RECORD OF TRIAL

(and accompanying papers)

of

SALIM AHMED HAMDAN (hereinafter "Hamdan")
also known as Salim Ahmad Hamdan, Salem Ahmed, Salem Hamdan, Saqr Al Jadawy, Saqr Al Jaddawi, Khalid bin Abdalla, and Khalid wl'd Abdallah

0149
Identification Number

By

MILITARY COMMISSION

Convened by the Convening Authority under 10 USC §948h

Office Military Commissions
(Name of Convening Authority)

Tried at

Guantanamo Bay, Cuba
(place or Places of Trial)

on

4 February 2008/ Motions
(Date or Dates of Trial)

Companion cases:
None.

Motions Session

Filings Inventory – US v. Khadr

As of 1200, 3 February 2008

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

Prosecution (P Designations)

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

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

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

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

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

MJ Designations

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

PROTECTIVE ORDERS

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

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

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

Prosecution (P Designations)

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

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

Defense (D Designations)

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

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

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

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

Inactive Section

MJ Designations

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

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

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** to Dismiss Due for Lack of Jurisdiction for Failure to Comply with Common Article 3 17 January 2008

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

2. Relief Sought: The accused, Omar Khadr (Mr. Khadr), seeks an order dismissing all charges against him for lack of jurisdiction under the Military Commissions Act of 2006 (MCA).

3. Overview:

(1) Congress enacted the MCA following the decision of the Supreme Court in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006). There, the Court rejected the government's position that individuals detained in the course of the "armed conflict" with al Qaeda possessed no enforceable rights. Instead, the Court found that, at a minimum, the protections of "Common Article 3" of the 1949 Geneva Conventions, *see, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 V.ST. 3317, 75 V.NT.S. 135, applied to the armed conflict with al Qaeda. *See Hamdan*, 126 S.Ct. at 2795-96. The Court concluded that Mr. Hamdan's military commission failed to meet Common Article 3's requirement of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," and was, for that reason, among others, illegal. *See id.* at 2797.

(2) Because Common Article 3 is part of the law of war, with which the President was required to comply in establishing military commissions authorized by Article 21 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C.S. § 821 (2005), the Court invited the President to seek authorization from Congress to depart from its requirements. *Hamdan*, 126 S.Ct. at 2799 (Breyer, J., concurring). This the President did. In response, Congress *could have* chosen to repeal or abrogate the Geneva Conventions and expressly authorize military commissions that failed to comply therewith. It did not. As a result, the Geneva Conventions, as treaties to which the United States is a party, remain the "supreme [l]aw of the [l]and." U.S. Const. art. VI; *United States v. Khadr*, CMCR 07-001, n.4 (U.S.C.M.C.R. Sep. 24, 2007) (citations omitted).

(3) Instead of exempting military commissions from the requirements of Common Article 3, Congress authorized, subject to few statutory constraints, the Secretary of Defense to promulgate rules for military commissions. *See* MCA § 949a(a). Congress arguably purported to declare those commissions to comply with Common Article 3, *see* MCA § 948b(f), which, of course, it has no power to do. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Its statement can only be interpreted, consistent with constraints on the legislative power, as a

manifestation of intent that rules promulgated by the Secretary *comply* with Common Article 3, except where Congress has specifically mandated a contrary result.

(4) As shown herein, the rules of evidence and procedure in the Manual for Military Commissions (MMC) depart from the requirements of Common Article 3 in numerous instances not specifically authorized or mandated by Congress. Accordingly, this Military Commission, like the military commission at issue in *Hamdan*, violates the governing statute and is therefore illegal. *Cf. Hamdan*, 126 S.Ct. at 2793. Because it lacks jurisdiction, the Military Commission must dismiss charges against Mr. Khadr. In the alternative, the Commission must interpret the Act and its rules to provide the requisite fair trial guarantees.

4. Facts: This motion presents a question of law.

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

6. Law and Argument:

I. The MCA Requires That Military Commissions Comply With Common Article 3 Of The Geneva Conventions

(1) The Military Commission must comport with the MCA.[1] The MCA requires that military commissions comply with Common Article 3 of the Geneva Conventions.[2] MCA § 948b(g) purports to remove the Geneva Conventions as a source of rights. Because the Court of Military Commission Review has held that Geneva Conventions are self-executing[3] and the MCA itself declares that it does not violate the Geneva Conventions,[4] this attempt to remove the

[1] Military Commissions Act of 2006, 10 U.S.C. § 948 (2006) [hereinafter MCA].

[2] MCA § 948b(f); Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, Common Article 3, *entered into force* Oct. 21, 1950 [hereinafter Common Article 3]. Section 948(b)(f) states: "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." Whether military commissions, in fact, comply with common article 3 is ultimately a judicial question that Congress does not have the power to answer. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") (emphasis added). Any congressional attempt to legislative an answer to such a judicial question violates the bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). Because a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936), the only reasonable interpretation is that § 948b(f) is that it requires military commissions to comply with common article 3.

[3] *United States v. Khadr*, No. 07-001, n.4 (U.S.C.M.C.R. Sep. 24, 2007).

[4] MCA, 10 U.S.C. § 948b(f) (2006).

Geneva Conventions as a source of rights is unavailing. As a result, military commissions lack jurisdiction if they do not comport with the MCA and Common Article 3. In any case, Common Article 3 should be used as a guide to interpreting the MCA.

II. The Military Commission Must Understand A "Regularly Constituted Court Affording Judicial Guarantees" To Be Consistent With The Fundamental Fair Trial Requisites Of Common Article 3, Article 75 Of Protocol I, Human Rights Law And The Fundamental Fair Trial Guarantees Of Courts-Martial.

(2) U.S. law requires the Military Commission to interpret "a regularly constituted court" affording "judicial guarantees" in a manner consistent with the fundamental fair trial requisites under international law, including sources such as (1) Article 75 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Article 75 of Protocol I);[5] (2) human rights law, including the International Covenant on Civil and Political Rights;[6] (3) customary international law as reflected in the protections of the International Criminal Tribunal for Rwanda[7] and the International Criminal Tribunal for the former Yugoslavia;[8] and (4) the fundamental procedural guarantees of courts-martial. The Manual for Military Commissions is inconsistent in several important respects with the requirements of the MCA and Common Article 3.

A. U.S. Law Requires "A Regularly Constituted Court" Affording "Judicial Guarantees" To Be Interpreted Consistently With International Law

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

[6] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 (*entered into force* for the U.S. on September 8, 1992) [hereinafter Civil and Political Covenant].

[7] Statute of the International Tribunal for Rwanda, *adopted by* S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994) [hereinafter ICTR Statute]; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.1 (1995), *entered into force* 29 June 1995 [hereinafter ICTR Rules].

[8] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), *adopted by* Security Council 25 May 1993, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute]; International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), *entered into force* 14 Mar. 1994, *amendments adopted* 8 January 1996 [hereinafter ICTY Rules].

(3) A treaty's relevance to interpretation of federal statutes, such as the Military Commissions Act, is reflected in the long-standing rule of statutory construction known as the *Charming Betsy* rule. Chief Justice Marshall first articulated that rule when the Supreme Court declared that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ."[9]

(4) Interpreting the Manual in light of the human rights treaties and the related international law so as to ensure fair trial protections is an approach the Supreme Court has employed in a number of landmark cases. In examining the protections guaranteed by the Eighth Amendment, the Supreme Court has looked to treaties and foreign law to assist in its determination of what constitutes cruel and unusual punishment in *Thompson v. Oklahoma*,[10] *Atkins v. Virginia*,[11] and *Roper v. Simmons*.[12] In *Lawrence v. Texas*, the Supreme Court relied on the jurisprudence of the European Court of Human Rights to assist in determining "the values we share with a wider civilization."[13] Justice Ginsburg cited the International Convention on the Elimination of All Forms of Racial Discrimination in her concurrence in *Grutter v. Bollinger* as support for her position regarding the affirmative action efforts of the University of Michigan Law School.[14] In *Hamdan v. Rumsfeld*, the Supreme Court relied upon the Geneva Conventions and the international law of war to analyze the authority of the President to convene the military commissions.[15] The Court noted that the military commissions could only try crimes acknowledged as an offense against the law of war[16] and that "international sources confirm that the crime charged here [conspiracy] is not a recognized violation of the law of war."[17] The Court observed that the President's use of military commissions was conditioned upon compliance with "the rules and precepts of the law of nations."[18] Hence, international law should be used to interpret which judicial guarantees must be afforded by military commissions.

B. Common Article 3

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[9] *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

[10] *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988).

[11] *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

[12] *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.").

[13] *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

[14] *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

[15] *Hamdan*, 126 S.Ct. at 2794.

[16] *Id.* at 2780.

[17] *Id.* at 2784.

[18] *Id.* at 2786 (quoting Ex Parte Quirin, 317 U.S. 1, 28 (1942)). *See also* David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: a Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497 (2007).

(5) The MCA requires that military commissions comply with Common Article 3 of the Geneva Conventions.[19] As the Court of Military Commission Review (CMCR) has declared, "[t]he 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."[20] Since the Geneva Conventions are self-executing and the MCA cannot violate Common Article 3,[21] Common Article 3 controls. In any case, where the MCA purports to create an exception to the general rule of judicial guarantees under Common Article 3, that exception must be read narrowly to preserve the general rule of a regularly constituted court affording judicial guarantees. Common Article 3 of the four Geneva Conventions provides:

> In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions [prohibiting]: . . . (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.[22]

(6) Secretary of Defense Robert Gates intended the Manual for Military Commissions of January 18, 2007, to comply with Common Article 3.[23] He tracks the language of Common Article 3 in several places, including the Executive Summary, which states, "[this Manual] is intended to ensure that alien unlawful enemy combatants who are suspected of war crimes and certain other offenses are prosecuted before regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[24] The Manual also notes in the Preamble (Part I.2) that the Manual Rules "extend to the accused all the 'necessary judicial guarantees' as required by Common Article 3."[25]

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[19] MCA § 948b(f); *see supra* note 2.

[20] *United States v. Khadr*, CMCR 07-001, n.4 (U.S.C.M.C.R. Sep. 24, 2007) (citations omitted).

[21] MCA § 948b(f).

[22] Common Article 3, *supra* note 2. Common Article 3 was considered by the drafters as proclaiming "the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built." Int'l Comm. of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 14 (Jean S. Pictet, ed., 1958). *See also* Derek Jinks, *Protective Parity and the Laws of War*, 79 NOTRE DAME L. REV. 1493, 1508-10 (2004) (outlining the purpose of Common Article 3 and arguing that the principles embodied therein "would pierce the veil of sovereignty").

[23] U.S. Dept. of Def., Manual for Military Commissions, "Executive Summary," at 1 (Jan. 18, 2007) *available at* http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20 Commissions.pdf [hereinafter Manual Rules].

[24] *Id.*

[25] Manual Rules, *supra* note 23, "Preamble," Part I.2; Common Article 3, *supra* note 3.

(7) Simply tracking the language or mentioning Common Article 3, however, is not sufficient to make the commissions compliant with the content of that provision. While the Manual does protect certain rights, the Manual contains several provisions which violate the procedural safeguards required under Common Article 3.

(8) Common Article 3 requires judicial guarantees which are "recognized as indispensable by civilized peoples," but does not expressly define these rights. When interpreting Common Article 3 in *Hamdan v. Rumsfeld*, the Supreme Court considered Article 75 of the first Additional Protocol to the Geneva Conventions,[26] the Civil and Political Covenant,[27] and customary international law.[28] For reasons discussed below, the Military Commission should follow the same approach to interpreting Common Article 3.

C. Article 75 Of Protocol I

(9) Article 75 of Additional Protocol I, which the U.S. recognizes as customary international law,[29] should be used to clarify the meaning of the rights provided by Common Article 3. As a part of international law promulgated after the Geneva Conventions, Article 75 of Protocol I is a widely accepted statement of fair trial guarantees that must be provided under international law. Article 75 states "[n]o sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure."[30] Article 75 then lists judicial guarantees considered fundamental to a fair trial under customary international law, including the right to be present at trial, the right to call witnesses, the right to confront witnesses, the right to a public hearing, and the right to appeal. Just as the Military Commission should incorporate Common Article 3 into its interpretation of the Manual, it should also incorporate Article 75's guarantees into Common Article 3.

D. Civil And Political Covenant And Other Human Rights Provisions

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[26] Additional Protocol, *supra* note 5, art. 75(3).

[27] Civil and Political Covenant, *supra* note 6; *Hamdan*, 126 S.Ct. at 2797 n.66 (Stevens, J., concurring) (citing the Civil and Political Covenant as an additional source of legal protections mirroring those under Article 75).

[28] Customary international law includes the right to a "fair trial affording all essential judicial guarantees." Customary international humanitarian law is examined in detail by the International Red Cross in *Customary International Humanitarian Law* (Jean-Marie Henckaerts & Louise Doswald-Beck, Int'l Comm. of the Red Cross, eds., 2005).

[29] Parks, *supra* note 5.

[30] Additional Protocol, *supra* note 5, art. 75(4). *See generally* Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. OF THE RED CROSS 375 (2005) (setting forth the sources of customary international law in times of conflict).

(10) In addition, the Civil and Political Covenant and the Third Geneva Convention, which are treaties ratified by the United States, provide valuable guidance in the interpretation of the MCA and Manual for Military Commissions. In order to provide for regularly constituted courts affording fair trial guarantees, the MCA and Manual for Military Commissions should be interpreted in light of U.S. treaty obligations. As discussed below, well-established methods of statutory interpretation consider treaties as interpretive aids. Interpreting Common Article 3, the MCA, and the Manual in accordance with the Civil and Political Covenant and other human rights provisions will effectuate the Congressional intention that the military commissions be regularly constituted courts affording judicial guarantees recognized as indispensable by civilized peoples under Common Article 3.[31]

(11) The Civil and Political Covenant requires a "regularly constituted court" that is "independent and impartial" and conducted by a "competent tribunal."[32] The Covenant specifically enumerates a number of fair trial protections, including the right to be present at trial, the right to call witnesses, the right to confront witnesses, the right to counsel, the right to equality of arms, the right against self-incrimination, the right to appeal, and the right to prompt notice of charges.[33] In interpreting the Civil and Political Covenant, the Human Rights Committee, established by the Civil and Political Covenant as its implementing organ, notes that jurisdiction of military courts over civilians not performing military tasks is normally inconsistent with the fair, impartial, and independent administration of justice.[34]

E. International Criminal Tribunals For Rwanda And The Former Yugoslavia

(12) In addition to general human rights law, the Military Commission should take into account the procedural guarantees afforded by the International Criminal Tribunal for Rwanda (ICTR)[35] and the International Criminal Tribunal for the Former Yugoslavia (ICTY)[36] when interpreting the meaning of a regularly constituted court affording judicial guarantees.[37] International criminal tribunals have, since World War II, applied the laws of war in proceedings that comply with international standards of fairness. The ICTY and the ICTR operate under

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[31] *See* MCA § 948b(f).

[32] Civil and Political Covenant, *supra* note 6, art. 14(1). *See also* Pejic, *supra* note 31, at 78, 84.

[33] Civil and Political Covenant, *supra* note 6, art. 14.

[34] Human Rights Committee, Concluding Observations, Peru, CCPR/CO/70/PER (2000), ¶ 12. *See generally* William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 22-23 (2002) ("Military tribunals, depending on their structure and rules, may well violate core principles of international law, such as the right – enshrined in numerous international conventions – to a fair trial before an independent arbiter.") (citation omitted).

[35] ICTR Statute, *supra* note 7. Article 14 of the ICTR Statute adopts "the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters" of the ICTY "with such changes as they deem necessary."

[36] ICTY Statute, *supra* note 8.

[37] Common Article 3, *supra* note 2.

rules of procedure and evidence that respect the rights of the accused.[38] The Supreme Court and other federal courts have looked to the international criminal tribunals for guidance in cases involving war crimes and international humanitarian law,[39] which provides precedent for using the rules of such tribunals as guidance for the military commissions.

F. Courts-Martial

(13) Finally, the Military Commission should draw on the practice of courts-martial in understanding what qualifies as a regularly constituted court affording judicial guarantees. The Third Geneva Convention (POW Convention)[40] requires POWs to be tried by court-martial, so courts-martial under the Uniform Code of Military Justice (UCMJ) generally provide a regularly constituted court affording judicial guarantees as directed by Common Article 3. The Military Commission should draw on the fundamental principles of courts-martial in understanding what constitutes a regularly constituted court affording judicial guarantees.

III. Military Commissions Under The MCA Are Not Regularly Constituted Courts

(14) The Military Commission is not a regularly constituted court as required by Common Article 3,[41] Article 75 of Protocol I,[42] and the Civil and Political Covenant.[43] Under the Civil and Political Covenant, a "regularly constituted court" must, at a minimum, be "independent and impartial" and conducted by a "competent tribunal."[44] The requirement of independence protects the accused's right to judges that are not subject to political influence.[45] Impartiality requires judges to be free of personal bias or prejudice as well as to appear impartial to objective observers.[46] In the military commissions, the convening authority performs some of the functions of a chief prosecutor by, for example, determining who will be charged and with what offenses they will be charged.[47] The convening authority also selects the chief trial judge

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[38] Report of the Secretary-General Pursuant to Paragraph 2 of Resolution 808 (1993), S/25704, 3 May 1993.

[39] *See, e.g., Hamdan*, 126 S.Ct. at 2785 n.40; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1292-93 (11th Cir. 2002); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1995).

[40] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[41] Common Article 3, *supra* note 2, § 1(d).

[42] Additional Protocol, *supra* note 5, art. 75(4).

[43] Civil and Political Covenant, *supra* note 6, art. 14(1).

[44] *Id*. *See also* Pejic, *supra* note 32, at 78, 84.

[45] *See* Human Rights Comm., General Comment No. 32, 19th Sess., U.N. Doc. CCPR/C/GC/32, ¶ 19 (2007) [hereinafter Gen. Comm. 32].

[46] *Id.* ¶ 21.

[47] R.M.C. 504.

from a pool of candidates.[48] The chief trial judge then selects the remaining judges from the same pool.[49] At a minimum, a judge who is selected by the person in charge of prosecuting detainees or selected by the judge that was chosen by that person cannot meet the standard of appearing to be impartial to an objective observer.

(15) This military commission also fails to meet *Hamdan's* definition of "regularly constitute court." In *Hamdan*, a majority of the Supreme Court defined a "regularly constituted court" for purposes of Common Article 3 as one "established and organized in accordance with the laws and procedures already in force in a country."[50] A "regularly constituted court" should therefore be understood as a tribunal employing the rules and procedures applicable in trial by courts-martial, as that was the procedure in force at the time of the offenses, absent some "practical need" justifying deviation from court-martial practice.[51] The military commissions fail to satisfy this standard for at least two reasons. First, because the principal "need" justifying the procedures used by military commissions under the MCA is apparently the "need" to secure convictions using tainted evidence, the Commission does not constitute a regularly constituted court and lacks jurisdiction over Mr. Khadr.

(16) Second, the Military Commission is not a regularly constituted court "established in accordance with laws and procedures already in force in a country" as required by *Hamdan* because it is *ex post facto*. The alleged offenses took place in 2002, but the MCA was not adopted until 2006. Unlike the Nuremberg tribunals which were presaged by the Hague Convention of 1907, military commissions under the MCA prosecute newly defined offenses under newly defined jurisdiction over a new category of individuals in a foreign country. Traditionally, military commissions have prosecuted war crimes without triggering *ex post facto* concerns, because the offenses tried were already known under international law.[52] In contrast, despite its claim that it merely codifies existing offenses, the MCA adds new crimes to those previously known in international law.[53] This *ex post facto* prosecution violates the United States Constitution,[54] the Civil and Political Covenant,[55] the Additional Protocol,[56] and Common

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[48] R.M.C. 503(b)(2).

[49] R.M.C. 503(b)(1).

[50] *Hamdan*, 126 S.Ct. at 2797.

[51] *Id*.; *id*. at 2803-04 (Kennedy, J., concurring).

[52] Charles H. Rose III, *Criminal Conspiracy and the Military Commissions Act: Two Minds That May Never Meet*, 13 ILSA J. INT'L & COMP. L. 321, 326-27 (2007).

[53] *See* Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 AM. J. INT'L L. 56, 61 (2007); Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165, 1192-93 (2007); Sean Riordan, *Military Commissions in America? Domestic Liberty Implications of the Military Commissions Act of 2006*, 23 TOURO L. REV. 575, 602-603 (2007).

[54] U.S. Const. art. I, § 9, cl. 3.

[55] Civil and Political Covenant, *supra* note 6, art. 15. The prohibition of *ex post facto* prosecution is non-derogable, in recognition of the fundamental nature of this requirement for a regularly constituted court and a fair trial. Civil and Political Covenant, *supra* note 6, art. 4.

Article 3. Thus, the military commissions established by the MCA are not "regularly constituted courts" for the purpose of trying offenses allegedly occurring in 2002, more than four years before the MCA was enacted.

IV. The Military Commission Must Afford Judicial Guarantees Required By The MCA And Common Article 3 Or It Lacks Jurisdiction

(17) Although the MCA requires military commissions to comply with Common Article 3, the Manual for Military Commissions does not adequately protect fair trial rights in practice. The MCA and Common Article 3 require:

1. the defendant's right to confront evidence and witnesses,[57] including
    a. the defendant's right to call witnesses,[58]
    b. the right to cross-examine witnesses against the accused,[59] and
    c. the right of the defendant to be present at proceedings;[60]
2. the right to counsel of choice before, during, and after trial;[61]
3. the right to equality of arms;[62]
4. the right of defendants not to testify against themselves or to confess their guilt;[63]

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[56] Additional Protocol, *supra* note 5, art. 75(4)(c).

[57] Gen. Comm. 32, *supra* note 45, ¶¶ 36, 39. *See also* David Weissbrodt, *The Right to a Fair Trial* 53-57 (forthcoming, 2008) (outlining other rights regarding witnesses) (revising David Weissbrodt, *The Right to a Fair Trial* (2001); Additional Protocol, *supra* note 5, art. 75(g).

[58] *See* MCA § 949j(a); Additional Protocol, *supra* note 5, art. 75(4)(g); Civil and Political Covenant, *supra* note 6, art. 14(3)(e).

[59] *See* MCA § 949a(b)(1)(A); Additional Protocol, *supra* note 5, art. 75(4)(g); Civil and Political Covenant, *supra* note 7, art. 14(3)(e).

[60] *See* MCA § 949a(b)(1)(B); Additional Protocol, *supra* note 5, art. 75(4)(e); Civil and Political Covenant, *supra* note 6, art. 14(3)(d).

[61] *See* MCA § 949c(b)(1); Additional Protocol, *supra* note 5, art. 75(4)(a) (procedure "shall afford the accused before and during his trial all necessary rights and means of defence"); Civil and Political Covenant, *supra* note 6, art. 14(3)(d); Gen. Comm. 32, *supra* note 45, ¶ 10 (citing *Currie v. Jamaica*, Communication No. 377/1989, U.N. Doc. CCPR/C/50/D/377/1989 (1994), ¶ 13.4; *Shaw v. Jamaica*, Communication No. 704/1996, U.N. Doc. CCPR/C/62/D/704/1996 (1998), ¶ 7.6; *Taylor v. Jamaica*, Communication No. 707/1996, U.N. Doc. CCPR/C/60/D/707/1996 (1997), ¶ 8.2; *Henry v. Trinidad and Tobago*, Communication No. 752/1997, U.N. Doc. CCPR/C/64/D/752/1997 (1999), ¶ 7.6; *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, U.N. Doc. CCPR/C/74/D/845/1998 (2002), ¶ 7.10). These Human Rights Committee cases derive from communications submitted pursuant to the Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* Mar. 23, 1976. As of January 10, 2008, 110 countries were states parties to the Optional Protocol and 160 nations were states parties to the Covenant. *See* Ratification Status, *available at* http://www2.ohchr.org/english/bodies/ratification/5.htm.

[62] *See* MCA, 10 U.S.C. § 948b(f) (2006); Civil and Political Covenant, *supra* note 6, art. 14(1).

[63] *See* MCA § 948r; Additional Protocol, *supra* note 5, art. 75(f); Civil and Political Covenant, *supra* note 6, art. 14(3)(g); Gen. Comm. 32, *supra* note 45, ¶ 41 (citing *Kurbonov v. Tajikistan*, Communication No.

5. the right to exclude evidence adduced through torture or ill-treatment;[64]
6. the right to a speedy trial, including the right to be promptly informed of the charges or reasons for detention;[65] and
7. the right to review by a higher court.[66]

(18) In order to meet Common Article 3's requirement of "affording all the judicial guarantees which are recognized as indispensable by civilized people" any court or tribunal must, at a minimum, provide for the above rights and judicial guarantees,[67] or the analogous requirements of the Civil and Political Covenant and Article 75 of Additional Protocol I to the Geneva Conventions. The Manual for Military Commissions does not adequately guarantee the following rights:

1. the right to call witnesses,
2. the right to cross-examine witnesses,
3. the right to be present at trial,
4. the right to counsel,
5. the right to equality of arms,

1208/2003, U.N. Doc. CCPR/C/86/D/1208/2003 (2006), ¶¶ 6.2 – 6.4; *Shukurova v. Tajikistan*, Communication No. 1044/2002, U.N. Doc. CCPR/C/86/D/1044/2002 (2006), ¶¶ 8.2 – 8.3; *Singarasa v. Sri Lanka*, Communication No. 1033/2001, U.N. Doc. CCPR/C/81/D/1033/2001 (2004), ¶ 7.4; *Deolall v. Guyana*, Communication No. 912/2000, U.N. Doc. CCPR/C/82/D/912/2000 (2004), ¶ 5.1; *Kelly v. Jamaica*, Communication No. 253/1987, U.N. Doc. CCPR/C/41/D/253/1987 at 60 (1991), ¶ 5.5).

[64] *Cf.* MCA §§ 948r(b), 948b(f); Additional Protocol, *supra* note 5, art. 75; Civil and Political Covenant, *supra* note 6, art. 7.

[65] *See* MCA § 948b(f) (including judicial guarantees from Common Article 3 in the MCA); Additional Protocol, *supra* note 5, art. 75(4)(a) (right to notice); Civil and Political Covenant, *supra* note 6, art. 14(3)(a), (c) (right to notice, right to trial without undue delay); Gen. Comm. 32, *supra* note 45, ¶ 27 (citing *Muñoz Hermoza v. Peru*, Communication No. 203/1986, U.N. Doc. CCPR/C/34/D/203/1986 (1988), ¶ 11.3; *Fei v. Columbia*, Communication No. 514/1992, U.N. Doc. CCPR/C/53/D/514/1992 (1995), ¶ 8.4).

[66] Civil and Political Covenant, *supra* note 6, art. 14(5); Gen. Comm. 32, *supra* note 45, ¶ 45 (citing *Henry v. Jamaica*, Communication No. 230/1987, U.N. Doc. CCPR/C/43/D/230/l987 (1991), ¶ 8.4).

[67] *See generally* Luisa Vierucci, *Prisoners of War Or Protected Persons Qua Unlawful Combatants? The Judicial Safeguards to Which Guantánamo Bay Detainees Are Entitled*, 1 J. INT'L CRIM. JUST. 284 (2003) (laying out the framework for construing Common Article 3 and the basic judicial guarantees provided therein); Melysa H. Spetber, *Note, John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 AM. CRIM. L. REV. 159, 174-75 (2003) (commenting that the requirements established by Common Article 3 are the minimum standards that must be met, and should be viewed as inviting a greater level of protection); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 352 (2002) (noting that judicial guarantees under the Civil and Political Covenant are non-derogable and that Human Rights Committee General Comment 29 indicates that military commissions must comply with international humanitarian law and may not deny fair trial rights where not strictly required). *Cf.* Derek Jinks, *The Applicability of the Geneva Conventions to the "Global War on Terrorism*," 46 VA. J. INT'L L. 165, 185 (2005) (noting the dual purposes of Common Article 3 to be "the minimization of human suffering and the respect for state sovereignty").

6. the right to avoid self-incrimination,
7. the exclusion of evidence obtained through torture or other ill-treatment,
8. the right to speedy trial and notice, and
9. the right to review by a higher court.

A. There Is Sufficient Disjuncture Between The Commission Rules And The MCA And Common Article 3 To Demonstrate That The Commission Lacks Jurisdiction Over Mr. Khadr.

(19) The rules of procedure and evidence used to conduct the military commissions should be construed to conform to the MCA and Common Article 3. If there is no construction that makes the rules compatible with the MCA and Common Article 3, then the rules are invalid for lack of statutory authorization.[68] If the rules are invalid, the rules do not grant jurisdiction over Mr. Khadr and charges should be dismissed. In the alternative, this inconsistency obligates the Military Commission to interpret its rules to provide the requisite judicial guarantees.[69]

(20) The Manual for Military Commissions guarantees several rights necessary to conform to internationally accepted norms. The Manual is, however, inconsistent in several respects with the rights afforded by the MCA and Common Article 3. Following are examples of particularly problematic inconsistencies between the MCA Rules and the MCA as interpreted in light of Common Article 3

1. Confrontation

(21) The Manual for Military Commissions does not ensure the right of the accused to confront the evidence and witnesses against him. The Manual threatens three components of the right to confrontation: the right to call witnesses, the right to cross-examine adverse witnesses, and the right to be present. The right to call witnesses is infringed by trial counsel's ability to contest defense counsel's request for a witness on the basis of national security – a departure from accepted practice in courts-martial. The right of the accused to cross-examine witnesses is not sufficiently protected under the Manual, leaving the accused unable to defend effectively against charges by the government. Further, the right to be present is compromised by provisions that allow the accused to be excluded from *in camera*, *ex parte* reviews of national security privilege claims.

(22) When interpreting each of these fair trial attributes, the Military Commission should construe the MCA in view of Common Article 3 and other relevant sources of interpretation.

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[68] *See* MCA § 949a(a) ("Pretrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense, in consultation with the Attorney General. Such procedures shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial. Such procedures and rules of evidence may not be contrary to or inconsistent with this chapter."); Manual Rules, *supra* note 23, "Preamble," ¶ 1(f).

[69] *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

a. Right To Call Witnesses

(23) The MCA generally provides for the right to call witnesses, as interpreted by Common Article 3 and other relevant sources. But the Manual violates this right. Therefore, the charges should be dismissed or the right to call witnesses should be incorporated into the Military Commission's procedures.

i. What Does The MCA Say?

(24) The defense is afforded the right to call witnesses under the MCA: "Defense counsel in a military commission . . . shall have reasonable opportunity to obtain witnesses . . . as provided in regulations prescribed by the Secretary of Defense."[70]

ii. How Should The MCA Be Interpreted?

