

	)	IN THE COURT OF MILITARY
	)	COMMISSION REVIEW
)	
UNITED STATES OF AMERICA,	)	APPELLANT’S RESPONSE TO
	)	APPELLEE’S MOTION TO
Appellant,	)	DISMISS APPELLANT’S
	)	INTERLOCUTORY APPEAL
)	
	)	C.M.C.R. Case No. 08-003
)	
v.	)	Tried at Guantanamo Bay, Cuba
	)	on 13 August 2008
	)	before a Military Commission
OMAR AHMED KHADR	)	convened by M.C.C.O. #07-02
a/k/a “Akhbar Farhad”)	
a/k/a “Akhbar Farnad”	)	Presiding Military Judge
a/k/a “Ahmed Muhammed Khali,”	)	Colonel Patrick J. Parrish
)	
Appellee.	)	DATE: 22 September 2008

**TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY
COMMISSION REVIEW**

Relief Sought

The Government respectfully opposes Appellee’s Motion to Dismiss Appellant’s Interlocutory Appeal (“Motion to Dismiss). As explained below, Appellant’s interlocutory appeal is authorized under the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (“M.C.A.”), and the Manual for Military Commissions (“M.M.C.”). The Motion to Dismiss should be denied, and the Government’s appeal should be heard.

FACTS

The facts necessary to deny the Motion to Dismiss are set forth in the Parties’ respective briefs filed in connection with this appeal.

ARGUMENT

As stated in Appellant's Opening Brief, *see* Open. Br. at 1, and the Notice of Appeal, Appellant filed an interlocutory appeal with this Court pursuant to 10 U.S.C. § 950d(a)(1)(A) and Rule for Military Commissions ("R.M.C.") 908(a)(1), which provide that the Government may appeal from "any order or ruling by the military judge that terminates proceedings of the military commission with respect to a charge or specification."^{*} The order appealed from is the Military Judge's 14 August 2008 ruling, which had reaffirmed, in part, the Military Judge's 4 April and 9 May 2008 rulings. Those earlier rulings had struck as surplusage language in the referred charges alleging that the accused willfully joined al Qaeda, knowing that al Qaeda shares a common criminal purpose to commit violations of the law of war, and committed overt acts in furtherance thereof. *See United States v. Khadr*, Referred Charges (24 Apr. 2007), *in* Open. Br., Appx., Ex. J; *see also* M.M.C., Part IV-6(b)(28)(b) (listing the elements of the Conspiracy offense).

By striking this language from the Conspiracy specification, the Military Judge deprived the Government of the opportunity to prove the accused's guilt of Conspiracy by demonstrating that the accused willfully and knowingly joined al Qaeda (and committed an overt act in furtherance of the enterprise), and instead forced the Government to rely entirely on proving that the accused knowingly *entered into an agreement* to commit one or more unlawful acts (and committed an overt act in furtherance thereof). The Military Judge's 4 April 2008 ruling, therefore, terminated

^{*} Although the Government may not appeal a finding of not guilty by the military commission, *see* 10 U.S.C. § 950d(a)(2), that exception is not relevant here, as the Military Judge's dismissal of the enterprise language from the specification did not go to the merits of the charge.

proceedings of the military commission with respect to that allegation. While it did not terminate *all* proceedings of the military commission with respect to that specification, MCA § 950d(a)(1)(A) and R.M.C. 908(a)(1) do not require that an appealable order terminate *all* proceedings with respect to a specification. Rather, they require only that proceedings be terminated, whether in whole or part.

The interlocutory appeal provisions do not require that the ruling appealed from terminate proceedings with respect to an *entire* charge or specification. To read such a requirement into MCA § 950d(a)(1)(A) and R.M.C. 908(a)(1) would truly elevate form over substance, since the Conspiracy specification against the accused could readily have been charged as two separate specifications—one with respect to the agreement theory and one with respect to the enterprise theory. Were the Government to have charged separate specifications for the two alternative theories of Conspiracy authorized by the M.M.C., however, the Defense would no doubt have claimed that the two specifications were multiplicitous. That the Government chose to limit the Conspiracy charge to a single specification (and thus obviate any potential (albeit meritless) charge of multiplicity) should not put the Government in a worse position than if it had simply charged two separate specifications of Conspiracy from the outset.

