Judge is

inclined to withdraw his previous challenge to jurisdiction, the Government requests the Military Judge specifically find that the commission has personal jurisdiction over the accused and can proceed to trial absent a challenge properly made in accordance with the MCA, MMC, and decision of the Court of Military Commission Review.

By:

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

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

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

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was emailed to Lieutenant Commander Kuebler on the 6th day of November 2007.

/s/
Keith A. Petty
Prosecutor
Office of Military Commissions

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** For a Fair Status Determination Hearing November 1, 2007

1. **Timeliness**: This motion is filed 7 days in advance of the 8 November 2007 hearing to which it pertains. Pursuant to MCTJ Rule of Court 3.6, this is sufficient time to allow this tribunal to receive responsive briefing, hear argument, and to rule on the issues presented. This motion is also filed within the timeframe set forth in paragraph 5(d) of the military judge's order of 10 October 2007.

2. **Relief Sought:** The accused, Omar Khadr (Mr. Khadr), seeks an order modifying this Commission's orders of 25 September 2007 and 27 September 2007. Specifically, Defendant seeks an order rescinding those parts of the Military Judge's e-mail order of 25 September 2007 (specifically paragraphs 8 and 9) relating to a contemplated "threshold or initial determination" of whether Khadr is subject to the jurisdiction of the Commission as an "unlawful enemy combatant" (UEC) under 10 U.S.C. § 948a(1).

3. **Facts:**
   a) On 4 June 2007, the Military Judge dismissed charges against Mr. Khadr on the grounds that the government had failed to show that Mr. Khadr was subject to jurisdiction under the Military Commissions Act (MCA) as an "unlawful enemy combatant."

   b) The government subsequently filed a motion for reconsideration of the Military Judge's ruling, which the Military Judge denied on 29 June 2007. The government then appealed the Military Judge's ruling to the Court of Military Commission Review (CMCR) on 4 July 2007.

   c) The CMCR issued its final decision in the case on 24 September 2007, remanding to this Commission to make the initial status determination.

   d) On 25 September 2007, the Military Judge issued an order, via e-mail, scheduling arraignment in this case for 11 October 2007 and directing the parties to submit various matters to the Commission in advance of the 11 October hearing. This order was subsequently amended by a second e-mail order from the Military Judge, dated 27 September 2007, which postponed the proposed hearing to 8 November 2007.

   e) The e-mail order of 25 September 2007 indicated that a "threshold or initial determination" of status determination hearing would take place on the same day as

the proposed arraignment. The order directs the parties to simultaneously exchange materials related to the determination of UEC status. In addition, the order states that the purpose of the proceeding is solely to determine whether there is "MCA-jurisdiction over the accused and appears to prohibit the parties from raising "other matters that might affect jurisdiction," such as international law, constitutional law, or criminal law.

f) In light of these deficiencies in the procedure for adjudicating Mr. Khadr's status, the defense filed a Motion for Reconsideration with the CMCR on 1 October 2007, which was denied without comment within 24 hours. Khadr then petitioned the U.S. Court of Appeals for the District of Columbia Circuit on 9 October 2007, seeking review of the CMCR's original decision. On 18 October 2007, the D.C. Circuit ordered the parties to submit various documents, including a statement of the issues to be raised and dispositive motions and set deadlines for submission.[1]

4. Law and Argument:

I. The Commission's 27 September order must be rescinded in part in order to afford the Defense the opportunity to bring a motion to dismiss prior to this Commission's finding of UEC status, or alternatively modified to ensure that the initial status hearing comports with the CMCR's decision, the governing statute, and fundamental norms of due process.

The CMCR decision in *Khadr* held that this Commission had *prima facie* jurisdiction under the MCA because of "the facial compliance by the Government with all the pre-referral criteria contained in the Rules for Military Commissions." CMCR 07-001 at 21 (Sept. 24, 2007). This jurisdiction obtained over the accused "until such time as that jurisdiction was challenged by a motion to dismiss for lack thereof, or proof of jurisdiction was lacking on the merits." *Id.*; *see also* RMC 202(b), Discussion.

The CMCR's opinion further directed this tribunal to conduct all of its proceedings consistently with "Common Article 3" and "fundamental notions of due process." CMCR 07-001, at 15. The Geneva Conventions require that a person held must be tried "by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power," i.e. by courts-martial, until and unless they have been determined by a competent tribunal not to be prisoners-of-war. Geneva Convention III Relative to the Treatment of Prisoners of War ("GPW"), arts. 102, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; Protocol Additional to the Geneva conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 45, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. The CMCR interpreted Article 45(2) of Protocol I as consistent with the MCA because they "allowed an accused to assert a claim of POW (i.e., lawful combatant) status at a pretrial motion session before the military judge." CMCR, 07-001 at n. 38.

[1] The government moved to dismiss the petition on 22 October 2007, contending that the D.C. Circuit lacked jurisdiction over the petition. On 31 October 2007, Khadr responded to the government motion and sought a stay of these proceedings from the D.C. Circuit.

This tribunal's *sue sponte* orders seeking to dispositively resolve Mr. Khadr's UEC status complies neither with the CMCR's directive to allow the defense to challenge the UEC determination in an appropriate motion to dismiss, nor basic due process protections to which Mr. Khadr is entitled in challenging the jurisdiction of this Commission. Of particular import, the orders seem to rule out necessary pre-hearing discovery and to leave Mr. Khadr with no opportunity to challenge the legal basis, or even to litigate the legal standard, of his UEC status prior to the commencement of his trial. This tribunal's orders seem to envision a narrow hearing limited to the prosecution's *prima facie* demonstration that Mr. Khadr could meet the statutory definition of an UEC, which according to the CMCR, it has already done. CMCR, 07-001 at 21. What remains is for the military judge to "hear evidence and decide factual and legal matters concerning the court's own jurisdiction over the accused appearing before it." *Id*. at 24.

A finding by this Commission that Mr. Khadr is an UEC is a ruling on the jurisdiction of this Commission. If not wholly preclusive of the myriad factual and legal challenges that Mr. Khadr seeks to raise, it would, at the very least, compel the military judge to make a legal finding of status before receiving any evidence or briefing on the applicable law. It is incumbent upon this Commission, in the exercise of its *prima facie* jurisdiction, to either reserve judgment on Mr. Khadr's status as an UEC until after such time as the defense challenges the Commission's jurisdiction through a motion to dismiss, or at a minimum, to clarify his orders to allow the defense to challenge the factual and legal basis of this Commission's jurisdiction at the proposed hearing.

In its decision, the CMCR proceeded from the premise that "one of the most indispensable and important judicial guarantees among civilized nations honoring a tradition of due process and fundamental fairness is the right to adequate notice and an opportunity to be heard in regard to allegations which might result in criminal sanctions." *United States v. Khadr*, CMCR 07-001, at 15 (Sept. 24, 2007). In the present circumstance, Mr. Khadr faces an imminent status determination, which will be dispositive to whether he will face trial and potential life imprisonment before this extraordinary tribunal. It is impossible – indeed, contrary to controlling law – to make this determination without at the same time allowing him to have a full hearing where all relevant evidence can be put before the tribunal, to assert Prisoner-of-War status and to raise substantive legal defenses under international law, the Constitution, Military law and the other federal laws that govern these proceedings.

II. Pre-hearing discovery is needed to have an adequate opportunity to respond.

As it stands, the Military Judge's Orders of 25 and 27 September 2007 do not provide Mr. Khadr any opportunity to conduct the pre-hearing discovery necessary to rebut the government's *prima facie* allegation that he is a UEC. The only provision for fact-finding in the orders is the instruction that the government "insure that all materials previously provided to LtCol Vokey are provided to LCDR Kuebler." Order of 27 Sept 2007 ¶ 9. However, these materials do not comprise *all* of the information in the Government's possession to which Mr. Khadr is entitled. Without any opportunity for formal discovery, it will be impossible for him to even know what evidence the governments has.[2]

[2] Indeed, as of the date if this motion, government has indicated that it has not yet completed its initial discovery obligation to the defense.

The right of the Defense to access evidence is fundamental to our adversarial judicial system. It has been reaffirmed by the rules and judicial decisions of our military courts, and even Combatant Status Review Tribunals (CSRTs). The UCMJ provides that "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence." UCMJ Art. 46, 10 U.S.C. § 846 (2000). GPW art. 105 entitles defense counsel to "confer with any witnesses for the defence, including prisoners of war" and especially given the second-hand nature of most of the evidence proffered by the prosecution in support of the UEC determination, there is an acute need to interview and call witnesses who can confirm or refute the prosecution's allegations. *See, e.g.*, RMC 701, 703, 807, 913, 914, 914a; UCMJ art. 46, 10 U.S.C. § 846; RCM 701, 703, 914.

It further warrants this tribunal's attention that with respect to CSRTs, the D.C. Circuit ruled that even an administrative status determination solely for the purpose of detention required the production of *all* government information that is practicably available.[3] There is no reason, therefore, that when the consequence of a determination entails not only being detained but tried and, in some cases, executed, that the accused should have anything less than a full and fair discovery process. The requirement that all parties have fair access to evidence, especially of an exculpatory nature, has deep roots in American jurisprudence.[4] *Brady v. State of Maryland*, 373 U.S. 83, 87 (1963).

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[3] The D.C. Circuit pointed out that a court cannot discharge its responsibility to determine whether a preponderance of the evidence supports a determination of a detainee's status as an unlawful enemy combatant "unless a petitioner's counsel has access to as much as is practical of the classified information regarding his client." *Bismullah v. Gates*, Nos. 06-1197 & 06-1397, 2007 U.S. App. LEXIS 17255, at *23-*24 (D.C. Cir. July 20, 2007) ("*Bismullah I*"). The D.C. Circuit further explained that in the context of its review of a CSRT determination, neither the court nor the petitioner's counsel can consider whether "a preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant without seeing all the evidence, any more than one can tell whether a fraction is more or less than one half by looking only at the numerator and not as the denominator." *Bismullah I*, 2007 U.S. App. LEXIS 17255, at *18. In a subsequent opinion denying the government's petition for rehearing Court reiterated that "the record on review must include all Government Information, as defined by the DoD Regulations." *Bismullah v. Gates*, Nos. 06-1197 & 06-1397, Slip. Op. at 9 (D.C. Cir. Oct. 3, 2007) (*Bismullah II*).

[4] *See, e.g.*, *Wadius v. Oregon*, 412 U.S. 470, 473-74 (1973) (discussing that certain discovery rules "are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system.") (internal citations omitted); *Thomas v. Wyrick*, 687 F.2d 235, 239-40 (8th Cir. 1982) ("[A] liberal system of reciprocal discovery has been a central feature of modern criminal practice in both the federal and state courts. The purpose of such discovery is to 'permit thorough preparation for trial and minimize surprise at trial.'" (quoting STANDARDS FOR CRIMINAL JUSTICE § 11-1.1(a)(iii) (2d ed. 1978))).

III. Mr. Khadr must have the opportunity to assert POW Status and other affirmative defenses to jurisdiction before the UEC determination is made

The Military Judge's first order appears to forbid Mr. Khadr from challenging the sufficiency of the procedures and the legal standards used to resolve his status as an UEC. Order of 25 Sept. 2007 ¶ 9. UEC status is as inherently a legal question as a factual one. Mr. Khadr has a right to know by what legal standard the facts presented must meet. Unable to even litigate the applicable law, Mr. Khadr may be adjudicated to be an UEC, and therefore subject to the jurisdiction of this Commission, on an ultimately unlawful basis. In a motion to dismiss, as contemplated by the CMCR, Mr. Khadr would be able to raise these issues in turn. For instance, the MCA was never intended by Congress to apply to someone, such as Mr. Khadr, who was a minor at the time of the alleged misconduct.

Moreover, the MCA recognizes two classes of enemy combatant –lawful and unlawful. Since the MCA defines UEC in part as "not a lawful enemy combatant," MCA § 948a(1)(i), a finding of UEC status would be necessarily preclusive of POW status. This is why the CMCR held that Mr. Khadr has the right to assert POW status before trial, *Khadr*, CMCR 07-001, at 25 n.38, and why the manner by which the proposed hearing will proceed risks making Mr. Khadr's UEC status *res judicata* before this Commission has received any briefing on its legal foundation. Order of 27 Sept 2007 ¶ 5(a).

The Geneva Conventions provide that in the case of international armed conflicts if "any doubt arise[s]" as to whether persons who have "fallen into the hands of the enemy" are prisoners of war, such persons must be afforded POW status "*until such time as their status has been determined by a competent tribunal*." GPW art. 5(2); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 549 (2004) (Souter, J. and Ginsburg, J., concurring in part, dissenting in part, and concurring in judgment) (GPW requires "that even in cases of doubt, captives are entitled to be treated as prisoners of war 'until such time as their status has been determined by a competent tribunal.'"). [5] Whenever a detainee claims POW status, "his status is 'in doubt.'" *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 162 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006), (quoting Army Regulation 190-8, § 1-6(a)) (citing *Hamdi*, 542 U.S. at 549 (Souter, J. and Ginsburg, J., concurring in part, dissenting in part, and concurring in judgment)); s*ee also* 1956 Army Field Manual 27-10 ¶ 71 (July 1956). [6] Indeed, the CMCR saw fit to recognize that "Article 45(2) of Protocol I to the Geneva Conventions . . . suggests that a detained individual who is not being held as a POW has the right to assert an entitlement to POW status before a judicial tribunal, and that judicial adjudication of combatant status shall occur before trial for any alleged substantive offense." *Khadr*, CMCR 07-001, at 25 n.38. [7] As such, Mr. Khadr must be

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[5] This principle has been reflected in U.S. military manuals since at least 1956. DEPARTMENT OF THE ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 71(b) (July 1956) [hereinafter 1956 Army Field Manual 27-10]; *see also* MACV Directive No. 20-5 § 5(e) (Sept. 21, 1966, as amended Dec. 16, 1966) (stating that in doubtful cases "the necessity for a determination of status by a tribunal may arise").