(25) The Military Commission should consult sources of international law to interpret the meaning of Common Article 3. Article 75 of the Additional Protocol guarantees the accused the right "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him . . . ." The Civil and Political Covenant Article 14(3)(e) uses identical language: the accused has the right "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him . . . ."

(26) The UCMJ provides a good example of how to implement these rights. In courts-martial, where classified information is an anticipated part of many prosecutions, the protection of classified information would not be a valid basis for contesting the defense's right to call a witness.[71] The only two recognized bases for contesting a witness would be irrelevance and lack of necessity.[72] The ICTY and the ICTR similarly provide "minimum guarantees" for the accused "to examine, or have examined, the witnesses against [the accused] and to obtain the attendance and examination of witnesses on [behalf of the accused] under the same conditions as witnesses against [the accused]."[73] Accordingly, the MCA and Common Article 3 should be interpreted to provide the equal right to call and examine witnesses.

iii. What Does The Manual Provide?

(27) The Manual for Military Commissions fails to provide the accused the fair trial right to call witnesses that the MCA mandates in two respects.

(28) First, the prosecution has a superior right to call witnesses, in direct conflict with the Civil and Political Covenant and Protocol I. In a military commission, "[t]he trial counsel

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[70] MCA § 949j(a).

[71] *See* Rules for Courts-Martial [hereinafter R.C.M.] 703(c)(2)(D).

[72] *Id.*

[73] ICTY Statute, *supra* note 8, art. 21(4)(e); ICTR Statute, *supra* note 7, art. 20(4).

shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution," without limitation.[74] When the defense submits a list of witnesses to trial counsel for production by the government, trial counsel may contest the production of the witness because the testimony of the witness concerns classified information.[75] Not only does trial counsel have a more extensive right to call witnesses, defense counsel may be chilled in trial strategy knowing that trial counsel can contest witnesses on the basis of national security. Accordingly, the Military Commission rules do not afford each side an equal opportunity to call witnesses.

(29) Because of congressional intent to follow international law, any exception to the equal right to call witnesses must be construed as narrowly as possible. The court-martial system adequately protects classified information while affording both sides the opportunity to call witnesses. Hence, inequality in military commissions cannot be justified. The denial of the right of the accused to call witnesses on the same terms as trial counsel is contrary to the MCA and is therefore unlawful.

(30) Second, military commissions deny the right to call witnesses by allowing the trial to continue despite the absence of an essential witness. In courts-martial, if the testimony of an unavailable witness is so important to an issue that it is essential to a fair trial, "the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party."[76] In a military commission, the military judge must grant a continuance or other relief to obtain a witness essential to a fair trial only "if the reason for the witness' unavailability is within the control of the United States."[77] The United States is allowed to continue prosecution despite the absence of a witness essential to a fair trial, so long as the absence is not the fault of the government.[78] Again, preference is given to the government, which is unacceptable in light of Common Article 3's equality requirement.

(31) When trial counsel has a superior right to call witnesses and when a trial by military commission may continue despite the absence of an essential witness through no fault of the accused, the Rules for Military Commissions cannot ensure the equal right to call witnesses as required by the MCA interpreted in light of Common Article 3.

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[74] R.M.C. 703(c)(1).

[75] R.M.C. 703(c)(2)(D).

[76] R.C.M. 703(b)(3).

[77] R.M.C. 703(b)(3)(B).

[78] For example, this problem would arise if detainee "A" in Guantánamo gives testimony against detainee "B." The U.S. government may then release "A" to the custody of his government or eventually to remain outside of custody. During B's trial in the military commission the government may rely on a summary of A's accusatory testimony. So long as A is not in U.S. government custody, B cannot insist on A's testimony and the right to cross-examine. Indeed, the U.S. government may use a summary of A's testimony – despite a hearsay objection.

b. Right To Cross-Examination

i. What Does The MCA Say?

(32) In a military commission, "[t]he accused shall be permitted . . . to cross-examine the witnesses who testify against him . . . as provided for by this chapter."[79] "Defense counsel may cross-examine each witness for the prosecution who testifies before a military commission under [the MCA]."[80] MCA § 948b(f) states that a military commission offers all "judicial guarantees which are recognized as indispensable by civilized peoples" under Common Article 3, which include the right to cross-examine.

ii. How Should The MCA Be Interpreted?

(33) As discussed above, the Military Commission should consult sources of international law to interpret the meaning of Common Article 3. Article 75 of the First Additional Protocol establishes that "[a]nyone charged with an offence shall have the right to examine, or have examined, the witnesses against him . . . ." The Civil and Political Covenant uses identical language: everyone shall be entitled "[t]o examine, or have examined, the witnesses against him. . . ."[81] The Human Rights Committee has interpreted the Civil and Political Covenant to guarantee "the accused the same legal powers of . . . examining or cross-examining any witnesses as are available to the prosecution."[82] The rules of the ICTR and the ICTY, however, allow witnesses to testify remotely or behind screens.[83] This practice largely relies on judges as finders of fact, and is based on a concern for victims of sexual assault. International criminal tribunals have been reluctant to withhold evidence from the defense.[84] Furthermore, even when a witness testifies remotely or behind a screen, the judges are allowed to observe the demeanor of the witness and permit the defense to ask a range of questions to evaluate the witness's credibility.[85]

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[79] MCA, 10 U.S.C. § 949a(b)(1)(A) (2006).

[80] MCA § 949c(b)(7).

[81] Civil and Political Covenant, *supra* note 6, art. 14(3)(e).

[82] *See* Gen. Comm. 32, *supra* note 45, ¶ 39.

[83] *See, e.g.*, *Prosecutor v. Delalic*, Case No. IT-96-21-T, Decision on the Motion to allow Witnesses K, L and M to give their Testimony by Means of video-link Conference, (May 28, 1997); *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, (Aug. 10, 1995). *See generally* Hon. Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, (2001) (analyzing why the ICTY decreased emphasis on live testimony over time). Under ICTY Rules, Rule 89(D) and ICTR Rules, Rule 89, judges have discretion to refuse admission of evidence "if its probative value is substantially outweighed by the need to ensure a fair trial."

[84] *See, e.g.*, ICTY Rules, *supra* note 8, Rule 96; ICTR Rules, *supra* note 7, Rule 96.

[85] *See, e.g.*, *Prosecutor v. Tadic*, IT-94-I-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995.

(34) Courts-martial provide an example of how courts should afford the right to cross-examine. In courts-martial, the accused has a broad right to cross-examine witnesses against him that is derived from the principles motivating the Sixth Amendment to the United States Constitution.[86] And hearsay is admitted only under longstanding exceptions where hearsay is inherently reliable.[87] The right to cross-examine may be narrowed by such concerns as harassment, prejudice, confusion of issues, witness safety, repetitiveness, or marginal relevancy.[88] Courts-martial, despite dealing with cases involving classified information and danger to witnesses, have no provision for concealing the identity of witnesses from the accused and defense counsel. The identify of a witness can be concealed in courts-martial only in very narrow circumstances after the relevance and materiality of the information as well as the accused's need for access to the information has been balanced against the government's need to keep the information from disclosure.[89]

iii. What Does The Manual Provide?

(35) A number of limitations and privileges in the Manual make the MCA's general grant of the right to cross-examine ineffective.

(36) The first limitation is the general admissibility of hearsay for military commissions under the MCA and the Manual.[90] Allowing hearsay denies the right to cross-examine because the declarant is not present. In such a case the accused is confronted with unreliable statements, but cannot demonstrate their lack of probative value. In contrast, courts-martial generally exclude hearsay. Hearsay allowed under exceptions to the hearsay rule in courts-martial and civilian courts must have circumstantial guarantees of trustworthiness,[91] mitigating the inability of the accused to cross-examine the declarant.

(37) If the commission accepts hearsay evidence, then the accused bears the burden of proving that the government's hearsay is unreliable.[92] Since the government is able to protect its sources, methods, and activities under R.M.C. 701(f), the accused effectively bears the burden of proving his own innocence, loses the presumption of innocence, and will find it impossible to demonstrate that such hearsay is unreliable. As discussed below, the general admissibility of hearsay in military commissions aggravates problems of coerced testimony and equality of arms.

(38) Second, government witnesses before the military commissions are allowed to testify from behind a screen, visible to the military judge and members but hidden from the accused and defense counsel.[93] Since the defense does not know the identity of the witness, it is

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[86] *See United States v. Velez*, 48 M.J. 220, 226 (C.A.A.F. 1998).

[87] M.R.E. 803-807.

[88] *Id.*

[89] *See United States v. Lone Tree*, 35 M.J. 396 (C.M.A. 1992).

[90] MCA, 10 U.S.C. § 949a(b)(2)(E)(i) (2006); M.C.R.E. 802.

[91] *See* M.R.E. 807; Fed. R. Evid. 807.

[92] M.C.R.E. 803(c).

[93] M.C.R.E. 611(d)(2).

impossible to fairly impeach the credibility of the witness. Trial counsel has the right to know the identity of all defense witnesses but the accused is screened from adverse witnesses, giving the government a more robust right to cross-examine. Courts-martial do not allow the witness to be hidden in this manner except in narrow circumstances after weighing the accused's need for disclosure against the government's need for secrecy.[94]

(39) Third, the military judge is required to limit cross-examination of government witnesses upon request of the government.[95] As with screened witnesses, there is no analogous provision for courts-martial. The accused cannot effectively cross-examine a witness if the military judge has entered a protective order forbidding specific questions identified by the military judge. As discussed above, the accused must be afforded equal opportunity to cross-examine witnesses. Because the MCA and Rules for Military Commissions restrict cross-examination, they do not provide the full right to cross-examine that is guaranteed by Common Article 3, as discussed above. In any case, the MCA must be interpreted in light of Common Article 3 to interpret narrowly the exception to the general rule of cross-examination.[96]

c. Right To Be Present

i. What Does The MCA Say?

(40) The MCA provides the right to be present in a military commission. The accused in a military commission "shall be present at all sessions of the military commission (other than those for deliberation and voting), except when excluded under section 949d of [the MCA]."[97]

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[94] *See United States v. Lone Tree*, 35 M.J. 396 (C.M.A. 1992).

[95] MCA § 949d(f)(2)(C); M.C.R.E. 505(e)(2).

[96] Mr. Khadr has a Due Process right to cross-examine witnesses against him. *But see Boumediene v. Bush*, 476 F.3d 981 (2007). Because it demonstrates the Court's understanding of which judicial guarantees are indispensable to the U.S. system of justice, the Supreme Court's own procedural Due Process and incorporation jurisprudence can also help to clarify which "judicial guarantees" should be recognized as "indispensable" under Common Article 3. *See Hamdan*, 126 S. Ct. at 2803 (Kennedy, J., concurring) ("The concept of a 'regularly constituted court' providing 'indispensable' judicial guarantees requires consideration of the system of justice under which the commission is established . . . ."). Common Article 3 requires, at minimum, that an accused be afforded "all the judicial guarantees which are recognized as indispensable by civilized peoples." In determining which procedural provisions of the U.S. Bill of Rights are made obligatory upon the states via the Due Process Clause of the 14th Amendment, the Supreme Court has asked whether the right in question is "fundamental and essential to a fair trial." *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). Among the procedural rights recognized as essential by the Supreme Court are: the right to counsel, *Gideon*, 372 U.S. at 342; the right to be "heard," *Powell v. Alabama*, 287 U.S. 45, 68 (1932); trial by an impartial finder of fact, *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); the right of the accused to confront adverse witnesses, *Pointer v. Texas*, 380 U.S. 400, 404 (1965); the right to a speedy trial, *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967); and the right to a public trial, *In re Oliver*, 333 U.S. 257, 273 (1948). In Mr. Khadr's case, a number of these procedures, which are fundamental and essential to a fair trial, have been violated. Mr. Khadr reserves the right to file a due process motion more fully analyzing his right to due process after the Supreme Court reaches decides *Boumediene v. Bush.*

[97] MCA, 10 U.S.C. § 949a(b)(1)(B) (2006).

Section 949d(f)(3) allows the military judge to exclude the accused from *ex parte* reviews of trial counsel's claims of national security privilege in certain circumstances "at trial." MCA § 948b(f) states that a military commission offers all "judicial guarantees which are recognized as indispensable by civilized peoples" under Common Article 3, including the right to be present at one's trial.

ii. How Should The MCA Be Interpreted?

(41) Interpreting the MCA in light of Common Article 3 and other international sources, Protocol I Article 75 declares that "[a]nyone charged with an offence shall have the right to be tried in his presence." Article 14 of the Civil and Political Covenant provides the same guarantee, stating that in a criminal trial, the accused has the right "[t]o be tried in his presence . . . ." Neither mentions any exceptions. The ICTR and the ICTY also guarantee the right of the accused "to be tried in his presence."[98]

(42) Similarly, under court-martial procedures, "a military accused has both a constitutional and a statutory right to be present during the conduct of his trial."[99] The right to be present at one's trial is derived from the Fifth Amendment of the U.S. Constitution and from UCMJ Art. 39, which directs that "[p]roceedings . . . shall be conducted in the presence of the accused." Although it is not unlimited, the Supreme Court in *Hamdan* described the right to be present as "one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself . . . ."[100] An example of the balance between the strong right to be present and the need for security in courts-martial is M.R.E. 505(i). Under this rule, trial counsel can move *ex parte* for an *in camera* review of classified information, but if such a hearing is granted, the defense has a right to be present and make arguments.[101] Similarly, M.R.E. 505(g)(3) allows for *ex parte* exclusion of classified evidence, but only if it is duplicative of statements already made in open court.

iii. What Does The Manual Provide?

(43) In a military commission, the accused can be excluded from portions of the trial when the military judge considers claims of national security privilege on an *ex parte* basis.[102]

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[98] ICTY Statute, *supra* note 8, art. 21(4)(d).

[99] *U.S. v. Rembert*, 43 M.J. 837, 838 (A. Ct. Crim. App. 1996).

[100] *Hamdan*, 126 S.Ct. at 2792.

[101] *See* M.R.E. 505(i); UCMJ art. 39(a).

[102] MCA § 949d(f)(3); R.M.C. 804(a); M.C.R.E. 505(b)(3). The Classified Information Procedures Act (CIPA) should not be used as an aid to interpreting the MCA. 18 U.S.C. app. 3 (2000). Unlike the MCA, the CIPA has no provision shielding from the accused sources, methods, and activities used to obtain evidence. As written, the MCA allows the following trial scenario: a government employee witness ties the accused to alleged crimes through a heavily redacted summary of a statement adduced through ill-treatment. When cross-examined about the circumstances surrounding the statement's production, the government witness takes advantage of the privilege against revealing sources, methods, or activities that produce classified information. The accused is then convicted in reliance on the tainted evidence. This

These provisions conflict with Common Article 3, which affords the right to be present as discussed above, and with MCA § 948b(f). MCA § 948b(f) requires the military commission to afford judicial guarantees under Common Article 3, and Common Article 3 requires that the accused be tried in his presence. The Military Commission must provide the right to be present under Common Article 3, and in any event should narrowly construe the provisions in the MCA that allow exceptions to the general right of the accused to be present at trial. If such a construction is not possible, the MCA is self-contradictory and the Military Commission lacks jurisdiction.

2. Right To Counsel

a. What Does The MCA Say?

(44) The MCA affords the accused the right to counsel: "[m]ilitary defense counsel shall be detailed for each military commission under this chapter."[103]

b. How Should The MCA Be Interpreted?

(45) Consulting international sources to interpret Common Article 3, Article 75 of Protocol I states that trial procedure "shall afford the accused before and during his trial all necessary rights and means of defense."[104] Similarly, Article 14 of the Civil and Political Covenant grants the defendant the right "to communicate with counsel of his own choosing," the right "to defend himself in person or through legal assistance of his own choosing, to be informed, if he does not have legal assistance, of this right, and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."[105] Courts-martial are a good example of how to guarantee effective access to counsel for the accused.[106] "The accused has the right to be represented before . . . a court-martial . . . as provided in this subsection."[107] These sources provide background for interpreting the MCA.

c. What Does The Manual Provide?

(46) Just as international law requires the right to counsel, at a military commission, the accused should have the right to counsel under the MCA.[108] The Manual for Military

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scenario would not be possible under the CIPA, and thus the two acts are too dissimilar to permit a comparison.

[103] MCA § 948k(a)(1).

[104] Additional Protocol, *supra* note 5, art. 75(4)(a)

[105] Civil and Political Covenant, *supra* note 6, art. 14. The ICTY and the ICTR provide an identical right. *See* ICTY Statute, *supra* note 8, art. 21(4)(d); ICTR Statute, *supra* note 7, art. 20(4)(d).

[106] UCMJ art. 38.

[107] UCMJ art. 38(b)(1).

[108] Because Mr. Khadr has been denied access to counsel, his rights under the Due Process Clause of the Fifth Amendment have been violated. *See supra* note 91.

Commissions does not properly provide the right. Military Commissions Rule 506 grants the accused the right to be represented by military counsel.[109] This general right to counsel is limited by a provision directing the military judge to "enter an appropriate protective order to guard against the compromise of the information disclosed to the defense."[110] The protective order may "[prohibit] the disclosure of the information except as authorized by the military judge . . . ."[111] Similarly, M.C.R.E. 505(e)(2) empowers the military judge to "enter such additional protective orders as are necessary for the protection of national security information . . . ." Both of these provisions have been used to prevent defense counsel from discussing certain information with the accused. When the accused lacks critical information, the accused is unable to make an informed decision on matters such as how to raise questions of witnesses. Since the accused is denied information by the very person who is supposed to be his champion, the accused cannot trust defense counsel and the right to counsel is denied.

(47) Courts-martial ensure that the accused may discuss *all* issues with defense counsel. Under the Military Rules of Evidence, applicable in courts-martial, the military judge may "enter an appropriate protective order to guard against the compromise of the information disclosed to the accused."[112] The military judge in a court-martial may *not* enter an order allowing full disclosure of information to defense counsel but forbidding disclosure to the accused. The absence of full and frank dialogue with defense counsel under the Manual for Military Commissions therefore impermissibly burdens the right to counsel provided by Common Article 3 as a self-executing treaty, as well as the MCA. In any event, any exception to the general right to counsel must be narrowly construed.

3. Right To Equality Of Arms

a. What Does The MCA Say?

(48) MCA § 948b(f) guarantees procedural equality of arms in proceedings before a military tribunal, stating that military commissions must offer all "judicial guarantees which are recognized as indispensable by civilized peoples" under Common Article 3, including the fundamental right to equality of arms.

b. How Should The MCA Be Interpreted?

(49) Under Article 14(1) of the Civil and Political Covenant, "[a]ll persons shall be equal before the courts and tribunals." The Human Rights Committee has authoritatively interpreted Article 14, saying "[t]he right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not

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[109] R.M.C. 506.

[110] M.C.R.E. 505(e)(1).

[111] M.C.R.E. 505(e)(1)(A).

[112] M.R.E. 505(g)(1). As discussed above, *supra* note 97, the CIPA is not sufficiently analogous to be considered in interpreting the MCA.

entailing actual disadvantage or other unfairness to the defendant."[113] The equality of arms is an inherent element of a fair trial.[114] The MCA should be construed in line with these interpretations guaranteeing the right to equality of arms.

c. What Does The Manual Provide?

(50) A number of inequalities between prosecution and defense in the Manual for Military Commissions violate the right to equality of arms under the MCA.

(51) First, the prosecution has an unlimited amount of time to prepare for trial, but the defense can be forced to trial with only 120 days notice.[115] Under R.M.C. 707, there is no requirement that charges be served upon a detainee within a certain period of time. When charges are served, trial must ordinarily begin within 120 days.[116] In contrast, courts-martial give each side an equal amount of time to prepare for trial. As discussed below, UCMJ Article 10 is a good example of how speedy trial rights under the MCA interpreted in light of Common Article 3 should be implemented, despite not being directly applicable in this instance. R.C.M. 707(a) requires that trial by court-martial commence within 120 days of preferral of charges or confinement, whichever is earlier. Since both parties ordinarily begin preparation upon preferral of charges or confinement, each side has had an equal amount of time to prepare when trial begins. The prosecution in a military commission, however, has unlimited time to prepare, but the defense only has 120 days. This procedure's imbalance violates equality of arms.

(52) Second, trial counsel in a military commission has a more extensive right to object to cross-examination under the MCA and the Manual. "During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information."[117] The defense is not afforded an analogous right.[118] Courts-martial provide equality of arms in this area, despite having to deal with classified information. Trial counsel in courts-martial cannot halt cross-examination at will because classified information may arise.[119] Because trial counsel has a more extensive right to object to testimony, the accused is denied equality of arms.

(53) Third, trial counsel in a military commission can move *ex parte* to withhold classified information from the accused. Under the Manual, once trial counsel asserts the

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[113] Gen. Comm. 32, *supra* note 45, ¶ 13 (citing *Dudko v. Australia*, Communication No. 1347/2005, U.N. Doc. CCPR/C/90/D/1347/2005 (2007), ¶ 7.4).

[114] Decision of the Committee of Ministers, Resolution Relating to Cases of Ofner and Hopfinger (5 Apr. 1963), 6 Y.B. 708, 710.

[115] *See* R.M.C. 707 (after service of charges, arraignment required within 30 days, and assembly of military commission required within 120 days).

[116] *See id.*

[117] MCA, 10 U.S.C. § 949d(f)(2)(C) (2006); M.C.R.E. 505(f)(1).

[118] MCA § 949d(f)(2)(C); M.C.R.E. 505(f)(1).

[119] *See* M.R.E. 505.

national security privilege to withhold classified information, the military judge may then review trial counsel's claim of privilege *in camera* and on an *ex parte* basis.[120] Counsel for the accused has no corresponding right to object to evidence and the absence of the accused is a serious disadvantage to the defense. Trial counsel's ability to move for *ex parte* examination of evidence violates the right to equality of arms when defense counsel does not have the same opportunity.

(54) Fourth, the government may refuse to disclose the sources, methods, and activities that produced the evidence it is introducing.[121] The accused has no corresponding right. If the accused cannot learn the circumstances surrounding how evidence is elicited, defense counsel will be unable to inquire into reliability and probative value of critical evidence. Physical evidence may have been collected in a slipshod manner or a statement may have been coerced, without the possibility for the accused to test its reliability. As discussed below, the non-disclosure of sources, methods, and activities may even allow the admission of evidence adduced through torture. Hence, MCA § 949d(f)(2)(B), which allows withholding of sources, methods, and activities, contradicts MCA § 948b(f), which requires equality of arms. In all these contexts, the accused in a military commission is denied equality of arms in violation of Common Article 3, as discussed above, and MCA § 948b(f). In any case, the exceptions must be narrowly construed.

4. Protection From Self-Incrimination

a. What Does The MCA Say?

(55) Under the MCA, the accused has a right against self-incrimination. MCA § 948r states: "No person shall be required to testify against himself at a proceeding of a military commission under this chapter."[122]

b. How Should The MCA Be Interpreted?

(56) The right provided by the MCA should be interpreted in light of Article 75 of Protocol I, the Civil and Political Covenant, and military law – all of which provide a right against self-incrimination. Article 75 of Protocol I provides the right of defendants not "to testify against themselves or to confess their guilt."[123] Similarly, Article 14 of the Civil and Political Covenant includes the right of an accused person "not to be compelled to testify against himself or to confess guilt." The ICTR and the ICTY also provide the accused the right "not to be compelled to testify against himself or to confess guilt."[124] Under the UCMJ, "[n]o person . . . may compel any person to incriminate himself or to answer any questions the answer to which

[120] MCA § 949d(f)(2)(C); M.C.R.E. 505(f)(1).

[121] MCA § 949d(f)(2)(B); R.M.C. 701(f).

[122] MCA, 10 U.S.C. § 948r (2006).

[123] Additional Protocol, *supra* note 5, art. 75(f).

[124] ICTY Statute, *supra* note 8, art. 21(4)(g).

may tend to incriminate him."[125] If a statement is obtained in a way that violates the privilege against self-incrimination, such as by coercion, the statement is inadmissible.[126]

c. What Does The Manual Provide?

(57) The Manual for Military Commissions threatens the right against self-incrimination granted by the MCA by allowing uncorroborated confessions in evidence. M.C.R.E. 304(g)(1) allows "[a]n oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it . . . ." In contrast, courts-martial require that confessions must be supported with independent evidence, as they may be easily manufactured. The problem of uncorroborated confessions is aggravated by MCA § 948r and MCRE 304(c), which allow for the admission of coerced testimony if the totality of the circumstances make a statement reliable and probative. These provisions make it possible that the accused could be convicted based on an uncorroborated coerced confession, as further discussed in Section E below.[127] Because the Manual for Military Commissions allows confessions procured through law enforcement interrogations – as opposed to interrogations for the purpose of gathering intelligence[128] – that are uncorroborated and adduced without warning, it provides insufficient protection from self-incrimination.[129]

5. Exclusion Of Evidence Obtained Through Coercion Or Ill-Treatment

a. What Does The MCA Say?

(58) MCA § 948r(b) provides that "[a] statement obtained by use of torture shall not be admissible in a military commission under this chapter . . . ." The military judge may, however, allow a statement with a disputed degree of coercion if (1) "the totality of the circumstances renders the statement reliable and possessing sufficient probative value;" (2) the interests of justice would best be served by the admission of the statement into evidence; and (3) if the statement was made after the enactment of the Detainee Treatment Act (Dec. 30, 2005), the interrogation methods do not include cruel, inhuman, or degrading treatment.[130] The accused has

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[125] UCMJ art. 31(a). Although art. 31 is not directly applicable, it provides a strong right against self-incrimination that the Military Commission should consider in interpreting the same right under the MCA.

[126] UCMJ art. 31(d).

[127] R.M.C. 701(f).

[128] Interrogations conducted for operational or intelligence purposes have been specifically exempted from requirements to comply with Article 31b of the UCMJ (10 U.S.C. § 831). *See, e.g. United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990); *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992).

[129] *See United States v. Bin Laden*, 132 F.Supp.2d 168, 181-88 (S.D.N.Y.2001) (holding that a non-resident alien interrogated abroad is nonetheless entitled to Fifth Amendment protection against self-incrimination). *See also Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Dickerson v. United States*, 530 U.S. 428, 444, 120 S.Ct. 2326, 2336, 147 L.Ed.2d 405 (2000) ("*Miranda* announced a constitutional rule that Congress may not supersede legislatively.").

[130] MCA, 10 U.S.C. § 948r(c) (2006).

a separate right to exclusion of evidence obtained using ill-treatment under MCA § 948b(f) interpreted in light of Common Article 3.

b. How Should The MCA Be Interpreted?

(59) Article 7 of the Civil and Political Covenant declares that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Human Rights Committee interpreted Article 7 in its General Comment 20 of 1992: "It is important for the discouragement of violations under Article 7 that the law must prohibit the . . . admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment." Protocol I, Article 75 forbids "torture of all kinds, whether physical or mental," "corporal punishment," and "outrages upon personal dignity, in particular humiliating and degrading treatment." Similarly, in the ICTY and the ICTR, "[n]o evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings."[131]

c. What Does The Manual Provide?

(60) The MCA and the Manual do not provide the accused the right to exclusion of evidence adduced through ill-treatment that is well-established in international law and binding on the United States through Common Article 3, as discussed above. The Preamble to the new Manual rightly excludes statements obtained by torture, but specifically allows for "'statements in which the degree of coercion is disputed' if reliable, probative, and the admission would best serve the interests of justice," and "admission of an accused's allegedly coerced statements if they comport with §948r."

(61) The test for admission of allegedly coerced testimony, set forth in MCA § 948r(c) and implemented in M.C.R.E. 304, allows evidence adduced by cruel, inhuman, or degrading treatment in evidence at military commissions. The admission of such evidence directly conflicts with MCA § 948b(f). Because of the strong legislative intent expressed in § 948b(f) in favor of following international law, this exception to the general rule of exclusion must be construed as narrowly as possible.

(62) The rationale for the exclusion of evidence adduced by torture is the same as the rationale making evidence inadmissible if procured by other forms of ill-treatment. Information obtained by either torture or ill-treatment is unreliable since a witness will say whatever may stop the infliction of pain – rather than the truth. As noted above, Common Article 3 prohibits cruel, inhuman, or degrading treatment as well as torture.

(63) Despite the MCA declaration against evidence adduced by torture, the broader endorsement of judicial guarantees against coerced statements based on MCA § 948b(f), and the unreliability of coerced statements, the government may still introduce coerced statements without the defense ever becoming aware. The government may withhold the sources, methods,

[131] ICTY Rules, *supra* note 8, Rule 95. *See, e.g. Prosecutor v. Milomir Stakic*, Case No. IT-97-24-AR73.5, Decision (Oct 10, 2002).

and activities through which it obtained statements and physical evidence under MCA § 949d(f)(2)(B). Hence, if trial counsel wants to offer a statement adduced through torture, they can simply offer it; claim the privilege against disclosure of sources, methods, and activities; and use it at trial. The defense will be unaware of the statement's illegal provenance, and will have no opportunity to defend against such unreliable evidence.

(64) The admission of evidence adduced by either torture or other ill-treatment by military commissions outrages the values of civilization. Allowing this evidence creates an unacceptable incentive to engage in severe abuse and undermines the right to a fair and impartial trial by a regularly constituted court affording judicial guarantees. The MCA and the Manual create an exception to the general rule under MCA § 948b(f) and international law that evidence adduced through torture and ill-treatment should not be allowed in evidence. This exception violates Mr. Khadr's right under Common Article 3 to exclude evidence adduced through torture. In any case, this exception should be construed as narrowly as possible given the strong international norms against evidence adduced through torture and ill-treatment, the legislative intent in § 948b(f) to comport with Common Article 3, and the inherent unreliability of coerced testimony.

6. Speedy Trial

a. What Does The MCA Say?

(65) The MCA affords the right to a speedy trial under § 948b(f), which provides "judicial guarantees which are recognized as indispensable by civilized peoples" under Common Article 3. The MCA disallows speedy trial rights derived from the UCMJ,[132] but Mr. Khadr has an independent right to speedy trial from MCA § 948b(f), so the inapplicability of the UCMJ does not affect the analysis in the present case.

b. How Should The MCA Be Interpreted?

(66) The right to notice is guaranteed in both the Civil and Political Covenant and Protocol I. Article 14(3)(a) of the Covenant guarantees the accused the right "[t]o be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him." Article 75 of Protocol I similarly states that an "accused [shall] be informed without delay of the particulars of the offence alleged against him." The purpose of the right to notice is to enable the accused to prepare an effective defense.[133] Article 14(3)(c) of the Covenant also provides the right "[t]o be tried without undue delay . . . ." The ICTR and the ICTY provide the same guarantee in Article 21(4)(c) of the ICTY Statute.[134] As discussed above, Common Article 3 applies in this case, and provides Mr. Khadr with a right to a speedy trial.

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[132] MCA, 10 U.S.C. § 948b(d)(1)(A) (2006).