Moreover, proceedings *have* been terminated with respect to a specification. That part of the military commission that would have considered evidence relating to a charge of Conspiracy under the enterprise theory has been terminated. MCA § 950d(a)(1)(A) and R.M.C. 908(a)(1) authorize appeals “with respect to *a* charge or specification.” The relevant word is “*a*,” since the point of the provisions are clearly to authorize appeals when all *or just some* of the charges or specifications against an accused have been

dismissed. The emphasis is on permitting the Government to take an interlocutory appeal even if some of the charges or specifications have not been terminated. There is no evidence whatsoever that Congress and the Secretary of Defense were concerned with permitting appeals only when all of a charge or specification (rather than “only” 99% of a charge or specification) is dismissed. Because the interlocutory appeal provisions permit appeals not merely when an entire specification or charge has been terminated, but rather when proceedings have been terminated “with respect to *a* charge or specification,” the instant appeal is fully authorized by the M.C.A. and M.M.C.

The accused argues that statutes authorizing Governmental appeals must be strictly construed. *See* Mot. to Dismiss at 4. But that is not license to attach an untenable reading to a provision that clearly is intended to authorize the Government to appeal a ruling that dismisses all *or some* of its charges or specifications. *See* United States v. Pearson, 33 M.J. 777, 779 (N.M.C.M.R. 1991) (“The statutes authorizing [prosecution] appeals are construed strictly against the right of the prosecution to appeal. *They are not so strictly construed, however, as to defeat the intent of the legislature in authorizing the procedure.*” (emphasis added)). The M.C.A. and M.M.C.’s interlocutory appeal provisions should be read in their most sensible light, as described above, and the Motion to Dismiss should be denied.

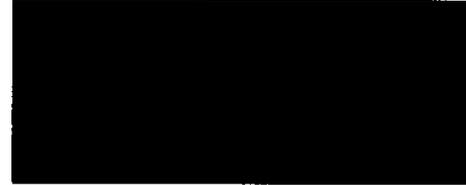
PRAYER FOR RELIEF

WHEREFORE, Appellant respectfully prays that this Court deny the Motion to Dismiss and hear the instant appeal.

Respectfully submitted,



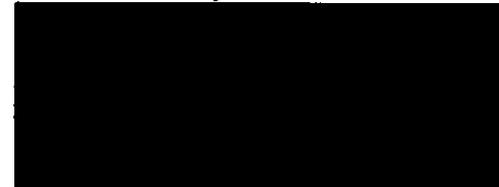
Jordan A. Goldstein
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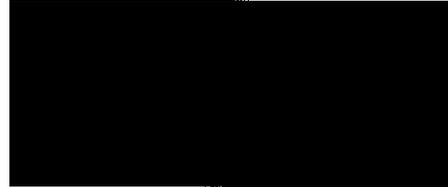
Trial Counsel

CERTIFICATE OF SERVICE

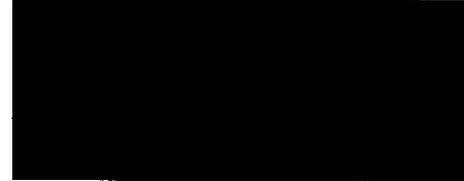
I certify that a copy of the foregoing was e-mailed to William C. Kuebler, LCDR, JAGC, USN, Detailed Defense Counsel on this 22nd day of September 2008.



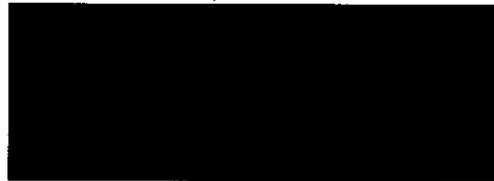
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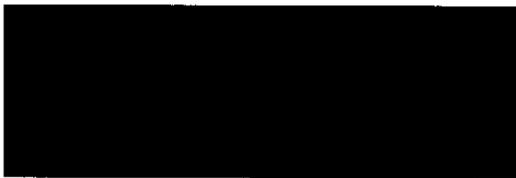
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