[6] GPW, art. 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."

[7] Article 45(2) states, "If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question

given an opportunity to raise all legal issues relating to his POW status and to develop and present all factual evidence supporting his POW claim *before* this Commission rules upon his alleged status as an UEC under the MCA.

Finally, many of the factual judgments that must be made in order to show UEC status are similar or the same as those that must be established by the prosecution ultimately to establish guilt. It would unfairly prejudice this tribunal against Mr. Khadr to make those determinations. While the CMCR's order, which is presently in force pending review by the D.C. Circuit, appears to make this sort of conflict inevitable, this tribunal must mitigate the possibility of prejudice by giving Mr. Khadr an opportunity, *before the hearing*, to contest the legal standards that make these broad factual determinations necessary.

IV. The Military Judge Must Consider the Constitution, International Law, and Criminal Law in Determining Khadr's Status as a Combatant.

The commission's declaration that the Constitution, international law, or criminal law will not be considered in determining Khadr's status conflicts with the Constitution, the Court of Military Commission Review (CMCR), the Military Commissions Act (MCA), and the principles of statutory construction.

A. The Military Commission Judge is Making a Legal Determination, Therefore Relevant Law Must be Considered

The CMCR contemplated the consideration of the Constitution, international law, and criminal law when it ruled that the military commissions had the jurisdiction to determine Mr. Khadr's status as an unlawful enemy combatant. The CMCR declared that "Determining lawful and unlawful combatant status under existing international treaties, customary international law, case law precedent (both international and domestic), and the MCA is a matter well within the professional capacity of a military commission judge."[8] Therefore, the CMCR clearly intends that the military commission judge should take these sources of law into consideration.

Indeed, the military commission must consider the relevant law – including the Constitution, international law, and criminal law – in determining the status of *Mr. Khadr* to fulfill its role under the MCA. The CMCR concluded that the military commission judge "may determine both the factual issue of an accused's 'unlawful enemy combatant status' and the corresponding legal issues of the military commission's *in personam* jurisdiction."[9] Because the military commission judge is making factual determinations within a legal context in determining threshold jurisdictional issues, the military commission judge must consider the relevant law when doing so.[10] In the *Khadr* case, for example, the military commission judge must consider

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adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur *before* the trial for the offence." Protocol I art. 45(2) (emphasis added).

[8] *United States v. Khadr*, CMCR 01-001, at 7 (Sept. 24, 2007).

[9] *Id.* at 22.

[10] Rules for Military Commissions 908(b)(3) (The CMCR may review findings of law). *United States v. Khadr*, CMCR 01-001, at 4 (Sept. 24, 2007) ("Regarding all matters of law, we review the military judge's findings and conclusions *de novo*.")

whether Khadr can be considered an "unlawful enemy combatant" in light of U.S. obligations under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts.[11] In addition, the military commission will likely be challenged as to whether it lacks threshold jurisdiction because it does not qualify as a "regularly constituted court" under Common Article 3 of the Geneva Conventions. If the military commission believes it cannot consider such fundamental jurisdictional arguments or refuses to do so, the military commission will fail to fulfill its obligation under Common Article 3 as a "regularly constituted court."

B. Standards of Statutory Interpretation Require the Military Judge to Consider the Constitution, International Law, and Criminal Law

In addition to the CMCR's jurisprudence, the accepted standards of statutory interpretation require that a judge consider the Constitution, international law, and criminal law when interpreting a law. This requirement is based upon time-honored means of interpreting the Constitution and law. The CMCR employs these means of interpretation in its decisions, further endorsing the principles for use within the military commissions.[12] Since the military commission judge is interpreting the MCA to determine Mr. Khadr's status and the court's jurisdiction, the judge must employ these standards of interpretation.

(1) The Constitution Must Be Considered

The Military Commission Act must be read in context of the Constitution. It is the role of the courts, including the military commissions, to determine what the law is. The Constitution is the supreme law of the land. Article VI, § 2 of the United States Constitution establishes: "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 . . .."[13] Therefore, the courts must consider the Constitution when determining what the law is.

In *Marbury v. Madison*, Chief Justice Marshall declared "that an act of the legislature, repugnant to the constitution, is void."[14] Because it is for the courts to decide what the law is, the courts must consider the Constitution when considering the law. "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."[15] Therefore, it is inherent in the duty of the courts to consider arguments from the Constitution when interpreting the law.

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[11]Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), *entered into force* February 12, 2002.

[12] *United States v. Khadr*, CMCR 01-001 (Sept. 24, 2007).

[13] U.S. Const. art. VI, § 2.

[14] Marbury v. Madison**,** 1 Cranch 137, 177 (1803).

[15] *Id.* at 178.

Not only must the courts strike down laws conflicting with the Constitution, but a court must also strive to interpret the law in a manner that accords with the Constitution if at all possible.[16] As the Supreme Court has noted: "The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative."[17] Therefore, the military commission must attempt to interpret the MCA in a manner that would not raise any conflicts with the Constitution. This interpretation can only be made by considering the Constitution. Therefore, the military commission judge must consider the Constitution when determining Mr. Khadr's status.

Any argument that the Constitution does not need to be considered because it does not apply to the military commissions when outside of the United States must fail because such a position is in clear conflict with the Supreme Court's ruling in *Hamdan v. Rumsfeld*.[18] The Court ruled that the President had "authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war," despite the fact that the military commissions were convened outside the U.S.[19] This holding clearly indicates that the powers of the military commission are dependent on the laws and Constitution of the United States regardless of its location.

(2) International Law Must Be Considered

International law must be considered when determining Mr. Khadr's status as an unlawful enemy combatant. Determining Mr. Khadr's status requires interpreting the Military Commissions Act. When interpreting the Military Commissions Act, the judge must apply the proper canons of construction. The *in pari materia* rule of construction mandates that–absent an express provision to the contrary–when a law involves the same subject matter as another law, the two laws must be read together.[20] Since treaties are the supreme law of the land, they must be considered when interpreting the Military Commissions Act. Furthermore, there is a long standing canon of statutory interpretation, known as the *Charming Betsy* rule, mandating that laws should not be interpreted to conflict with international law, if at all possible.[21] These rules of construction require that treaties as well as international law be considered when discerning the military commission's jurisdiction over Mr. Khadr under the MCA.

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[16] U.S. v. Rumely, 345 U.S. 41, 45 (1953). *See also,* Richmond Screw Anchor Co. v. U.S. 275 U.S. 331, 346 (1928) ("It is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality.").

[17] U.S. v. Five Gambling Devices, 346 U.S. 441, 448 (1953) .

[18] Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006).

[19] *Id.* at 2755.

[20] *See,* Haig v. Agee, 453 U.S. 280, 300-01 (1981) ("Title 8 U.S.C. § 1185(b) (1976 ed., Supp. IV) must be read *in pari materia* with the Passport Act."); Allen v. Grand Central Aircraft Co., 347 U.S. 535, 542 (1954) ("To read the Defense Production Act of 1950 without reference to [the Stabilization Act of 1942] is to read it out of the context in which Congress enacted it.").

[21] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64,(1804).

5. **Oral Argument:** The Defense requests oral argument and is entitled to it to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."). Oral argument will assist the Court in understanding and resolving the complex legal issues presented by this motion.

6. **Witnesses and Evidence:** None.

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

8. **Attachments:** None.

By: /s/_____
William Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

[redacted]

From: [redacted]
Sent: Friday, November 02, 2007 2:32 PM
To: [redacted]
Cc: Bley, Natalie, Ms, DoD OGC; 'Kohlmann Col Ralph H'; Wilkins, Donna, Ms, DoD OGC; Kelly, [redacted]
Subject: FW: Military Commissions Trial Judiciary Rules of Court: Change 2 2 November 07
Importance: High
Attachments: MCTJ Rules of Court--CHANGE 2--2 NOV 07.pdf

MCTJ Rules of Court--CHANGE 2-..

Sirs,

Col Kohlmann has directed that I forward the attached Rules of Court (with Change 2) to the Convening Authority, the Chief Defense Counsel, and the Chief Prosecutor. (RC 3.9 has been added. There is no change to any forms.)

v/r,

[redacted]

Military Commissions Trial Judiciary

[redacted]

-----O
From: [redacted]
Sent
To: [redacted]
Subj[redacted])

[redacted]:

1. The attached Rules of Court (w/ Change 2) are approved in accordance with R.M.C. 108.

2. Please forward a copy of the Rules of Court (w/ Change 2) to the Convening Authority, the Chief Defense Counsel and the Chief Prosecutor for their further promulgation as appropriate.

V/R,

Ralph H. Kohlmann
Colonel, U.S. Marine Corps
Chief Judge
Military Commissions Trial Judiciary

MILITARY COMMISSIONS

TRIAL JUDICIARY

RULES OF COURT

MILITARY COMMISSIONS
TRIAL JUDICIARY

2 November 2007

MILITARY COMMISSIONS RULES OF COURT: CHANGE 2

From: Chief Judge of the Military Commissions Trial Judiciary

Subject: Military Commissions Rules of Court

Reference: (a) Military Commissions Act of 2006, 10 U.S.C. §§948a, *et seq.*, (M.C.A.)
(b) Manual for Military Commissions, 2007, (M.M.C.)
(c) Regulation for Trial by Military Commission

1. **Purpose**: To prescribe rules of court consistent with the references. This change includes an update to RC 3.9.

2. **Background**: The references authorize, and the sound administration of justice for Military Commissions requires, rules of court for the conduct of Military Commission proceedings. The enclosed rules are intended to facilitate the smooth and orderly trial of Military Commission cases and are specifically promulgated within the authority of Rule for Military Commissions (R.M.C.) 108. To the extent that inconsistencies are perceived, the rules contained within references (a) and (b) shall control.

3. **Action**:

a. The judges of the Military Commissions Trial Judiciary shall ensure enforcement of these Rules of Court.

b. All counsel practicing before Military Commissions shall become familiar with these Rules and shall comply with them.

4. **Effective Date**: These rules are effective upon publication and shall remain in effect until cancelled, superseded, or modified.

RALPH H. KOLHMANN
Colonel, U.S. Marine Corps
Chief Judge, Military Commissions Trial Judiciary

RULES OF COURT FOR MILITARY COMMISSIONS

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Military Commissions Trial Judiciary

11 October 2007

Military Commissions Rules of Court

Rule 1. Scope, Short Form, Citations, Time

1. These Rules of Court (RC) are established pursuant to Manual for Military Commissions (M.M.C.), 2007, Rules for Military Commissions (R.M.C.) 108 and 801(b) (1), and shall apply to all cases referred to trial by Military Commission.

2. Rules of Court shall be interpreted to be consistent with the Military Commissions Act (M.C.A.), the M.M.C, and the Regulation for Trial by Military Commissions. In the event of any conflict between the M.C.A. or M.M.C. and the Rules of Court, the former two shall prevail.

3. Rules of Court may be cited as RC followed by the Arabic numeral of the Section and then the Arabic paragraph number, and if applicable, subparagraph letters. For example, this Rule and paragraph may be cited as RC 1.3.

4. The Rules of Court will be added to or modified on an as-required basis. Counsel and all other interested parties will be furnished any additions or modifications as soon as they are made.

5. A Military Judge may modify, change, or determine that a certain Rule of Court or any portion thereof is not applicable to a given trial by Military Commission. Before taking such action, the Military Judge will so advise counsel in the case, other interested parties, the Chief Trial Judge, and Military Commission Trial Judiciary (MCTJ) Staff.

6. In computing any period of time prescribed or allowed by these Rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. When a time (1630 hours, 4:30pm, 0900 hours) is used in these Rules, or in a message, order, email, or other directive from a Military Judge, that time refers to Washington, D.C. time, unless otherwise specifically stated.

Military Commissions Trial Judiciary

11 October 2007

Military Commissions Rules of Court

Rule 2. Communications

1. **Purpose.** This rule establishes general procedures for communications among counsel, the Military Judges and MCTJ Staff. These procedures are designed to avoid *ex parte* communications, to ensure that procedural matters leading to trial are handled efficiently, and to provide efficient and expeditious methods of communications. *Ex parte* communication by a party with the Military Judge or *vice versa* concerning the case is prohibited except as authorized by the M.C.A. or the M.M.C. (e.g., 10 USC Sec. 949d(f)(2)(C), R.M.C. 701-703 and Mil. Comm. R. Evid. 505).