[133] *Mbenge v. Zaire*, Communication No. 16/1977, U.N. Doc. CCPR/C/OP/2 at 76 (1990), ¶ 14.2.

[134] ICTY Statute, *supra* note 8, art. 21(4)(c).

(67) The UCMJ provides a good example of a system ensuring speedy trial rights. The MCA does not allow the accused speedy trial rights under the UCMJ, but it nonetheless serves as an example of how speedy trial rights under Common Article 3 should be implemented. "When any person subject to [the UCMJ] is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."[135] After the accused is charged, the burden is on the government to show that it moved forward with "reasonable diligence" in pursuing the charges.[136]

c. What Does The Manual Provide?

(68) The Manual for Military Commissions does not afford the accused the right to a speedy trial as required under the MCA. There is no time frame within which the accused must be charged.[137] Cases brought before the Human Rights Committee have varied in the period that is considered to be undue delay, but generally detention without charges for over three years has been found to violate international norms.[138] In the present case, Mr. Khadr has been held for more than five years, a violation under any international standard.

(69) The Rules for Military Commissions also fail to afford the accused adequate notice to prepare a defense. As discussed above, the prosecution has unlimited time in which to prepare for trial, while the accused has only 120 days notice. Because of the advantage this disparity gives the prosecution, the accused does not have sufficient notice to enable him to prepare an adequate defense. Without a timeframe for charges, adequate notice, and equal preparation time, the Rules for Military Commissions fail to provide the accused the right to a

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[135] UCMJ art. 10.

[136] *United States v. Brown*, 10 C.M.A. 498, 503, 28 C.M.R. 64, 69 (1959).

[137] *See* R.M.C. 707.

[138] *See* Weissbrodt, *supra* note 54, at 45-47 (examining cases brought before the Human Rights Committee for violation of Article 14(3)(c)'s undue delay provision); *Bozize v. Central African Republic*, Communication No. 428/1990, U.N. Doc. CCPR/C/50/D/428/1990 (1994) (finding that trial did not take place within a "reasonable time": military leader arrested in a foreign country, repatriated, imprisoned, held incommunicado for a period, and mistreated, as well denied rights of access to counsel, of notice, and of prompt review of the legality of his detention; he had not yet been formally charged, let alone tried, four years after his arrest); *Dole Chadee et al v. Trinidad and Tobago*, Communication No. 813/1998, U.N. Doc. CCPR/C/63/D/813/1998 (1998) (failing to find a violation of prompt trial right, one year and seven months (for criminal trial) and seven months for appeal); *Cid Gómez v. Panama*, Communication No. 473/1991, U.N. Doc. CCPR/C/54/D/473/1991 (1995) (finding an undue delay between indictment and trial when a murder suspect was held without bail for more than three and a half years before his acquittal); *Leslie v. Jamaica*, Communication No. 564/1993, U.N. Doc. CCPR/C/63/D/564/1993 (1998) (finding no prompt trial, 29 months after arrest); *Morrison v. Jamaica*, Communication No. 635/1995, U.N. Doc. CCPR/C/63/D/635/1995 (1998) (not finding a violation of prompt trial right when trial occurred approximately 18 months after arrest; delay included a preliminary enquiry); *Shalto v. Trinidad and Tobago*, Communication No. 447/1991, U.N. Doc. CCPR/C/53/D/447/1991 (1995) (finding no prompt trial when there was a delay of almost four years between the judgment of the court of appeal and the beginning of the retrial, a period during which the petitioner was kept in detention).

speedy trial as required by Common Article 3 and MCA § 948b(f). In any case, exceptions to the general rule of a speedy trial must be narrowly construed.

(70) Mr. Khadr was seized by U.S. troops and was detained in Bagram, Afghanistan, until October 2002, when he was transferred to Guantánamo Bay.[139] Mr. Khadr has been detained for more than five years[140] and was given no access to counsel until formally charged. Accordingly, Mr. Khadr has been denied the right to a speedy trial under both Common Article 3 and MCA § 948b(f).

7. Other Missing Rights

a. Right To Appeal/Review

(71) The accused in a military commission has the right to review by a higher court. Such an appellate court must be able to review the facts as well as the law.[141] Through MCA § 948b(f), Article 14(5) of the Civil and Political Covenant affords the accused the right to have his conviction and sentence reviewed by a higher tribunal according to law. Mr. Khadr also has the right to review by a higher court through Common Article 3, as discussed above. In the current situation, the Court of Military Commission Review automatically reviews all military commissions resulting in a conviction.[142] But the Court of Military Commission Review can act only with respect to errors of law.[143]

(72) International courts provide the right to appeal on matters of both law and fact.[144] In international criminal tribunals, the right to review is "a component of the fair trial requirement set out in Article 14 of the [Civil and PoliticalCovenant], and Article 21(4) of the [ICTY] Statute. The right to a fair trial is, of course, a requirement of customary international law."[145] The Civil and Political Covenant specifically provides for a right to appeal.[146] It is also provided by the Statutes of the ICTY,[147] the ICTR,[148] the ICC,[149] and the international courts established in Kosovo,[150] East Timor,[151] and Sierra Leone.[152]

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[139] *See* Inter-American Commission on Human Rights, Organization of American States, *Request by Omar Khadr for Precautionary Measures Under Article 25 of the Commission's Regulations and for an Oral Hearing Before the Commission through Counsel*, at 2.

[140] *See* Charges filed by the government against Omar Khadr ¶ 20, *available at* http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf

[141] *Vazquez v. Spain*, Communication No. 701/1996, U.N. Doc. CCPR/C/69/D/701/1996 (2000).

[142] MCA, 10 U.S.C. § 950c (2006).

[143] MCA § 950f(d).

[144] Report of the Secretary-General Pursuant to Paragraph 2 of Resolution 808 (1993), S/25704, 3 May 1993 ¶ 117.

[145] *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgment, ¶ 104 (24 March 2000).

[146] ICC Rules, art. 14(5) ("Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.").

[147] ICTY Statute, *supra* note 9, art. 25.

(73) Rule for Military Commissions 1201(d)(1) empowers the Court of Military Commission Review to act only with respect to errors of law. Since the Court of Military Commission Review cannot act with respect to the facts of the case, the Rules for Military Commissions and MCA § 950f do not provide the comprehensive right to review by a higher court required by MCA § 948b(f) and the Civil and Political Covenant. Exceptions to the broad rights granted by MCA § 948b(f) should be read narrowly, especially in view of the legislative intent expressed in § 948b(f) to follow international obligations.

b. Presumption Of Innocence

(74) The accused has the right to be presumed innocent under the MCA. "[T]he accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt."[153] Mr. Khadr has a right to be presumed innocent under Common Article 3, as discussed above. Human rights law also guarantees the presumption of innocence.[154] The national security privilege abrogates the right to be presumed innocent by providing measures that assume an inability to trust the accused. The military judge is allowed to screen witnesses from the accused while the witnesses remain visible to the military judge and military commission members.[155] Trial counsel can also move to protect classified information *ex parte*.[156] These provisions show a predetermination that the accused cannot be trusted or might retaliate against witnesses, which is incompatible with the right to the presumption of innocence under Common Article 3 and the MCA.

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[148] ICTR Statute, *supra* note 8, art. 24.

[149] Rome Statute of the International Criminal Court art. 81, July 1, 2002, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90.

[150] Statute for the Special Court for Sierra Leone, arts. 20-21, 14 Aug., 2000.

[151] UNMIK Reg. 1999/5, 4 September 1999, §1(1) ("There shall be established, ad hoc, a Court of Final Appeal, which shall have the powers of the Supreme Court which exercised jurisdiction in Kosovo, as regards appeals against decisions of District Courts in the sphere of criminal law and also as regards detention terms.").

[152] UNTAET Reg. 2000/11, 6 March 2000, § 14(2) ("The Court of Appeal shall have jurisdiction to hear appeals of decisions rendered by any District Court in East Timor, and such other matters as are provided for in the present or any other UNTAET regulation.").

[153] MCA, 10 U.S.C. § 949l(c)(1) (2006).

[154] Additional Protocol, *supra* note 6, art. 75 (Anyone charged with an offence is presumed innocent until proved guilty according to law); Civil and Political Covenant, *supra* note 7, art. 14 (right to be presumed innocent until proved guilty according to law).

[155] M.C.R.E. 611(d)(2).

[156] MCA § 949d(f)(2)(C); M.C.R.E. 505(e)(5)(B).

V. Conclusion

(75) In view of the expressed congressional intent to fulfill international obligations under Common Article 3,[157] the MCA should be interpreted using sources of international law, including the Civil and Political Covenant, the Additional Protocol, and the jurisprudence of the ICTY and ICTR, as well as the UCMJ. This interpretation demonstrates violations of Common Article 3 in the entirety of the process by which Mr. Khadr has been subjected to prolonged, indefinite detention from age 15 to 21; ill-treatment and witnessing the ill-treatment of others; criminal charge despite being a victim of armed conflict as a child soldier; and continued prosecution with no guarantee of release if he is found not guilty. Problems with the prosecution stem from varied sources, including flaws in the Manual for Military Commissions and conflicts with the Military Commissions Act, troubling provisions in the Military Commissions Act itself, and other concerns about how these trial provisions will be applied. In essence, the Military Commission fails to provide rights required by Common Article 3 (and thus the Military Commissions Act), including the right to be judged by an impartial and regularly constituted tribunal, the right to confrontation, the right to counsel, the right to equality of arms, the right against self-incrimination, the right to exclude evidence adduced through ill-treatment, the right to a speedy trial, the right to appeal, and the right to be presumed innocent.

(76) This Military Commission would not qualify as a regularly constituted court or would fail to afford the requisite judicial guarantees, unless the Manual is interpreted in a manner consistent with international law. Because military commission procedures are inconsistent with Common Article 3, the Military Commission lacks jurisdiction over Mr. Khadr and the charges against Mr. Khadr should be dismissed. In the alternative, the Commission should read into the Manual all of the rights required by the MCA as properly construed under Common Article 3.

7. Oral Argument: The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."). Oral argument will allow for thorough consideration of the issues as well as assist the commission in understanding and resolving the complex legal issues presented by this motion.

8. Witnesses and Evidence: This motion presents a question of law.

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

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

[157] *See* MCA § 948b.

11. Attachments:

A. Memorandum from W. Hays Parks, Chief, International Law Branch, DAJA-IA, et. al., to Mr. John H. McNeill, Assistant General Counsel (International), OSD (8 May 1986)

/s/
William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

9 MAY 1986

UNCLASSIFIED

MEMORANDUM FOR MR. JOHN H. McNEILL, ASSISTANT GENERAL COUNSEL (INTERNATIONAL), OSD

SUBJECT: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications

This is in reply to your memorandum of 26 March 1986, same subject, to the undersigned. In that memo you asked our views on which articles of the Protocol are currently recognized as customary international law, and which should be supported for eventual incorporation into that law. Our views were to be based on the list of provisions provided by OJCS.

We view the following provisions as already part of customary international law:

a. Medical activities: Articles 10; 12, paragraphs 1 (as it applies to military medical activities) and 4; 13, paragraph 1; and 18, paragraphs 1, 2, 4 and 7 (as it applies to military medical activities). We do not believe any reference to "signals" represents customary law

b. Medical aircraft: Articles 24 (except reference to "this Part"); 28, paragraph 1; and 31, subject to there being a reasonable basis for assuming that the party ordering a landing will respect the Geneva Conventions and Articles 30 and 31 of the Protocol.

c. Basic principles: Article 35, paragraphs 1 and 2.

d. Quarter: Article 40.

e. Parachutists: Article 42.

f. Persons who have taken part in hostilities: Article 45, paragraph 3, first sentence.

g. Civilians: Articles 51, paragraph 2; 52, paragraphs 1 and 2 (except for the reference to "reprisal"); and 57, paragraphs 1, 2(c) and 4).

h. Undefended localities and demilitarized zones: Articles 59 and 60.

i. Refugees: We regard Article 73 as a correct and authoritative interpretation of Article 4 of the Fourth Geneva Convention of 1949.

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Attachment A

j. Fundamental guarantees: Article 75.

k. Women and children: Articles 76, paragraph 1, and 77, paragraph 1.

We regard the following provisions as supportable for inclusion in customary law through state practice:

a. Medical activities: Articles 12, paragraphs 1 (as applicable to civilian medical activities), 2 and 3; 13; 14; 15, paragraph 5; 18, paragraph 3, and 20. Also, adding identification guidelines for civilian medical activities is acceptable as provided for in paragraphs 1, 2 and 4 of Article 18. We do not support inclusion of "signals" in customary law.

b. Medical transportation: Articles 21; 25--27; 28, paragraphs 2 (except the first sentence), 3 and 4; 29 and 30. Support for the provisions pertaining to aircraft is also subject to the general conditions that the duties of aircraft shall depend on control of airspace rather than control of the surface overflown, and that a summons to land need not be respected unless there is a reasonable basis to believe the party ordering the landing will respect the Geneva Conventions and Articles 30 and 31 of the Protocol. Also, as to Articles 26 and 27, support is conditioned on the requirement for an agreement between the parties to the conflict concerned.

c. Missing personnel: Articles 32, 33 and 34.

d. Persons who have taken part in hostilities: Article 45, paragraphs 1, 2 and the second sentence of 3.

e. Family reunification: Article 74.

f. Women and children: Articles 76, paragraphs 2 and 3, and 77, paragraphs 2, 3 and 4.

g. Evacuation of children: Article 78, subject to the right of asylum and compliance with the United Nations Protocol on Refugees.

h. Journalists: Article 79.

i. Execution: Articles 81, 82 and 83.

The above lists are in the nature of an advisory opinion on our part. As with all such opinions, the actual application of

Attachment A

these provisions may vary depending on the concrete factual situation involved.

In addition to the undersigned, Lt Col Burrus M. Carnahan, USAF, and CDR John C. W. Bennett, JAGC, USN, participated in preparation of this memorandum.

W. HAYS PARKS,
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Lt Colonel, USAF
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WILLIAM ANDERSON
HQ USMC/JAR

Attachment A

UNITED STATES OF AMERICA	**D 21**
v.	**GOVERNMENT'S RESPONSE**
OMAR AHMED KHADR **a/k/a "Akhbar Farhad"** **a/k/a "Akhbar Farnad"** **a/k/a "Ahmed Muhammed Khali"**	**To the Defense's Motion to Dismiss for Lack of Jurisdiction (Common Article 3)** **24 January 2008**

1. Timeliness: This motion is filed within the timelines established by Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 28 November 2007.

2. Relief Requested: The Government respectfully submits that the Defense's motion to dismiss all charges for lack of jurisdiction due to an alleged failure to comply with Common Article 3 of the Geneva Conventions ("Mot. to Dismiss") should be denied.

3. Overview:

a. Common Article 3 of the Geneva Conventions may not be used to challenge the jurisdiction of this commission. Contrary to the accused's representation, the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA"), does not imbue the accused with any right to challenge the jurisdiction of this commission based on its purported non-compliance with Common Article 3. In addition, the Manual for Military Commissions ("MMC"), which has been promulgated by the Secretary of Defense ("Secretary") pursuant to section 3(b) of the MCA, must be *presumed* to comply with the MCA and Common Article 3 under principles of *Chevron*-deference.

b. Even if the MCA or MMC were somehow in conflict with Common Article 3, Congress is not bound by the Geneva Conventions, Common Article 3 or any other earlier-enacted treaty or source of international law. Similarly, just as Congress is not bound by international law, regulations of the Secretary of Defense—promulgated pursuant to an express delegation from Congress—are likewise not bound by international law.

c. The accused may not bring a motion to dismiss charges in this proceeding based on Common Article 3. Common Article 3 is not self-executing, and Congress in the MCA removed the only source of domestic law that the Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), had recognized as importing the protections of Common Article 3 into U.S. law. In addition, Congress in the MCA specifically forbade an alien unlawful enemy combatant subject to the jurisdiction of this commission, such as the accused, from invoking the Geneva Conventions as a source of rights.

d. Finally, even if Common Article 3 were somehow applicable to this commission, the procedures of the MCA and MMC easily meet whatever obligations Common Article 3 may impose. Accordingly, the motion to dismiss should be denied.

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

5. Facts:

a. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan. During this period, he paid numerous visits to and at times lived at Usama bin Laden's compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and personally met many senior al Qaeda leaders including, Usama bin Laden, Doctor Ayman al Zawahiri, Muhammad Atef, and Saif al Adel. The accused also visited various al Qaeda training camps and guest houses. *See* AE 17, attachment 2.

b. On 11 September 2001, members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy. *See The 9/11 Commission Report,* FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 4-14 (2004).

c. After al Qaeda's terrorist attacks on 11 September 2001, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. *See* AE 17, attachment 3.

d. Following this training the accused received an additional month of training on landmines. Soon thereafter, he joined a group of al Qaeda operatives and converted landmines into improvised explosive devices ("IEDs") capable of remote detonation.

e. In or about June 2002, the accused conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

f. In or about July 2002, the accused planted IEDs in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

g. On or about 27 July 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan. *See id.*, attachment 4..

h. Before the firefight had begun, U.S. forces approached the compound and asked the accused and the other occupants to surrender. *See id.*, attachment 5.

i. The accused and three other individuals decided not to surrender and instead "vowed to die fighting." *Id.*

j. After vowing to die fighting, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound. *Id.*

k. Near the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer. *See id.*, attachment 6. American forces subsequently shot and wounded the accused. After his capture, American medics administered life-saving medical treatment to the accused.

l. Approximately one month later, U.S. forces discovered a videotape at the compound where the accused was captured. The videotape shows the accused and other al Qaeda operatives constructing and planting IEDs while wearing civilian attire. *See id.*, attachment 4.

m. During an interview on 5 November 2002, the accused described what he and the other al Qaeda operatives were doing in the video. *Id.*, attachment 1.

n. When asked on 17 September 2002 why he helped the men construct the explosives, the accused responded "to kill U.S. forces." *Id.*, attachment 6.

o. The accused related during the same interview that he had been told the U.S. wanted to go to war against Islam. And for that reason he assisted in building and deploying the explosives, and later he threw a grenade at an American. *Id.*

p. During an interrogation on 4 December 2002, the accused agreed that his use of land mines as roadside bombs against American forces was also of a terrorist nature and that he is a terrorist trained by al Qaeda. *Id.*, attachment 3.

q. The accused further related that he had been told about a $1,500 reward being placed on the head of each American killed, and when asked how he felt about the reward system, he replied: "I wanted to kill a lot of American[s] to get lots of money." *Id.*, attachment 8. During a 16 December 2002 interview, the accused stated that a "jihad" is occurring in Afghanistan, and if non-believers enter a Muslim country, then every Muslim in the world should fight the non-believers. *Id.*, attachment 9.

r. The accused was designated as an enemy combatant as a result of a Combatant Status Review Tribunal ("CSRT") conducted on 7 September 2004. *See* AE 11. The CSRT also found that the accused was a member of, or affiliated with, al Qaeda. *Id.*

s. On 5 April 2007, charges of Murder in violation of the law of war, Attempted Murder in violation of the law of war, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. After receiving the Legal Adviser's formal "Pretrial Advice" that the accused is an "unlawful enemy combatant" and thus that the military commission had jurisdiction to try the accused, those charges were referred for trial by military commission on 24 April 2007.

6. Discussion:

a. COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS MAY NOT BE USED TO CHALLENGE THE JURISDICTION OF THIS COMMISSION.

i. The MCA *states* that it complies with Common Article 3. It does *not require* compliance with Common Article 3.

(a) The MCA both embodies and states the joint determination by both political branches of the federal government that the system of military commissions authorized thereby complies with 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." 10 U.S.C. § 948b(f).

(b) The accused cites section 948b(f) over 30 times in his brief, apparently for the proposition that "[t]he MCA *requires* that military commissions comply with Common Article 3 of the Geneva Conventions." Mot. to Dismiss at 2 (emphasis added). But that is clearly *not* what section 948b(f) says. Rather, section 948b(f) contains a *factual* statement—that "[a] military commission established under [the MCA] is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of Common Article 3 of the Geneva Conventions."

(c) Contrary to the accused's description of this modest sentence, section 948b(f) is *not* written in the hortatory tense; it is not *commanding* the Secretary of Defense to abide by Common Article 3, nor is it stating that this commission should review each jot and tittle of the MCA and MMC for compliance with Common Article 3. Rather, section 948b(f) states that the military commissions authorized by the MCA *do* comply with Common Article 3. This determination by Congress and the President as to the compliance of the Military Commissions Act—an Act that concerns foreign affairs, the war power and aliens—with a treaty must be accorded tremendous deference by a reviewing court. *See, e.g., Iceland S.S. Co., Ltd.–Eimskip v. U.S. Dep't of the Army*, 201 F. 3d 451 (D.C. Cir. 2000) ("To the extent that the meaning of treaty terms are not plain, we give 'great weight' to 'the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement.'") (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[T]he power over aliens is of a political character and therefore subject only to narrow judicial review.") (quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976)); *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.") (alteration in original) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)). It would be

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

ii. The Manual for Military Commissions must be *presumed* to comply with Common Article 3 under principles of *Chevron*-deference, and does in fact comply with Common Article 3.

(a) The Manual for Military Commissions was promulgated by the Secretary of Defense. The Secretary's rule-making was pursuant to an express delegation of authority from Congress: "[T]he Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the procedures for military commissions prescribed under chapter 47A of title 10, United States Code (as added by subsection (a))." MCA § 3(b). Under the principles articulated by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Manual for Military Commissions must be presumed to comply with the MCA. *See also United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) ("A very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed.").

(b) In *Chevron*, the Supreme Court articulated a rule, to which it has adhered ever since, that "[i]f . . . the court determines Congress has not directly addressed the precise question at issue, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843; *see also id.* at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ."). As the D.C. Circuit recently explained,

> Under step one [of *Chevron*], the court asks "whether Congress has directly spoken to the . . . issue;" if Congress' intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. However, if the court determines that "Congress has not directly addressed the precise question at issue," *id.* at 843, then, under step two, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

Envtl. Def., Inc. v. EPA, — F.3d —, 2007 WL 4302116, at *4 (D.C. Cir. Dec. 11, 2007) (alteration in original).

(c) As discussed above, Congress has "directly spoken to the . . . issue" of whether the military commissions authorized by the MCA comply with Common Article 3, and has unambiguously stated that "[a] military commission established under this chapter is a regularly constituted court," for purposes of Common Article 3. Accordingly, under step one of *Chevron*, this court must defer to Congress's

"unambiguously expressed intent," *Chevron*, 467 U.S. at 843, that the military commissions authorized by the MCA comply with Common Article 3.

(d) Second, even if this commission were to accept the accused's argument—that section 948b(f) doesn't merely *describe the fact* that the military commissions authorized by the MCA comply with Common Article 3, but independently *requires* that the Manual for Military Commissions itself comply with Common Article 3—under *Chevron*'s principle of administrative deference, the Secretary's rules promulgated pursuant to section 3(b) of the MCA must be presumed to comply with the MCA because they represent a permissible construction of the Act. *See Mead Corp.*, 533 U.S. at 229 (*Chevron* applicable where rulemaking is pursuant to express congressional authorization). In fact, the MMC does little more than implement the decisions Congress made in the MCA, and it is clear from the accused's motion to dismiss that his primary criticism of the MMC is not that it contravenes the MCA, but that it *doesn't*.

iii. The accused ignores that Congress is not bound by international law, including the Geneva Conventions, Common Article 3 or any other earlier-enacted treaty or source of international law.

(a) As the Supremacy Clause makes clear, it is the *Constitution* that is the supreme law of the land, and not commentary by the International Committee of the Red Cross or any other foreign entity. *See* U.S. Const. art. VI, cl. 2. Further, there is absolutely no doubt that Congress is *not* bound by international law, let alone by treaties it has repeatedly refused to ratify, such as Additional Protocol I to the Geneva Conventions.[1] *See, e.g.*, *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296,

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[1] To the accused's argument that the Rules for Military Commissions violate Article 75 of Additional Protocol I to the Geneva Conventions, the Prosecution must once again point out that *the United States is not a party to this Protocol.* This is not an accident or an oversight by the United States—rather, the United States has, in fact, *refused* to ratify Article 75 of Protocol I precisely because it could be read as extending the protections of the Geneva Conventions to terrorists and associated unlawful combatants, who flout the Conventions' strictures. As President Reagan explained:

> We must not, and need not, give recognition and protection to terrorist groups as the price for progress in humanitarian law. . . . The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.

President Ronald Reagan, Letter of Transmittal to the Senate of Protocol II Additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on 10 June 1977 (29 Jan. 1987). Thus regardless of whether "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,'" *United States v. Khadr*, No. 07-001, at 15 n.24 (C.M.C.R. 24 Sept. 2007); *see also Hamdan*, 126 S. Ct. at 2797 (plurality op.), it is perverse to argue that the United States should be bound, as a matter of customary international law, to provide terrorists and associated unlawful combatants the same protections we have steadfastly refused to grant them as a matter of treaty law.

We also note that the accused cites an "unclassified memorandum" by a handful of Department of Defense employees for the proposition that Article 75 is customary international law. *See* Mot. to Dismiss at 3 n.5. Needless to say, such unpublished musings—which, even on their face, simply comprise *personal opinions*—do not amount to binding declarations on the United States as to what is customary international

302 (D.C. Cir. 2005) ("Never does customary international law prevail over a contrary federal statute."); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) ("Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency."); *see also The Paquete Habana*, 175 U.S. at 700 (explaining that international law is relevant to U.S. courts "where there is no treaty and no controlling executive or legislative act or judicial decision").

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

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law. The accused's suggestion that such an "unclassified memorandum" constitutes the view of the United States is a drastic overstatement, to say the least.

In addition, the "unclassified memorandum" expresses only its authors' personal opinions that Article 75's "fundamental guarantees" are part of customary international law; it does *not* purport to set forth the view of the United States. For example, the memorandum provides only that "*[w]e* view the following provisions as already part of customary international law." Unclassified Memorandum at 1 (emphasis added); *see also id.* (expressing "our views"); *id.* at 2 ("*we* regard the following" as customary international law) (emphasis added); *id.* ("The above lists are in the nature of *an advisory opinion on our part.*") (emphasis added). It is a bedrock legal principle that an individual's views may be probative of customary international law *only* insofar as they provide "trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. 677, 700 (1900). This memorandum does not.

(c) Nor does the canon of construction articulated by *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), have any applicability. There, the Supreme Court held that an ambiguous statute should be construed, to the extent possible, not to conflict with international law. *See id.* at 118. As the Court of Appeals has explained, however, "[t]his canon of statutory interpretation . . . does not apply where the statute at issue admits no relevant ambiguity." *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 235 (2d Cir. 2005). Here, Congress has unambiguously stated the procedures for admitting allegedly coerced evidence, admitting hearsay, limiting the scope of appellate review, and other matters that are at issue in this motion. *See, e.g.*, 10 U.S.C. §§ 948r, 949a(b)(2)(E), 950f(d), 950g(c). Because none of these provisions is ambiguous, *Schooner Charming Betsy*'s canon of construction is inapplicable. *Cf. Clark v. Martinez*, 543 U.S. 371, 382 (2005) ("The canon [of constitutional avoidance] is . . . a means of giving effect to congressional intent, *not of subverting it.*") (emphasis added). Moreover, Congress has expressly legislated that the accused may not invoke the Geneva Conventions as a source of rights, *see* 10 U.S.C. § 948b(g), which necessarily prevents him from relying on *Schooner Charming Betsy*'s canon of construction to impose Common Article 3 on the MCA and MMC.

iv. Just as Congress is not bound by international law, regulations promulgated by the Secretary of Defense, pursuant to an express delegation from Congress, are valid and enforceable under U.S. law, regardless of anything in international law to the contrary.

(a) As the *Head Money Cases* and other authorities cited above make clear, Congress is not bound by Common Article 3. Likewise, when Congress expressly authorizes the Secretary of Defense to promulgate rules, such as the Manual for Military Commissions, in order to implement the legislation that Congress has passed, those rules—which do little more than implement the MCA itself—are likewise not limited by Common Article 3. *Cf. Billings v. Truesdell*, 321 U.S. 542, 551 (1944) ("War Department Regulations have the force of law"); *Ace Tel. Ass'n v. Koppendrayer*, 432 F.3d 876, 881-82 (8th Cir. 2005) ("Regulations promulgated by a federal agency pursuant to an act of Congress carry with them the force of law.") (citing *Chevron*). Thus, even if the Manual for Military Commissions were somehow at odds with Common Article 3, the MMC—promulgated pursuant to an express delegation of legislative power from Congress—is valid and enforceable, notwithstanding anything in international law to the contrary.

v. Even if the accused were somehow correct that the Military Commissions Act and/or the Manual for Military Commissions violate Common Article 3, the accused may not bring a claim before this commission based on Common Article 3.

(a) Congress passed, and the President signed into law, the MCA in direct response to the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). *See, e.g., Military Commissions in Light of the Supreme Court Decision in* Hamdan v. Rumsfeld: *Hearing Before the S. Comm. on Armed Svcs.*, 109th Cong. (2006); *Authority To Prosecute Terrorists Under the War Crime Provisions of Title 18: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006). In *Hamdan*, the

Court had held that the military commission authorized by the President to try the petitioner in that case was *ultra vires* because it was not authorized by any statute and violated Common Article 3. *See* 126 S. Ct. at 2755, 2786-99.[2]

(b) Relevant to the present motion, the *Hamdan* Court did *not* hold that Common Article 3 was self-executing on its own terms.[3] Rather, the Court held that Common Article 3 was relevant because a statutory basis for the military commissions that the President had authorized was Article 21 of the Uniform Code of Military Justice, which provides that military commissions may try "offenses that . . . by the law of war may be tried by military commissions."[4] The *Hamdan* Court reasoned that the reference to the "law of war" in Article 21 incorporated principles of international law, including the Geneva Conventions and Common Article 3. *See* 126 S. Ct. at 2794. Accordingly, the Court held that Common Article 3 set a floor on the procedural requirements for military commissions authorized under Article 21, and that those procedural requirements had not been complied with. *See id.* at 2796-97. Importantly, the Court in *Hamdan* did not hold that Common Article 3 was self-executing in its own right, and certainly did not hold that Common Article 3 was self-executing in the face of a contrary *statute* or lawfully promulgated regulations.[5]

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[2] The accused misleadingly neglects to cite that certain determinations by the Court in *Hamdan*, such as whether conspiracy is a recognized violation of the law of war, were made only by a plurality of the Justices, and therefore are not precedential. *See, e.g.*, Mot. to Dismiss at 4 & nn. 16 & 17 (citing *Hamdan*, 126 S. Ct. at 2780, 2784 (*plurality op.*)); *cf. CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987) ("[W]e are not bound by [a plurality opinion's] reasoning."); *cf. also Horton v. California*, 496 U.S. 128, 136 (1990) (reaffirming that a plurality view that does not command a majority is not binding precedent).

[3] The accused's statement that "the Court of Military Commission Review has held that [sic] Geneva Conventions are self-executing," Mot. to Dismiss at 2 (citing *Khadr*, No. 07-001, at 4 n.4), is incorrect. In *Khadr*, the Court of Military Commission Review simply noted the "general view[]" as to whether the Geneva Conventions are regarded as self-executing. *See also Hamdan*, 126 S. Ct. at 2794 n.58. The court's passing observation is not a holding. In any event, as discussed below, Congress is not bound by the Geneva Conventions.

[4] At the time of the Court's decision in *Hamdan*, Article 21 read, in its entirety, as follows:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821 (2000).

[5] The legal authority for Hamdan's military commission was a Presidential order, rather than a statute. This distinction was highly relevant to the narrow *Hamdan* majority. *See, e.g., id.* at 2774-75 ("The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the [Authorization for Use of Military Force] or the [Detainee Treatment Act] specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions. . . . *Absent a more specific congressional authorization*, the task of this Court is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified.") (emphasis added); *id.* at 2799 (Breyer, J., concurring, joined by Kennedy, Souter and Ginsburg, JJ.) ("The Court's conclusion ultimately rests upon a

(c) Congress's response to *Hamdan* was swift and decisive. Less than four months after the Court's decision, the Military Commissions Act was signed into law after passing both houses of Congress with strong bipartisan majorities. *See* 152 Cong. Rec. H7959-01, H7959 (daily ed. Sept. 29, 2006) (Roll Call Vote No. 508); 152 Cong. Rec. S10354-02, S10420 (daily ed. Sept. 28, 2006) (Roll Call Vote No. 259). In the MCA, Congress made crystal clear that (1) the new military commission system complied with the Geneva Conventions in general, and Common Article 3 in particular, and (2) persons tried before military commissions would not be permitted to hinder their trials with appeals to vague provisions of Common Article 3.

(d) Because Congress and the President had jointly determined that the MCA and the military commissions authorized thereby complied with Common Article 3, the MCA included ***three*** provisions to ensure that an accused alien unlawful enemy combatant could not bring a challenge to the conduct of the U.S. Government based on Common Article 3. *See* 10 U.S.C. § 948b(g); MCA § 4(a)(2); *id.* § 5(a).

(e) First, Congress stated in unambiguous terms that the Geneva Conventions were *not* a source of rights for accused alien unlawful enemy combatants: "GENEVA CONVENTIONS NOT ESTABLISHING SOURCE OF RIGHTS.—No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights." 10 U.S.C. § 948b(g). There is no reading of this passage other than that persons subject to trial by military commission, such as the accused,[6] cannot point to the Geneva Conventions (of which Common Article 3 is a part) as a source of rights.

(f) It is also worth noting that section 948b(g)'s unambiguous declaration that Khadr may not invoke the Geneva Conventions as a source of rights is not limited to invoking those rights *vis-à-vis* the MCA. Rather, it is a blanket statement and applies to all matters, including a challenge to the Manual for Military Commissions. It is preposterous to suggest, as the accused does, that section 948b(g)'s statement that the accused may not invoke the Geneva Conventions was intended to apply to the MCA, but not to the Manual for Military Commissions. Because section 948b(g) makes clear, by statute, that Khadr "may [not] invoke the Geneva Conventions as a source of rights," Khadr *may not invoke the Geneva Conventions* as a source of *any* rights, whether with respect to the MCA, the Manual for Military Commissions, or any other regulations governing the conduct of his military commission.

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single ground: Congress has not issued the Executive a 'blank check.' Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. *Nothing* prevents the President from returning to Congress to seek the authority he believes necessary.") (emphasis added) (citation omitted). Thus, it appears that all, or nearly all, of the members of the *Hamdan* Court would have upheld the President's military commissions had they been authorized by statute.

[6] This commission has accepted the Government's argument that Khadr is an alien unlawful enemy combatant, subject to trial under the MCA. *See United States v. Khadr*, Jurisdictional Hearing, 8 November 2007 Tr. at 90.

(g) Second, Congress enacted an entire section of the MCA devoted to ensuring that the Geneva Conventions may not give rise to any rights in any habeas corpus or other civil action or proceeding to which the United States is a party:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

MCA § 5(a).

(h) Third, Congress responded directly to *Hamdan*'s holding that Common Article 3 applied to that petitioner's military commission because it was a military commission authorized under Article 21 of the Uniform Code of Military Justice ("UCMJ"), and therefore could try only "offenses that by statute or by the law of war may be tried by military commissions."[7] In response to *Hamdan*, Congress in the MCA amended Article 21 to provide that it would henceforth be *inapplicable* to military commissions authorized under the MCA: "[Articles 21, 28, 48, 50(a), 104, and 106 of the UCMJ] are amended by adding at the end the following new sentence: 'This section does not apply to a military commission established under chapter 47A of this title.'" MCA § 4(a)(2). Thus, the mechanism by which the Court in *Hamdan* applied Common Article 3 to Hamdan (i.e., via Article 21's use of the term "law of war") was deliberately and surgically removed by Congress. Accordingly, Common Article 3—because it is not tied to any domestic source of U.S. law—cannot form the legal basis for a motion to dismiss.

(i) It is therefore irrelevant whether the MCA and MMC comply with Common Article 3. Because the accused has no right to challenge the jurisdiction of this commission based on an alleged violation of Common Article 3, *see* 10 U.S.C. § 948b(g); MCA § 4(a)(2), the motion to dismiss should be denied.[8]

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[7] Arguably this amendment was not even necessary, since the MCA is indeed a statute, and therefore is itself sufficient to authorize trial by military commission. *See* 10 U.S.C. § 821 (2000) ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that *by statute* or by the law of war may be tried by military commissions . . . .") (emphasis added).

[8] The accused also asserts several times in his motion to dismiss that his due process rights under the U.S. Constitution have been abridged. *See* Mot. to Dismiss at 17 n.96, 19 n.108. Of course, as the D.C. Circuit correctly held, the accused has no rights under the Due Process Clause. *See Boumediene*, 476 F.3d at 992; *see also Johnson v. Eisentrager*, 339 U.S. 763, 782-85 (1950) (holding that enemy combatants detained outside the United States had no rights under the Fifth Amendment); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002) ("[A] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.") (quoting *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)); *United States v. Khadr*,

b. EVEN IF THE ACCUSED DID SOMEHOW HAVE A RIGHT TO CONTEST THE JURISDICTION OF THIS COMMISSION BASED ON COMMON ARTICLE 3—NOTWITHSTANDING THE MCA'S REPEATED COMMANDS TO THE CONTRARY—BOTH THE MCA AND THE MMC EASILY MEET ANY REQUIREMENTS SET BY COMMON ARTICLE 3.

i. The accused argues that various provisions of the Military Commissions Act and the Manual for Military Commissions violate Common Article 3. Each of these baseless allegations is rebutted below. In any event, for the reasons explained above, the accused may *not* challenge the jurisdiction of this commission based on its compliance *vel non* with Common Article 3. *See, e.g.*, 10 U.S.C. § 948b(g); MCA § 4(a)(2).

ii. The accused's right to call witnesses under the MCA and MMC easily meets any requirements set by Common Article 3.

(a) The MCA guarantees defense counsel in a military commission "a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense." 10 U.S.C. § 949j(a). The Rules for Military Commissions faithfully implement the MCA, providing that "[t]he defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules." RMC 703(a). RMC 703(b) entitles the defense "to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary." Although Rule 703(b) provides that the accused is not entitled to the presence of a witness who is "unavailable" within the meaning of Military Rule of Evidence ("MRE") 804,[9] RMC 703(b) also provides that if a witness is necessary for the military commission and it is within the Government's power to produce the witness, the military judge *must* grant a continuance or other relief in order to secure the witness's presence, or must even abate the proceedings entirely. Contrary to

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Government's Response to the Defense's Motion to Dismiss for Lack of Jurisdiction (Equal Protection) (filed 18 Jan. 2008).

In addition, the accused asserts that his trial by military commission violates the Ex Post Facto Clause of the U.S. Constitution as well as similar principles under international law. However, as explained more fully in the Government's previously filed responses to the accused's motions to dismiss, *see, e.g.*, *United States v. Khadr*, Government's Response to the Defense's Motion to Dismiss Charges I & II (Murder and Attempted Murder), at 10-12 (filed 14 Dec. 2007), *United States v. Khadr*, Government's Response to the Defense's Motion to Dismiss Charge III (Conspiracy), at 8-13 (filed 14 Dec. 2007); *United States v. Khadr*, Government's Response to the Defense's Motion to Dismiss Charge IV (Material Support for Terrorism), at 9-13 (filed 14 Dec. 2007); *United States v. Khadr*, Government's Response to the Defense's Motion to Dismiss Charge V (Spying), at 8-12 (filed 14 Dec. 2007), the Ex Post Facto Clause does not apply to the accused—an alien enemy combatant detained outside the sovereign borders of the United States—and, in any event, the MCA and MMC merely codify existing violations of international law, rather than create new substantive offenses, and therefore do not violate any ex post facto principles immanent in either domestic or international law.

[9] In this regard, the Rules for Military Commissions parallel the Rules for Courts-Martial ("RCM"), which look to MRE 804 to define when a witness is "unavailable." *See* RCM 703(b)(3).

the accused's cries of unfairness, this is far more process than an accused alien enemy combatant has *ever* received in the history of warfare.[10]

(b) The unavailability provisions of RMC 703 depart slightly from its court-martial counterpart (RCM 703) in order to accommodate the realities of trying alien unlawful enemy combatants before military commissions:

> This rule departs from the R.C.M. 703(b)(3), which would permit the abatement of the proceedings even when the absence of the witness is not the fault of the United States. That rule provides a broader standard than that existing in the federal civilian courts, and it is particularly impracticable for military commissions. *The M.C.A. recognizes that witnesses located in foreign countries may be unavailable for many reasons outside the control of the United States, and Congress provided for the broad admissibility of hearsay precisely to allow for the introduction of evidence where the witnesses are not subject to the jurisdiction of the military commission or are otherwise unavailable.*

RMC 703(b)(3)(B), Discussion Note (emphasis added). The differences noted between the Rules for Courts-Martial and the Rules for Military Commissions reflect Congress's recognition that the Rules for Courts-Martial had to be adapted to the military commission-context. *See, e.g.*, 10 U.S.C. § 949a(a) ("Pretrial, trial, and post-trial procedures . . . may be prescribed by the Secretary of Defense, in consultation with the Attorney General. Such procedures shall, *so far as the Secretary considers practicable or consistent with military or intelligence activities*, apply the principles of law and the rules of evidence in trial by general courts-martial.") (emphasis added).

(c) Military commissions will frequently involve witnesses who are overseas and are not within the power of the U.S. government to compel attendance at a military commission. In such situations, where the U.S. government cannot produce a requested defense witness, it would be extraordinary to prevent the commission from proceeding, and would give the accused more rights than even U.S. citizens enjoy in Article III courts. In that regard, it is clear that defendants in civilian Article III trials do *not* have a right to have proceedings abated if a critical witness is missing. Rather, the absence of the witness can be noted in arguments to the finder of fact, who can draw whatever conclusions are appropriate from that witness's absence. *See, e.g., Arizona v. Youngblood*, 488 U.S. 51 (1988). As *Youngblood* makes clear, the relevant test in civilian courts is not whether physical evidence or a witness is missing, per se, but

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[10] As an historical matter, unlawful enemy combatants have rarely if ever been accorded as much process as the accused has received. *See, e.g.*, Francis Lieber, *Instructions for the Government of the Armies of the United States in the Field* ¶ 82 (1863) ("Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.").

whether the state refuses in bad faith to produce it. *See id.* at 58 ("We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."). That the Rules for Courts-Martial may provide more robust protections for our servicemen and women is commendable, but it is certainly not among the "'judicial guarantees which are recognized as indispensable by civilized peoples," given that it does not exist in Article III courts.

(d) The accused also faults the MMC because it "do[es] not afford each side an equal opportunity to call witnesses." Mot. to Dismiss at 14. However, the Rules for Military Commissions largely mirror the Rules for Courts-Martial, and both recognize that the defense must often rely on the Government to produce witnesses. Thus, both RMC 703(c)(1) and RCM 703(c)(1) provide, *in identical terms*, that "[t]he trial counsel shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution." Similarly, RMC 703(c)(2)(A) and RCM 703(c)(2)(A) provide, *in identical terms*, that "[t]he defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests."

(e) The accused faults the MMC because it provides that trial counsel may argue to the judge that a particular witness should not be produced in order to safeguard classified information under 10 U.S.C. 949j(c). *See* RMC 703(c)(2)(D). However, section 949j(c) is not merely something that the Secretary of Defense came up with on his own—it is part of the MCA and specifically qualifies the accused's right to produce witnesses and evidence. Moreover, contrary to the accused's insinuation, RMC 703(c)(2)(D) does not give trial counsel a unilateral right to block defense witnesses based on an allegation of national security. Rather, it merely provides trial counsel with the opportunity to make his case to the military judge or, if prior to referral, the convening authority. To the extent there is some inequality between trial counsel and the defense, it reflects the unavoidable fact that classified information is information that is classified by the United States Government and therefore must be protected from unauthorized disclosure. This is unavoidable, and reflects, per Congress's command, the realities of "military or intelligence activities." 10 U.S.C. § 949a(a).

(f) Accordingly, the MCA and MMC strike a fair and reasonable balance between the rights of the accused and the interest of the United States in allowing this commission to proceed and meet any requirements set by Common Article 3.

iii. The accused's right under the MCA and MMC to cross-examine witnesses easily meets any requirements set by Common Article 3.

(a) The MCA guarantees the accused the right to cross-examine witnesses who testify against him. *See, e.g.*, 10 U.S.C. § 949a(b)(1)(A) ("The accused shall be permitted to present evidence in his defense, 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, as provided for by this chapter."); *id.* § 949c(b)(7) ("Defense counsel may cross-examine each witness for the prosecution who

testifies before a military commission under this chapter."). Hearsay evidence in a military commission not otherwise admissible under a general hearsay exception is admissible only if it is both probative and reliable. *See id.* § 949(b)(2)(E); Military Commission Rules of Evidence ("MCRE") 402; MCRE 803(b), (c). Contrary to the accused's claims, this is a fair standard, permitting the accused to exclude hearsay evidence if he can show that it is either unreliable or irrelevant to his case. In essence this is simply an articulation of the standard governing more traditional exceptions to the hearsay rule. The probative-value and reliability requirements protect against any unfairness to the accused because of not having a particular witness in court. In addition, contrary to the accused's insinuation, the MCA and MMC's broader hearsay rules do not favor the Government over the accused; rather, either party may make use of the hearsay exception to introduce exculpatory or inculpatory evidence, as the case may be.

(b) We also note, once again, that the accused's arguments against the MMC are really just gussied up arguments against the MCA. *See, e.g.*, Mot. to Dismiss at 16 ("A number of limitations and privileges in the Manual make the MCA's general grant of the right to cross-examine ineffective. . . . The first limitation is the general admissibility of hearsay for military commissions *under the MCA* and the Manual.") (emphasis added). In essence, the accused is arguing here, as he argues elsewhere in his brief, either that the MCA should be ignored because it violates Common Article 3, or that the *MMC* should be ignored because it violates Common Article 3 by faithfully implementing the MCA. But, as the accused should know, an Act of Congress cannot be declared void because of its non-compliance with Common Article 3. *See, e.g.*, *Reid*, 354 U.S. at 18 ("This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."); *see also Head Money Cases*, 112 U.S. at 599. This commission should not permit the accused to make an end-run around this basic and long-standing principle by collaterally attacking the very regulations that Congress has required the Secretary of Defense to promulgate to implement the MCA.

(c) The accused also makes much of the fact that, in limited circumstances, government witnesses may testify behind a screen. *See* MCRE 611(d)(2). However, this limited provision is relevant *only* when the "identity or name and appearance [of the witness] is classified, privileged, or otherwise protected from disclosure" by an Act of Congress or the Manual for Military Commissions. *Id.* Courts have repeatedly held that government witnesses may testify with anonymity under limited circumstances. *See, e.g.*, *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992) (Sentelle, J.); *see also United States v. Alston*, 460 F.2d 48 (5th Cir. 1972); *United States v. Abu Marzook*, 412 F. Supp. 2d 913 (N.D. Ill. 2006). Far from requiring witnesses to testify anonymously as a default matter, the MMC permits that only if the witness's "identity or name and appearance is classified, privileged, or otherwise protected from disclosure." MCRE 611(d)(2). Since it is permissible under U.S. law for witnesses to testify with varying degrees of anonymity in criminal trials (including behind screens), it must certainly be permissible under Common Article 3 for witnesses to testify with their identities or appearances shielded under limited circumstances, subject to the military judge's sound discretion.

(d) The MCA also permits the government to assert a national security privilege at trial to a line of questioning. *See* 10 U.S.C. § 949d(f)(2)(C) ("During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information. Following such an objection, the military judge shall take suitable action to safeguard such classified information."); *see also* MCRE 505(e)(2) ("At the request of the government the military judge shall enter such additional protective orders as are necessary for the protection of national security information to include protective orders limiting the scope of direct examination and cross examination of witnesses."). According to the accused:

> Because the MCA and Rules for Military Commissions restrict cross-examination, they do not provide the full right to cross-examine that is guaranteed by Common Article 3, as discussed above. In any case, the MCA must be interpreted in light of Common Article 3 to interpret narrowly the exception to the general rule of cross-examination.

Mot. to Dismiss at 17. Again, the Prosecution notes that the MCA cannot be ignored simply based on international law. Moreover, given that the national security privilege provisions of the MMC faithfully implement the related provisions of the MCA, it is unclear what the accused means by "interpret[ing] narrowly the exception to the general rule of cross-examination," unless he means simply ignoring the MCA.

(e) In any event, the United States is in a state of war and must be able to preserve the sources and methods of intelligence information and other classified information. The accused cites nothing in Common Article 3 that forbids such action. Moreover, it appears that the accused's view is that virtually any restriction on the right to cross-examine witnesses must violate international law. But that has never been the law with respect to the Fifth and Sixth Amendments to the Constitution, *see, e.g.*, *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992); *United States v. Alston*, 460 F.2d 48 (5th Cir. 1972); *United States v. Abu Marzook*, 412 F. Supp. 2d 913 (N.D. Ill. 2006), and the accused cites no authority for the proposition that an accused alien unlawful enemy combatant is entitled to *greater* rights than U.S. citizens. Accordingly, the limited national security privilege provided for in the MCA and implemented in the MMC complies with Common Article 3.[11]

iv. The accused's right to be present under the MCA and MMC easily meets any requirements set by Common Article 3.

(a) The MCA authorizes the accused to be present at all military commission sessions in which evidence is received by members of the commission, with

[11] The accused also claims in a footnote that he "has a Due Process right to cross-examine witnesses against him." Mot. to Dismiss at 17 n.96. If by "Due Process," he is referring to the Due Process Clause of the U.S. Constitution, he is mistaken. *See, e.g.*, *Eisentrager*, 339 U.S. at 782-85 (holding that enemy combatants detained outside the United States had no rights under the Fifth Amendment); *Boumediene*, 476 F.3d at 992; *see also supra* note 8.

a limited exception to ensure the physical safety of individuals or to prevent the accused from disrupting the proceedings. *See* 10 U.S.C. §§ 949a(b)(1)(B), 949d(e).

(b) However, the accused cites various sources of international law that purport to stand for the proposition that he can never be excluded from his own trial. *See* Mot. to Dismiss at 18 ("Neither [Article 75 of Protocol I nor Article 14 of the Civil and Political Covenant] mentions any exceptions [to the right to be tried in one's presence]."). Regardless of whether the sources cited by the accused actually stand for such a radical proposition, that is emphatically *not* the law under the United States Constitution. In Article III courts, a defendant may certainly be excluded from the proceedings where that is necessary to maintain order. *See, e.g.*, *Illinois v. Allen*, 397 U.S. 337, 343 (1970) ("[W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom."); *Quintana v. Virginia*, 295 S.E.2d 643 (Va. 1982) ("[A]n accused may forfeit his right to be present at his trial 'if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.'") (quoting *Allen*, 397 U.S. at 343).

(c) To say that Khadr—an accused alien unlawful enemy combatant—has more rights under international law than a U.S. citizen in an Article III civilian court is absurd. Common Article 3 establishes certain minimal safeguards with respect to trials. Unless the accused is arguing for the startling proposition that cases such as *Allen* violate those "judicial guarantees which are recognized as indispensable by civilized peoples," it cannot be the case that excluding an accused from a proceeding because he is disruptive violates Common Article 3.

(d) With respect to the exclusion of the accused during consideration of the Government's national security privilege per 10 U.S.C. § 949d(f)(3) and MCRE 505(h), this narrow exception to the accused's right to be present at his military commission is modeled after both the Military Rules of Evidence and the Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3, and is narrowly tailored to the need of the United States to preserve classified information, and particularly classified sources and methods, when trying persons who are at war with us. *Cf.* 10 U.S.C. § 949a(a) ("Pretrial, trial, and post-trial procedures . . . may be prescribed by the Secretary of Defense, in consultation with the Attorney General. Such procedures shall, *so far as the Secretary considers practicable or consistent with military or intelligence activities*, apply the principles of law and the rules of evidence in trial by general courts-martial.") (emphasis added).

(e) In any event, permitting the military judge to consider trial counsel's assertion of the national security privilege in camera and ex parte would certainly be reasonable in limited circumstances, given the extraordinary sensitivity of such information and the harm that improper disclosure would cause the United States.

Cf. 10 U.S.C. § 949a(a). Delimiting such reasonable circumstances is sensibly left by the MCA and MMC to the sound discretion of the military judge, who is in the best position to ensure a fair trial for both the accused and the Government.

v. The accused's right to counsel under the MCA and MMC easily meets any requirements set by Common Article 3.

(a) The MCA guarantees the accused not only the right to detailed military counsel, *see* 10 U.S.C. § 948k(a)(3); RMC 502(d)(6), 506, but also to the assistance of civilian defense counsel if provided at no expense to the Government, see 10 U.S.C. § 949c(b)(3); RMC 506.

(b) The Military Commission Rules of Evidence also provide that, in light of the sensitive classified information that may be at issue in military commissions, "[t]he military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the [classified] information disclosed to the defense." MCRE 505(e)(1); *see also* MCRE 506(g). The accused correctly notes that this provision differs from its court-martial analogue, which provides that "the military judge, at the request of the Government, shall enter an appropriate protective order to guard against the compromise of the [classified] information disclosed to *the accused*." MRE 505(g)(1) (emphasis added); *see also* MRE 506(g).

(c) MCRE 505(e)(1) is not intended to interfere with the relationship between the accused and his defense counsel. Rather, it recognizes that the accused may receive classified information that should be subject to a protective order, *or* that his defense counsel may receive classified information (regardless of whether it's disclosed to the accused) that should be subject to a protective order, including *vis-à-vis* third parties. Indeed, federal courts have recognized that there is no constitutional infirmity in withholding classified information from the accused that is provided to counsel. *See, e.g., United States v. Bin Laden*, 2001 U.S. Dist. LEXIS 719, at *8-*9, *14-*15 (S.D.N.Y. 25 Jan. 2001). In considering whether to issue a protective order with respect to the Defense, the military judge would presumably consider, among other factors, the impact the order would have on the accused's relationship with his attorneys, as well as other equities, such as the need to safeguard classified or other information.

(d) We also note that the accused has produced absolutely no evidence to suggest that his right to a robust defense from his skilled military and civilian lawyers has been in any way compromised by any protective orders this commission has entered, or at some uncertain point in the future might enter. As previously noted, Congress chose to enact the MCA as the authoritative source of law for trying accused alien unlawful enemy combatants. Congress could have, but did not, legislate that such combatants should be tried under either the UCMJ or civilian law and procedures. Instead, Congress enacted a new system of rules and procedures for trying persons such as the accused. Moreover, Congress expressly recognized that this new system would necessarily differ from the UCMJ because of military and intelligence realities. *See, e.g.*, 10 U.S.C. § 949a ("Such procedures shall, *so far as the Secretary considers practicable or consistent with military or intelligence activities*, apply the principles of law and the rules of evidence in

trial by general courts-martial.") (emphasis added). To the extent the MCA and MMC provide for additional safeguards with respect to national security information that go beyond those that exist in the UCMJ, those differences reflect Congress's and the President's determination that the exigencies of war call for them, a determination to which substantial deference is due, *see, e.g.*, *Diaz*, 426 U.S. at 81 n.17, and that conforms to any requirements set by Common Article 3.

vi. The provisions of the MCA and MMC governing the timing of pretrial matters easily meet any requirements set by Common Article 3.

(a) Congress has emphatically legislated that the speedy trial provisions of the UCMJ do *not* apply to military commissions: "The following provisions of this title shall not apply to trial by military commission under this chapter: . . . 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." 10 U.S.C. § 948b(d)(1)(A). RMC 707 faithfully reflects Congress's intent that the MMC not contain a "speedy trial" rule with respect to how long the accused may be detained prior to being charged. Instead, RMC 707 reflects both the accused's and the Government's legitimate interest in having the case heard expeditiously once charges have been sworn against the accused. For example, the rule requires that the accused be brought to trial within 30 days of the service of charges. It also sets timetables with respect to the assembly of the military commission and the setting of a discovery schedule. These timetables protect both the rights of the accused to have the charges against him adjudicated, as well as the rights of the United States to have a timely hearing on the charges it has brought.

(b) The accused claims that this is unfair, since the Government controls the timing of when charges are brought. But the Government *always* controls the timing of when charges are brought. There is nothing exceptional about this. In addition, we note that the accused cites Article 75 of Protocol I and Article 14(3)(a) of the Civil and Political Covenant for the proposition that he must be promptly notified of the charges against him. However, that's exactly what the MMC provides—that the accused must be promptly notified of charges that have been brought against him, and that he must be brought to trial within 30 days of the service of charges. *See* RMC 308; RMC 707(a)(1).

(c) The accused argues that "[t]he MCA disallows speedy trial rights derived from the UCMJ, but Mr. Khadr has an independent right to speedy trial from MCA § 948b(f), so the inapplicability of the UCMJ does not affect the analysis in the present case." Mot. to Dismiss at 25 (footnote omitted). That is, the accused's argument is that this commission should ignore Congress's unambiguous statement in section § 948b(d)(1)(A) that the UCMJ's speedy trial rules do not apply, and should instead rely on section 948b(f)'s vague reference to the "judicial guarantees which are recognized as indispensable by civilized peoples" to substitute *precisely the right that Congress had just declared inapplicable*. But Common Article 3 is not a license for this commission simply to ignore what Congress has written in the MCA in favor of the accused's

preferred version of the Act. *See, e.g., TMR Energy Ltd.*, 411 F.3d at 302 ("Never does customary international law prevail over a contrary federal statute.").

vii. Whatever "equality of arms" is required by Common Article 3 is provided by the MCA and MMC.

(a) As already noted, the MCA and MMC's rules governing cross-examination, the withholding of classified information and the timing of pretrial matters fully comply with Common Article 3. Because each of these provisions individually complies with Common Article 3, they collectively comply with Common Article 3. In addition, because the MMC faithfully implements the MCA, the MMC cannot be void based on some supposed conflict with international law and/or Common Article 3. *See, e.g., TMR Energy Ltd.*, 411 F.3d at 302.

(b) To the extent there is any ambiguity as to whether the MCA faithfully implements the MCA, *Chevron*'s principles of deference dictate that this commission should defer to the Secretary of Defense's reasonable judgment that the MMC fully complies with the MCA, including any requirement that trials conducted thereunder comply with Common Article 3.

viii. The MCA and MMC fully protect the accused's right against self-incrimination and easily meet any requirements set by Common Article 3.

(a) The MCA and MMC unambiguously forbid the accused from being required to testify against himself at a military commission. *See* 10 U.S.C. § 948r(a) ("No person shall be required to testify against himself at a proceeding of a military commission under this chapter."); MCRE 301(a) ("No person shall be required to testify against himself at a proceeding of a military commission under these rules."). Despite these clear protections of his right against self-incrimination, the accused claims that the MMC violates that right by permitting uncorroborated confessions into evidence.

(b) MCRE 301(g)(1) provides that "[a]n oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing is not accounted for." However, any confession admitted under MCRE 301(g) must, just like every other such piece of evidence admitted at a military commission, be both *reliable and probative*. *See* MCRE 402 (evidence must have probative value to be admissible); MCRE 403 (unduly prejudicial evidence not admissible); MCRE 304(c) (in considering the admissibility of a statement as to which the degree of coercion with respect to producing that statement is disputed, the military judge must consider, among other factors, the statement's reliability and probative value); MCRE 803(c) (hearsay evidence not subject to a recognized exception under the MRE may be admitted if reliable under the totality of the circumstances).

(c) As the discussion note to MCRE 304(g) makes clear, "in determining the probative value and reliability of such a statement, the military judge may consider the degree of corroboration, if any." Thus, nothing in MCRE 304(g) (or

anywhere else in the MCA or MMC) requires a military judge to admit an uncorroborated confession. Rather, the military judge would consider the totality of the circumstances, including the extent to which it is corroborated. This flexible standard—protecting the rights of the accused, while accommodating the practicalities of gathering evidence in wartime half a world away—is a reasonable accommodation of military realities and fully complies with Common Article 3.

ix. The MCA and MMC's rules with respect to the exclusion of evidence obtained through alleged coercion or ill-treatment easily meet any requirements set by Common Article 3.

(a) The MCA permits the admission of statements with respect to which the degree of coercion is disputed *only* where "the totality of the circumstances renders the statement reliable and possessing sufficient probative value" and "the interests of justice would best be served by admission of the statement into evidence." In addition, with respect to statements obtained on or after December 30, 2005, such statements may be admitted only if they are probative, reliable, the interests of justice would be served by admitting the statement, and "the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005." 10 U.S.C. § 948r(c), (d).[12]

(b) The discussion note to MCRE 304(c) makes clear that

> [i]n evaluating whether the statement is reliable and whether the admission of the statement is consistent with the interests of justice, the military judge may consider all relevant circumstances, including the facts and circumstances surrounding the alleged coercion, as well as whether other evidence tends to corroborate or bring into question the reliability of the proffered statement.

Thus, contrary to the accused's insinuations, allegedly coerced evidence may be admitted only after careful evaluation by the military judge as to both its probative value and its reliability, including the degree to which it is corroborated. In addition, with respect to a statement obtained after enactment of the DTA, the statement may be admitted *only* if "the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005." 10 U.S.C. § 948r(d). Thus, with respect to statements obtained after December

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[12] As the discussion note to MCRE 304(c) explains,

> The Detainee Treatment Act, or "D.T.A.," enacted on December 30, 2005, provides that no individual in the custody or under the physical control of the United States Government shall be subject to cruel, inhuman, or degrading treatment or punishment, as defined by reference to the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution, regardless of the nationality or location of the individual. Therefore, the M.C.A. requires military judges in military commissions to treat allegedly coerced statements differently, depending on whether the statement was made before or after December 30, 2005.