2. The preferred, and most reliable, method of communication among the Military Judges and counsel is email with "Cc" to all opposing counsel, clerks and paralegals, the entire MCTJ Staff, and the Chief Prosecutor/Chief Defense Counsel and their chief legal clerks. The following email conventions will be followed. Failure to comply with these rules will result in the communication being returned for lack of compliance with these rules.

a. Do not send e-mail directly to the Military Judge. The Military Judge shall be listed as "Cc" only. The MCTJ Staff is the support staff for the Military Judges and is the clearing house through which their communications are routed. Communications sent directly to Military Judges will not be acted upon by the Military Judge, but will be forwarded to the MCTJ Staff for appropriate action. Communications will not be deemed to be received by a Military Judge unless and until the MCTJ Staff have been included on the e-mail.

b. All e-mail to the MCTJ Staff for action by a Military Judge shall be sent to all members of the MCTJ Staff. The email will also be "Cc" to counsel for both sides, the Chief Defense Counsel, the Chief Prosecutor, the Chief Legal Clerks for the Prosecution and Defense, and the paralegals assigned to the case. In addition, all pleadings will be "Cc" to the Clerk of Court, Office of Military Commissions.

c. Do not send classified information or protected information in the body of an email or as an attachment. If a filing or attachment would contain any information that could be considered classified information or protected information, then a redacted version, suitable for disclosure to the public, shall be provided and filed. All filings may be subject to public disclosure and must be redacted accordingly.

d. Keep emails to a single subject, and use a simple yet descriptive subject line. If the email is related to an item that has a filing designation (*see* RC 5), a pending motion, or item that is on the Filings Inventory (*see* RC 5), then a reference to the pending motion or item and the filing designation shall be included in the subject line.

e. List the case name in the subject line of every email.

f. Identify, in the body of the email, each attachment being sent.

g. Every paragraph and sub-paragraph of any email to the Military Judge or MCTJ Staff that contains more than one paragraph or sub-paragraph will be numbered or lettered to provide for easy reference. A logical numbering or lettering scheme will be used, such as: 12 a (1) (a) (i).

h. All attachments to a filing will be sent in the same email as the document to which it is an attachment. If such email would exceed the capabilities of the LAN, permission for an exception to send an attachment by separate email should be requested. (This practice will be used sparingly.)

i. Text attachments will be, in order of preference, in Microsoft Word, HTM/HTML, or RTF. In addition to the text version, a PDF version may be included. Attachments will not be in "track changes" or "mark-up" format. If it is necessary to send images, in order of preference, PDF, JPG, BMP, or TIFF may be used. If a party wishes to use some other file format, the party must request and receive permission from the MCTJ Staff.

j. Save all emails you send for your record copy of the communication.

k. Avoid archiving or compressing files (such as WinZip). Before sending an archived or compressed file, get permission from the MCTJ Staff.

l. If the Military Judge will need to know classified information to resolve the matter, that fact must be noted in the email and the location of the materials that he/she will need to review (if such facts or locations are not classified or protected).

m. Given the potential number of counsel and changes in the trial teams, all parties must ensure that all who need the email receive a copy. If any addressee notices that an email was not "Cc" to a person who needs to have a copy, such addressee shall forward a copy to the person who needs that email and advise the sender and all other "Cc" recipients of the failure to include the person.

3. Because of potential changes to the composition of trial teams, the Military Judge or MCTJ Staff may elect to send an email to the Chief Defense Counsel or Chief Prosecutor, and/or their respective Chief Legal NCOs, for distribution to all counsel, or all counsel of a particular team. The MCTJ Staff and the Military Judge will be copied on the email that is forwarded to those to whom distribution was directed in compliance with these instructions.

4. When a telephonic conference is necessary, the Military Judge will designate the person to arrange the conference call. Conference calls will be in accordance with R.M.C. 802.

5. When authorized by these instructions, or directed by the Military Judge, any member of the MCTF Staff may sign for and issue directions, instructions, requests, or rulings to the parties and others "For the Military Judge" or "By Direction of the Military Judge." Signatures "for" or "by direction of" carry the same force and effect as if signed by, or personally issued by, the Military Judge.

Military Commissions Trial Judiciary

2 November 2007

Military Commissions Rules of Court

Rule 3. Motions Practice

1. Purpose. This rule establishes the procedures for motions practice before Military Commissions.

2. Definitions.

a. A "motion" is an application to the Military Judge for particular relief or for the Military Judge to direct another to perform, or not perform, a specific act. A motion as used herein also specifically includes those motions addressed in R.M.C. 905, 906, and 907.

b. A "filing" includes a written motion, response, reply, supplement, notice of a motion, special request for relief, or other communication involved in resolving a motion.

c. A “response” is the opposing party’s answer to a motion.

d. A “reply” is the moving party’s answer to a response.

e. A “supplement” is a filing in regard to a motion other than a motion, response, or reply.

f. A “certificate of conference” is a statement by the moving party confirming that the moving party has conferred with the opposing party and whether the opposing party concurs with or objects to the requested relief.

3. How motions are made. Motions shall be made in writing in accordance with these instructions unless the Military Judge permits or directs otherwise. Should a matter come to the attention of a party at such a time or in a situation in which they have insufficient time to file a written motion, they shall immediately notify the Military Judge, all opposing counsel, and the MCTJ Staff of the nature of the motion, the nature of the relief sought, and the reasons why the motion cannot be made in writing. A motion must include a certificate of conference indicating that the moving party has conferred with the opposing party and whether the opposing party concurs or objects. When submitted by email, follow the instructions in RC 2.

4. Special requests for relief. A special request for relief relieves counsel of the specialized format for filings (motions, reply, and response) generally. A special request, and the responses and replies thereto, can be in the body of an email.

a. Ordinarily, requests for relief will be in the form of a motion using the format established herein. Counsel may at times have requests for relief that do not involve extensive facts or citations to authority. Common special requests for relief could address, for example, requests: to supplement a filing, for an extension to submit a filing, for an extension of a timing requirement, to adjust the date a filing was received, to append or attach documents to a previously made filing, or for similar matters that do not involve contested matters of law or fact.

b. A special request for relief must include a certificate of conference indicating that the moving party has conferred with the opposing party and whether the opposing party concurs or objects. If the moving party has made a best effort to confer with the opposing party and has not been able to do so through no fault of their own, the efforts made shall be listed.

c. The Military Judge or, on behalf of the Military Judge, a MCTJ Attorney Advisor may direct that a special request for relief be resubmitted as a motion before the matter will be considered by the Military Judge.

d. The content of a special request for relief will contain the name of the case, the precise nature of the relief requested, those facts necessary to decide the request, citations to authority if any, and why the relief is necessary.

e. A response may be submitted by the opposing party as soon as possible, but is not required.

5. Sending and receiving filings.

a. A filing is "sent" or "filed" when sent via email to the correct email address of the recipient(s). If there is a legitimate question whether the email system functioned correctly (undeliverable email notification for example), the sender shall again send the filing until satisfied it was transmitted or an email receipt is received.

b. A filing is "received" by the opposing party when it is sent to the proper parties, with the following exceptions:

(1) The recipient was outside the continental United States (OCONUS) when the email was sent, in which case the filing is received on the first duty day following return from OCONUS.

(2) The filing was sent on a Friday after 4:30 p.m., Saturday, or Sunday, in which case the filing is received the following Monday. If the following Monday is a federal holiday, the filing is received on the following Tuesday. A document filed or sent on a federal holiday is not received until the first business day after the federal holiday.

(3) The filing was sent Monday - Thursday after 4:30 p.m., in which case the filing is received the following day.

(4) Upon request by the receiving party or the Chief Prosecutor or Chief Defense Counsel or their Deputies on behalf of their counsel, the Military Judge establishes a different "received date" to account for unusual circumstances. Requests to extend the time a filing was received shall be in the form of a special request for relief. In the alternative, a request for an extension may be filed.

6. Timing for filing motions, responses, and replies.

a. Motions.

(1) Timing. Motions addressed in R.M.C. 905(b)(1) – (5) must be raised and made by the time provided in R.M.C. 905(b) unless the Military Judge directs otherwise. As to other motions, the Military Judge will ordinarily establish a deadline for the filing of motions by way of an Order.

(2) Format of a motion: *See* Form 3-1.

(3) Waiver. Motions which are not made in a timely fashion are waived. Requests for exceptions to waiver must be addressed to the Military Judge with motion-specific reasons for failure to make the motion in a timely fashion.

b. Responses.

(1) Timing. Unless the Military Judge provides otherwise, a response is due within 7 days after a motion is received.

(2) Format of a response: *See* Form 3-2.

c. Replies.

(1) Counsel may submit a reply to a response, however Counsel must take care that matters that should have been raised in the original motion are not being presented for the first time as a reply. Replies are unnecessary to simply state that the party disagrees with a response. If a reply is not filed, that indicates that the party stands on their motion or initial filing, and it does not indicate agreement with a response.

(2) Timing: Replies shall be filed within three days of receiving a response unless the party does not desire to file a response.

(3) Format for a reply: *See* Form 3-3.

7. Burdens of proof and persuasion in motion practice.

a. As a general rule, the burden of proof (production of evidence and preponderance of evidence), and the burden of persuasion are on the moving party. (*See* R.M.C. 905(c)). In any motion in which the moving party does not believe that the general rule should apply, or believes

that one or both of the burdens should change after a certain quantum of evidence is introduced, the party must provide in the filing:

(1) A statement of the burden of proof (production of evidence) in the particular motion;

(2) A statement of the burden of persuasion in the particular motion;

(3) The point, if any, at which either the burden of proof or the burden of persuasion is shifted to the non-moving party; and,

(4) The legal argument in support of the statement. (Stating merely that fairness requires shifting the burden of proof or persuasion is not sufficient legal argument.)

b. A response must address those matters concerning shifting of the burden(s) raised by the moving party.

8. Rulings on motions.

a. The Military Judge shall make final rulings on all motions submitted to him/her based upon the written filings of the parties submitted in accordance with this Rule, and the facts and law as determined by the Military Judge, unless:

(1) Material facts necessary to resolution of the motion are in dispute and require the taking of evidence;

(2) A party correctly asserts in a filing that the law does not permit a ruling on filings alone, accompanied by citation to the authority which prohibits the Military Judge from ruling on the filings alone; or,

(3) The Military Judge, in his/her sole discretion, determines that oral argument is necessary to provide a full and fair trial.

b. *See also* R.M.C. 905(e).

9. Public Release of Pleadings.

a. Paragraph 19-1 of reference c (Department of Defense Regulation for Trials by Military Commission) establishes a policy of releasing information in a manner that strikes a "fair balance among the protection of individuals accused of offenses, improper or unwarranted publicity pertaining to their cases, and public understanding of the military commission process". In furtherance of this policy, the Military Commissions Trial Judiciary will facilitate release of materials included in the record of trial through appropriate channels, and in accordance with applicable regulations, at the earliest appropriate time.

b. Paragraph 19-3 of reference c provides that "Except in unusual circumstances, information [subject to release] should be released by the Assistant Secretary of Defense for Public Affairs or his designee". Absent some other designation in this regard, the Military Judge will, through the MCTJ Staff, make those portions of the record of trial, which are suitable for release, available to the Office of Military Commissions for appropriate redaction, coordination with the Assistant Secretary of Defense for Public Affairs, and release to the general public.

c. Under the provisions of R.M.C. 801 and Paragraphs 19-5 and 19-6 of reference c, the Military Judge has the sole authority to determine whether or not any given matter shall be released. After an order or ruling has been issued on a pending matter, the Military Judge may authorize forwarding of all pleadings concerning that matter in accordance with paragraph b above. (Pleadings include motions, responses, replies, and orders, but not attachments.) Any other information or documents which are filed in a case, including, but not limited to, email threads, Appellate Exhibits, and Filings Inventories, may be forwarded in accordance with paragraph b above when authorized by the Military Judge.

d. Rule of Court 2.2c requires the parties to prepare all filings for public release. Any party having special concerns regarding the release of materials included in pleadings should make such concerns known to the Military Judge in the body of those pleadings.

Form 3-1 Format for a Motion

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	**Defense Motion** to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones [Date motion filed] *Note: Use bold as shown above.* .

Note: The caption above was created using a 2 column table. Counsel may use that method, or any other, that separates the name of the case from the name of the filing.

*NOTE: The following will be included in **separately numbered paragraphs**. Use Arabic numbers.*

1. A statement that the motion is being filed within the time frames and other established guidance or direction of the Military Judge.

2. A concise statement of the relief sought.

3. (Optional) An overview of the substance of the motion.

4. (May be required) Statement concerning burden of proof.

5. The facts, and the source of those facts (witness, document, physical exhibit, etc.). Each factual assertion will be in a separate, lettered sub-paragraph. This will permit responses to succinctly admit or deny the existence of facts alleged by the moving party. If the facts are, or the identity of the source is, protected or classified, that status will be noted.

6. Why the law requires the relief sought in light of the facts alleged, including proper citations to authority relied upon.

7. Whether oral argument is requested or required by law. If asserted that argument is required by law, citations to that authority, and why the position of the party cannot be made fully known by filings.

8. The identity of witnesses who will be required to testify on the matter in person, and/or evidentiary matters that will be required. Listing a witness is not a request for the witness. Requests for production of witnesses by the defense must be made separately, and in accordance with R.M.C. 703. Stating the evidence needed is not a discovery request or a request for access to evidence.

9. A certificate of conference indicating that the moving party has conferred with the opposing party and whether the opposing party concurs with or objects to the requested relief.

10. Additional information not required to be set forth as above.

11. A list of attachments.

Form 3-2 Format for a Response

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	**D-1** *(Filing Designation as assigned by MCTJ Staff)* **Government Response** To Defense Motion to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones [Date motion filed] *Note: Use bold as shown above.*

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the response is being filed within the time frames and other established guidance or direction of the Military Judge.

2. Whether the responding party believes that the motion should be granted, denied, or granted in part. If granted in part, the response shall be explicit about what relief, if any, the responding party believes should be granted.

3. (Optional) Overview - This paragraph is not required even if the motion had an overview.

4. Those facts cited in the motion that the responding party agrees are correct. When a party agrees to a fact in motions practice, it shall constitute a good faith belief that the fact will be stipulated to for purposes of resolving a motion. The agreed upon facts will correspond to the subparagraph in the motion containing the facts involved.

5. The responding party's statement of the facts, and the source of those facts (witness, document, physical exhibit, etc.), insofar as they may differ from the motion. As much as possible, each factual assertion should be in a separate, lettered subparagraph. If the facts or identity of the source is protected or classified, that status will be noted. These factual assertions will correspond to the subparagraph in the motion containing the facts involved.