30, 2005, there is no possibility that any statement obtained by cruel, inhuman, or degrading treatment may be admitted into evidence, thus mooting much of the accused's concern.

(c) With respect to statements obtained prior to enactment of the DTA, the MCA and MMC carefully provide that such statements are admissible only under the limited circumstances discussed above, which include, as already noted, a requirement that admission of the disputed statement be in "the interests of justice." RMC 304(c)(1); *see also* 10 U.S.C. § 948r(c)(2). The Prosecution is not aware of any principle in international law that prohibits a military judge from conditioning his decision to admit evidence on whether admission of that evidence satisfies "the interests of justice"—in fact, Common Article 3 would seem to require such considerations. Thus, the MMC's standard for admitting allegedly coerced statements fully complies with Common Article 3.

x. The accused's right to appellate review under the MCA and MMC easily meets any requirements set by Common Article 3.

(a) Congress has carefully provided for a robust process of appellate review in the MCA. First, a person convicted under the MCA may appeal his sentence to the convening authority, who may "in his sole discretion, approve, disapprove, commute, or suspend the sentence in whole or in part." 10 U.S.C. § 950b(c)(2)(C). When acting pursuant to this authority, "[t]he convening authority may *not* increase a sentence beyond that which is found by the military commission." *Id.* (emphasis added). This authority—to commute or disapprove a sentence *for any reason whatsoever*—has no analogue in the civilian justice system and is an extraordinary protection for the accused. Second, in any case in which the accused has been found guilty, the convening authority will automatically refer the case to the Court of Military Commission Review ("CMCR") to hear the appeal. *See* 10 U.S.C. § 950c(a). In addition, the accused has the right to petition for a further appeal to the U.S. Court for Appeals for the D.C. Circuit and even to the U.S. Supreme Court. *See id.* § 950g.

(b) The accused makes much of the fact that the CMCR "may act only with respect to matters of law." *Id.* § 950f(d). However, it is not at all extraordinary that the ability to appeal factual matters—as distinct from legal matters—may be severely limited. *Cf.* U.S. Const. amend. VII. ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."). Moreover, the convening authority *does* have authority to modify the findings and sentence of a military commission, *see* 10 U.S.C. § 950b(b), (c), or order a rehearing, *see id.* § 950b(d). In any event, the appellate process created in 10 U.S.C. §§ 950b, 950c, 950f and 950g, and reflected in RMC 1107, 1201(d)(1) and 1205, is the appellate process that Congress has created. Because Congress is not bound by international law, this commission must give effect to Congress's intent. The accused's argument that Congress's intent must be read "narrowly" in interpreting 10 U.S.C. §§ 950c, 950f and 950g, *see* Mot. to Dismiss at 28, is apparently the accused's subtle way of saying that Congress's intent should be ignored and that this commission should either strike down the military commission rules that the Secretary of Defense has promulgated, or else use

them as some sort of vehicle to import into military commissions the accused's preferred principles of international law to which he believes Congress has paid insufficient heed. However, where Congress has clearly and unambiguously spoken—as it surely has in 10 U.S.C. §§ 950c, 950f and 950g—this commission has no basis for setting aside Congress's and the President's careful judgment as to the proper process for appeals because it may arguably conflict or be in tension with international law. *See TMR Energy Ltd.*, 411 F.3d at 302. In any event, it is perfectly reasonable for Congress to determine that factual determinations, which routinely turn on assessments of in-court participants' credibility, facial expressions, voice-tone, and the like, should not be subject to appellate review by the CMCR and federal courts, while legal determinations should be. *See* 10 U.S.C. §§ 950c, 950f and 950g.

xi. The MMC and MCA fully preserve the accused's presumption of innocence.

(a) The MCA unambiguously presumes the accused to be innocent. *See* 10 U.S.C. § 949*l*(c)(1) (The military judge must charge the members that "the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt."); *see also* RMC 920(e)(5) (same). In addition, the Rules for Military Commissions include numerous safeguards to protect the presumption of innocence. *See, e.g.*, RMC 502(d)(5), Discussion Note (E) ("Trial counsel should not . . . intimate, transmit, or purport to transmit to the military judge or members the views of the convening authority or others as to the guilt or innocence of the accused . . . ."); RMC 902(b)(3) ("A military judge shall . . . disqualify himself or herself . . . [w]here the military judge . . . has expressed an opinion concerning the guilt or innocence of the accused."); RMC 912(f)(1)(M) ("A member shall be excused for cause whenever it appears that the member . . . [h]as informed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged . . . ."); RMC 919(b), Discussion Note ("Counsel should not express a personnel belief or opinion as to the truth or falsity of any testimony or evidence or the guilt or innocence of the accused, nor should counsel make arguments calculated to inflame passions or prejudices."); *cf.* MCRE 403 (unfairly prejudicial evidence not admissible).

(b) Amazingly, the accused argues that the national security privilege and the potential that a witness may testify behind a screen destroy the presumption of innocence because they "assume an inability to trust the accused." Mot. to Dismiss at 28. As an initial matter, we note that the use of screens to preserve witness anonymity is not a particularly rare occurrence in federal court. Moreover, it is a testament to the extraordinary protections that are being accorded the accused that he even has a forum in which he can challenge the decision of the United States not to turn over classified information to him. In addition, as already discussed, the classified information provisions of the MCA and MMC strike a reasonable balance in the prosecution of our Nation's enemies between affording the accused every possible piece of information he might want for his defense and protecting our Nation's secrets that are necessary to preserve the sources and methods of gathering information and other classified information.

(c) Ultimately, it seems that the accused is exercised that he is not being treated like a trusted member of the United States Government. That is indeed true. But, obviously, the accused is *not* a trusted member of the United States Government. Given that reality, the accused has, and will, receive an extraordinary amount of information, including witnesses and discovery, with which to make his defense. However, no treaty of which the Prosecution is aware could possibly require the accused to be treated as if he were a member of the United States Government with full access to all our Nation's classified information. *Cf. United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992) (Sentelle, J.); *United States v. Alston*, 460 F.2d 48 (5th Cir. 1972); *United States v. Abu Marzook*, 412 F. Supp. 2d 913 (N.D. Ill. 2006). The MCA and MMC fully preserve the presumption of innocence, and easily comply with Common Article 3.

c. Conclusion

i. Common Article 3 is not self-executing, and Congress in the MCA removed the only source of domestic law that the Supreme Court in *Hamdan* recognized as importing the protections of Common Article 3 into U.S. law. In addition, Congress in the MCA specifically limited the ability of an alien unlawful enemy combatant subject to the jurisdiction of this commission, such as the accused, to invoke the Geneva Conventions as a source of rights. The accused therefore has no right to challenge the jurisdiction of this commission based on its purported non-compliance with Common Article 3. In addition, the MMC, which has been promulgated by the Secretary of Defense pursuant to section 3(b) of the MCA, must be *presumed* to comply with the MCA and Common Article 3 under principles of *Chevron*-deference. Moreover, even if the MCA or MMC were somehow in conflict with Common Article 3, Congress is not bound by the Geneva Conventions, Common Article 3 or any other previously enacted treaty or source of international law. Finally, even if Common Article 3 were somehow applicable to this commission, the procedures of the MCA and MMC easily meet whatever obligations Common Article 3 may impose. Accordingly, the motion to dismiss should be denied.

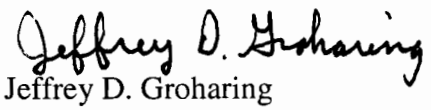
7. Oral Argument: In view of the authorities cited above, which directly, and conclusively, address the issues presented, the Prosecution believes that the motion to dismiss should be readily denied. Should the Military Judge order the parties to present oral argument, the Government is prepared to do so.

8. Witnesses and Evidence: All of the evidence and testimony necessary to deny this motion is already in the record.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

11. Submitted by:



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	D021
UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Reply** to Government's Response to Motion to Dismiss (Common Article 3) 29 January 2008

1. Timeliness: This Reply is filed within the timeline established by the military judge.

2. Overview:

a. The Government's Response is based on "facts" that have not been proven, that violate Mr. Khadr's rights, and therefore should be stricken.

b. Military commissions must comply with Common Article 3.

c. Congress has spoken precisely in the MCA to the issue at stake in these proceedings, that is, the judicial guarantees which must be afforded by the Manual for Military Commissions under the MCA and Common Article 3 of the Geneva Conventions.

d. Congress has not overruled Common Article 3.

e. Additional Protocol 1 is useful in interpreting Common Article 3.

f. The Military Commission should disregard the comparative argument presented by the Government.

g. The Manual for Military Commissions does not comply with several judicial guarantees required by the MCA interpreted in light of Common Article 3.

h. Mr. Khadr is entitled to Due Process both as a basis for understanding judicial guarantees under the MCA and as a directly enforceable right.

i. Fundamental fair trial rights, guaranteed under 10 U.S.C. § 948b(f) and Common Article 3, are inadequately protected by current military commissions. As the Government would interpret the Manual, the accused, Mr. Khadr, would possess no rights to Due Process, no right to assert judicial guarantees under Common Article 3 to the Geneva Conventions, no right to a speedy trial, no right to be informed of the charges in a timely manner, no right to be free from self-incrimination, and no right to be protected from unreliable and untestable hearsay. In this military commission there is a substantial likelihood that hearsay information derived from torture, other ill-treatment, and coercion will be used against the accused. Testimony is likely to include witnesses whose identity is not disclosed to the accused, impeding his ability to effectively cross-examine and question veracity. The accused will also not be informed of the circumstances in which the information was obtained, the source of the information, or whether it was obtained by torture, other ill-treatment, or coercion. Even if the accused is found not

guilty, he may still, according to the Government, be held in indeterminate detention. Each of these issues is an independent violation of U.S. obligations under domestic and international law. Taken together, these procedures are fundamentally unfair and fail to provide a "regularly constituted court" affording "judicial guarantees" as required by the Military Commission Act and Common Article 3, as well as Due Process. As such, they harm the U.S. reputation for respect for human rights and fair trials.

3. Facts: The present motion concerns a question of law and not facts. See the discussion immediately below as to the Government's impermissible statement of "facts" that have not been proven and seek to prejudice the proceedings and the public.

4. Discussion:

a. The Government's Response is Based on "Facts" that Have not Been Proven, that Violate Mr. Khadr's Rights, and That Should be Stricken

(1) The present motion concerns a question of law. Indeed, the Military Judge's scheduling order of 28 November 2007 provided that motions at this stage would deal with issues of law and not fact. This, as the military judge may recall, was the Government's justification for compelling resolution of these motions now, before the Defense has had the opportunity to conduct comprehensive discovery in this case. Moreover, because the Government's Response to the Defense's Motion to Dismiss for Lack of Jurisdiction is based on allegations of fact that have not been proven, they are inadmissible at this stage in the proceedings. Indeed, the allegations purported by the Government to constitute "facts" violate Mr. Khadr's rights to a fair and impartial proceeding in which the presumption of innocence is respected. To the extent that the Government has relied upon supposed admissions by Mr. Khadr during interrogation, the use of these alleged facts constitute a violation of the privilege against self-incrimination and may, depending on the circumstances, constitute a violation of Mr. Khadr's rights not to be subjected to torture and cruel, inhuman, or degrading treatment or punishment. Such allegations have no purpose in a motion on a question of law besides improperly prejudicing the proceedings against Mr. Khadr, and they must be stricken. In addition, to the extent that these allegations (expressed as supposed "facts") have been revealed to the public, they further violate Mr. Khadr's right to a fair and impartial determination of his innocence as well as his right to equality of arms required by the Military Commission Act and Common Article 3.

b. Military Commissions Must Comply with Common Article 3

(1) The MCA states that "[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." 10 U.S.C. § 948b(f). This provision is a direct expression of Congress' requirement that the military commissions comply with Common Article 3.

(2) The Government contends that § 948b(f) is, instead, a simple statement of fact, that the procedures for military commissions, whatever they may be, already *do* comply with Common Article 3. But Congress is powerless to make such a determination. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the

judicial department to say what the law is."). The Government's interpretation of § 948b(f) should be avoided because it would raise serious constitutional concerns. The Supreme Court has long recognized the "'cardinal principle' of statutory interpretation," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), that a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

(3) MCA § 948b(f) either means that the Government's actions under the MCA shall comply with Common Article 3 or that the MCA should be interpreted in light of Common Article 3. The Government's approach would say that MCA § 948b(f) blesses anything in the MCA or its Manual for Military Commissions – no matter what the content – with automatic compliance with Common Article 3. Following the Government's perversely narrow view, a hypothetical provision in the MCA reading, "(1) the accused shall be tortured until he confesses before the Commission; and (2) this law complies with Common Article 3," would be read by the Government to somehow "comply" with Common Article 3. Such a construction is nonsensical, not to mention the fact that it results in a separation of powers violation. The MCA cannot comply with Common Article 3 simply because the Government says it does. The Supreme Court has stated that "all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent." *McDonald v. Thompson*, 305 U.S. 263, 266 (1938). Since § 948b(f) *itself* discloses legislative intent, the correct construction of § 948b(f) is that Congress requires military commissions to comply with Common Article 3, or at least that the MCA should be construed in light of Common Article 3.

c. Congress has Spoken Precisely in the MCA to the Issue at Stake in These Proceedings, that is, the Judicial Guarantees which Must be Afforded by the Manual for Military Commissions under the MCA and Common Article 3 of the Geneva Conventions

(1) When issuing several critical provisions of the MMC, the Secretary of Defense failed to comply with the mandate of the MCA and, therefore, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), does not require deference to the MMC's interpretation. *Chevron* articulates a two-part test to determine if an agency used a permissible construction of the statute it administers:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43. Congress has "directly spoken to the precise question at issue," *id.* at 842, requiring that military commissions under the MCA must comply with Common Article 3. Since Congress has expressed that intent, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. As discussed above, the MCA speaks precisely to the judicial guarantees it affords in saying that "[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." 10 U.S.C. § 948b(f). "Deference is not due if Congress has made its intent 'clear' in the statutory text." *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2523 (2007) (citing *Chevron*, 467 U.S. at 842).

(2) The Government seeks to create an ambiguity by suggesting that that provision has essentially no substantive effect. It is clear, however, that Congress tracked the language of Common Article 3 and spoke to the precise issue of what judicial guarantees the accused should possess. The Government's purported ambiguity should not distract the Military Commission from its responsibility to follow the language of the MCA.

(3) If the Military Commission is somehow concerned about the Government's suggestion of ambiguity, so as to reach the second step in the *Chevron* test, the MMC still fails to provide a permissible construction of the statute. In the many respects identified by Mr. Khadr's Motion to Dismiss of 18 January 2008, the MMC fails to afford the rights required by 10 U.S.C. § 948b(f). Congress clearly expressed its intention that the military commissions must comply with Common Article 3. 10 U.S.C. § 948b(f). Even if that expression were ambiguous, the MMC does not control because it does not, in several important respects identified by the Motion to Dismiss, provide a permissible construction of the MCA. "[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear . . . ." *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988); *Chevron*, 467 U.S. at 842-43).

(4) The Government asserts without justification that "the Secretary's rules . . . must be presumed to comply with the MCA because they represent a permissible construction of the Act." (Govt. Resp. at 6, para. 6(a)(ii)(d).) This assertion begs the question of whether the MMC actually does comply with the MCA. The Government argues tautologically that the MMC complies with the MCA because the prosecution so asserted. The Government goes on to argue that "the MMC does little more than implement the decisions Congress made in the MCA . . . ." (*Id.*) If the MMC did little more than implement Congress' decisions in the MCA, the MMC would be unnecessary and military commissions would simply be held under the MCA. In fact, the MMC contains a number of detailed rules not contained in the MCA itself that regulate the functioning of military commissions. In assessing the compliance of the MMC with the MCA, the Military Commission should further note that the MCA and MMC reflect not just a simple administrative law delegation of rulemaking authority, but the establishment of an entirely separate criminal justice system in which the lives and liberties of many individuals are at stake. Hence, stringent scrutiny rather than broad deference is appropriate**.**

d. Congress has Not Sought to and Should Not Overrule Common Article 3

(1) The Government cites a number of authorities for the proposition that Congress is not bound by international law. To the contrary, under the doctrine of *pacta sunt servanda*, a government that has ratified a treaty is bound to comply in good faith with that treaty. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* Jan. 27, 1980, Art. 26. As a matter of domestic law Congress can, of course, violate a treaty subjecting the United States to international sanctions. In this context, however, it is particularly important for the United States to comply with its obligations under the Geneva Conventions because the safety and appropriate treatment of U.S. military personnel is at stake in future conflicts.

(2) While Congress may adopt legislation that violates international law, it has not done so in the MCA. The Government argues that Congress has repudiated Common Article 3. Far from abandoning Common Article 3, as the Government argues, Congress has stated affirmatively that Mr. Khadr should be afforded judicial guarantees under Common Article 3. 10 U.S.C. § 948b(f). The MCA contains no clear statement by Congress that it wishes to violate United States obligations under Common Article 3. Additionally, there is a strong presumption that "repeals by implication are not favored." *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). Hence, the MCA must be construed in harmony with Common Article 3. In passing the MCA, Congress was aware of the pragmatic consequences that would result from abandoning Common Article 3, including retaliatory ill-treatment of United States personnel captured in future conflicts. The Military Commission should not impute to Congress an intention to expose United States personnel to such needless risks without an express declaration. For these reasons, although Congress has the power to enact legislation in violation of Common Article 3, it has not done so in this case.

(3) The MCA must be interpreted in light of Common Article 3 to provide Mr. Khadr the required judicial guarantees, but Common Article 3 applies in any case because it is self-executing. *United States v. Khadr*, CMCR No. 07-001, at 4 n.4. The Government seeks to dismiss the views expressed by the appellate body that reviews this Military Commission as a "passing observation." (Govt. Resp. at 9 n.3.) The CMCR stated "[t]he Geneva Conventions are generally viewed as *self-executing* treaties . . ., form a part of American law, and *are binding in federal courts* under the Supremacy Clause." *Khadr* at 4 n.4 (emphasis added). The CMCR goes on to say that "[t]he Geneva Conventions stand preeminent among the major treaties on the law of war." *Id.* The CMCR's consideration of the Geneva Conventions was hardly a passing reference; as a subsidiary body, the Military Commission should follow its determination.

e. Additional Protocol 1 is Useful in Interpreting Common Article 3

(1) The Government argues that the United States is not a party to Additional Protocol I to the Geneva Conventions (Protocol I). (Govt. Resp. at 6 n.1.) The Government's concern is misplaced. Mr. Khadr's Motion to Dismiss considers Protocol I as an *interpretive aid* in understanding Common Article 3 and MCA § 948b(f) and *not* as a source of rights. Because Common Article 3 is international law, international sources must be consulted to determine its meaning. (Motion to Dismiss at 3-8.) Article 75 of Additional Protocol 1 is particularly respected for its exposition of the meaning of judicial guarantees in Common Article 3. Motion

Dismiss at 6. As the Justice Stevens said in *Hamdan*, "it appears that the Government regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2797 (2006) (quotation omitted) (Stevens, J., plurality opinion). Just as the Government Response tries to dismiss the CMCR decision, it also encourages the Military Commission to ignore the Supreme Court's guidance in using Additional Protocol 1 as an interpretive device, simply because it has not been ratified by the United States.

f. The Military Commission Should Disregard the Comparative Argument Presented by the Government

(1) The Government argues on several occasions in its Response that certain fair trial protections afforded to Mr. Khadr through 10 U.S.C. § 948b(f) and Common Article 3 supposedly exceed those afforded to U.S. citizens in Article III courts. At the same time, the Government repeats that Mr. Khadr does not qualify for Due Process protections under the Constitution (see section h below for further discussion of Due Process). In fact, Mr. Khadr should be afforded all the rights guaranteed by the MCA and Common Article 3, which are substantially identical to Due Process protections. Due Process helps to inform the meaning of "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" for purposes of Common Article 3 of the Geneva Conventions.

(2) Not only did the Government misunderstand the thrust of the Motion to Dismiss, it also misunderstood the meaning of Due Process. The Government incorrectly minimized the content of Due Process in Article III courts to somehow argue that Common Article 3 goes too far in protecting judicial guarantees. For example, the Government's Response of 24 January 2008 invoked *Arizona v. Youngblood*, 488 U.S. 51 (1988), to argue that both court-martial procedures and military commission procedures are unusually protective because "the relevant test in civilian courts is not whether physical evidence or a witness is missing, per se, but whether the state refuses in bad faith to produce it." (Govt. Resp. at 13-14, para. 6(b)(ii)(c).) In *Youngblood*, the accused complained that the Government was at fault for missing evidence and therefore his conviction should be overturned. Such reliance on *Youngblood* is misplaced. *Youngblood* concerned evidence "of which no more can be said than that it *could have been* subjected to tests, the results of which *might* have exonerated the defendant." *Youngblood*, 488 U.S. at 57 (emphasis added). *Youngblood*'s evidence of unknown probative value stands in stark contrast to a witness who has been established as *central* to an issue *essential* to a fair trial as in Rule for Military Commissions 703(b)(3)(B):

> if the testimony of a witness determined to be unavailable is of *central importance to the resolution of an issue essential to a fair trial*, and there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence, or shall abate the proceedings, if the military judge finds that the reason for the witness' unavailability is within the control of the United States. (emphasis added)

As discussed below in section g(4), Mr. Khadr's right to call witnesses under the MCA and Common Article 3 is not adequately protected by military commission procedures. The correct test for whether proceedings should be abated is whether the accused is at fault for the witness' unavailability, not whether the Government has the power to produce the witness. The Government's argument based on *Youngblood* dealt with a very different situation, and is thus irrelevant.

g. The Manual for Military Commissions Does not Comply with Several Judicial Guarantees Required by the MCA Interpreted in Light of Common Article 3

(1) The denial of Mr. Khadr's speedy trial rights is unlawful and unjust

(i) Mr. Khadr has been held from the ages of 15 to 21, not informed of the charges against him for nearly 5 years, and not informed of his rights for nearly 5 years, all of which deny him his right to a speedy trial. The Government focuses on "the accused's . . . legitimate interest in having the case heard expeditiously once charges have been sworn . . . ." (Govt. Resp. at 19, para. (6)(b)(vi)(a).) The Government simultaneously ignores the fact that Mr. Khadr's right to be tried expeditiously after charges are sworn is worthless when, as here, he is denied the right to be informed of the charges in a timely manner, detained in uncertainty for many years, and deprived of the right to be tried expeditiously once detained. The right to be tried expeditiously after swearing of charges would be little comfort, indeed, to a teenager who may not be charged until he is an old man, if ever.

(ii) The Government protests vigorously that "the Government *always* controls the timing of when charges are brought. There is nothing exceptional about this." (Govt. Resp. at 19, para. (6)(b)(vi)(a).) In fact, this aspect of the military commissions is truly extraordinary. For instance, in courts-martial "[w]hen any person . . . is placed in arrest or confinement prior to trial, *immediate* steps shall be taken . . . to try him or to dismiss the charges and release him." 10 U.S.C. § 810 (emphasis added). "Immediate" leaves no time for the lengthy investigation and contemplation of prosecution while the detainee remains in custody that the Government implies is unexceptional.

(iii) Everyone is entitled to the judicial guarantees of prompt notice and a speedy trial under the Military Commission Act as interpreted in light of Common Article 3. As discussed in the Motion to Dismiss at 26, the proceedings in this case have far exceeded the permissible delays established by the Covenant on Civil and Political Rights and other international sources of interpretation. Further, the right to a speedy trial is a fundamental right inherent in Due Process. *Klopfer v. State of N.C.*, 386 U.S. 213, 223 (1967). Rights absorbed by Due Process are so important that, in the words of Justice Cardozo, "neither liberty nor justice would exist if they were sacrificed." *Palko v. State of Connecticut*, 302 U.S. 319, 326 (1937). It is unreasonable to impute to Congress a judgment that justice should be sacrificed by denying Mr. Khadr his speedy trial rights. In adopting 10 U.S.C. § 948b(f), Congress showed its intent to preserve the right to a speedy trial and prompt notice as found in the judicial guarantees of Common Article 3. Even if Congress for some reason intended to deprive Mr. Khadr of his right to a speedy trial, it would need to clearly express that specific intent. Furthermore, Congress

lacks that power. The right to speedy trial is a constitutional right, not a statutory one, and Congress has no power to eliminate it.

(2) The MCA and MMC should not be interpreted to admit statements adduced through cruel, inhuman, or degrading treatment

(i) Evidence adduced through either torture or cruel, inhuman, or degrading treatment should not be allowed in evidence. The Government maintains that it protects against evidence adduced by ill-treatment and that evidence adduced through ill-treatment should be allowed in evidence. These claims are contradictory. Evidence adduced through cruel, inhuman, or degrading treatment is inherently unreliable. It is impossible to use such evidence without prejudicing the rights of the accused and undermining the interests of justice. The Government claims that "with respect to statements obtained after December 30, 2005, there is no possibility that any statement obtained by cruel, inhuman, or degrading treatment may be admitted into evidence, thus mooting much of the accused's concern." (Govt. Resp. at 21-22, para. (6)(b)(ix)(b).) Mr. Khadr was detained in 2002, three years before December 30, 2005. It is therefore likely that most statements offered against him will have been obtained prior to that date and would be allowed in evidence even if they were adduced through cruel, inhuman, or degrading treatment. Evidence adduced through ill-treatment at any time should not be allowed in evidence. What little protection does exist in the MMC is of dubious value to Mr. Khadr. A related flaw is the fact that military commissions operate under a extraordinarily narrow definition of "cruel, inhuman, or degrading" that includes only conduct prohibited by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution as cruel, unusual, and inhumane. MCRE 304(b)(4). Common Article 3 and international jurisprudence use a broader standard. *See, e.g.*, Human Rights Committee, *General Comment 20, Article 7* (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994).

(ii) While 10 U.S.C. § 948r and MCRE 304 correctly forbid the use of evidence adduced by torture and ill-treatment adduced after December 30, 2005, that prohibition must be extended in the "interests of justice," 10 U.S.C. § 948r, to evidence adduced by cruel, inhuman, or degrading treatment before that date, as required by 10 U.S.C. § 948b(f) and Common Article 3.

(3) Broad hearsay admission favors the government and results in an unfair trial

(i) The Government Response places great weight on the claim that hearsay is admissible in military commissions only where probative and reliable, on the theory that this approach is "simply an articulation of the standard governing more traditional exceptions to the hearsay rule." (Govt. Res. at 15.) Although the Government cites no authority, it presumably refers to the idea that traditional hearsay exceptions involve circumstantial indicators of trustworthiness. *See* Federal Rule of Evidence 807. The Government extends this analogy too far, arguing that because hearsay may be excluded if not reliable or probative, the accused has equivalent protection to that afforded him by a system of general exclusion with limited exceptions.

(ii) Hearsay prejudices Mr. Khadr's right to cross-examine witnesses against him, his right against self-incrimination, his right to exclude statements adduced through torture, and his right to equality of arms. Mr. Khadr obviously cannot cross-examine hearsay declarants. It is even possible his own alleged confession could be offered against him through the MCA's hearsay rule as an uncorroborated confession. *See* MCRE 803, 304. If the Government is allowed to withhold the sources, methods, and activities through which it adduced the hearsay, evidence adduced through ill-treatment could be used against Mr. Khadr. Aggravating all of these problems is the fact that Mr. Khadr will bear the burden of proof to exclude hearsay offered against him. MCRE 803(c).

(iii) Hearsay has long been distrusted in the United States because of "[i]ts intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover . . . ." *Queen v. Hepburn*, 7 Cranch [11 U.S.] 290, 296 (1813). The general hearsay exception, which the Government portrays as essentially the same as the MCA allowing hearsay in evidence as a matter of course, "should be used stintingly." *United States v. Nivica*, 887 F.2d 1110, 1127 (1st Cir. 1989). The Supreme Court has recognized the inadmissibility of hearsay as one of those rules "which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded." *Queen*, 11 U.S. at 295.

(iv) The Government argues that the general admission of hearsay does not favor the accused because both sides may offer hearsay. Naturally, the Government will tend to offer hearsay from United States military personnel, while the accused will be forced to rely on statements from foreign citizens and other detainees. The idea that a commission composed of United States military officers will lend equal weight to both sets of hearsay declarants defies common sense. Hence, the general admissibility of hearsay favors the Government in violation of Mr. Khadr's right to equality of arms. Because the general admission of hearsay would abridge Mr. Khadr's rights and particularly his right to cross-examine witnesses against him, the Military Judge should interpret the MCA to afford Mr. Khadr his full right to cross-examine witnesses against him under 10 U.S.C. § 948b(f), interpreted in light of Common Article 3, and should avoid the use of hearsay that would not fit traditional exceptions.

(4) <u>Mr. Khadr's right to call witnesses under Common Article 3 is not satisfied by military commission procedures</u>

(i) As discussed briefly above, Rule for Military Commissions 703(b)(3)(B) states that:

> if the testimony of a witness determined to be unavailable is of central importance to the resolution of an issue essential to a fair trial, and there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence, or shall abate the proceedings, if the military judge finds that the reason for the witness' unavailability is within the control of the United States.

(ii) In the Motion to Dismiss at 14, Mr. Khadr argued that because a trial by military commission is allowed to proceed in the absence of a witness essential to a fair trial, his right to a fair trial would be infringed because he cannot call or confront the essential witness and cannot cross-examine the witness as guaranteed by the MCA interpreted in light of Common Article 3. Where a witness *essential* to a fair trial is absent through no fault of the accused, the absence of the witness should not prejudice the accused and the trial should not proceed.

(iii) The Government argues that this provision should be narrowly construed against the accused. The Government's argument fails for two reasons. First, the Government mischaracterizes R.M.C. 703(b)(3)(B), claiming that "if a witness is necessary for the military commission and it is *within the Government's power to produce the witness*, the military judge *must* grant a continuance or other relief . . . ." (Govt. Resp. at 12, para. 6(b)(ii)(a) (emphasis added).) The true test under R.M.C. 703(b)(3)(B) for whether abatement is required is whether the *reason for the witness' unavailability* is within United States control, not whether the Government can produce the witness. This difference would be crucial, for instance, if the Government adduced a statement from detainee A through ill-treatment, released A and shipped him back to his home in a foreign country, and then proposed to use A's statement in a trial as the fundamental basis for the case against detainee B. Under the Government's formulation there would be no abatement of the trial because the Government could not produce A, however, under the true test of R.M.C. 703(b), abatement would be required because the Government controlled the cause of A's unavailability. Second, the Government argues that R.M.C. 703(b) is fair because it "is far more process than an accused alien enemy combatant has *ever* received in the history of warfare." (Govt. Resp. at 13, para. 6(b)(ii)(a) (citing the Lieber rules of 1863).) This implication is incorrect because, assuming for the sake of argument that military commissions improve on past efforts, providing an incremental improvement over unsatisfactory process of the long past does not automatically make it sufficient. Rather, the military commission must actually satisfy R.M.C. 703(b) as properly interpreted in light Common Article 3's requirements.