6. Why the law does not require or permit the relief sought in light of the facts alleged, including proper citations to authority relied upon.

7. (May be required) Address issue regarding burdens if addressed in the motion, or it is otherwise required to be addressed.

8. Whether oral argument is requested or required by law. If asserted that argument is required by law, citations to that authority, and why the position of the party cannot be made fully known by filings.

9. The identity of witnesses who will be required to testify on the matter in person, and/or evidentiary matters that will be required. Listing a witness is not a request for the witness. Requests for production of witnesses by the defense must be made separately, and in accordance

with R.M.C. 703. Stating the evidence needed is not a discovery request or a request for access to evidence.

10. Additional information not required to be set forth as above.

11. A list of attachments.

Form 3-3 Format for a Reply

UNITED STATES OF AMERICA v. [Name of Accused] [aka if any; not required]	**D-1** *(Filing Designation as assigned by MCTJ Staff)* **Defense Reply** to Government Response to Defense Motion to Suppress Oct 5, 2002 Statement Allegedly Made by the Accused to Joe Jones [Date motion filed] *Note: Use bold as shown above.*

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers.

1. A statement that the reply is being filed within the time frames and other established guidance or direction of the Military Judge.

2. In separately numbered paragraphs, address the response as needed. When referring to the response, identify the paragraph in the response being addressed.

3. Citations to additional authority if necessary.

4. The identity of witnesses not previously mentioned in the motion or response who will be required to testify on the matter in person, and/or evidentiary matters not previously mentioned in the motion or response that will be required. Listing a witness is not a request for the witness. Requests for production of witnesses by the defense must be made separately, and in accordance with R.M.C. 703. Stating the evidence needed is not a discovery request or a request for access to evidence.

5. Additional information not required to be set forth as above.

6. A list of any additional attachments.

Military Commissions Trial Judiciary

11 October 2007

Military Commissions Rules of Court

Rule 4. Appearance, Absence, and Excusal, Relief or Withdrawal of Counsel

1. **Purpose.** This rule governs the entry of appearance of counsel, absence, and excusal, relief or withdrawal of counsel.

2. **Detailing and appearance.**

a. Military Counsel.

(1) Military counsel have made an appearance on behalf of the United States or an accused when such counsel are detailed by proper authority to a case which has been referred for trial by a Military Commission.

(2) Upon referral of a case, the Chief Defense Counsel and the Chief Prosecutor will provide copies of detailing documents to the MCTJ Staff and, if known, to opposing counsel.

(3) Until the DDC is relieved or excused from his/her duty of representation by competent Authority, in accordance with R.M.C. 505, the DDC will continue to represent the interests of an accused.

(4) Under R.M.C.109 and 506, it is the responsibility of the Chief Defense Counsel (CDC) to provide representation for an accused at all times by detailing a qualified defense counsel. R.M.C. 502 outlines the qualifications and duties of personnel of Military Commissions; to include detailed defense counsel, associate or assistant defense counsel, and civilian defense counsel. (*See also* Regulation for Trial by Military Commissions, Chapter 9).

b. Civilian Defense Counsel (CC). A CC will be deemed to have entered an appearance with the Commission when the CC submits Form 4-1, the notice of appearance and agreement, including MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel, by email to the Military Judge through the MCTJ Staff.

c. Associate or Assistant Defense Counsel. An associate or assistant defense counsel may perform any act or duty which a defense counsel may perform under law, regulation, or custom of the service, under the supervision of the defense counsel. (*See* R.M.C. 502(d)(6)). DDC or CC, if they are lead counsel, should ensure that Assistant Defense Counsel are always afforded the appropriate supervision. Assistant Defense Counsel may not appear alone at any session of a Military Commission or a R.M.C. 802 conference, and may not submit motions

under only their signature. Assistant Defense Counsel have made an appearance when a written notice of detail is provided to the Military Judge by the detailing authority.

d. Other Assistants to Counsel. If a party has R.M.C. 506(d) assistant(s) who will be present at a commission session or trial, and the party desires the assistant's presence at counsel table, the party will notify the Military Judge, the MCTJ Staff, and opposing counsel of the identity of the assistant and the capacity in which the assistant will serve.

e. If any counsel believes that his/her participation in the Military Commissions or representation of an accused is or may be prohibited because of ethical or other considerations, he/she shall follow the procedures set forth in R.M.C.109.

3. **Presence of counsel at Commission sessions.** The following rules govern the presence of counsel at Commission sessions.

a. As a general rule, all counsel who have entered an appearance in a specific case must attend all sessions of that case before the Commission.

b. The Military Judge may authorize counsel's absence from a particular session with advanced waiver of that counsel's presence by their client. Any counsel seeking authorization for absence from a session will request permission from the Military Judge and provide written evidence of the waiver by the client. The requirements of paragraph 3.e below must be met. The "client" for the purposes of the prosecution shall be the Chief Prosecutor or the lead prosecutor. (*See* paragraph e(2) below).

c. Because a closed session may be required during any session and could occur without warning, at least one Detailed Military Defense Counsel must attend all Commission sessions.

d. If a counsel's presence is waived by the client and such absence has been authorized by the Military Judge, that absence will not limit the business that is scheduled to be accomplished at the session for which a counsel has been authorized to be absent. For example, if the Commission is scheduled to hear motions, the fact that a client has waived the appearance of a counsel would not allow a party to defer or avoid litigating a motion because said counsel is not present. Similarly, consideration of matters that arise during a session in which a counsel's presence has been waived will not be subject to deferral simply because of the absence of the counsel whose presence has been waived.

e. The notice of waiver to the Military Judge will be submitted by email through the MCTJ Staff and will contain the following information:

(1) In the case of the defense, a signed waiver by the accused must be provided to the Military Judge in advance of the scheduled session. The waiver must indicate that:

(a) The accused is expressly waiving the presence of a named counsel for the scheduled Commission session and be signed by the accused, DDC, and the lead defense

counsel, if other than the DDC. The waiver will be in English or, if the original is in a language other than English, translated into English.

(b) The accused and lead counsel for the defense and the counsel seeking permission to be absent are aware that absence of the counsel does not permit delay or deferral of business of the Commission because said counsel is absent, and that another counsel for the defense who will be present can fully address and litigate, if necessary, any business of the Commission.

(c) The accused understands that another of his defense counsel is responsible for ensuring all business of the Commission can be conducted at the session.

(d) The request is not for the purposes of seeking delay and will not, in fact, delay Commission proceedings.

(e) The format contained at Form 4-2, Waiver of Counsel, may be used by the defense.

(2) In the case of the prosecution, the waiver must be approved by the Chief Prosecutor or lead prosecutor. The absence of a prosecutor for a particular session will not limit the business to be conducted at that session, whether anticipated or not.

f. In lieu of the signed waiver (Form 4-2), the client may, at a session at which the civilian counsel is present, state that the civilian counsel's presence is waived for all subsequent sessions at which the civilian counsel does not appear. The client must state that he understands those matters addressed in paragraph 3.e(1)(b) above and specifically that he understands that other matters may be handled at such sessions which would normally have been handled by the civilian counsel and that he waives such advice and assistance.

g. In cases in which there has been an on-the-record or written waiver of the future presence of civilian counsel at sessions, the civilian counsel will not be required to be present at all sessions.

h. If, at any session, the accused seeks to revoke his written or on-the-record waiver of the presence of the civilian counsel, the civilian counsel will be required to be present at all subsequent trial terms of the Commission. Alternatively, the civilian counsel may request to withdraw from the case completely, and the request may be granted at the discretion of the Military Judge. Any such revocation of waiver by the accused during a given trial term will not require the civilian counsel's presence during the trial term at which the revocation of waiver was made.

i. Any request for waiver of appearance of assistant defense counsel or any military counsel will be addressed by the military judge as appropriate.

4. Excusal, relief or withdrawal of counsel.

a. Excusal/Relief/Withdrawal: The termination of all representational responsibility of a detailed counsel or a qualified civilian counsel after entering an appearance.

b. Detailed Counsel: *See* R.M.C. 505(d) and 506(b).

c. Defense Counsel: *See* R.M.C. 506(b).

Form 4-1 Notice of Appearance and Agreement

UNITED STATES OF AMERICA v. NAME	)))))))))	CIVILIAN DEFENSE COUNSEL NOTICE OF APPEARANCE AND AGREEMENT (DATE)

1. Pursuant to procedures of court/instruction for counsel, I, ATTORNEY'S FULL NAME, hereby provide notice to the Military Judge of my appearance on behalf of CLIENT'S FULL NAME. My office address, phone numbers, and email address are: ADDRESS, VOICE AND FAX PHONE NUMBERS, & EMAIL ADDRESS. I am an active member in good standing licensed to practice in the following jurisdictions: LIST BAR ADMISSIONS.

2. I have attached MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel.

_____
COUNSEL NAME

Form 4-2 Waiver of Presence of Counsel

UNITED STATES OF AMERICA	)	WAIVER OF PRESENCE OF COUNSEL
v.	)	
NAME	)	(DATE)

1. I, ACCUSED'S FULL NAME, hereby provide notice to the Military Judge that I waive the presence of FULL NAME OF ATTORNEY, my defense counsel for the Commission session scheduled for DATE. By my signature below, I certify that:

a. I have fully discussed this waiver with my defense counsel, NAME OF COUNSEL WITH WHOM DISCUSSED, and he/she has fully advised me of, and I understand my right to, have my defense counsel present for Commission sessions. I have also been advised and understand that the absence of NAME OF ABSENT ATTORNEY will not delay or defer the business of the Commission, whether previously scheduled or arising during the Commission session. I further understand and agree that NAME OF COUNSEL WHO WILL BE PRESENT AT THE SESSION is/are competent and fully capable of representing me and litigating all matters that are scheduled for or may come up at the Commission session. I further certify that this waiver is not made in an attempt to delay the proceedings and in fact will not delay the proceedings.

b. I am voluntarily executing this waiver of counsel after being fully advised of my right to counsel and discussing that right with my defense counsel. No one has threatened me or in any way forced me to execute this waiver and I believe it is in my best interest to execute it.

_____
ACCUSED

I/We, NAME OF DETAILED DEFENSE COUNSEL & LEAD DEFENSE COUNSEL (if other than DDC), by my/our signature below, certify to the Military Judge that:

1. I/we have fully discussed the substance of this waiver with the accused, NAME OF ACCUSED, and he fully understands its content and impact.

2. This waiver will not in any way delay or inhibit the business of the Commission, whether scheduled or that may arise at the next session, and this waiver is not offered to delay or defer the business of the Commission.

3. The Detailed Defense Counsel, NAME OF DDC TO BE PRESENT, is fully qualified and competent to litigate all matters that should arise at the scheduled Commission session.

4. I believe it is in the best interest of the accused that he execute this waiver.

_____ _____

Detailed Defense Counsel/Date Lead Defense Counsel/Date

Military Commissions Trial Judiciary

4 May 2007

Military Commissions Rules of Court

Rule 5. Filings Inventory

1. Purpose. This rule establishes:

a. Requirements for the MCTJ Staff to maintain a Filings Inventory. The purpose of the Filings Inventory is to set forth which filings and other matters are before the Military Judge.

b. Responsibilities for counsel to use filing designations, once created, and to check the accuracy of a Filings Inventory, upon receipt, so that counsel are certain of those matters before the Military Judge.

2. Establishing the Filings Inventory. The MCTJ Staff shall establish and maintain a Filings Inventory for each case referred to the Commission, which reflects those filings pending before the Military Judge.

a. As soon as the first filing on an issue is received, the MCTJ Staff shall assign a *filing designation* using one of four categories below followed by a number:

P for a filing or series of filings initiated by the prosecution.
D for a filing or series of filings initiated by the defense.
MJ for a filing or series of filings initiated/directed by the Military Judge.
PO for protective orders issued by the Military Judge.

(The terms “filing number” and “filing designation” may be used interchangeably.)

b. The number following the category designation shall be the next unused number for the category and case. The *filing designation* (category and number e.g., P2, D4, PO1) shall be unique for each case and the designation shall not be reused in that case.

c. To identify a specific document, the filing designation will include a letter and the MCTJ Staff may, as required, add a simple description of the nature of the filing such as Motion, Response, Reply, Supplement, Answer, or other designation assigned, plus the name of the accused. For example, the second prosecution motion in Jones would be P2. The response would be P2A. The reply would be P2B. MCTJ Staff might also make the designation "P2B - Reply, Compel Discovery - Jones."

d. The Filings Inventory shall contain an Active Section which lists all filings currently before the Military Judge.

e. The Filings Inventory shall also contain a listing of all filings which are no longer pending before the Military Judge (matters which have been resolved in some fashion). These items shall be placed in the Inactive Section of the Filings Inventory.

3. Filing designation and future communications or filings.

a. Once a filing designation has been assigned, all future communications - whether in hard copy or by email - concerning that series of filings will use the filing designation as a reference in addition to the name of the filing. This includes adding the initial file designations to the style of all filings, the subject lines of emails, and the file names to ALL email attachments. Examples:

* An email subject line forwarding a response to P2 in US v Jones should read: *"P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith."* The filename of the filings shall be the same as the response being sent.

* The filename of a document that is an attachment to the response should read: *"P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith - attachment - CV of Dr Smith."*

b. Each of the designations or filenames listed above may also include other descriptions or information (date, when filed, etc.) the parties may wish to add to assist in their management of filings.

c. The names given to matters that may appear on the Filings Inventory - such as the subject of a motion - will not be classified or otherwise protected as the Filings Inventory is intended to be transmitted through unsecured networks. Counsel must therefore ensure that the names of their filings are not in themselves classified.