(iv) The Government also argues that when the reason for the unavailability of an essential witness is within the control of the United States, "it would be extraordinary to prevent the commission from proceeding, and would give the accused more rights than even U.S. citizens enjoy in Article III courts." (Govt. Resp. at 13, para. 6(b)(ii)(c).) Preventing a commission from proceeding due to the absence of a witness of central importance to an issue *essential* to a fair trial, *through no fault of the accused*, is quite ordinary. *See* R.C.M. 703(b)(3).

(v) Moreover, as discussed above, the Government's invocation of *Arizona v. Youngblood*, 488 U.S. 51 (1988), fails to establish that court-martial procedures are unusually protective because "the relevant test in civilian courts is not whether physical evidence or a witness is missing, per se, but whether the state refuses in bad faith to produce it." (Govt. Resp. at 13-14, para. 6(b)(ii)(c).) Any reliance on *Youngblood* is misplaced for two reasons. First, *Youngblood* concerned evidence "of which no more can be said than that it *could have been* subjected to tests, the results of which *might* have exonerated the defendant." *Youngblood*, 488 U.S. at 57 (emphasis added). *Youngblood*'s evidence of unknown probative value stands in stark contrast to a witness who has been established as *central* to an issue *essential* to a fair trial. Second, *Youngblood* concerns physical evidence, while R.C.M. 703(b) and R.M.C. 703(b)

concern witnesses. The duty to preserve evidence and the duty to produce witnesses are separate and distinct. For these reasons, *Youngblood* is inapposite and court-martial procedures are an apt comparison for military commissions, illustrating that where an essential defense witness is unavailable through no fault of the accused, the interests of justice demand that the Government must bear the burden, not the accused.

(5) Permissibility of screened testimony under U.S. domestic law is not dispositive of the acceptability of screened testimony under the Military Commissions Act and Common Article 3

(i) Procedures allowing witnesses to testify while screened from the defense deny Mr. Khadr his right to cross-examine witnesses against him because it is impossible for the defense to fully cross-examine a witness without knowing his identity. The Government proposes that witnesses must be permitted to testify from behind screens because if "it is permissible under U.S. law . . . it must certainly be permissible under Common Article 3 . . . ." (Govt. Resp. at 15, para. 6(b)(iii)(c).) This argument is essentially a restatement of the Government's argument that 10 U.S.C. § 948b(f) intrinsically makes the MCA compliant with Common Article 3: because Congress has acted, these procedures comply with Common Article 3. As discussed above, the correct test is not whether Congress has acted, but whether the procedures do, in fact, comply with Common Article 3. (Motion to Dismiss at 2-3.) Also, the Government ignores the other serious constraints under which the accused must present his case, including limitations on cross-examination, permissibility of hearsay evidence, inhibitions on calling witnesses, inequality of arms between the prosecution and the defense, the use of coerced evidence adduced prior to December 30, 2005, etc. In this context, screened witnesses would represent yet another infringement of the judicial guarantees afforded by 10 U.S.C. § 948b(f) and Common Article 3.

(6) Mr. Khadr should be given the right to cross-examine wherever possible

(i) In the context of Mr. Khadr's right to cross-examine witnesses against him, the Government states "it is unclear what the accused means by 'interpret[ing] narrowly the exception to the general rule of cross-examination' . . . ." (Govt. Resp. at 16, para. 6(b)(iii)(d).) To interpret narrowly simply means that, to the extent the Military Judge determines that Mr. Khadr's right to cross-examine under Common Article 3 may somehow be limited by the MCA, he must still interpret the MCA and MMC to provide Mr. Khadr the right to cross-examine whenever possible.

(ii) Mr. Khadr has a general right to cross-examine witnesses against him. *See, e.g.*, 10 U.S.C. § 948b(f); 10 U.S.C. § 949a(b)(1)(A); *id.* § 949c(b)(7). The MCA and MCRE contain purported exceptions to this general right. *See* 10 U.S.C. § 949d(f)(2)(C) ("During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information. Following such an objection, the military judge shall take suitable action to safeguard such classified information."); MCRE 505(e)(2) ("At the request of the government the military judge shall enter such additional protective orders as are necessary for the protection of national security information to include protective orders limiting the scope of direct examination and cross examination of

witnesses."). In ruling on a defense objection under 10 U.S.C. § 949a(b)(1)(A), the Military Judge should construe "suitable action" to safeguard Mr. Khadr's right to cross-examine. Similarly, in fashioning a protective order under MCRE 505(e)(2), the military judge should interpret "necessary" to mean that limiting the scope of cross-examination should be a last resort.

(7) Mr. Khadr must not be excluded from his own trial on the basis of national security

(i) The Government has offered no convincing justification for excluding Mr. Khadr from his own trial as a result of the Government's assertion of a national security privilege. After citing the Military Rules of Evidence and the Classified Information Procedures Act, neither controlling here, the Government states that Mr. Khadr's exclusion is "narrowly tailored" to the Government's need to conceal classified information. (Govt. Resp. at 17, para. 6(b)(iv)(d).) The Government then neglects to offer any reason *why* the exclusion is narrowly tailored or to consider less restrictive alternatives. Instead, the Government notes that military commission procedures need not be identical to procedures in courts-martial and appeals to the vague "extraordinary sensitivity" of classified information and the harm its disclosure might cause. *Id.* As observed in *Hamdan*, "an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him." *Hamdan*, 126 S.Ct. at 2798 (Stevens, J., plurality opinion). The Government must make a stronger showing if it wishes to abridge a right that the Supreme Court has declared is "scarcely less important to the accused than the right of trial itself." *Diaz v. United States*, 223 U.S. 442, 455 (1912). Furthermore, Mr. Khadr will be detained in a secure facility until the end of his trial, at which point he will either be found not guilty, and therefore not a threat, or guilty, in which case he will still be detained. Hence, the Government cannot plausibly claim the national security exception is "narrowly tailored" without even considering alternatives that would respect Mr. Khadr's right to be present at his trial.

(8) MCRE 304(g) does not adequately protect Mr. Khadr's right against self-incrimination because it allows uncorroborated coerced confessions in evidence

(i) The Government argues that the admission of uncorroborated confessions is a "reasonable accommodation of military realities." (Govt. Resp. at 21, para. 6(b)(viii)(c).) The Government cites the discussion note to MCRE 304(g) to establish that the military judge may consider the degree of corroboration when deciding whether to admit a confession. Because confessions are easily manufactured, a permissive inquiry into corroboration is insufficient, especially when corroboration is not required. MCRE 304(g), discussion. Only a mandatory inquiry into required corroboration suffices to protect detainees such as Mr. Khadr from manufactured confessions. The Government maintains that in future commissions "the military judge would consider the totality of the circumstances, including the extent to which [the confession] is corroborated." (Govt. Resp. at 21, para. 6(b)(viii)(c).) Because prognostication is an inexact science, this assertion lends no support to the Government's position. For these reasons, the MCRE does not protect the right against self-incrimination required by 10 U.S.C. § 948b(f) and Common Article 3.

(9) Mr. Khadr is faced with prosecution under *ex post facto* laws

(i) The MMC and MCA do not merely codify existing offenses against the law of war, rather, they create new offenses such as conspiracy. The Government's argument, (Govt. Resp. at 12 n.8), that conspiracy was and is an offense against the law of war was soundly rejected in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2779-85 (2006) (Stevens, J., plurality op.). Hence, these military commissions violate the *ex post facto* principles of both the U.S. Constitution and international law.

h. Mr. Khadr is Entitled to Due Process both as a Basis for Understanding Judicial Guarantees under the MCA and As a Directly Enforceable Right

(1) As discussed above in section f, the Government argues twice in its Response (Govt. Resp. at 11 n.8, 16 n.11) that Mr. Khadr, as an enemy alien outside the territory of the United States does not qualify for Due Process protections under the Constitution. In fact, Mr. Khadr should be afforded all the rights guaranteed by the Military Commissions Act and Common Article 3, which are substantially identical to Due Process protections. Due Process helps to inform the meaning of "a regularly constituted court, affording all the necessary judicial guarantees which are recognized as indispensable by civilized people" for purposes of common Article 3 of the Geneva Conventions.

(2) Further, Mr. Khadr is an alien within the territorial jurisdiction of the United States and is entitled to fundamental Due Process rights. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). The Government's appeals to various cases lend no support to its position. The Supreme Court has rejected the view that Guantánamo Bay is not "territory over which the United States exercises exclusive jurisdiction and control." *Rasul v. Bush*, 542 U.S. 466, 476, (2004). As such, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), which relies on *Eisentrager* and is currently under review, are inapplicable.

(3) *Zadvydas v. Davis*, 533 U.S. 678 (2001) far from reinforcing the Government's position, declares that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* at 693, citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98, and n.5 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Of course, as a detainee at Guantánamo Bay, Mr. Khadr is detained in "territory over which the United States exercises exclusive jurisdiction and control," *Rasul*, 542 U.S. at 476, and thus deserves Due Process rights. Mr. Khadr's presence in United States jurisdiction also undermines the Government's reliance on *32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002), which states that "[a] foreign entity *without property or presence in this country* has no constitutional rights, under the due process clause or otherwise." (emphasis added).

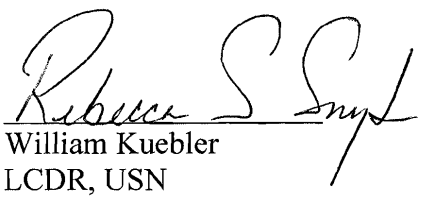
(4) For all these reasons, Mr. Khadr must be afforded Due Process rights, and in any case United States Due Process jurisprudence on fundamental fair trial rights should be used to interpret what judicial guarantees are required by Common Article 3.

i. Conclusion

(1) Military commissions do not adequately protect the right to a fair trial under 10 U.S.C. § 948b(f) and Common Article 3. Procedures under the MCA and the MMC deny the right to a speedy trial, the right to be informed promptly of the charges against him, the right to be present at his trial, the right to call witnesses, the right to cross-examine witnesses, the right to counsel, the right to equality of arms, the right against self-incrimination, the right to exclude evidence adduced through ill-treatment, the presumption of innocence, the right to review by a higher court, and the right not to be subjected to indeterminate detention. Any one of these denials of judicial guarantees under the Military Commission Act, Common Article 3 of the Geneva Conventions, and Due Process would be egregious. Taken together they are manifestly unfair, fatally undermining the right to a fair trial and this nation's reputation for fairness and respect of human rights.

(2) The Government urges the Military Commission to ignore the judicial guarantees afforded by the Military Commissions Act and Common Article 3. The Government has even argued that persons tried before military commissions should not be allowed to "hinder their trials" by asserting their rights. (Govt. Resp. at 10, para. 6(b)(4)(c).)

(3) Because military commission procedures as set forth in the Manual for Military Commissions are inconsistent with Common Article 3, the Military Commission lacks jurisdiction over Mr. Khadr and the charges against Mr. Khadr should be dismissed. In the alternative, the Commission should protect the rights of the accused under the Military Commissions Act, which incorporates Common Article 3 to the Geneva Conventions as well as Due Process.

By: 

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UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** For Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier 18 January 2008

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

2. Relief Sought: The accused, Omar Khadr (Mr. Khadr), seeks an order dismissing all charges against him for lack of jurisdiction under the Military Commissions Act of 2006 (MCA or Act).

3. Facts: The following factual allegations from the 2 February 2007 Charge Sheet (Attachment A) may be assumed to be true for purposes of this motion:

a. Mr. Khadr was born on September 19, 1986, in Toronto, Canada. (*See* Sworn Charge Sheet (2 Feb 2007) [hereinafter Sworn Charges].).

b. Mr. Khadr was captured and detained by U.S. forces following a firefight at or near Khost, Afghanistan on July 27, 2002. Accordingly, Mr. Khadr was 15 years old at the time of the alleged conduct forming the basis for the charges in this case. (*See id.*)

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

5. Law and Argument:[1]

a. Introduction

(1) Omar Khadr, a Canadian national, was fifteen years old when he was captured in Afghanistan in July 2002. (*See* Sworn Charges.) This military commission does not have jurisdiction to try Mr. Khadr, a child soldier, for crimes he allegedly committed when he was fifteen years old because Congress did not in the MCA grant military tribunals jurisdiction over juvenile crimes by child soldiers. The government, however, attempts to contort the MCA into a

[1] Mr. Khadr endorses the following amicus briefs filed today in support of this motion and requests the Commission to consider them before ruling on this motion: Amicus Brief filed by Sarah H. Paoletti on behalf of Canadian parliamentarians and international law scholars and experts in the area of international humanitarian law, international criminal law and international human rights law; Amicus Curiae Brief filed by McKenzie Livingson, Esq. on behalf of Sen. Robert Badinter, *et al.*; Amicus Brief filed by Marsha Levick on behalf of Juvenile Law Center. The defense wishes to express its gratitude to Mr. Jeffrey Keyes and Professor David Weissbrodt for their assistance in coordinating the filings of *amicii curiae* supporting the defense in connection with this motion.

juvenile justice statute even though this military commission lacks the resources, skills or expertise required for such an exercise. To do this, the government must persuade this commission to ignore the pre-existing statutory plan adopted by Congress, 18 U.S.C. §§ 5031, *et seq*., which was neither amended nor repealed by the MCA, that Congress intended to govern the conduct of "any proceedings" against individuals such as Mr. Khadr and which provides a clear jurisdictional vehicle for the prosecution of Mr. Khadr for alleged crimes against the United States.

(2) Assuming, *arguendo*, the government's allegations to be true, the illegal conduct of al Qaeda, a non-State armed terrorist group, in recruiting a juvenile under the age of eighteen and using him in combat is the critical starting point in the analysis of whether Congress intended military tribunals to have jurisdiction to try child soldiers like Mr. Khadr. As explained below, this use and abuse of a juvenile by al Qaeda is a violation of the law of nations which is reflected in the international treaty ratified by Congress in 2002, commonly known as the Optional Protocol to the Convention on the Involvement of Children in Armed Conflict ("Optional Protocol"), which sets forth the world community's condemnation of the use of child soldiers.[2] *See, e.g.*, Optional Protocol, art. 4 ("1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.").

(3) Thus, and this is very important to the issue of military jurisdiction in the case, a juvenile illegally used in combat by al Qaeda does not have the requisite military status that has been historically necessary for military jurisdiction to be exercised. To now exercise military commission jurisdiction over an alleged al Qaeda child soldier and try him for alleged war crimes puts this commission in the very awkward position of legitimizing – contrary to the interest of the United States – the illegally imposed military status of an illegally recruited al Qaeda child fighter. This is certainly not what Congress intended when it granted jurisdiction to this commission to try al Qaeda's war crimes against the United States.

(4) If jurisdiction is exercised over Mr. Khadr, the military judge will be the first in western history to preside over the trial of alleged war crimes committed by a child. This unprecedented result need not be reached, however, because the Government cannot sustain its

[2] Peter W. Singer, Director of the 21st Century Defense Initiative at Brookings, summarized the international prohibitions on the use of child soldiers as follows: "The recruitment and use of child soldiers is one of the most flagrant violations of international norms. Besides being contrary to the general constructs of the last four millennia of warfare, the practice is prohibited by a number of relevant treaties codified in international law. At the international level, these include the 1945 Universal Declaration of Human Rights, the Geneva Conventions of 1949, and the 1977 Additional Protocols to the Geneva Conventions. The UN Security Council, the UN General Assembly, the UN Commission on Human Rights, and the International Labor Organization are among the international bodies that have condemned the practice, not to mention the global grassroots effort of the nongovernmental sort. At the regional level, the Organization for African Unity, the Economic Community of West African States, the Organization of American States, the Organization for Security and Cooperation in Europe, and the European Parliament have also denounced the use of child soldiers. However, these conventions are extensively ignored and, instead, the presence of child soldiers on the battlefield has become a widespread practice at the turn of the century." Peter W. Singer, "Caution:
Children at War," *Parameters*, Winter 2001-02, pp. 40-56.

burden of establishing that Congress, through the MCA, granted jurisdiction to military commissions to try a defendant for war crimes and other statutory offenses allegedly committed when the defendant was a child. R.M.C. 905(c)(2)(B) (the burden of persuasion is on the prosecution "[i]n the case of a motion to dismiss for lack of jurisdiction").

(5) Nothing in the MCA indicates a Congressional intent to disrupt the controlling body of existing law, described in the argument below, including military law and policy, international treaty obligations, and federal statutory law, which constrained military jurisdiction over juvenile crimes, and provided the government with a clearly defined avenue for juvenile jurisdiction. The exercise of jurisdiction over a child soldier by a military tribunal such as this one, which has a complete lack of juvenile justice expertise and operates through a process which narrows or even eliminates important procedures protecting even an adult defendant's trial rights, would be contrary to presumptive intent of Congress in passing the MCA. Congress expressed no intent to strip child offenders of their entitlement to heightened protection in all legal matters, particularly criminal prosecutions. The well-established presumption of statutory interpretation against repeal by implication applies with special force here, where Congress has not hesitated to specify, clearly and expressly, the preexisting laws that are overridden by the MCA. *See, e.g.*, MCA § 4, 10 U.S.C. § 948b(d).

(6) A critical component of the response of our nation and the world to the tragedy of the use and abuse of child solders in war by terrorist organizations like al-Qaeda is that post-conflict legal proceedings must pursue the best interest of the victimized child with the aim of their rehabilitation and reintegration into society, not their imprisonment or execution. Despite the fact that this principle of law was well-established by October 2006 when the MCA was adopted, and that many children including Mr. Khadr were being detained at Guantanamo at that time, Congress made no provision in the MCA to extend the jurisdiction of the military commissions to try child soldiers or, in what would have been a necessary corollary of any such jurisdiction, to equip the commissions with the array of procedural and remedial resources necessary to conduct proceedings in the best interest of the child and to foster their rehabilitation. In sum, the Government cannot sustain its burden of proving that the MCA granted jurisdiction to this commission to try alleged child soldier Mr. Khadr for his alleged juvenile crimes.

b. Longstanding Military Law, Which Was Not Abrogated By The MCA, Does Not Recognize Military Jurisdiction Over Crimes By Juveniles Who, Like Mr. Khadr, Have Not Acquired Lawful Military Status

(1) Neither the AUMF, DTA nor the MCA authorize personal jurisdiction over juvenile offenders by military commission. This silence requires this commission to choose between two possible interpretations of these statutes: (i) there is no minimum age, be it fifteen or five years old, that a captured detainee must be in order to be tried by military commission; or (ii) Congress' silence presupposes that the minimum age for personal jurisdiction was fixed the same way the military has for hundreds of years – that is, to the minimum age required for participation in hostilities and to join the military force on whose behalf he allegedly fought.

(2) Of direct relevance to the military judge's jurisdiction here, courts-martial do not have jurisdiction over juvenile offenses. Though the Uniform Code of Military Justice (UCMJ) equally does not specify a minimum age for personal jurisdiction, the United States Court of

Appeals for the Armed Forces has long held that a court-martial lacks jurisdiction over unlawfully recruited minors. *See United States v. Brown*, 23 C.M.A. 162 (1974); *United States v. Blanton*, 7 C.M.A. 664 (1957). As a general matter, and absent some explicit direction, Congress cannot be understood to have adopted a military tribunal system contrary to this well-established canon of military law. But that is especially true here, where Congress expressly made the UCMJ the model for military commissions convened pursuant to the MCA, *see* MCA § 3, 10 U.S.C. § 948b(c) ("The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under [the UCMJ]"), and specifically identified those provisions of the UCMJ that it did *not* wish to apply. *See, e.g.*, MCA §§ 3, 4(a)(2); 10 U.S.C. §§ 821, 828, 848, 850, 904, 906, 948b(d). Rather than overturn this body of precedent interpreting the UCMJ, Congress expressly *narrowed* the class of persons over whom commissions convened pursuant to the MCA have personal jurisdiction from the wider class of persons subject to military tribunals convened under the UCMJ. MCA § 948d(b).

(3) In *United States v. Blanton*, 7 C.M.A. 664 (1957), the CAAF considered whether the enlistment of a person under the statutory age was void so as to preclude trial by court-martial. Looking to a long line of precedent, the CAAF held that "[a]n agreement to enlist in an armed service is often referred to as a contract. However, more than a contractual relationship is established. What is really created is a status." *Id.* at 665. The CAAF held that when someone is below the minimum age for enlistment, "a person is deemed incapable of changing his status to that of a member of the military establishment." *Id.* at 666. Blanton had enlisted in the Army when he was not yet fifteen years of age and was charged with desertion. The court held that "at no time was he on active duty at an age when he was legally competent to serve in the military. In sum, the court-martial had no jurisdiction over the accused." *Id.* at 667 (internal citation omitted). This holding was reaffirmed in *United States v. Brown*, 23 C.M.A. 162 (1974). There, the CAAF held that a defendant who enlisted at age sixteen was incompetent to acquire military status, and that the court-martial lacked personal jurisdiction over him even for a violent robbery committed at age seventeen.

(4) This limitation on military jurisdiction to cover only those who had the capacity to obtain a military status dates back to at least 1758, when the Kings Bench in England heard the petition of a minor who was charged with desertion before a court-martial. *Rex v. Parkins*, [1758] 2 Kenyon 295, 96 Eng. Rep. 1188. According to the case report, "The question was, whether he was to be considered as a soldier?" The Kings Bench held that because of his age, his enlistment had been unlawful, he was not a soldier and thereby ordered him "out of the hands of the military." In the United States, one sees the same refusal to subject minors to military jurisdiction throughout the Nineteenth Century. *Webster v. Fox*, 7 Pa. L.J. 227, 7 Pa. 336, 7 Barr. 336 (1847), provided factual circumstances nearly identical to *Parkins* and *Blanton*, prompting the court to release a minor "unlawfully enlisted and held without authority of law." In *Comm. v. Harrison*, 11 Mass. 63 (1814), a Russian minor enlisted in our military and was ordered discharged because the military had "no legal claim to the custody or control of him." These are but two examples of a long line of precedent where minors obtained release from military jurisdiction, even from conflict zones, at a time when the enlistment age was as high as 21 and no lower than 18. *See In re McDonald*, 1 Low. 100, 16 F. Cas. 33 (1866); *In re Higgins*, 16 Wis. 351 (1863); *Dabb's Case*, 21 How. Pr. 68, 12 Abb. Pr. 113 (1861); *Bamfield v. Abbot*, 2 F.Cas. 577, 9 Law Rep. 510 (1847); *Comm. v. Downes*, 24 Pick. 227, 41 Mass. 227 (1836); *Comm. v. Callan*, 6 Binn. 255 (1814).

(5) Accordingly, no international criminal tribunal established under the laws of war, from Nuremberg forward, has ever prosecuted former child soldiers as war criminals. In fact, the current draft of the UN's model rules for military tribunals stipulates that "In no case, therefore, should minors [under the age of 18] be placed under the jurisdiction of military courts." Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, Issue of the administration of justice through military tribunals, UN Economic and Social Council, Commission on Human Rights**,** E/CN.4/2006/58 (13 January 2006), Principle 7. In the discussion of this proposed rule, the drafters conclude, "Only civilian courts would appear to be well placed to take into account all the requirements of the proper administration of justice in such circumstances, in keeping with the purposes of the [Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict]. The Committee on the Rights of the Child has adopted a very clear position of principle when making its concluding observations on country reports." *Id.* at ¶ 28.

(6) The charges against Mr. Khadr stem from his alleged recruitment in violation of international law into al Qaeda to be a child soldier when he was fifteen years old and younger. As described below, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict prohibits any armed force from deploying anyone under the age of 18 into combat and forbids non-State armed groups, such as al Qaeda, from utilizing children in any capacity. These are recognized as binding obligations by the U.S. military and DoD has, pursuant to them, forbidden the deployment of anyone under 18 from the U.S. armed forces into combat zones. *See* Michael Dominguez, Memorandum: Enforcement of Child Soldier Implementation Policies, Office of the Under Secretary of Defense, March 23, 2007.[3] Thus, Mr. Khadr, like the minors in *Blanton* and *Brown*, and child soldiers throughout modern military history, was incompetent as a matter of law to acquire a military status, and this military commission lacks jurisdiction over him for the crimes he allegedly committed as a child.

(7) The reason minors are incapable of obtaining a military status, even voluntarily, is as based in common sense as it is military history. Whereas in daily civilian life, we would anticipate the average child's basic sense of right and wrong to prevent them from breaking laws that prohibit destroying property, stealing or committing homicide; in warfare, this conduct is not only acceptable but rewarded. Moreover, children can't be expected to understand the law of armed conflict. The laws of war require a degree of maturity and sophistication that children simply cannot be expected to have. This is especially so with respect to the war crimes Mr. Khadr is alleged to have committed, where alleged criminality derives not from wanton cruelty or violence against protected persons, but from a failure to wear a uniform and the illegitimate status of the military force on whose behalf he allegedly fought.

(8) As was reported in a study by the Marine Corps' Center for Emerging Threats and Opportunities, child soldiers "do not respect the laws of war or follow any specific rules of

[3] "The Department learned recently that some Service members younger than 18 have been deployed in support of operations in Iraq and Afghanistan. This of course would contravene Article 1 of the Child Soldiers Protocol Letters which essentially requires that Parties (including the United States), 'take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.'" Michael Dominguez, Memorandum: Enforcement of Child Soldier Implementation Policies, Office of the Under Secretary of Defense, March 23, 2007.

engagement," since "children do not even know what these things are." *See* CETO, Child Soldiers: Implications for U.S. Forces 19 (CETO Seminar Report 005-02, November 2002). In such situations, the only right and wrong a child understands are obedience and disobedience to the authorities controlling them. Indeed, it is this very blind obedience that makes child soldiers a useful weapon to exploit; or in the words of one Khmer Rouge officer, "It usually takes a little time but eventually the younger ones become the most efficient soldiers of them all." Geraldine Van Bueren, The International Legal Protection of Children in Armed Conflicts, 43 Int'l & Comp. L.Q. 809, 813 (1994); *see also* Human Rights Watch, Easy Prey: Child Soldiers in Liberia 23 (HRW 1994) ("The children don't question their orders; they act out of blind obedience").

(9) Both internationally, domestically and from our nation's highest military court, military trials – whether by court-martial or ad hoc commission – are adult proceedings that presume defendants had the capacity to take on the special status that subjects them to military jurisdiction, whether as members of the "military establishment" or as "enemy combatants." There is no indication that Congress intended to disturb that precedent, and to delineate the personal jurisdiction of MCA commissions in a manner inconsistently with well-established military law.[4] "Where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard, Div. of Loewe's Theaters, Inc. v. Pons*, 434 U.S. 575, 581 (1978); *see also, e.g., Whitfield v. United States*, 543 U.S. 209 (2005). Congress knew that under the UCMJ courts-martial have no jurisdiction over minors. But an age limit is *not* among the features of the UCMJ that Congress singled out as inapplicable to military tribunals under the MCA. There is no indication that Congress ever contemplated giving this commission jurisdiction where other military courts would be without. Thus, the Government cannot sustain its burden of proving that this commission has jurisdiction over Mr. Khadr for his alleged war crimes as a child soldier.

c. The MCA Should Be Interpreted As Not Granting Jurisdiction To The Military Commissions To Try And Imprison Or Execute Child Soldiers Because The MCA Does Not Abrogate Or Alter Pre-Existing Treaty Obligations Of The U.S. Toward Captured Child Soldiers

(1) <u>The World Community, Including The United Sates, Responds to The Tragedy Of Child Soldiers Through A Treaty To Protect Child Soldiers</u>

(i) The growing participation of child soldiers in armed conflicts around the world has been condemned by the world community and has led to the worldwide legal development aimed at protecting these children and stopping this scandal. *See* Peter W. Singer, "Caution:

[4] Military policy accords special status to minors in other respects as well. For instance, minors are included in a specially protected class of detainees (along with religious figures and women) who are accorded special "dignity and respect" and must be housed separately from adult male detainees. *See* First Marine Division, Detainee Handling and Detention Facility SOP §§ 1(c)(3)(a), 2(c)(4) (Oct. 1, 2004). Similarly, United States policy in Afghanistan condemns the use of "child soldiers," conditioning support for the Afghan army on prohibition of the use of child soldiers or combatants. Afghanistan Freedom Support Act of 2002, Pub. L. No. 107-327, 116 Stat. 2797 (Dec. 4, 2002).

Children at War," *Parameters*, Winter 2001-02, pp. 40-56. Although the stereotype of the child soldier is the pre-adolescent African boy toting an AK-47, the reality is that children throughout the world are being drawn into armed conflict by groups ranging from national military forces to terrorist organizations such as al Qaeda. According to the Coalition to Stop the Use of Child Soldiers, in the period between 1999 and 2001 children were fighting in some thirty countries, and children in more than eighty-five counties have been conscripted into everything from governmental armed forces, paramilitaries, and civil militia to a wide variety of non-state armed groups of insurgents and terrorists.[5]

(ii) Children are particularly vulnerable to recruitment into armed conflicts waged by outlaw and terrorist groups organizations, such as al Qaeda, because children are more docile than adults and are easily manipulated. "They are also more fearless, being less able to assess the risks of combat and lacking the strong streak of self-preservation adults have. A relief worker in Liberia commented: 'I think they [the warring factions] use kids because the kids don't understand the risk and children are easier to control and manipulate. If the commanding officer tells a child to do something, he does it.'"[6] Terrorist groups in particular are able to manipulate adolescent children into the horrors of war because the "lure of ideology is particularly strong in early adolescence" with often disastrous consequences such as the child *genocidaires* in Rwanda and the child suicide bombers in Lebanon and Sri Lanka.[7]

(iii) The world's condemnation of the use of child soldiers resulted in the treaty entitled the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict which was adopted by the General Assembly of the United Nations and opened for signature, ratification, and accession on May 25, 2000. The United States deposited its instrument of ratification of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc.

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[5] Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2001*. Although the drastic spike in child soldiers globally has captured the attention of many, the problem is hardly recent. Tens of thousands participated in the "Children's Crusade" of 1212, and Napoleon had a division of young boys in his army. Afua Twum-Danso, *Africa's Young Soldiers: The Co-option of Childhood* 17 (2003). During World War II, Nazis employed child fighters to carry out underground missions on a large scale. *See* Sarah L. Wells, *Crimes Against Children in Armed Conflict Situations: Application and Limits of International Humanitarian Law*, 12 Tul. J. Int'l & Comp. L. 287, 290 (2005). After the war, the British established "Small Boys Units" in various colonies, including Sierra Leone. *See* William A. Schabas, *Conjoined Twins of Transitional Justice? The Sierra Leone Trust and Reconciliation Committee and the Special Court*, 2 J. Int'l Crim. Just. 1082, 1087 (2004). By the 1980s, national armies and non-national armied groups all over the world freely used and recruited children; Iran and Cambodia are a few of many examples. *See, e.g.*, Geraldine Van Bueren, *International Law on the Rights of the Child* 336 (1999); George Kent, *Children in the International Political Economy* 85 (1995). The Iranian Minister of Education claimed that 150,000 children "volunteered" to fight for the Iranian army, 60% of all recruits. *See* Kent, supra, at 85. Due to the rapid expansion of this practice after the Cold War, the last fifteen years have come to be known as the "era of the child soldier," and this has led to the world community's adoption of a legal regime to protect child soldiers. Tum-Danso, supra, at 17.

[6] M. Happold, *Child Soldiers In International Law* 10 (2005).

[7] The Secretary-General, *Promotion and Protection of the Rights of children: Impact of Armed Conflict on Children*, ¶ 43, U.N. Doc. A/51/306 (1996) (*prepared by* Ms. Garça Machel).

A/RES/54/263 (May 25, 2000), *entered into force* Feb. 12, 2002) ("Optional Protocol"), with the United Nations on December 23, 2002, and the treaty went into effect for the United States on January 23, 2003. The Optional Protocol not only prohibits the recruitment of children into armed conflict, it also places obligations on State Parties, such as the United States, which take child soldiers into custody. Article 7 of the Optional Protocol, for example, imposes the following obligation on states parties:

> States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary to the Protocol *and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol*, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with concerned States Parties concerned and the relevant international organizations. (Emphasis added.)

Given its obligation to work to rehabilitate and socially reintegrate Mr. Khadr, classification of Mr. Khadr as an "unlawful enemy combatant" who will be tried for alleged war crimes committed when he was a child soldier of 15 years of age is manifestly inconsistent with the requirement of operating in the best interest of the child's restoration ("[T]he best interests of the child are to be a primary consideration in all actions concerning children . . .." Preamble to the Optional Protocol, cl. 8).

(2) Mr. Khadr, A Fifteen-Year-Old Child Soldier Of A Non-State Armed Group, Is Protected By The Provisions Of The Optional Protocol

(i) Article 1 of the Optional Protocol forbids States Parties from recruiting persons under the age of eighteen for use in hostilities. Article 4 extends this prohibition to "[a]rmed groups that are distinct from the armed forces of a State." Article 3 allows a State Party such as the United States to recruit persons under eighteen for non-combat roles when: (1) the recruitment is "genuinely voluntary"; (2) it is done with the consent of the recruit's parent or legal guardian; (3) the recruit is fully informed of the duties of military service; and (4) the recruit provided reliable proof of age prior to acceptance into the national military. There is no such exception, however, for armed groups such as al Qaeda that are distinct from the armed forces of the state. All members of a non-state armed group must be at least eighteen years of age for them to be a combatant of any kind, either lawful or unlawful. Optional Protocol, art. 4.

(ii) This interpretation was made clear in the discussions leading up to the ratification of the Optional Protocol. In a hearing before the Senate Foreign Relations Committee, the Deputy Assistant Secretary of State for International Organizations explained that Article 4 "creates a standard, which is readily understandable, that 18 is the breakpoint for these non-state actors . . . . And with a clear standard, replacing what has been kind of murky out there, it is easy for civil society [and] governments . . . to put the spotlight on what those practices are." *Hearing on Protocols on Child Soldiers and Sale of Children (Treaty Doc. 106–37) before the Sen. Foreign Relations Comm.*, 107th Cong. (2002) (Annex to S. Exec. Rep. 107-4 at 53-54 (2002) (statement of E. Michael Southwick, State Dep't). In ratifying the Optional Protocol, the United States did so with the understanding that "the term 'armed groups' in Article 4 of the

Protocol means non-governmental armed groups such as rebel groups, dissident armed forces, and other insurgent groups." United States, *Initial Report of the United States of America to the UN Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (Initial Report), art. 4, ¶ 28, U.N. Doc. CRC/C/OPAC/USA/1 (2007). Further, clause eleven of the preamble to the Optional Protocol specifically condemns "with the gravest concern the recruitment, training, and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State . . . ." That same clause goes on to recognize the "responsibility of those who recruit, train, and use children in this regard . . . ."

(iii) In drafting the Optional Protocol, most delegates "believed that the protocol should reflect the reality of the situation in the world today, where most armed conflicts take place within States and most under-age combatants serve in non-governmental armed groups." U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts*, ¶ 32, U.N. Doc. E/CN.4/1998/102 (Mar. 23, 1998). The sixth clause in the Optional Protocol's preamble recognizes these realities of the world by noting that "there is a need to increase the protection of children from involvement in armed conflict . . . ." The phrase "armed conflict" in the Optional Protocol is not modified or limited by such terms as international or non-international. Further, the inclusion in Article 4 of non-state armed groups leads to the logical conclusion that the Optional Protocol is meant to apply to all armed conflicts, and all parties involved in them.

(iv) Clause eight of the Optional Protocol's preamble states that "the best interests of the child are to be a primary consideration in all actions concerning children . . . ." This clause, taken in conjunction with the clause discussed in the previous paragraph, further indicates that the Optional Protocol was meant to apply to all persons under the age of eighteen – whether recruited into national or other non-state armed forces, such as al Qaeda.

(v) The United States has endorsed the application of Article 4 to child soldiers used by al Qaeda. In its initial report to the Committee, the United States documented the aid work it undertook under the Optional Protocol. In Afghanistan, the United States provided educational support for former child soldiers. Initial Report, art. 7, ¶ 35. In this report, the United States stated that it applies the Cape Town Principles[8] in determining who is a child soldier. *Id.* at ¶ 34. The report characterizes this program as involving "underage former soldiers." *Id.* at ¶ 36. This program demonstrates both that: (1) the United States views providing support to former child soldiers as a necessary component of its duties under the Optional Protocol; and (2) this duty extends to those former child soldiers used by al Qaeda during the conflict in Afghanistan.

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[8] The Cape Town Principles are the end product of a symposium which was organized by UNICEF and the NGO working group on the Convention on the Rights of the Child, and held in April 1997. According to the Cape Town Principles, a "child soldier" is "any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members." UNICEF, *Cape Town Annotated Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa* (April 1997), available at http://www.unicef.org/emerg/files/Cape_Town_Principles.pdf.

(vi) Although Mr. Khadr is no longer under the age of eighteen, this fact is irrelevant in determining the government's obligations under the Optional Protocol. Article 6(3) applies to individuals who were "*used* in hostilities contrary to this Protocol." (Emphasis added). Hence, the only age that is relevant in determining U.S. obligations under the Protocol is Mr. Khadr's age when he was "used" in armed conflict as a fifteen-year-old. Because Mr. Khadr is in the custody of the United States, and because he was used in hostilities by a non-state armed group before the age of eighteen, the United States, pursuant to Article 7, must take necessary steps to aid in his rehabilitation and social reintegration.

(3) Mr. Khadr's Trial By Military Commission Contradicts U.S. Obligations Under The Optional Protocol To Aid In His Rehabilitation And Social Integration

(i) Article 6(3) of the Optional Protocol requires that States Parties take "all feasible measures to ensure that persons within their jurisdiction . . . used in hostilities contrary to this Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration." Further, Article 7 requires States Parties to "cooperate in the implementation of the present Protocol, including . . . in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol . . . ." Hence, the U.S. Government must take "all feasible measures" to ensure that Mr. Khadr is demobilized or released from service. To this end, the government must take the necessary steps to aid in Mr. Khadr's "rehabilitation and social reintegration." Any action taken by the U.S. Government after the capture and demobilization of a child soldier like Mr. Khadr must comply with the "best interests of the child" principle. Preamble to the Optional Protocol, cl. 8. The criminal prosecution of Mr. Khadr by a military tribunal under the terms and conditions of the MCA is completely inconsistent with these obligations.

(ii) Rather than operating in the best interest of the child with procedural safeguards to protect the child, the military trials of the MCA in fact curtail or eliminate important safeguards which would otherwise apply even in the prosecution of adult defendants in a court-martial under the UCMJ. *See*, *e.g.*, MCA §§ 948b(d)(A)-(C), 949a(b)(2)(E), 950(b)-(g). They even allow the admission of evidence which was coerced from the defendant himself or from others. MCA § 3, 10 U.S.C. 948r(c), (d). Such truncated procedures are at odds with the minimum safeguards that would have to be present in a prosecution conducted in the best interest of the child.

(iii) The MCA also makes no provision for any of the resources that would be necessary for a military tribunal to carry out the obligation of the United States Government to rehabilitate a captured child soldier, as required by the Optional Protocol. It did not provide, for example, for the imposition, or the resources to carry out, any of the following: care guidance and supervision orders, community service orders, counseling, foster care, correctional, educational, and vocational training programs, approved schools, programs of demobilization and reintegration into society through child protection agencies.

(iv) In drafting the Optional Protocol, the United States declared that the "recruitment and use [of child soldiers] by non-State actors, the need for international cooperation in their rehabilitation and reintegration, and the establishment of an effective mechanism for

international scrutiny of the implementation by States of their obligations with respect to children in armed conflict" were the "real problems" that the Optional Protocol was meant to address. ECOSOC, Comm. on Human Rights, *Inter-Sessional Open-Ended Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child in Armed Conflicts*, U.N. Doc. E/CN.4/2000/WG.13/2/Add.1 ¶ 10 (Dec. 8, 1999). In determining whether Mr. Khadr's trial by military commission is appropriate, it is necessary to consider the importance placed on "rehabilitation and reintegration" by the international community generally, and the United States specifically.

(v) The Committee on the Rights of the Child has recommended that child soldiers never be tried by military tribunal.[9] *Concluding Observations of the Committee on the Rights of the Child*, Congo, ¶ 75, U.N. Doc. CRC/C/15/Add.153 (2001). In addition, as stated previously, clause eight of the Optional Protocol's preamble states that "the best interests of the child are to be a primary consideration in all actions concerning children." The Committee has further elucidated this principle to require "active measures throughout Government, parliament, and the judiciary. Every legislative, administrative, and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions . . . ." Committee on the Rights of the Child, *General Comment No. 5, General Measures of Implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6), § 1, ¶ 12, U.N. Doc. CRC/GC/2003/5 (2003).

(4) The MCA Should Be Interpreted In Light Of These U.S. Treaty Obligations In The Optional Protocol To Exclude Mr. Khadr From The Jurisdiction Of The Military Commission

(i) When President George W. Bush signed the MCA, it was with the specific understanding that the Act "[c]omplie[d] with both the spirit and the letter of our international obligations." White House Fact Sheet: The Military Commissions Act of 2006 (Oct. 17, 2006).[10] The Optional Protocol is, as noted above, a treaty to which the United States is a party and which sets forth specific obligations of the United States with respect to the treatment of child soldiers such as Mr. Khadr. The Optional Protocol, as a treaty entered into by the United States, is the "supreme law of the land" and has Constitutional parity with any federal law. U.S. Const. art. VI, cl. 2. As stated above, DoD deems it controlling on military policy. Moreover, it is a well-settled rule that courts should endeavor to construe a treaty and a statute on the same subject so as to give effect to both. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *see also Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ."). Courts

[9] The Committee on the Rights of the Child ("Committee") is the authoritative body charged with the interpretation and application of the Optional Protocol, and its observations are therefore relevant in determining whether groups like al Qaeda should be considered non-state armed groups under Article 4 of the Optional Protocol. *See* Vienna Convention on the Law of Treaties, art. 31(3)(b), 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* January 27, 1980. For example, the Committee has found that child combatants were protected by the Optional Protocol, even when they were recruited by "illegal armed groups for combat purposes." Concluding Observations of the Committee on the Rights of the Child, Colombia, ¶ 80, U.N. Doc. CRC/C/COL/CO/3 (2006).

[10] Available at http://www.whitehouse.gov/news/releases/2006/10/20061017.html.

generally should construe a treaty "in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924).

(ii) There is absolutely no indication that Congress intended in any way to abrogate or limit the international obligations of the United States under the Optional Protocol when Congress passed the MCA. In *Cook v. United States*, 288 U.S. 102, 120 (1933), the Supreme Court could find no mention of the relevant treaty in the statutory language or the legislative history of a subsequent statute they were construing, and the Court stated, "[a] treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed." *Id*. (citing *United States v. Payne*, 264 U.S. 446, 448 (1924); *Chew Heong v. United States*, 112 U.S. 536 (1884)). Interpretation of a statute, such as the MCA, so as to give effect to both the treaty and the statute is analogous to the "cardinal rule [for interpreting two statutes] . . . that repeals by implication are not favored." *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). Given the fact that this military prosecution, which lacks any of the rehabilitative functions of a juvenile justice system, would violate, in the words of President Bush, "both the spirit and the letter of our international obligations" under the Optional Protocol, the MCA should be interpreted to exclude Mr. Khadr from the jurisdiction of the military tribunal because Congress did not abrogate or modify the treaty obligations of the Optional Protocol.

(iii) The penal remedies for the war crimes and statutory offenses of the MCA are also inconsistent with the Optional Protocol's obligation to pursue only restorative justice and rehabilitation of the child soldier. For example, if Congress had intended for the MCA to apply to juveniles, it would have explicitly prohibited the imposition of the juvenile death penalty given that the Supreme Court of the United States struck down the juvenile death penalty as cruel and unusual punishment only one year prior to the enactment of the MCA. *Roper v. Simmons*, 543 U.S. 551 (2005). The fact that the MCA does not mention juveniles at all, even in the provisions that provide for the imposition of the death penalty, makes abundantly clear that Congress did not intend for juveniles to be tried by these military commissions.

(iv) There is nothing preventing Congress, if it desires to try former child soldiers as war criminals, from explicitly laying out the necessary groundwork for doing so, as the U.S. did in the drafting of the UN Special Court for Sierra Leone. U.N. Doc. S/RES/1315 (Aug. 14, 2000) at Arts. 7(1)-7(2).[11] It is for Congress to make that choice, not trial counsel. The military

[11] Compare, for example, the statute of the Special Court for Sierra Leone, adopted by the United Nations in 2000, which specifically granted the international tribunal jurisdiction over children between the ages of fifteen and eighteen but which, in order to carry out proceedings that would be in the best interests of the child: (a) provided a wide range of resources to the court so that it could conduct a juvenile justice proceeding in the best interest of the child soldier such as care, guidance, and supervision orders and rehabilitation options, and (b) excluded imprisonment for juvenile offenders convicted under the Statute. U.N. Doc. S/RES/1315 (Aug. 14, 2000) at Arts. 7(1)-7(2). Even with these safeguards in place, the Special Court's Prosecutor announced that he did not intend to charge anyone for crimes committed while they were under the age of eighteen and no such charges have been brought. *See* Special Court for Sierra Leone Public Affairs, "Special Court Prosecutor Says He Will Not Prosecute Children" (Nov. 2, 2002) *available* at http://www.sc-sl.org/Press/pressrelease-110202.pdf.

judge only preserves the integrity of these proceedings by giving effect to what Congress said, not what trial counsel wishes it had said. The Government simply has no basis for demonstrating Congress' intent to the contrary and therefore fails to meet its burden of proving that this military commission has jurisdiction over Mr. Khadr.

d. The MCA Did Not Override The Juvenile Delinquency Act Which Continues To Govern In The Prosecution Of Juvenile Crimes

(1) In enacting the MCA, Congress provided no indication that it intended to abrogate the extensive statutory framework that governs the prosecution of juvenile offenses by the federal government. *See* Juvenile Delinquency Act ("JDA"), 18 U.S.C. §§ 5031, *et seq.* There is no reason to believe that Congress intended the MCA to have the effect of diverting minors such as Mr. Khadr to military tribunals, rather than the procedures set forth in the JDA – particularly in the face of long-standing military law and policy conferring special status on minors and precluding court-martial jurisdiction over them.

(2) "The age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Roper*, 543 U.S. at 574. Consistent with this understanding, Congress, in the JDA, established specific and carefully considered procedures for the federal detention and prosecution of persons under the age of 18. The charges referred against Mr. Khadr, though doubtful as war crimes, do allege federal crimes, such as murder (*see* 18 U.S.C. § 1114) and conspiracy (*see* 18 U.S.C. § 1117), that are cognizable in a prosecution under the JDA, which creates a broad statutory basis for prosecuting any "violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult." 18 U.S.C. § 5031 (2000).

(3) Most important here, the JDA provides juveniles with a statutory right not to be tried as criminal defendants outside of its terms. *See* JDA, 18 U.S.C. §§ 5031, *et seq.*; *In re Sealed Case*, 893 F.2d 363, 367-68 (D.C. Cir. 1990). Where the JDA applies, as here, the Attorney General is required to issue a certification as to the propriety of a federal forum. 18 U.S.C. § 5032 (2000). Absent that certification or delivery of the juvenile to state authorities, "any proceedings against him shall be in an appropriate district court of the United States."

(4) The JDA governs the federal prosecution of juveniles in the military context as well. The JDA is routinely invoked when juveniles are taken into federal custody in situations where there is no concurrent state jurisdiction – such as on foreign territory or a military base. *See* 18 U.S.C. § 5032, para. 1. *See also United States v. R. L. C.*, 503 U.S. 291 (1992) (juvenile held on Indian territory); *United States v. Jose D. L.*, 453 F.3d 1115 (9th Cir. 2006) (alien juvenile caught at border crossing); *United States v. Male Juvenile*, 280 F.3d 1008 (9th Cir. 2002) (juvenile held on Indian territory); *United States v. Juvenile (RRA-A)*, 229 F.3d 737 (9th Cir. 2000) (alien juvenile caught at border crossing); *United States v. Female Juvenile*, 103 F.3d 14 (5th Cir. 1996) (juvenile held on military base); *United States v. Juvenile Male*, 939 F.2d 321 (6th Cir. 1991) (juvenile held on military base). Hence, the fact that Mr. Khadr was seized in Afghanistan and is detained at Guantánamo Bay does not exclude him from the scope of the act.

(5) Within the military, the JDA is understood as applying to the prosecution of anyone under eighteen who is not a member of U.S. forces and commits a criminal act overseas.

See International and Operational Law Department, The Judge Advocate General's Legal Center and School, *Operational Law Handbook*, JA 422, 139 (2006). And because the JDA also "draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship." *Rasul v. Bush*, 542 U.S. 466, 481 (2004). In fact, the JDA's provisions are recognized as applying equally to both legal and illegal aliens prosecuted for criminal conduct committed before the age of eighteen. *See United States v. C.M.*, 485 F.3d 492 (9th Cir. 2007); *United States v. Jose D. L.*, 453 F.3d 1115 (9th Cir. 2006); *United States v. Juvenile (RRA-A)*, 229 F.3d 737 (9th Cir. 2000); *United States v. Juvenile Male*, 74 F.3d 526 (4th Cir. 1996); *United States v. Doe*, 862 F.2d 776, 799 (9th Cir. 1988); *United States v. Doe*, 701 F.2d 819 (9th Cir. 1983).

(6) The MCA neither expressly abrogates the JDA, nor provides any indication that Congress intended to override the specific statutory framework designed to prosecute juveniles who commit these offenses. Accordingly, the best reading of the entire statutory framework is that the JDA has not been repealed by implication, but instead continues to govern in the specific area of prosecution of juvenile offenses. *See Branch v. Smith*, 538 U.S. 254, 273 (2003) ("[A]bsent 'a clearly established congressional intention repeals by implication are not favored.' An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'") (internal citations omitted). As noted already, the well-established presumption against repeal by implication applies with special force here, where Congress has not hesitated to specify, clearly and expressly, the preexisting procedures that *are* overridden by the MCA. *See, e.g.*, MCA § 4, 10 U.S.C. § 948b. The Government cannot present any reason why the specific legislative mandates of the JDA were supplanted *sub silento* by the MCA and therefore cannot meet its burden of proving that the MCA granted jurisdiction to the military commission to try Mr. Khadr for alleged child crimes.

e. Conclusion

(1) The Government cannot meet its burden of proving that this military commission has jurisdiction over Mr. Khadr for the crimes he allegedly committed as a child soldier at age fifteen. Congress did not equip this military commission with any of the resources, expertise, or remedial alternatives that would be necessary for a juvenile justice system to operate, as it must, in the best interest of the child to rehabilitate and restore him. The MCA does not vest such juvenile jurisdiction in this commission, and the principles of statutory interpretation compel the conclusion that when it passed the MCA Congress did not abrogate or repeal by implication the preexisting law and policy, including longstanding military law and policy, treaty obligations and federal statutory law, which is in conflict with the exercise of jurisdiction by this military tribunal over Mr. Khadr for his alleged crimes as a child soldier.

6. Oral Argument: The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."). Oral argument will allow for thorough consideration of the issues as well as assist the commission in understanding and resolving the complex legal issues presented by this motion.

7. Witnesses and Evidence: Sworn Charge Sheet (2 Feb 2007).

8. Certificate of Conference: The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

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

10. Attachment:

A. Sworn Charge Sheet (2 Feb 2007)

By: Rebecca S. Snyder

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR
OFFICE OF MILITARY COMMISSIONS
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_____
(day) (month) (year)

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

SUBJECT: Notification of the Swearing of Charges

1. You are hereby notified that criminal charges were sworn against you on the ____ day of _____, 2007, pursuant to the Military Commissions Act of 2006 (MCA) and the Manual for Military Commissions (MMC). A copy of this notice is being provided to you and to your detailed defense counsel.

2. Specifically, you are charged with the following offenses:

MURDER IN VIOLATION OF THE LAW OF WAR

ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

CONSPIRACY

PROVIDING MATERIAL SUPPORT FOR TERRORISM

SPYING

(Read the charges and specifications to the accused. If necessary, an interpreter may read the charges in a language, other than English, that the accused understands.)

AFFIDAVIT OF NOTIFICATION

I hereby certify that a copy of this document was provided to the named detainee this ____ day of _____, 2007.

_____	_____
Signature	Organization
_____	_____
Typed or Printed Name and Grade	Address of Organization

Attachment A

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

2. ALIASES OF ACCUSED:
Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0766

II. CHARGES AND SPECIFICATIONS

4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs II, Marvin W.	0-4	Office of the Chief Prosecutor, OMC

5d. SIGNATURE OF ACCUSER	5e. DATE (YYYYMMDD)
MC	20070202

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 2nd day of February, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Jeff Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

Commissioned Officer, U.S. Marine Corps
Official Capacity to Administer Oath
(See R.M.C. 307(b) must be commissioned officer)

Jeffrey D. Groharing
Signature

MC FORM 458 JAN 2007

Attachment A

IV. NOTICE TO THE ACCUSED

6. On February 2, 2007 the accused was notified of the charges against him/her (See R.M.C. 308).

Jeff Groharing, Major, U.S. Marine Corps
Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges

Office of the Chief Prosecutor, OMC
Organization of the Person Who Caused Accused to Be Notified of Charges

Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at _____ hours, on _____, at _____

_____.
Location

For the Convening Authority: _____
Typed Name of Officer

_____
Grade

_____
Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)

Referred for trial to the (non)capital military commission convened by military commission convening order _____

_____.

_____ subject to the following instructions[1]: _____

_____

By _____ of _____.
Command, Order, or Direction

_____ _____
Typed Name and Grade of Officer *Official Capacity of Officer Signing*

_____
Signature

VII. SERVICE OF CHARGES

9. On _____, _____ I (caused to be) served a copy these charges on the above named accused.

_____ _____
Typed Name of Trial Counsel *Grade of Trial Counsel*

_____
Signature of Trial Counsel

FOOTNOTES

[1]See R.M.C. 601 concerning instructions. If none, so state.

MC FORM 458 JAN 2007

Attachment A

UNITED STATES OF AMERICA	)	**CHARGES**
	)	
	)	**Murder in Violation of the Law of War**
	)	
	)	**Attempted Murder in Violation of the Law of War**
v.	)	
	)	
	)	**Conspiracy**
	)	
OMAR AHMED KHADR	)	**Providing Material Support for Terrorism**
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	**Spying**
a/k/a "Ahmed Muhammed Khali"	)	

INTRODUCTION

1. The accused, Omar Ahmed Khadr (a/k/a Akhbar Farhad, a/k/a Akhbar Farnad, a/k/a Ahmed Muhammed Khali, hereinafter "Khadr"), is a person subject to trial by military commission for violations of the law of war and other offenses triable by military commission, as an alien unlawful enemy combatant. At all times material to the charges:

JURISDICTION

2. Jurisdiction for this Military Commission is based on Title 10 U.S.C. Sec. 948d, the Military Commissions Act of 2006, hereinafter "MCA;" its implementation by the Manual for Military Commissions (MMC), Chapter II, Rules for Military Commissions (RMC) 202 and 203; and the final determination of the Combatant Status Review Tribunal of September 7, 2004, that Khadr is an unlawful enemy combatant as a member of, or affiliated with, al Qaeda.

3. The accused's charged conduct is triable by a military commission.

BACKGROUND

4. Khadr was born on September 19, 1986, in Toronto, Canada. In 1990, Khadr and his family moved from Canada to Peshawar, Pakistan.

5. Khadr's father, Ahmad Sa'id Khadr (a/k/a Ahmad Khadr a/k/a Abu Al-Rahman Al-Kanadi, hereinafter Ahmad Khadr), co-founded and worked for Health and Education Project International-Canada (HEPIC), an organization that, despite stated goals of providing humanitarian relief to Afghani orphans, provided funding to al Qaeda to support terrorist training camps in Afghanistan. Ahmad Khadr was a senior al Qaeda member and close associate of Usama bin Laden and numerous other senior members of al Qaeda.

6. In late 1994, Ahmad Khadr was arrested by Pakistani authorities for providing money to support the bombing of the Egyptian Embassy in Pakistan. While Ahmad Khadr was incarcerated, Omar Khadr returned with his siblings to Canada to stay with their grandparents.

Attachment A

Khadr attended school in Canada for one year while his father was imprisoned in Pakistan before returning to Pakistan in 1995.

7. In 1996, Khadr moved with his family from Pakistan to Jalalabad, Afghanistan.

8. From 1996 to 2001, the Khadr family traveled throughout Afghanistan and Pakistan, including yearly trips to Usama bin Laden's compound in Jalalabad for the Eid celebration at the end of Ramadan. While traveling with his father, Omar Khadr saw or personally met senior al Qaeda leaders, including Usama bin Laden, Doctor Ayman Al-Zawahiri, Muhammad Atef (a/k/a Abu Hafs al Masri), and Saif al Adel. Khadr also visited various al Qaeda training camps and guest houses.

9. After al Qaeda's terrorist attacks against the United States on September 11, 2001, the Khadr family moved repeatedly throughout Afghanistan.

10. In the summer of 2002, Khadr received one-on-one, private al Qaeda basic training, consisting of training in the use of rocket propelled grenades, rifles, pistols, grenades, and explosives.

11. After completing his training, Khadr joined a team of other al Qaeda operatives and converted landmines into remotely-detonated improvised explosive devices, ultimately planting these explosive devices to target U.S. and coalition forces at a point where they were known to travel.

12. U.S. Forces captured Khadr on July 27, 2002, after a firefight resulting in the death of three members of the U.S. led coalition and injuries to several other U.S. service members.

GENERAL ALLEGATIONS

13. Al Qaeda ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

14. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaeda.

15. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.

16. Al Qaeda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

17. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and

Attachment A

supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

18. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans,*" in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.

19. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

20. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

21. In or about 2001, al Qaeda's media committee created As Sahab ("The Clouds") Media Foundation, which has orchestrated and distributed multi-media propaganda detailing al-Qaeda's training efforts and its reasons for its declared war against the United States.

22. Since 1989 members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

23. Following al Qaeda's attacks on September 11, 2001, and in furtherance of its goals, members and associates of al Qaeda have violently opposed and attacked the United States or its Coalition forces, United States Government and civilian employees, and citizens of various countries in locations throughout the world, including, but not limited to Afghanistan.

24. On or about October 8, 1999, the United States designated al Qaeda a foreign terrorist organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

CHARGE 1: VIOLATION OF PART IV, M.M.C. SECTION 950v(15), MURDER IN VIOLATION OF THE LAW OF WAR

25. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, unlawfully and intentionally murder U.S. Army Sergeant First Class Christopher Speer, in violation of the law of war, by throwing a hand grenade at U.S. forces resulting in the death of Sergeant First Class Speer.

CHARGE II: VIOLATION OF PART IV, M.M.C., SECTION 950t, ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

26. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, between, on, or about June 1, 2002, and July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, attempt to commit murder in violation of the law of war, by converting land mines into improvised explosive devices and planting said improvised explosive devices in the ground with the intent to kill U.S. or coalition forces.

CHARGE III: VIOLATION OF PART IV, M.M.C., SECTION 950v(28), CONSPIRACY

27. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from on or about June 1, 2002 to on or about July 27, 2002, willfully join an enterprise of persons who shared a common criminal purpose, said purpose known to the accused, and conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al adel, Ahmad Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown, to commit the following offenses triable by military commission to include: attacking protected property; attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; hijacking or hazarding a vessel or aircraft; and terrorism.

28. In addition to paragraph 27, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet.

29. Additionally, in furtherance of this enterprise and conspiracy, Khadr and other members of al Qaeda performed overt acts, including, but not limited to the following:

a. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi." This training was arranged by Omar Khadr's father, Ahmad Sa'id Khadr, and consisted of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

b. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

c. In or about July 2002, Khadr attended one month of land mine training.

d. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

Attachment A

e. On or about July 27, 2002, near the village of Ayub Kheil, Afghanistan, U.S. forces surrounded a compound housing suspected al Qaeda members. Khadr and/or other suspected al Qaeda members engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members. Khadr and/or the other suspected al Qaeda members also threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

f. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

CHARGE IV: VIOLATION OF PART IV, M.M.C., SECTION 950v(25), PROVIDING MATERIAL SUPPORT FOR TERRORISM

30. Specification I: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such organization that engaged, or engages, in terrorism, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

31. In addition to paragraph 30, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

32. Specification II: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to be used in preparation for, or carrying out an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, and that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

33. In addition to paragraph 32, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

Attachment A

CHARGE V: VIOLATION OF PART IV, M.M.C., SECTION 950v(27), SPYING

34. Specification. In that Omar Ahmed Khadr, a person subject to military commission as an alien unlawful enemy combatant, did in Afghanistan, in or about June 2002, collect certain information by clandestine means or while acting under false pretenses, information that he intended or had reason to believe would be used to injure the United States or provide an advantage to a foreign power; that the accused intended to convey such information to an enemy of the United States, namely al Qaeda or its associated forces; that the conduct of the accused took place in the context of and was associated with an armed conflict; and that the accused committed any or all of the following acts: on at least one occasion, at the direction of a known al Qaeda member or associate, and in preparation for operations targeting U.S. forces, the accused conducted surveillance of U.S. forces and made notations as to the number and types of vehicles, distances between the vehicles, approximate speed of the convoy, time, and direction of the convoys.