4. Distribution of the Filings Inventory.

a. After making a filing, a party may request, by email, the filing designation that has been assigned by the MCTJ Staff.

b. At the request of any party or the Clerk of Court, Office of Military Commissions, the MCTJ Staff shall provide a copy of the current Filings Inventory as soon as practicable.

c. The MCTJ Staff shall from time to time, or when directed by the Military Judge, distribute copies of the Filings Inventory to the Military Judge, all counsel on the case, the Chief Prosecutor and Chief Defense Counsel (and their Deputies and Chief Legal NCOs,) and the Clerk of Court, Office of Military Commissions.

d. The Military Judge shall ensure that a copy of the current Filings Inventory is marked as an Appellate Exhibit at the beginning of each session of the Commission, so that parties may refer to filings by the filing designation.

e. At sessions of the Commission, counsel shall, whenever possible, refer to a filing by the filing designation so the record is clear concerning precisely which filing or issue is being addressed.

5. Counsel responsibility when receiving the Filings Inventory. The Filings Inventory is the only method by which counsel can be sure which filings have been received by the Military Judge, and which matters are before the Military Judge.

a. Counsel will examine each Filings Inventory as it is received and notify the MCTJ Staff, Military Judge, and opposing counsel of any discrepancies within one duty day.

b. If counsel believe they have submitted a filing which is not reflected on the Filings Inventory, they shall immediately send that filing - with all attachments - to the MCTJ Staff, Military Judge, and opposing counsel, noting the discrepancy.

c. If there is a discrepancy in the Filings Inventory and counsel fail to take the corrective action as indicated above and in paragraph 6 below, the Military Judge may elect not to consider that filing.

6. Effect of omission in Filings Inventory.

a. If a filing or other matter is not on the Filings Inventory, it is not before the Military Judge for decision. If a matter has been mistakenly left off the Filings Inventory, it is the responsibility of counsel to note the omission and advise the MCTJ Staff. (*See* paragraph 5, above).

b. If counsel believe that a matter should be on the Filings Inventory and have made that known to the MCTJ Staff, and the MCTJ Staff does not or fails to include the matter on the Filings Inventory, it is the responsibility of counsel to raise the matter with the Military Judge.

c. Failure to fulfill the responsibilities noted above constitutes waiver should the Military Judge not address or rule upon a matter that is not on the Filings Inventory.

Military Commissions Trial Judiciary

11 October 2007

Military Commissions Rules of Court

Rule 6. Trial Exhibits and Transcript of the Proceedings

1. **Purpose.** This rule establishes guidelines for marking, handling, and accounting for trial exhibits and the transcript of the proceedings in Military Commission trials.

2. **Definitions:**

a. Exhibit:

(1) A document or object, appropriately marked, that is presented, given, mentioned, or shown to the Military Judge, any other Commission member, or a witness during a session of the Commission.

(2) A document or object, appropriately marked, that is offered or received into evidence during a session of the Commission, or referred to during a Commission session as an exhibit.

(3) Other documents or objects that the Military Judge directs be marked as an exhibit or are marked with the Military Judge's permission.

b. Prosecution or Defense Exhibits *for identification* are exhibits sponsored by a party and:

(1) Intended to be considered on the merits or sentencing, but either not offered into evidence, or offered into evidence and not received; or,

(2) Not intended to be considered on the merits or sentencing, but used in some other manner during the trial such as a statement used to refresh the recollection of a witness with no intent to offer the statement.

c. Prosecution or Defense Exhibits are exhibits that have been offered and received into evidence on the merits or sentencing.

d. Appellate Exhibits are those exhibits:

(1) Presented for or used on a matter other than the issue of guilt or innocence, or a sentence. Motions, briefs, responses, replies, checklists, written instructions by the Military Judge for the Commission members, findings and sentencing worksheets, and other writings used during motions practice are among the most common forms of Appellate Exhibits.

(2) The Military Judge may decline to have lengthy publications or documents marked as Appellate Exhibits when the precise nature of the document can be readily identified at the session and later on appeal or review. Examples would be well-known directives, rules, cases, regulations, etc.

(3) *See* Rule of Court 8 regarding marking, recording, and controlling Appellate Exhibits.

e. Dual use exhibits. An exhibit identified on the record that is needed for a purpose other than the reason for which it was originally marked. A dual use exhibit allows an exhibit to be used for more than one purpose without having to make additional copies for the record. Example 1: An Appellate Exhibit that a counsel wants the Commission to consider on the merits. Example 2: A counsel marks an exhibit for identification but does not offer it, and opposing counsel desires to offer that exhibit. An exhibit may be used for a dual use only with the permission of the Military Judge, and the exhibit must be properly marked to show both uses. If the dual use exhibit will be provided to the members, the members will be given a copy that does not reflect that the exhibit is also an Appellate Exhibit.

3. **Rules pertaining to marking, handling, and referring to exhibits.**

a. Any exhibit provided to the Military Judge, a Commission member, or a witness during a session of the Commission shall be properly marked.

b. Any document or other piece of evidence present in the courtroom which is referred to in a session before the Commission as an exhibit shall be properly marked.

c. Any document or other piece of evidence which is displayed for viewing by a witness, the Military Judge, or a Commission member during a session of the Commission shall be properly marked. In the case of an electronic presentation (slides, PowerPoint, video, audio or the like) the Military Judge shall direct the form of the exhibit to be marked for inclusion into the record. The parties should be prepared, at trial, to provide hard (paper) copies of PowerPoint presentations and transcripts of audio or audio/video exhibits.

d. When a party marks or offers an exhibit that in its original state was in a language other than English, and the party marking or offering the exhibit has translated it, has arranged for its translation, or is aware that it has been translated into English from its original language, that party shall also mark and provide to opposing counsel an exhibit containing the English translation along with a copy of the original un-translated document, recording, or other media in which the item was created, recorded, or produced.

e. Parties that mark or offer exhibits which cannot be included into the record or photocopied - such as an item of physical evidence - shall inquire of the Military Judge as to the form by which a tangible representation or substitution of the exhibit shall be included in the record.

f. Before an exhibit is referred to by a counsel for the first time, or handed to a witness, the Military Judge, or a member of the Commission, it shall be first shown to the opposing counsel so that opposing counsel knows the item and its marking, even if the counsel is certain opposing counsel is familiar with the exhibit and its marking.

4. **How exhibits are to be marked.** *See* Form 6-4.

5. **Marking exhibits.**

a. Before trial. Pre-marking of Prosecution or Defense Exhibits will only be done by the court reporter. Counsel are encouraged to provide to the court reporter any exhibits they intend to use at a session of the Commission in advance of that session. Numbers shall not be applied to Appellate Exhibits in advance of any session, except as directed by the Military Judge or the MCTJ Staff.

b. At trial. Counsel should confer with the court reporter regarding marking exhibits which they are offering. Counsel are not allowed to mark Appellate Exhibits. The court reporter or the Military Judge may mark any exhibits during trial. *See* Rule of Court 8 regarding marking, recording, and controlling Appellate Exhibits.

6. **Marked exhibits not offered at trial and out of order exhibits.**

a. Counsel are not required to mark, offer, or refer to exhibits in the numerical or alphabetical order in which they have been marked. Example: The Defense pre-marked Defense Exhibits A, B, and C all for identification. At trial, the Defense wishes to refer to or offer Defense Exhibit C for identification before Defense Exhibit A or B for identification has been offered or mentioned. That sequence *is* permissible.

b. If an exhibit is pre-marked but not mentioned on the record or offered, counsel are responsible for ensuring that the record properly reflects exhibits by letter or number that were marked but not mentioned or offered. This is ordinarily done at the close of the last session of the day. Counsel may either do this on the record or may coordinate with the court reporter immediately after the session to ensure that the official log of exhibits is correct. (*See* paragraph 8, below.) If counsel chooses to do this on the record, an example of the correct procedure is: "Let the record reflect that the Prosecution marked, but did not offer, display, or mention, the following Prosecution Exhibits: 3, 6, and 11." The party will ensure that the court reporter is given and retains the marked exhibit, even though it has not been admitted into evidence.

c. Exhibit for identification marking as compared to the exhibit received. If an exhibit for identification is received into evidence, the received exhibit shall carry the same letter or number. Example: Offered into evidence are Prosecution Exhibits 1, 2, and 3 for Identification. Prosecution Exhibit 1 and 3 for Identification are not received. Prosecution Exhibit 2 for Identification is received. Once received, what was Prosecution Exhibit 2 for Identification is now "Prosecution Exhibit 2." The court reporter will mark the words "for Identification" off of the exhibit.

d. Form 6-4 is a guide for marking trial exhibits.

7. **How exhibits are offered.**

a. Prosecution and Defense Exhibits. In the interests of economy, to offer an exhibit, it is only necessary for counsel to say, "[(We) (The Defense) (The Prosecution)] offer(s) into evidence what has been marked as [(Prosecution Exhibit 2 for identification) (Defense Exhibit D for identification).]

b. Appellate Exhibits. Appellate Exhibits are not offered. They become part of the record once the Military Judge has directed that they be marked.

8. **Confirming the status of an exhibit.** The court reporter and Military Judge together shall keep the official log of exhibits that have been marked, and, in addition, with respect to Prosecution and Defense Exhibits, an annotation showing whether an exhibit has been offered and/or received. Before departing the courtroom after the last session of every day, counsel for both sides shall confer with the court reporter to ensure the log is properly annotated, is correct, and that all exhibits are accounted for.

9. **Control of exhibits.** During trial, and unless being used by counsel, a witness, the Military Judge, or other members of the Commission, all exhibits that have been marked shall be placed on the evidence table in the courtroom consistent with any regulations concerning the control of classified, privileged, or protected information. After the end of each session, the court reporter and the Security Officer, as directed by the Clerk of Court, Office of the Military Commissions, shall secure all classified exhibits until the next session. As to unclassified exhibits, the court reporter will inventory all exhibits and maintain control over such exhibits until the next session.

10. Transcript of the Proceedings. In accordance with R.M.C. 1103, during the course of a trial, the transcript of the proceedings of any session will be provided to the Military Judge who presided over the session in question before it is given to any other person or to the parties. In accordance with R.M.C. 1103 and R.M.C. 1104, prior to authentication of the record of trial, only the Military Judge can authorize the release of the unauthenticated transcript or any portion thereof. At the direction of the Military Judge, the court reporter will provide the transcript or portions thereof to counsel for errata purposes prior to authentication.

11. **Sample forms.**

a. Form 6-1: Appellate Exhibits.
b. Form 6-2: Prosecution Exhibits.
c. Form 6-3: Defense Exhibits.
d. Form 6-4: Marking Exhibits.

Form 6-1 Appellate Exhibits Log

US v. _____ Page ___ of ___ Pages

Arabic Number	Description	Mark X if classified or protected	Filings Inventory number (if applicable)

Form 6-2 Prosecution Exhibits Log

US v. _____ Page ___ of ___ Pages

Arabic Number	Description	Mark X if classified or protected	Offered	Received

Form 6-3 Defense Exhibits Log

US v. _____ Page ___ of ___ Pages

Letter	Description	Mark X if classified or protected	Offered	Received

Form 6-4 Marking Exhibits

I. Unclassified Exhibits and Exhibits that are not Protected Information		
Type of Exhibit	**Examples**	
	First Page - Single Page Exhibit	**Multiple Page Exhibits**
Prosecution Exhibits for Identification. Use Arabic numerals	Prosecution Exhibit 1 for Identification *OR* PE 1 for identification *OR* PE 1 for ID	*First page*: PE 1 for ID Page, 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Defense Exhibits for Identification. Use letters. After the letter Z is used, the next exhibit shall be AA.	Defense Exhibit A for Identification *OR* DE A for identification *OR* DE A for ID	*First page*: DE A for ID, Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Prosecution Exhibits and Defense Exhibits	Military Judge or Reporter will mark through ~~for Identification~~ *OR* ~~for ID~~.	*First page*: Mark through on first page. *Subsequent pages*: No markings necessary if properly marked as above.
Appellate Exhibits Use Arabic numbers	Appellate Exhibit 1 *OR* AE 1	*First page*: AE 1, Page 1 of 24 *Subsequent pages*: 2 of 24, 3 of 24 etc.
Attachments Letters or numbers depending on how indexed in the Appellate Exhibits	Attachment 1 to AE 3 *OR* Attachment A to AE 3	*First page*: Attachment 1 to AE 3, page 1 of 3 *Subsequent pages*: 2 of 3, 3 of 3.

II. Classified Exhibits

Mark the same as I, and in addition, adhere to directives regarding the proper markings and cover sheets.

III. Unclassified, Privileged, or Protected Exhibits

Mark the same as I, above, adding the words on the first page or cover sheet “Privileged Information” or “Protected Information.”

Military Commissions Trial Judiciary

11 October 2007

Military Commissions Rules of Court

Rule 7. *Amicus Curiae* Briefs

1. **Purpose.** This rule establishes general procedures for submitting an *amicus curiae* brief. An *amicus* brief, which logically addresses an important matter not previously considered by the Commission, or addresses an important matter in a way that another brief filed with the Commission does not, might be of benefit. Briefs that do not meet this standard would not assist the Commission.

2. **Submitting briefs**. A person individually, or on behalf of an organization or entity, may provide an *amicus* brief to the Clerk of Court, Office of Military Commissions by sending the brief as an attachment to the following email address: CCMC@dodgc.osd.mil. The person submitting the brief must meet the following qualifications, and such qualifications shall be stated in the first paragraph of the brief.

a. The submitter is an attorney who is licensed to practice before the highest court of any State of the United States or the District of Columbia;

b. If the submitter is a party to any Commission case in any capacity, has an attorney-client relationship with any person whose case has been referred to a Military Commission, is currently or is seeking to be *habeas* counsel for any such person, or is currently or is seeking to be next-friend for such person, the submitter must so state and further state the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding; and,

c. The submitter certifies, by submitting the brief, that he or she in good faith as a licensed attorney believes that the law is accurately stated, that he or she has read and verified the accuracy of all points of law cited in the brief, and that he or she is not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

3. **Format.** Any *amicus* brief submitted to the Clerk of Court, Office of Military Commissions shall comport with the following:

a. The brief must be in PDF (Adobe Acrobat) format as an attachment to the email submitting the brief to the Clerk of Court, Office of Military Commissions.

b. The brief, when printed, will contain one inch margins on 8 1/2 x 11 paper and be in a 12 point type face. The brief will be double-spaced and will not exceed 25 pages.

c. The brief may use URLs (web links) as cites to legal authority not generally available through legal research services such as LEXIS or Westlaw. URL matters are not part of the brief, and the brief will be rejected by the Clerk of Court, Office of Military Commissions or the Military Judge, if URL matters are viewed as an attempt to exceed page limitations. Parties submitting briefs are responsible for ensuring that the URL is functional on the date of submission.

d. The brief must follow the format set forth in Form 7-1.

4. **Action by the Clerk of Court, Office of Military Commissions.** When received by the Clerk of Court, Office of Military Commissions, he or she shall:

a. Send a copy to the MCTJ Staff;

b. Send a copy to the Chief Defense Counsel and Chief Prosecutor who may, in turn, forward such briefs to other counsel associated with the case.

5. **Consideration by a Military Commission**.

a. An *amicus* brief may be considered by a Military Commission only if:

(1) A filing (motion, response, or reply) by a party cites and endorses an *amicus* brief and a copy of the brief is appended to the motion filing; and,

(2) The *amicus* brief cited is relevant to the issues being asserted in the filing; and,

(3) The *amicus* brief, the certification, and its manner of submission meet the criteria in paragraphs 2 and 3 above.

b. The Military Judge may consider an *amicus* brief *sua sponte*, regardless of the provisions of this paragraph.

6. **Other matters.**

a. No person may argue an *amicus* brief before the Military Judge without specific, prior leave from the Military Judge. However, any party may invite the attention of the Military Judge to an *amicus* brief cited in the party's motion or response or in oral argument when such argument is permitted.

b. The submission, processing, and consideration of *amicus* briefs will not be allowed to delay the Commission.

7. **Timeframe exceptions**.

a. If a significant *amicus* brief has been made available as provided in paragraph 4, above, after a party has filed a motion, response, or reply on the same or a substantially similar

issue, and before the Military Judge has issued a ruling on the record or in writing, a party may request the Military Judge consider the *amicus* brief by:

(1) Requesting in the body of an email that the Military Judge consider the brief and attaching the brief; *and*,

(2) Stating those matters raised in the brief that were not considered or known before all filings were due.

b. If the Military Judge agrees to consider the brief, the Military Judge may allow the opposing party to file a response. If so, the Military Judge will advise the opposing party of the time limit. As a general rule, no reply to that response will be permitted. No adverse inferences will be drawn from an election by the opposing party not to respond to an *amicus* brief.

Form 7-1 Format for an *Amicus* Brief

UNITED STATES v. (Name of Accused) **BEFORE A MILITARY COMMISSION CONVENED PURSUANT TO THE MILITARY COMMISSIONS ACT OF 2006** *(Date brief is sent to the Clerk of Court, Office of Military Commissions)*	*Amicus Brief filed by* *(person filing the brief)* *[on behalf of (if applicable, indicate the entity on whose behalf the brief is submitted)]*

NOTE: The following will be included in separately numbered paragraphs. Use Arabic numbers. Sub paragraphs will be numbered or lettered.

1. (Required in every brief.). My name is _____. I certify that I am licensed to practice before the (state jurisdiction). I further certify:

a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor I am seeking to be *habeas* counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person. **OR,**

b. I am (describe the condition listed in paragraph 1a above and the specific individual case involved) and I further state the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding.

c. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

2. Issue(s) Presented. [Set forth, in a concise statement, each issue presented.]

3. Statement of Facts. [Set forth accurately all facts pertinent to the issues raised.]

4. The law.

5. Argument. (Optional.)

Signature Block
Office Address
Email Address
Phone Number

Military Commissions Trial Judiciary

4 May 2007

Military Commissions Rules of Court

Rule 8. Appellate Exhibits

1. **Purpose.** This rule establishes guidance regarding marking and maintaining Appellate Exhibits.

2. The MCTJ Staff will preserve the communications and filings of the parties marking them as Appellate Exhibits (AE), as directed by the Military Judge, and keeping an index of Appellate Exhibits. Copies of all Appellate Exhibits (except in the case of material requiring special handling) will be made available to counsel for both sides and in the courtroom during any session. Once a session has been held, the original copy of each Appellate Exhibit will be provided to the court reporter for safekeeping and future availability. The Clerk of Court, Office of Military Commissions will determine whether the original or a duplicate original is required for purposes of the Record of Trial.

3. Once marked and approved by the Military Judge, electronic copies of the Appellate Exhibits will be provided to the court reporter. Neither the Military Judge nor the MCTJ Staff will perform any security or other review for classified, Privacy Act, or Sensitive But Unclassified information. If the Military Judge determines that an Appellate Exhibit should not be released in the interests of ensuring the parties receive a fair trial or for other reasons, the Military Judge will direct that a particular exhibit be sealed or not released to the public for a certain period. The Military Judge's decision to seal or not authorize the release of an Appellate Exhibit, or a portion thereof, will be communicated to counsel for both sides and to the court reporter and the Clerk of Court, Office of Military Commissions.

[redacted]

From: [redacted]
Sent: Friday, November 02, 2007 9:41 AM
To: [redacted]
Cc: 'claytogt@ptf.gov'; Trivett, Clayton, Mr, DoD OGC; Ona, Guadalupe, SSG, DoD OGC; [redacted]
Subject: U.S. v. Khadr - Additional Detailing Memo
Signed By: [redacted]
Follow Up Flag: Follow up
Flag Status: Red
Attachments: Khadr - Detailing Memo - John Murphy.pdf

Sir,

The attached memo details Mr. John Murphy to U.S. v. Khadr.

Mr. Murphy has two email addresses copied above [redacted] Please add these addresses to your distribution lists.

Additionally, [redacted] (copied above at [redacted] will be the case paralegal for this case while [redacted] attends the Army Advanced Non-Commissioned Officers Course. Please copy him as well on all Khadr related email traffic.

Thank you.

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

<<...>>

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

October 25, 2007

MEMORANDUM FOR TRIAL JUDGE, UNITED STATES v. KHADR

SUBJECT: Detailing of Mr. John Murphy, DOJ, as Assistant Prosecutor

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

Robert C Swan, Deputy Chief Prosecutor
for LARRY J. MORRIS
Colonel, JA, USA
Chief Prosecutor
Office of Military Commissions

cf: Mr. John Murphy

[redacted]

From: [redacted]
Sent: Friday, November 02, 2007 8:23 PM
To: [redacted]
Cc: [redacted]
Subject: FW: US v. Khadr - Request for Continuance - 2 November 2007 - Ruling
Importance: High
Follow Up Flag: Follow up
Flag Status: Purple

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

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Friday, November 02, 2007 20:17
To: [redacted]
Subject: US v. Khadr - Request for Continuance - 2 November 2007 - Ruling
Importance: High

[redacted]

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

COL Brownback

Counsel in the case of US v. Khadr,

1. The email below from LCDR Kuebler was received after the ruling was issued.

2. The commission has considered the matters contained, has reconsidered its ruling, and affirms the denial of

the request for delay.

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

----- Original Message -----
From: [redacted]
Cc [redacted]
Sent: Friday, November 02, 2007 6:53 PM
Subject: Re: U.S. v. Khadr -- Defense Request for Continuance

Sir,

1. The defense notes that it has not yet received the remaining discovery (note: the govt offered to "serve" some of the discovery to us after hours, in their offices, on our way home). Additionally, in the course of discussion with the prosecution this afternoon, we learned that we may not have received discovery the prosecution assumed they had already served.

2. The defense understands that the additional discovery to be served (presumably) next week may contain important exculpatory information. The opportunity to review and respond to this information may be of critical importance to the defense's ability to adequately prepare for the planned initial determination of status.

3. Defense counsel will be traveling to GTMO early Monday morning. Prosecution counsel will be traveling Tuesday and it is unlikely the defense will receive the discovery before Wednesday (the day before the hearing). This is simply not enough time to review the materials and prepare for the planned status determination.

4. Based on the foregoing, the defense respectfully requests the military judge to grant the continuance, or, in the alternative, defer the status determination to a later date.

Vr,

LCDR Kuebler

----- Original Message -----
From: [redacted]
To: [redacted]
Cc: [redacted]
Sent: Friday, November 02, 2007 6:54 PM
Subject: FW: US v. Khadr - Request for Continuance - 2 November 2007 - Ruling

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

v/r,

[redacted]AR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Friday, November 02, 2007 17:30
To: [redacted]
Subject: US v. Khadr - Request for Continuance - 2 November 2007 - Ruling

[redacted]

Please forward the email below to the parties in US v. Khadr and distribute it to other interested parties.

COL Brownback

Counsel in the case of US v. Khadr,

1. The commission has considered the defense request for continuance and the government's response thereto.

2. The commission has also considered the matters contained in the record of trial which was authenticated on 29 June 2007 (See, for instance, lines 13-22 of the Record of Trial.) and matters which have subsequently arisen (See, for instance, p. 16 of AE 33.). The commission has also considered the previous requests for delay and abatement from the defense and the rulings thereon.

3. The commission further notes the correspondence involving the publishing of Protective Orders #1, #2, and #3 (See AE 031, AE 032, and AE 033, respectively.).

4. The commission finds that granting the delay requested will not serve the interests of justice and the best interests of the public and the accused in having a prompt trial. The request for a delay is denied.

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

----- Original Message -----
From: [redacted]
To: [redacted]
Cc: [redacted]
Sent: Friday, November 02, 2007 5:01 PM
Subject: RE: U.S. v. Khadr -- Defense Request for Continuance

Sir,

1. The Government requests that the Defense's renewed continuance request be denied.
2. Defense argues that the Government has not fulfilled its initial discovery obligation, but cites no authority indicating what that obligation might be.
3. The Military Judge previously ordered the Government to provide the Defense with all materials previously discovered to LTC Vokey. The Government previously discovered those materials to the Defense, and will provide additional materials to supplement that discovery today.
4. The Government notes that it requested via e-mail that the Defense compare what they already had in their possession to a list of what we believed to be the materials discovered to LTC Vokey. The Defense never answered this request, which would have significantly assisted the Government's efforts to give accurate and complete discovery under the Military Judge's order.
5. The Government, however, has met any remaining discovery obligations including those already issued by the Military Judge.
   a. The Government previously discovered all "papers accompanying charges; convening orders; statements." RMC 701(b)(1).
   b. The Defense has not requested discovery as required by RMC 701(c) and (d).
   c. The Government continues to comply with its obligation to provide Defense with exculpatory materials "as soon as practicable." RMC 701(e).

6. The fact that the Government has complied with any obligation it currently has to provide discovery to Defense, and continues to supplement this discovery, overcomes any claims of prejudice or inadequate preparation on the part of the Defense.
7. Therefore, the Government respectfully requests that the Military Judge deny the Defense's renewed request for a continuance and hold the 8 November 2007 hearing as scheduled.

V/r,

Keith A. Petty
Captain, U.S. Army
Prosecutor
Office of Military Commissions
[redacted]

From: [redacted]
Sent: Friday, November 02, 2007 2:16 PM
To: [redacted]
Cc: [redacted]
Subject: RE: U.S. v. Khadr -- Defense Request for Continuance
Importance: High

COL Brownback has directed that the government respond to the defense request for continuance NLT 1700 hours today, 2 November 2007.

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Friday, November 02, 2007 11:11
To: [redacted]
Cc: [redacted]
Subject: U.S. v. Khadr -- Defense Request for Continuance

Sir,

1. The defense renews its request for a continuance to 6 December 2007, previously denied by the military judge.

2. The defense notes that as of today, 2 November 2007, the government has not yet discharged its initial discovery obligation to the defense. Yet, the defense is expected to be prepared to litigate a factual determination of Mr. Khadr's purported status as an "unlawful enemy combatant" next Thursday. Assuming that the status determination must take place at the initial session, it is simply impossible for the defense to be adequately prepared given the government's failure to provide discovery until after the military judge's deadline for submission of matters to be considered in the determination.

3. Based on the foregoing, the defense believes that it is clearly in the interests of justice for proceedings to be continued to 6 December 2007. Grant of a continuance will (presumably) give the government the chance to complete its initial discovery obligation to the defense and give the defense the chance to adequately prepare for the proposed status determination. It will have the added benefit of giving defense counsel the opportunity to travel to GTMO next week to meet with their client, and discuss the counsel issues that are to be the subject of the planned RMC 802 conference this afternoon.

VR,

LCDR Kuebler

SUBJECT: Summary – RMC 802 Conference – 2 November 2007

1. A telephonic RMC 802 conference was held on 2 November 2007. Present were:

itary Judge
[redacted]

MAJ Groharing – Prosecution
CPT Petty
LTC Britt
Mr. Murphy, Prosecution

LCDR Kuebler – Defense
Ms. Snyder
COL David, CDC
Mr. Berrigan, Deputy CDC

2. The conference focused on certain concerns by both sides about the presence or absence of Mr. Dennis Edney at the 8 November 2007 hearing in Guantanamo.

3. After reviewing the references in [redacted] email of 24 October 2007, all parties to the confe[redacted]hat the prosecution's inquiry about the presence of Mr. Edney could not be interpreted by a fair observer as any sort of interference with the defense function.

4. LCDR Kuebler stated that he had an attorney-client relationship with Mr. Khadr and that he was representing him. His comments in the RMC 802 conference of 24 October 2007 were not meant to be viewed as a desire to form an attorney-client relationship with Mr. Khadr; rather they should have been interpreted as a desire to foster and maintain the current attorney-client relationship.

5. The prosecution's concern was that Mr. Khadr would go pro se at the 8 November 2007 session and would then request Mr. Edney's presence. The prosecution wanted some assurance from the military judge that a) Mr. Edney would be present or b) a pro se request by Mr. Khadr and a concurrent request for Mr. Edney would not delay the session. The military judge stated that he could not give an advance ruling on a contingency, even though he understood the prosecution's concerns.

6. The parties reviewed the other references in [redacted] email, specifically focusing on paragraph 9-6 of the DoD[redacted]ion. All parties agreed that it was the responsibility of the Convening Authority to arrange transportation for a Foreign Consultant, but that such obligation only arose when the defense advised the Convening Authority that the accused wanted a Foreign Consultant at a session. All parties agreed that the defense had furnished no such request to the Convening Authority concerning the 8 November 2007 session.

7. The parties discussed whether or not there was a prohibition on the Convening Authority arranging transportation for a Foreign Consultant absent a request from the accused thru the defense. No consensus was reached.

8. The military judge asked the parties to point out where the military judge had the authority to order the transportation of a Foreign Consultant to Guantanamo. The parties agreed that there was no specific authority to do so.

9. The conference concluded with the military judge stating that he would take no action with regard to Mr. Edney until a need arose based on some contingent future happening.

10. The military judge directed that the parties provide him a summary of the conference. On 7 November 2007, the military judge drafted a summary, showed it to the parties, made the corrections requested, and signed the final summary.

// Signed, 7 Nov 07 //
Peter E. Brownback III
COL, JA, USA
Military Judge

[redacted]

From: [redacted]
Sent: Friday, November 02, 2007 7:48 PM
To: [redacted]
Subject: FW: RMC 802 Conference - 2 November 2007 - Participation by Foreign Consultants

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From: [redacted]
Sent: Friday, November 02, 2007 13:58
To: [redacted]
Cc: [redacted]
Subject: RMC 802 Conference - 2 November 2007 - Participation by Foreign Consultants

[redacted]

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

COL Brownback

Counsel in the case of US v. Khadr,

The military judge, based specifically on the objection of detailed defense counsel and referring to RMC 802, does not invite the participation of Mr. Edney and Mr. Whitling in the RMC 802 conference to be held at 1500 hours on 2 November 2007. However, in the event it becomes evident that the input of Mr. Edney or Mr. Whitling is necessary to resolve any issue that may arise during the conference, I request that they stand-by to be contacted until the conference has ended. This is a request, not a direction.

Either party may present any matters on behalf of Mr. Edney or Mr. Whitling at the party's discretion.

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

----- Original Message -----
From: [redacted]
To: [redacted]
Cc: [redacted]
Sent: Friday, November 02, 2007 11:50 AM
Subject: RE: U.S. v. Khadr -- status of Foreign Attorney Consultants

Ma'am,

1. The defense objects to the participation of Messrs. Edney and Whitling in the planned RMC 802 conference.

2. Messrs. Edney and Whitling are consultants, not counsel, and the defense is aware of no authority that would

give them an independent right to attend the conference. The defense notes that they did attend the 3 June 2007 RMC 802 conference in this case. They did so, however, with the consent of the Military Judge and Detailed Defense Counsel. Detailed Defense Counsel does not consent in this case.

VR,

LCDR Kuebler

From: [redacted]
Sent: Friday, November 02, 2007 12:38
To: [redacted]
Cc: [redacted]
Subject: Electronic Recording of RMC 802 Conference

[redacted]

Please forward the email below to the parties in the case of US v. Khadr. Please distribute to other interested persons.

COL Brownback

Counsel in the case of US v. Khadr,

I do not direct the attendance of a court reporter.

Either party may make an electronic recording of the RMC 802 conference.

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

----- Original Message -----
From: [redacted]
To: [redacted]
Cc [redacted]
Sent: Friday, November 02, 2007 11:57 AM
Subject: RE: U.S. v. Khadr -- status of Foreign Attorney Consultants

Ma'am,

1. The defense respectfully requests that the Military Judge direct the attendance of a court reporter at the planned RMC 802 conference.

2. In the alternative, the defense requests that it be permitted to tape record the RMC 802 conference.

VR,

LCDR Kuebler

From: [redacted]
Sent: Friday, November 02, 2007 10:36 AM
To: [redacted]
Cc: [redacted]
Subject: U.S. v. Khadr -- status of Foreign Attorney Consultants

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

v/r
[redacted]
Attorney Advisor
Military Commissions Trial Judiciary
[redacted]

From: [redacted]
Sent: Friday, November 02, 2007 9:54 AM
To: [redacted]
Subject: Re: FW: U.S. v. Khadr -- status of Foreign Attorney Consultants

Dear [redacted]

Mr. Whitling and I would wish to attend the NLT 1000 hrs, 2 November 2007.

I can be contacted at 1 - 780 - 908 - 9555.

Dennis Edney.

From: [redacted]
Sent: Friday, November 02, 2007 10:03
To: [redacted]
Cc: [redacted],
DoD [redacted]
Subject: RE: U.S. v. Khadr -- Status of Foreign Attorney Consultants -- RMC 802 Conference

Sir,

LCDR Kuebler, myself, Mr. Berrigan and Col David will participate in the 802 conference for the Defense.

V/r
Ms. Snyder

From: [redacted]
Sent: Friday, November 02, 2007 9:48 AM
To: [redacted]
Cc: [redacted]
Subject: RE: U.S. v. Khadr -- Status of Foreign Attorney Consultants -- RMC 802 Conference

Sir,

1. Mr. Murphy, Captain Petty, and myself will be present for the 802 conference.

2. [redacted] is setting up the call and will send out coordinating instructions later today.

V/R,

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor
Office of Military Commissions
[redacted]

From: [redacted]
Sent: Friday, November 02, 2007 09:00
To: [redacted]
Cc: [redacted]
Subject: RE: U.S. v. Khadr -- Status of Foreign Attorney Consultants -- RMC 802 Conference

Sir,

The defense does desire the military judge to take the matters in the Chief Defense Counsel's e-mail into account in connection with the government's request.

VR,

LCDR Kuebler

From: [redacted]
Sent: Friday, November 02, 2007 8:48 AM
To: [redacted]
Cc: [redacted]
Subject: FW: U.S. v. Khadr -- Status of Foreign Attorney Consultants -- RMC 802 Conference

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

v/r,

[redacted]
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense
[redacted]

From: [redacted]
Sent: Friday, November 02, 2007 08:27
To: [redacted]
Subject: Fw: U.S. v. Khadr -- status of Foreign Attorney Consultants -- RMC 802 conference

[redacted]

Please forward the mail below to the defense, with a copy to the government. Please distribute it to other interested parties.

COL Brownback

LCDR Kuebler,

Does the defense want the military judge to consider the matters contained in the email below before making the decision on holding an RMC 802 conference?

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

----- Original Message -----
From: [redacted]
To: [redacted]
Cc: [redacted]
Sent: Thursday, November 01, 2007 5:57 PM

Subject: RE: U.S. v. Khadr -- status of Foreign Attorney Consultants -- RMC 802 conference

[redacted]. Would you please provide this to the Military Judge? Thank you.

1. The Chief Defense Counsel concurs with the Defense's Objection to the RMC 802 and respectfully requests that the Military Judge reconsider his decision to schedule an RMC 802 session tomorrow.

2. As Chief Defense Counsel, I had not had the opportunity to make any objection to the Government's request for an 802.

3. In support of my request for reconsideration of the decision to schedule an RMC 802 session, I believe it is premature at this point. The Government's concern about a potential delay is overshadowed by the intrusion of the Government into the attorney-client relationship and the relationship between foreign attorney consultants and detailed military counsel.

4. An RMC 802 may be necessary following the meeting between detailed counsel and Mr. Khadr (which I believe will include Mr. Nate Whitling, one of the foreign attorney consultants). However, it may not be necessary.

5. I am very concerned that an RMC 802 session would prove very counter-productive and might indeed result in the inability of counsel to disclose certain matters which are privileged, rendering the session useless.

6. In addition, it is of great concern that this would establish dangerous precedent for the Government to interfere in the Defense function. Mr. Khadr has not even been arraigned yet the Government wants to interfere with my management of my office for which I am charged with overall responsibility.

7. If the Military Judge desires an ex-parte RMC 802, that might be an alternative. However, it still seems to be premature. Detailed Counsel intends to discuss Mr. Khadr's right to counsel with him and intends to explain the present circumstances and seek to learn Mr. Khadr's intentions as to how he wishes to proceed. In due course this matter will be fully addressed. An RMC 802 session at this stage does not solve any potential problems. Quite the contrary, the potential problems would multiply.

Respectfully submitted

COL Steve David
Chief Defense Counsel

From: [redacted]
Sent: Thursday, November 01, 2007 17:31
To: [redacted]
Cc: [redacted]
Subject: RE: U.S. v. Khadr -- status of Foreign Attorney Consultants

Ma'am,

1. The defense objects to the proposed RMC 802 conference and respectfully requests the military judge to reconsider.

2. As was made clear during the ex parte RMC 802 conference last week, detailed defense counsel has formed an attorney-client relationship and currently represents the accused. Detailed Defense counsel does not believe it is in the accused's interests to have Mr. Edney present at Naval Station Guantanamo Bay next week. The Chief Defense Counsel concurs in this judgment, and, as a result, informed Mr. Edney that he would not be attending

next week's session of the commission. We believe that this is a matter within the discretion of the defense.

3. Mr. Whitling may attend next week's session, in which case there will be a foreign attorney consultant present.

4. If the government causes Mr. Edney to be present at next week's session, detailed defense counsel believes it will constitute material interference in defense counsels' relationship with the accused and will prejudice the accused in these proceedings as a result.

VR,

LCDR Kuebler

----- Original Message -----
From: [redacted]
Date: Thursday, November 1, 2007 2:08 pm
Subject: FW: U.S. v. Khadr -- status of Foreign Attorney Consultants
To: [redacted]

> Counsel,
>
> 1. COL Brownback has directed I send the email below to the parties.
>
> 2. NLT 1000 hrs, 2 November 2007, provide the names of who will take
> part in the RMC 802 conference.
>
> 3. Each party is responsible for taking notes during the
> teleconference.Following the call, all parties will coordinate
> preparing a record of
> the conference.
>
> v/r
> [redacted]
> Attorney Advisor
> Military Commissions Trial Judiciary
> [redacted]
>
> _____
>
> From: [redacted]

> Sent: Thursday, November 01, 2007 4:36 PM
> To: [redacted]
> Subject: Fw: U.S. v. Khadr -- status of Foreign Attorney Consultants
>
>
> [redacted]
>
> Please advise the parties that there will be
> an RMC 802
> teleconference at 1500 hours, 2 November 2007. The
> government is
> responsible for making the arrangements for the teleconference.
>
> You will participate in the
> teleconference. Please obtain a list of
> other participants from the parties. Please make prior
> arrangments with
> the parties concerning the creation of a record.
>
> COL Brownback
>
> ----- Original Message -----
> From: [redacted]
> To: [redacted]
> Cc: [redacted]
> Sent: Thursday, November 01, 2007 4:24 PM
> Subject: RE: U.S. v. Khadr -- status of Foreign Attorney Consultants

>
> Sir,
>
> 1. Per your e-mail below, the parties discussed the issues
> raised by
> the Government and were unable to come to an agreement.
>
> 2. The Government respectfully requests an RMC 802
> teleconference at
> 1500hrs tomorrow to discuss the matters addressed in the Government
> e-mail sent at 1008hrs on 1 NOV 2007.
>
> V/r,
>
>
> Keith A. Petty
> Captain, U.S. Army
> Prosecutor
> Office of Military Commissions
> [redacted]
>
>
>
> _____
>
> From: [redacted]
> Sent: Thursday, November 01, 2007 11:11 AM
> To: [redacted]
> Cc: [redacted]
> Subject: RE: U.S. v. Khadr -- status of Foreign Attorney Consultants
>
>
> Please see COL Brownback's email below.
>
> v/r,
>
> LTC Mike Chappell, USAR
> Senior Attorney Advisor
> Military Commissions Trial Judiciary

> Department of Defense
> [redacted]
>
>
> _____
>
> From: [redacted]
> Sent: Thursday, November 01, 2007 11:07
> To: [redacted]
> Cc: [redacted]
> Subject: Fw: U.S. v. Khadr -- status of Foreign Attorney Consultants
>
>
> [redacted]
>
> In the email below, there is no
> indication that counsel for both
> sides have met and discussed the issue at hand. Until
> there is such a
> meeting and the parties are not able to resolve the concerns involved,
> an RMC 802 conference would be premature.
>
> I am not saying that there will be no
> RMC 802 conference. I am
> stating that until the parties have met and discussed the issue,
> I will
> not hold one.
>
> COL Brownback
>
>
> _____
>
> From: [redacted]
> Sent: Thursday, November 01, 2007 10:08
> To: [redacted]
> Cc: [redacted]
> Subject: RE: U.S. v. Khadr -- status of Foreign Attorney Consultants
>

>
> Sir,
>
> 1. The Government requests an RMC 802 telephonic conference with all
> parties on Friday.
>
> 2. The Government is concerned that Mr. Edney will no longer be
> traveling to GTMO per the e-mail below. Based on the
> previous elections
> of the accused, Mr. Khadr may desire to proceed without his detailed
> military counsel, but with the assistance of foreign consultants
> pursuant to RMC 506 and Regulation 9-6.
>
> 3. In order to avoid additional delays, the Government would
> prefer if
> Mr. Edney and Mr. Whitling were at least at GTMO so that the
> accused, if
> he so chooses, may meet with his previously designated foreign
> consultants.
>
> 4. To be clear, the Government does not intend to interfere with the
> ability of Defense counsel to form an attorney-client
> relationship with
> the accused. However, given the accused's previous desires regarding
> counsel, we would like to avoid a delay in the event the
> Military Judge
> is inclined to approve the accused's request to have foreign
> consultantspresent for the hearing and arrangements have not
> been made for their
> travel to GTMO.
>
> 5. The Government is prepared to set up any logistics required
> for this
> teleconference.
>
> V/r,
>
> Keith A. Petty
> Captain, U.S. Army
> Prosecutor
> Office of Military Commissions
> [redacted]
>
>
>
> _____
>
> From: [redacted]
> Sent: Wednesday, October 31, 2007 5:04 PM
> To: [redacted]

> Cc: [redacted]
> Subject: U.S. v. Khadr -- status of Foreign Attorney Consultants
>
>
> Sir,
>
> 1. The defense desires to inform the military judge that
> Mr. Edney will
> not be attending next week's session of the military
> commission. Mr.
> Edney was so informed by the Chief Defense Counsel, Colonel David,
> following consultation with detailed defense counsel, on Monday.
>
> 2. It is not yet known whether Mr. Whitling will attend
> the session.
>
> VR,
>
> LCDR Kuebler
>
>

SUBJECT: RMC 802 Conference – 6 November 2007 – Summary

An RMC 802 conference was held from 1900 to 2000 hours, 6 November 2007, in the military judge's chambers at Guantanamo Bay, Cuba. Present were:

COL Brownback - Military Judge
MAJ Groharing - Prosecution
LCDR - Kuebler - Defense

1. The conference was held at the request of the attorneys and covered several items. No decisions were made, although certain guidance was given by the military judge.

2. The parties discussed COL Brownback's email of 0929 hours, 5 November 2007, Subject: Failure to Appear - Prosecution/Defense - RMC 802 Conference. Neither party had a valid reason for failing to comply with the military judge's order. There was a general discussion of the need to read and comply with orders from the military judge.

3. The conference discussed D-004, Motion for a Fair Status Determination Hearing. LCDR Kuebler stated that the defense position, as intimated in D-004, was that given the law of the case (the CMCR ruling), there was prima facie in personam jurisdiction over the accused and that the defense would not interpose lack of in personam jurisdiction as a bar to arraignment or other proceedings in the case, until such time as the defense raised the issue of lack of jurisdiction by motion. MAJ Groharing stated that the government believed that this was merely another request for delay by the defense. MAJ Groharing further noted that the government had gone to some expense to bring witnesses for the 8 November hearing. The military judge, although not the defense counsel, expressed surprise that the government was bringing witnesses, since the military judge had not been advised that any witnesses were going to be called to testify.

4. The conference discussed discovery. LCDR Kuebler reiterated his comments from various emails and motions that he had not received discovery. MAJ Groharing then pointed out that discovery had been made. COL Brownback made the following points:

a. Khadr was originally referred to a military commission in late 2005 or early 2006. He asked for and was given LTC Vokey as requested counsel.

b. Discovery was served on LTC Vokey.

c. LTC Vokey and LCDR Keubler were detailed as defense counsel in mid-to-late February 2007 to the MCA case of Khadr.

d. LTC Vokey was relieved and LCDR Keubler detailed as defense counsel in late May 2007.

e. LTC Vokey is still on active duty.

f. LCDR Keubler did not take those measures available to him to insure that LTC Vokey turned over all materials to LCDR Keubler.

g. The question of what had been furnished to whom when was further complicated by the government's renumbering of all discovery items - which was done, if not at the request of the defense, at least with the knowledge of the defense.

MAJ Groharing stated that to the best of his knowledge all discovery had been provided. LCDR Kuebler pointed out that MAJ Groharing did not have the defense perspective and could not know what it was that the defense was looking for or hoping not to find.

5. The discovery discussion was high-lighted by the government notice to the military judge that matters had just been found out by the government that might be exculpatory. However, the person who might be able to testify as to those matters was not available on Guantanamo or even by telephone until some much later period.

6. The military judge urged both sides to decide what had been given, what still needed to be given, and to talk to each other.

7. The conference discussed the authority of the military judge to order a deposition of a person who would be available to testify at trial. The parties agreed that the government would give its best efforts to insure that any witness talked with the defense before trial. There was no specific resolution as to the military judge's authority - that issue was left for another day.

8. This summary was provided to counsel at 0500 hours, 7 November 2007. Counsel reviewed the summary at 1015 hours, 7 November. Any requested corrections were made.

// Signed, 07 Nov 07 //
Peter E. Brownback III
COL, JA, USA
Military Judge

Filings Inventory – US v. Khadr

As of 1845, 7 November 2007

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

Dates in red indicate due dates

Prosecution (P Designations)

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

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 001: Motion to Vacate, or Alternately , for Continuance				• See Inactive Section	
D 002: Motion for Abeyance of Proceedings				• See Inactive Section	
D 003: Motion for Continuance				• See Inactive Section	
D 004: Motion for Proper Status Determination				• See Inactive Section	
D 005: Motion for Continuance				• See Inactive Section	
				•	
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				•	

MJ Designations

Designation Name (MJ)	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
MJ 001: Detail of Military Judge, and Scheduling of First Session	• See Inactive Section	
MJ 002: Voir Dire	• MJ sent bio and Matters re Voir Dire 25 Apr 07 directing questions be submitted 4 May 07 • A. MJ sent addendum to Voir Dire 15 Oct 07 addressing appointment of new Chief Prosecutor • B. Defense Email 1 Nov 07 with written voir dire questions • C. MJ Email 2 Nov 07 with responses to written voir dire	OR -005 A – 036 B – 036 C - 036
MJ 003: Rules of Court	• See Inactive Section	
MJ 004: Initial Notice of Trial Proceedings following CMCR Ruling	• Sent to all Parties 25 Sep 07 • A. Defense Motion to Vacate, or Alternately, for Continuance **(SEE D 001)** • B. MJ ruling on 27 Sep 07 granting a continuance to week of 5 Nov 07. **(SEE D 001)** • C. Defense email 28 Sep 07 requesting relief for deadlines on submissions for 8 Nov 07 hearing • D. MJ email adjusting deadlines for submissions to reflect 8 Nov 07 hearing date	030 030 030 030 030
MJ 005: Special Instructions to Parties re 8 Nov 07 Hearing to determine Initial Threshold Status	• Sent to all parties 10 Oct 07 A. Prosecution email concerning discovery releases to Defense B. Prosecution Email 2 Nov 07 suggesting procedural and evidentiary guidelines for 8 Nov 07 Hearing	OR 036 A – 036 None

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

PROTECTIVE ORDERS

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

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

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

Inactive Section

Prosecution (P Designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
P 001: Motion to Reconsider (Dismissal Order)	1700hr 08 June 07	20 June 07		• Prosecution Motion to Reconsider (Dismissal Order) • A. MJ email on 08 June 07 denying prosecution requested relief (to extend appeal deadline) • B. Defense email declining to respond to Motion to Reconsider • C. MJ ruling on 29 June 07 denying Motion to Reconsider	OR - 017 A - 018 B - 022 C – 023
				•	
				•	
				•	

Inactive Section

Defense (D Designations)

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

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

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First (original) filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	AE
D 005: Motion for Continuance	2 Nov 07, 1111 hrs	2 Nov 07, 1701 hrs	2 Nov 07, 1854 hrs	• Defense Motion for Continuance • A. MJ Email directing government to respond NLT 1700 hrs 2 Nov 07 • B. Government email response to Defense Motion to Continue 2 Nov 07, 1701 hrs • C. MJ Email 2 Nov 07, 1855 hrs denying Motion for Continuance • D. Defense email reply to Government response 2 Nov 07, 1854 hrs • E. MJ Email Affirming Denial of Motion to Continue 2 Nov 07, 2023 hrs	OR – 045 A – 045 B – 045 C – 045 D – 045 E - 045
				•	

Inactive Section

MJ Designations

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

SUBJECT: RMC 82 Conference – 7 November 2007 – Summary

An RMC 802 conference was held at 1855 hours on 7 November 2007, in the military judge's chambers at Guantanamo Bay, Cuba. Present were:

COL Brownback – Military Judge
MAJ Groharing – Prosecution
CAPT Petty – Prosecution
Mr. Murphy – Prosecution
LCDR Kuebler – Defense
Ms. Snyder – Defense
Col David – Defense (present for only part of the 802 conference)

1. The conference was held to discuss the trial schedule. LCDR Kuebler proposed that the schedule be structured like a court-martial schedule in which discovery is generally conducted before dispositive or law motions are litigated. The defense explained that discovery influences the theory of the case and that some of the dispositive or law motions will depend on what discovery reveals.

2. Major Groharing stated that the defense needs time to prepare, but that he felt the defense could go down two tracks at once. He recognized that part of the reason for the need to do discovery now is that the prior lead military counsel directed LCDR Kuebler not to attempt to interview any witnesses. Major Groharing stated that the defense must have motions that they have been working on from February to June 2007 when LCDR Kuebler was detailed as assistant defense counsel.

3. LCDR Kuelber noted that appellate litigation in Mr. Khadr's case is ongoing and that he and Ms. Snyder are responsible for both the military commission and appellate litigation, while the government has four prosecutors assigned to the military commission. LCDR Kuebler explained that the defense does not have the resources that the government has and that there are no other attorneys in the defense office that can be assigned to the case. At this point, Col David, the Chief Defense Counsel, joined the conference. Col David explained that the defense office is slated to have 31 attorneys, but that they only have 6 and are having great difficulty obtaining more attorneys. LCDR Kuebler explained that a significant portion of the case will involve classified discovery, but that the defense office has a single classified laptop to share, and does not have a classified printer, SCIF, or STU-III access while the prosecution has all of this plus classified computers for each attorney at their desks. Col David stated that neither defense office can be SCIF-ed. Col David also explained that there has been an outstanding request for intelligence analysts since long before he arrived to the office in September 2007. He noted the convening authority has agreed that it a resource the defense needs, but has not provided it to date. The contract that will allow the convening authority to begin the process of hiring intelligence analysts is expected to be signed between 16-29 November, but that it will be quite some time before intelligence analysts are on board. Col David also stated there were a number of other structural and logistical issues, including travel to GTMO to see the client. He said that roundtrip travel to GTMO takes a week and that it is difficult to get access to the client. The SJA sometimes denies access to the client

because they have a full schedule of visitors to the camps. It can also be difficult to get flights to GTMO.

4. Major Groharing expressed concern that the defense did not have adequate resources. He stated that he agrees they should have adequate resources and stated that he would do everything in his power to assist the defense in getting these resources.

5. The Military Judge stated that these issues are not new to OMC and that the defense in the Hicks case asked for security analysts and similar resources in December 2005. He also noted that the prosecution recently learned of these problems and that there is no ill motive on the part of the prosecution regarding the lack of defense resources.

6. Regarding the time for filing discovery motions, the military judge explained that there is no reason to set deadlines for discovery motions because they should be filed as discovery issues arise at anytime during the process. The military judge stated that the government's proposed trial schedule was a bit taxing and told the parties that today is day 11 on the RMC 707 clock.

7. LCDR Kuebler reiterated that discovery shapes the defense theory of the case. Therefore, the defense should not be required to file all dispositive/law motions before completing discovery. He stated that the defense could file about five law motions that did not depend on discovery in mid-December.

8. The military judge stated that he was not going to have the first law motion due in mid-April. He said that it doesn't matter whose fault it is that the case is not further along, but that he needed to get the case moving. The military judge stated that the defense be able to file law motions that were raised by discovery after the deadline for filing law motions has passed. The military judge then told the parties to try to reach an agreement on the schedule and left the room to allow the parties the talk.

9. The military judge returned to the 802 conference. The parties informed him that they agreed that 5 to 7 law motions and some discovery motions would be filed by 7 December 2007. The parties also agreed that a second round of law motions would be filed by 11 January 2008. The parties did not reach any further agreements. The military judge stated that he would likely hold a hearing on these motions the first week of February and that he would announce these dates on the record during the arraignment. He scheduled an RMC 802 conference for 1500 on Friday to further discuss the trial schedule.

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM – This form and the M.M.C., Rule 1103, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial for trials by military commission.

COPIES – See R.M.C. 1103(b). The convening authority may direct the preparation of additional copies.

ARRANGEMENT – When forwarded to the convening authority for review, the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 5, 6, and 13e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 12 will be inserted by either trial counsel or the convening authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of MC Form 490.

2. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.

3. Briefs of counsel submitted after trial, if any.

4. MC Form 490, “Commission Data Sheet.”

5. Military Commission orders promulgating the result of trial as to each accused, in 10 copies.

6. When required, signed recommendation of legal advisor, in duplicate, together with all clemency papers, including clemency recommendation by commission members.

7. Matters submitted by the accused.

8. MC Form 458, “Charge Sheet” (unless included at the point of arraignment in the record).

9. Congressional inquiries and replies, if any.

10. Advice of legal advisor.

11. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

12. Records of former trials.

13. Record of trial in the following order:

a. Errata sheet, if any.

b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt

c. Record of proceedings in court, including R.M.C. 803 sessions, if any.

d. Authentication sheet, followed by certificate of correction, if any.

e. Action of convening authority.

f. Exhibits admitted in evidence.

g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.

h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.