Attachment A

UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	**D22** **GOVERNMENT'S RESPONSE** **To the Defense's Motion For Dismissal Due to Lack of Jurisdiction Under the MCA in Regard To Juvenile Crimes of a Child Soldier** January 25, 2008

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 28 November 2007.

2. Relief Requested: The Government respectfully submits that the Defense's motion for dismissal due to lack of jurisdiction under the MCA in regard to juvenile crimes of a child soldier ("Def. Mot.") should be denied.

3. Overview:

a. The Military Commissions Act of 2006 ("MCA") unqualifiedly creates military commission jurisdiction over all unlawful enemy combatants, irrespective of their age.

b. The Defense's argument to the contrary does violence to the laws of both war and logic. The Defense can point to no obligation under international law, in general, or under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts ("Protocol"), in particular, that provides one iota of support for its motion. Instead of grounding its argument in law, the Defense builds its foundation on a fallacy: Because the United States is bound—under both federal law and the Protocol—not to employ children under the age of 17 in the United States Armed Forces, the Defense concludes that the U.S. is therefore bound not to prosecute an unlawful enemy combatant who was under the age of 18 when he conspired with al Qaeda and murdered an American serviceman in violation of the law of war. In the pantheon of *non sequiturs*, the Defense's argument qualifies as one of the most egregious.

c. Perhaps worse, however, is the argument—which the Defense and its *amici* repeatedly and passionately reiterate, notably without citation—that Khadr's prosecution is somehow "unprecedented." Def. Mot. at 2. That claim is ***demonstrably false***. As a matter of historical fact, military tribunals have exercised jurisdiction over war criminals who were under the age of 18 when they committed war crimes. Far from treating the Hitler Youth as "victims," for example, the British Military Court tried a 15-year-old for war crimes and sent him to prison. Moreover, the Permanent Military Tribunal at Metz

exercised jurisdiction over three German girls—one of whom was under the age of 16, and all of whom were tried as "war criminals"—before sending two to prison. Surely Khadr is no less amenable to the jurisdiction of a military tribunal than a German schoolgirl.

d. Khadr's attempt to rely on nonbinding law review articles and "declarations" of international law is also unavailing. To the extent there is any norm under "customary international law" that would even purport to prevent Khadr's prosecution, the United States emphatically rejected it by the very act of referring the charges in this case. And Khadr's attempt to invoke the Juvenile Delinquency Act has absolutely no basis in law. The motion should be readily denied.

4. Burden and Persuasion: The Prosecution bears the burden of proving the facts that support jurisdiction by a preponderance of the evidence. *See* Rule for Military Commissions ("RMC") 905(c)(2)(B). As the moving party, the Defense bears the burden of persuasion on questions of law. *See* Military Commission Trial Judiciary ("MCTJ") Rule of Court 3(7)(a).

5. Facts:

a. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan. During this period, he paid numerous visits to and at times lived at Usama bin Laden's compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and personally met many senior al Qaeda leaders including, Usama bin Laden, Doctor Ayman al Zawahiri, Muhammad Atef, and Saif al Adel. The accused also visited various al Qaeda training camps and guest houses. *See* AE 17, attachment 2.

b. On 11 September 2001, members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy. *See The 9/11 Commission Report,* FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 4-14 (2004).

c. After al Qaeda's terrorist attacks on 11 September 2001, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. *See* AE 17, attachment 3.

d. Following this training the accused received an additional month of training on landmines. Soon thereafter, he joined a group of al Qaeda operatives and converted landmines into improvised explosive devices ("IEDs") capable of remote detonation.

e. In or about June 2002, the accused conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

f. In or about July 2002, the accused planted improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

g. On or about 27 July 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan. *See* AE 17, attachment 4.

h. Before the firefight had begun, U.S. forces approached the compound and asked the accused and the other occupants to surrender. *See id.*, attachment 5.

i. The accused and three other individuals decided not to surrender and instead "vowed to die fighting." *Id.*

j. After vowing to die fighting, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound. *Id.*

k. Near the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer. *See id.*, attachment 6. American forces subsequently shot and wounded the accused. After his capture, American medics administered life-saving medical treatment to the accused.

l. Approximately one month later, U.S. forces discovered a videotape at the compound where the accused was captured. The videotape shows the accused and other al Qaeda operatives constructing and planting improvised explosive devices while wearing civilian attire. *See id.*, attachment 4.

m. During an interview on 5 November 2002, the accused described what he and the other al Qaeda operatives were doing in the video. *Id.*, attachment 1.

n. When asked on 17 September 2002 why he helped the men construct the explosives, the accused responded "to kill U.S. forces." *Id.*, attachment 6.

o. The accused related during the same interview that he had been told the U.S. wanted to go to war against Islam. And for that reason he assisted in building and deploying the explosives, and later he threw a grenade at an American. *Id.*

p. During an interrogation on 4 December 2002, the accused agreed that his use of land mines as roadside bombs against American forces was also of a terrorist nature and that he is a terrorist trained by al Qaeda. *Id.*, attachment 3.

q. The accused further related that he had been told about a $1,500 reward being placed on the head of each American killed, and when asked how he felt about the reward system, he replied: "I wanted to kill a lot of American[s] to get lots of money." *Id.*, attachment 8. During a 16 December 2002 interview, the accused stated that a "jihad" is occurring in Afghanistan, and if non-believers enter a Muslim country, then every Muslim in the world should fight the non-believers. *Id.*, attachment 9.

r. Khadr has never claimed that he was coerced into joining al Qaeda. The current Defense motion does not contain a single factual assertion to the contrary.

s. The accused was designated as an enemy combatant as a result of a Combatant Status Review Tribunal ("CSRT") conducted on 7 September 2004. *See* AE 11. The CSRT also found that the accused was a member of, or affiliated with, al Qaeda. *Id.*

t. On 5 April 2007, charges of Murder in violation of the law of war, Attempted Murder in violation of the law of war, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. After receiving the Legal Adviser's formal "Pretrial Advice" that Khadr is an "unlawful enemy combatant" and thus that the military commission had jurisdiction to try the accused, those charges were referred for trial by military commission on 24 April 2007.

6. Discussion:[1]

A. THE MCA ESTABLISHES JURISDICTION OVER ALL UNLAWFUL ENEMY COMBATANTS, REGARDLESS OF AGE.

i) The text of the MCA unequivocally establishes military commission jurisdiction over *all* alien unlawful enemy combatants, regardless of age. *See* 10 U.S.C. § 948c. Differences between the MCA and the UCMJ's jurisdictional provisions only reinforce the fact that the applicability of the former—unlike the latter—does not hinge on the age of an alien unlawful enemy combatant.

a) It is true that "Congress did not in the MCA grant military tribunals jurisdiction over juvenile crimes by child soldiers" as such, Def. Mot. at 1, just as it is true that Congress did not create military commission jurisdiction, specifically, over the elderly. But neither truism entitles the accused to relief.

b) Congress created unqualified jurisdiction over all "unlawful enemy combatants." The MCA defines an "unlawful enemy combatant" as "***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)." 10 U.S.C. § 948a(1)(A)(i) (emphasis added); *see also id.* § 948a(3) (defining an "alien" as "***a person*** who is not a citizen of the United States") (emphasis added). The MCA thus creates jurisdiction over "a person," and it does so without a modicum of congressional intent to limit the meaning of "a person" to those who have attained a certain minimum age. Notably, Congress

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[1] The Government has declined to respond to each of the *amicus* briefs, largely because of the irrelevance of the materials cited therein. "No adverse inferences will be drawn from an election by the opposing party not to respond to an amicus brief." MCTJ Rule 7(7)(b). If this Court determines, however, that any of the *amici*'s arguments merit consideration, the Government respectfully requests the opportunity to file a supplemental response. *See id.* ("If the Military Judge agrees to consider the [*amicus*] brief, the Military Judge may allow the opposing party to file a response.").

could have—but did *not*—define an "unlawful enemy combatant" or an "alien" as "an *adult* person."

c) The phraseology of the MCA's definition of "alien unlawful enemy combatant" stands in sharp contrast to its definition of "lawful enemy combatant." The MCA defines the latter term as "a member" of a State army, "a member" of a militia that abides by the laws of war, or "a member" of a regular armed force who pledges allegiance to a government not recognized by the United States. *See* 10 U.S.C. § 948a(2). As the Defense recognizes, *see* Def. Mot. at 4, there may be a "minimum age at which a person is deemed incapable of changing his status [from that of a civilian] to that of ***a member*** of the military establishment." *United States v. Blanton*, 23 C.M.R. 128, 130 (C.M.A. 1957) (emphasis added). But even if that is true, such a minimum-age requirement would only serve to limit the universe of "members" who qualify as "lawful enemy combatants"—it would do nothing to limit the meaning of "persons" who qualify as "unlawful enemy combatants."

d) The Defense's entire argument to the contrary is built upon a selective misquotation from the MCA. In the Defense's view, the MCA does not provide "explicit direction" to depart from the UCMJ. *See* Def. Mot. at 4. But that is true only if one—like the Defense—ignores the statutory text. The MCA provides: "The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice). *Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided in this chapter. The judicial construction and application of that chapter are not binding on military commissions established under this chapter.*" 10 U.S.C. § 948b(c) (emphasis added). The Defense's failure to acknowledge the italicized text does not delete it from the statute.

1) Given the plain text of section 948b(c), "judicial construction and application of [the UCMJ]"—such as *United States v. Blanton* and *United States v. Brown*, 48 C.M.R. 778 (C.M.A. 1974)—"are not binding on military commissions established under [the MCA]." Thus, the UCMJ's "age limit," which the military courts implied as a matter of "judicial construction," is "among the features of the UCMJ that Congress singled out as inapplicable to military tribunals under the MCA." Def. Mot. at 6.

2) Moreover, such cases are plainly irrelevant even on their own terms, and thus they do not provide persuasive authority here. The *Blanton* line of cases turned on the fact that *Congress* had unequivocally and statutorily prohibited individuals under the age of 18 (or 17, with their parents' permission) from becoming members of the Armed Forces. *See, e.g., Blanton*, 23 C.M.R. at 131 (quoting Act of June 28, 1947, 61 Stat. 191). Because the UCMJ affords jurisdiction only over a "member of the armed forces," *id.*, and because Congress deemed individuals under the ages of 17-18 incompetent to become "members" of the armed forces, the *Blanton* court held that such individuals were outside the jurisdiction of the court-martial system.

3) Here, however, the MCA provides jurisdiction over "person[s]." *See* 10 U.S.C. § 948a(1)(A)(i). Unlike the UCMJ, the MCA does not require unlawful enemy combatants to establish a "contractual relationship" to become "members" of any particular organization. *Compare Blanton*, 23 C.M.R. at 130. Simply being a "person," who meets the other requirements for an alien unlawful enemy combatant, is sufficient for purposes of the MCA.

4) Moreover, and in sharp contrast to *Blanton*, the Government has never alleged that Khadr "obtain[ed] a military status." Def. Mot. at 4. To the contrary, it is Khadr's refusal to fight within the legitimate bounds of a recognized military that forms the basis for jurisdiction here. Indeed, it would be the height of irony if military commission jurisdiction extended only to those who effectuate a lawful change in "status" by establishing a lawful "contractual relationship" with a lawful military organization, given that the individuals who qualify as "unlawful enemy combatants," such as Khadr, openly scorn the law of war. Recognizing this fact, Congress did not write the MCA's jurisdictional provisions to hinge upon a terrorist's ability (in law or fact) to execute a "lawful" membership agreement.

ii) The history of the MCA confirms that Congress intended all "unlawful enemy combatants" to fall within military commission jurisdiction, regardless of age. Khadr argues that "many children . . . were being detained at Guantanamo [in October 2006]," when the MCA was enacted. Def. Mot. at 3. Yet Khadr can point to nary a citation (in the Act's text or its legislative history) that suggests Congress had any qualms about prosecutions against members of al Qaeda—regardless of their age.

a) In fact, the Act's history strongly suggests that Congress was aware of and condoned Khadr's prosecution. In November 2005—almost a full year before the MCA's enactment—the Government charged Khadr for trial by military commission under the President's original military commission order. Congress therefore knew that the Government intended to prosecute Khadr for his unlawful activities—but Congress did not impose any age-specific exclusions in the MCA's jurisdictional requirements.

b) Obviously, the President also knew that Khadr was originally charged in 2005 and that he may well be charged under the MCA. And as the Defense concedes, the President declared that the MCA complies with all of our Nation's international obligations, including the Protocol. *See* Def. Mot. at 11 ("When President George W. Bush signed the MCA, it was with the specific understanding that the Act 'complied with both the spirit and the letter of our international obligations.'") (quoting White House Fact Sheet: The Military Commissions Act of 2006 (Oct. 17, 2006)) (alterations omitted). The President's view—that, consistent with the Protocol, Khadr is amenable to military commission jurisdiction—is entitled to "great weight." *See, e.g., Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

c) Moreover, in enacting the MCA, both the President and Congress certainly knew how to exclude individuals from trial by military commission where it desired to do so. *See, e.g.*, 10 U.S.C. § 948a(2)(A) (excluding one who has attained status as "*a member* of

the regular forces of a State party engaged in hostilities against the United States") (emphasis added). Congress's failure to exclude individuals under the age of 18 from trial by military commission speaks volumes under these circumstances. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'") (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)).[2]

iii) As the Supreme Court has emphasized, nothing prevents Congress from statutorily authorizing military commissions in the way it deems best. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006) (given "specific congressional authorization," the President has authority to use military commissions); *see also id.* at 2799 (Breyer, J., concurring). The fact that the United Nations' non-final, non-binding "model rules" for military tribunals may recommend otherwise is irrelevant, notwithstanding the Defense's desire to elevate them above the law of the land. Def. Mot. at 5.

B. THE PROTOCOL DOES NOT PURPORT TO APPLY HERE.

i) As explained above, the plain text of the MCA creates military commission jurisdiction over all unlawful enemy combatants, regardless of age. The Protocol does not purport to require anything to the contrary.

a) The Protocol prohibits States from recruiting or conscripting child soldiers. It does not impose obligations upon law-abiding States (such as America) for the illegal actions of non-State terrorist organizations (such as al Qaeda).

b) The Defense can point to nothing on the face of the Protocol that prohibits the United States from prosecuting Khadr for his war crimes. To the contrary, the Protocol's various articles—and our Nation's declared understanding of them—simply underscore the fact that the Protocol prohibits the United States from *using* child soldiers, not from *prosecuting* them.

1) The Protocol requires the United States to ensure that individuals under the age of 18 are not "compulsorily recruited" into our Armed Forces, Art. 2, and that such individuals "do not take a direct part in hostilities," Art. 1. Similarly, Article 3 requires the United States to "raise the minimum age for . . . voluntary recruitment" above the

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[2] The Defense premises its argument to the contrary on Congress's refusal to lard the MCA with wholly inapplicable and unnecessary provisions. For example, the Defense claims that "if Congress had intended for the MCA to apply to juveniles, it would have explicitly prohibited the imposition of the juvenile death penalty," in light of the Supreme Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005). Def. Mot. at 12. Of course, *Roper* involved the Eighth Amendment to the United States Constitution, which is inapplicable to Guantanamo Bay under principles that were well settled at the time of the MCA's enactment (and long before). *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *see also Boumediene v. Bush*, 476 F.3d 981, 992 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007); *Rasul v. Myers*, 2008 WL 108731, *14 & n.15 (D.C. Cir. Jan. 11, 2008) (reaffirming that *Boumediene* is the governing law and continuing to follow it, even while the case is under review).

previous minimum of 15, and it requires the United States to describe "the safeguards that it has adopted to ensure that such recruitment is not forced or coerced."

(A) Nothing in Articles 1 through 3 of the Protocol comes close to prohibiting military commission jurisdiction. In its instrument of ratification, the United States emphasized that (i) the Protocol governs only the membership of our Nation's Armed Forces, *see* Senate Exec. Session, Convention on the Rights of the Children in Armed Conflict, Treaty Doc. 106-37A, 148 Cong. Rec. S5716-04, S5717 (June 18, 2002) ("Senate Report"), and that (ii) federal law already ensured our Nation's compliance with each of the Protocol's requirements by prohibiting the coerced enlistment of individuals under the age of 18 into our Armed Forces, *see id.* (citing 10 U.S.C. § 505(a)).

(B) To be sure, Article 3(1) of the Protocol explains that the United States should not recruit 15 year-olds into the United States Armed Forces, in light of the "special protection" that such individuals are entitled under the Convention on the Rights of the Child ("Convention"). But the United States expressly emphasized that its ratification of the Protocol did not create any obligations under the Convention, the latter of which the United States has *not ratified*. *See* Senate Report § 2(1), 148 Cong. Rec. at S5717. And in any event, the "special protections" referenced in Article 3(1) of the Protocol plainly refer to the recruitment of certain individuals into the United States Armed Forces; it does not, under any reasonable interpretation, cloak juvenile terrorists from around the world with immunity for their unlawful actions.

2) Article 4 of the Protocol requires the United States to adopt "legal measures necessary to prohibit and criminalize" the use of individuals under the age of 18 by certain "armed groups." The Protocol, however, says nothing about the *prosecution* of the members of such groups.

(A) In its ratification of the Protocol, the United States emphasized its "understanding" that "the term 'armed groups' in Article 4 of the Protocol means nongovernmental armed groups such as rebel groups, dissident groups, and other insurgent groups." *See* Senate Report § 2(4), 148 Cong. Rec. at S5717. In its "Initial Report" on the Protocol, the United States further explained that it already complies with Article 4 because federal "law already prohibits insurgent activities by nongovernmental actors against the United States, irrespective of age. U.S. law also prohibits the formation within the United States of insurgent groups, again irrespective of age, which have the intent of engaging in armed conflict with foreign powers." Initial Report of the United States of America to the UN Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 4, ¶ 29, U.N. Doc. CRC/C/OPAC/USA/1 (2007) ("Initial Report") (citing 18 U.S.C. §§ 960, 2381, *et seq.*).

(B) The application of the MCA is perfectly consistent with United States obligations under Article 4. Assuming, *arguendo*, that Khadr was somehow duped into joining al Qaeda, planting IEDs, and throwing grenades in violation of the law of war, the

Government's prosecution of that behavior would constitute a "feasible measure[] to prevent" and a "legal measure[] necessary to prohibit and criminalize" it.[3]

3) Article 6 of the Protocol requires the United States to "take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service."[4]

(A) Assuming, *arguendo*, that Khadr was "recruited or used in hostilities contrary to the present Protocol," the United States has undoubtedly "demobilized" him and prevented him from rejoining al Qaeda's ranks.

(B) Moreover, in furtherance of the Government's obligation to demobilize Khadr, it provided him with "appropriate assistance for [his] physical and psychological recovery," including emergency medical care on the battlefield as Sergeant Speer lay dying. *See* Art. 6(3).[5]

4) Article 7 requires the United States to use "multilateral, bilateral or other programmes," such as a "voluntary fund," in order to "cooperate . . . in the rehabilitation and social reintegration of persons who are victims of acts contrary to the Protocol."

(A) Article 7 was based on a U.S. proposal and was intended to increase the amount of international assistance provided to victims of armed conflict by States and non-governmental organizations ("NGOs"). *See* Senate Report at 43.

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[3] If anything, the Protocol *obligates* the United States to prosecute Khadr. Assuming, *arguendo*, that al Qaeda violated the Protocol by recruiting and/or using Khadr to conduct terrorist activities, dismissing the charges here would effectively condone that alleged violation by allowing Khadr to escape all liability for his actions and would further incentivize such violations. Dismissal will ensure, in the Defense's words, that "this conduct is not only acceptable but rewarded." Def. Mot. at 5.

[4] The Defense suggests that Article 6's use of the past verb tense suggests that "the only age that is relevant in determining U.S. obligations under the Protocol is [an individual's] age when he was 'used' in armed conflict." Def. Mot. at 10. That proposition is entirely unsupported, however, given that Articles 1, 2, 4, and 7 use the *present* verb tense. Of course, Khadr is now 21, and therefore he is not a "victim" in the present tense, *see* Art. 7, even assuming *arguendo* he might have been one in the past.

[5] Article 6(3) also requires the United States to "take all feasible measures" to provide "appropriate assistance" for Khadr's "social reintegration." In its instrument of ratification, the United States emphasized its understanding that the term "feasible measures," as used in Article 1, "means those measures that are practical or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations." Senate Report § 2(2)(A), 148 Cong. Rec. at S5717. Needless to say, national security and military considerations prohibit Khadr's "reintegration" into a society that encourages terrorism as a means of destroying the United States. Khadr's family has emphasized that Khadr will never retreat from his self-proclaimed jihad: "When [Omar Khadr's] all right again he'll find [citizens from the United States] again . . . and take his revenge." *Omar Khadr: The Youngest Terrorist?*, CBS, "60 Minutes," Nov. 18, 2007.

(B) Although the Defense asserts that "[t]he United States has endorsed the application of Article [7][6] to child soldiers used by al Qaeda," Def. Mot. at 9 (citing the Initial Report), the Defense conveniently omits the State Department's explanation of our Nation's obligations under Article 7. In its Initial Report, the United States explained that it complies with Article 7 by providing financial and technical assistance through the Agency for International Development ("USAID") and the Department of Labor. *See* Initial Report ¶¶ 35-36.

(C) The Defense can point to nothing—in Article 7 or elsewhere—that suggests that the United States (or any other State party) understood its obligations to provide financial and programmatic assistance to be tantamount to a jurisdictional bar against the prosecution of war criminals. Simply stating the argument demonstrates its manifest implausibility.

c) Presumably because it recognizes that the body of the Protocol is irrelevant to its argument, the Defense places heavy emphasis on the Protocol's preamble. *See* Def. Mot. at 8 (one citation), 9 (three citations), 10 (one citation), 11 (one citation). All of the citations in the world, however, cannot give legal effect (or relevance, for that matter) to the Protocol's preamble.

1) It is a bedrock principle that a statute "clear and unambiguous in its enacting parts, may [not] be so controlled by its preamble as to justify a construction plainly inconsistent with the words used in the body of the statute." *Price v. Forrest*, 173 U.S. 410, 427 (1899). Thus, the Supreme Court has held that the Constitution's preamble lacks any operative legal effect and that, even though it states the Constitution's "general purposes," it cannot be used to conjure a "spirit" of the document to confound clear operative language. *See Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905). The non-operability of preambles stems in part from their unreliability as indicia of legislative intent. *See, e.g.*, 1 James Kent, *Commentaries on American Law* 516 (9th ed. 1858) (noting that preambles "generally . . . are loosely and carelessly inserted, and are not safe expositors of the law"); Thomas Jefferson, *A Manual of Parliamentary Practice for the Use of the Senate of the United States* 41 (1801; reprint 1993) (noting desirability that preamble "be consistent with" a bill but possibility that it may not be, because of legislative procedures). Thus, courts will resort to preambles—and other non-operative sources, such as legislative history—only as a last resort and only where the legally operative language is ambiguous. *See, e.g., Crespigny v. Wittenoom*, 100 Eng. Rep. 1304, 1305 (K.B. 1792) (Buller, J.) ("I agree that the preamble cannot controul the enacting part of a statute, which is expressed in clear and unambiguous terms. But if any doubt arise on the words of the enacting part, the preamble may be resorted to, to explain it."); *id.* at 1306 (Grose, J.) ("Though the preamble cannot controul the enacting clause, we may compare it with the rest of the Act, in order to collect the intention of the Legislature."). The D.C. Circuit has therefore repeatedly reaffirmed:

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[6] In its brief, the Defense actually cites Article 4. *See* Def. Mot. at 9. Given that the rest of the relevant paragraph pertains to Article 7, however, the Government assumes that the Defense's citation to Article 4 was a typographical error.

> A preamble no doubt contributes to a general understanding of a statute, but it is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble. The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will.

Ass'n of Amer. Railroads v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *accord Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999).

2) Here, the Defense has not identified a single ambiguity in the Protocol's text, and its preamble is therefore irrelevant. But even if the Protocol's preamble could somehow "contribute[] to a general understanding of [the Protocol]," *Costle*, 562 F.2d at 1316, the provisions emphasized by the Defense are purely precatory and simply confirm the Protocol's inapplicability.

(A) For example, clause 6 of the preamble suggests States should "implement[the] rights recognized in the Convention on the Rights of the Child" by "increas[ing] the protection of children from involvement in armed conflict." *See* Def. Mot. at 9 (quoting clause 6). As explained above, however, the United States has refused to ratify the Convention, and the Government conditioned its ratification of the Protocol upon its understanding that the Convention would not apply to the United States in any way. *See* Senate Report § 2(1), 148 Cong. Rec. at S5717. And in any event, clause 6 is purely precatory: It urges States to "strengthen" and to "increase" children's rights; it certainly does not limit a State's power to prosecute unlawful enemy combatants.[7]

(B) Similarly, clause 11 of the preamble urges States to hold armed groups responsible for "the recruitment, training and use within and across national borders of children in hostilities." *See* Def. Mot. at 9 (quoting clause 11). Khadr has not shown how dismissing the charges against him will do anything to hold al Qaeda responsible for recruiting, training, and using individuals like Khadr in its terrorist operations. *See also* footnote 3, *supra*.

(C) Finally, the Defense includes *four* citations to clause 8 of the Protocol's preamble, which urges States to "raise[] the age of possible recruitment of persons into armed forces" as a means of furthering, in "principle," "the best interests of the child." *See* Def. Mot. at 8, 9, 10, 11. As explained above, the United States has fully complied with this "principle" by "rais[ing] the age of possible recruitment of persons into armed forces" beyond the preexisting international baseline (15). Moreover, even if clause 8

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[7] As the Government has emphasized in its other pleadings, the MCA provides unprecedented rights to unlawful enemy combatants, who, under the common law of war, were traditionally subject to summary execution when captured. *See, e.g.*, Winthrop, *Military Law and Precedents*, 783-84 (1895, 2d ed. 1920); *accord* Francis Lieber, *Guerilla Parties Considered with Reference to the Laws and Usages of War* 7, 20 (1862); 11 Op. Atty. Gen. 297, 314 (1865). Needless to say, the MCA has "strengthened" and "increased" the rights of all unlawful enemy combatants, including Khadr.

were included in the operative text of the Protocol—which it assuredly is not—Khadr could not rely upon it as a source of rights. *See, e.g., I.N.S. v. Stevic*, 467 U.S. 407, 428 n.22 (1984) (emphasizing that precatory treaty provisions are "not self-executing" and do "not work a substantial change in the law"). And even if clause 8 somehow operated as a source of treaty rights, Khadr could not invoke it to dismiss military commission jurisdiction, which is a purpose wholly alien to the Protocol.

ii) The Protocol's ratification history confirms what its text makes plain—namely, that the treaty imposes limits on our Nation's recruitment of "child soldiers," but it does ***nothing*** to limit our ability to prosecute other States' or groups' war crimes.

a) Those involved in providing "advice and consent" for the ratification of the Protocol focused on two issues: (1) ensuring that the United States would assume no obligations under the Convention, and (2) ensuring that the Protocol would not hamper our Nation's military preparedness. *See* Senate Exec. Rpt. 107-4 to Accompany Treaty Doc. 106-37, Senate Foreign Relations Committee (June 12, 2002) ("Executive Report").

1) The very first thing that Senator Boxer emphasized when calling to order the Senate hearing on the Protocol was that the United States would remain free of any and all obligations created by the Convention. *See id.* at 20.

(A) Multiple witnesses reemphasized that point, unanimously, in both oral testimony and in written responses to the Senators' questions for the record. *See, e.g., id.* at 24, 26, 28 (Ambassador Southwick); *id.* at 33, 36 (Mr. Billingslea); *id.* at 50 (Mr. Malcolm); *id.* at 62 (Ms. Becker); *id.* at 67-68 (RADM Carroll); *id.* at 78 (Mr. Revaz); *id.* at 80 (responses of Departments of State, Defense, and Justice to questions for the record from Senator Biden). Even the representative from Human Rights Watch—which has long urged the United States to ratify the Convention—recognized that the United States would incur no obligations under the Convention by ratifying the Protocol. *See id.* at 62.

(B) The witnesses also unanimously assured the Senators that, as a non-Party to the Convention, the United States would incur no obligations whatsoever with respect to the Committee on the Rights of the Child. *See id.* at 28 (Ambassador Southwick); *id.* at 50 (Mr. Malcolm); *id.* at 80 (responses of Departments of State, Defense, and Justice to questions for the record from Senator Biden).[8]

2) Second, the Senators and witnesses focused extensively on the extent to which the Protocol would or would not hamper United States military capabilities or readiness. Senator Helms emphasized that "we must see that the disruption of unit morale and readiness—factors critical to maintaining a robust military and winning any armed conflict—are not hurt or deterred." *Id.* at 23. Mr. Billingslea, DoD's Deputy Assistant Secretary for Negotiations Policy, testified almost exclusively about the military's "recruitment policies and . . . readiness posture," *id.* at 29, and he presented several charts

[8] The Committee's so-called "recommendation," upon which the Defense attempts to rely, *see* Def. Mot. at 11, is therefore doubly irrelevant. On its face, that "recommendation" does not purport to bind anyone to do anything. And even if it did, the United States could not be so bound.

with hard data, *see id.* at 37-41, to demonstrate that the Protocol would not negatively affect the armed forces' personnel options. Similarly, Admiral Carroll testified almost exclusively about the Navy's manpower requirements, *see id.* at 64-68, and Admiral Fanning emphasized that commanding officers should not and would not be forced "to consider birthdays when making duty assignments." *Id.* at 69. Even the representative from Human Rights Watch recognized that the Protocol's effect (or the lack thereof) on our military's "recruitment and operations" was crucially important. *See id.* at 62.

b) The Defense can point to *nothing* in the 89-page Executive Report (or any other source of the Protocol's ratification history) that suggests anyone ever contemplated that anything in the Protocol would have the effect that the Defense attempts to impute to it.

1) To the contrary, the ratifiers concluded that United States could violate the Protocol only by recruiting, enlisting, or using juveniles in the United States military. For example, Mr. Billingslea emphasized that our formal "understandings" of the terms "feasible measures" and "direct part in hostilities" were intended to preempt any allegation that the United States violated the Protocol. *See id.* at 44-45. Mr. Malcolm reiterated the point. *See, e.g., id.* at 49.

2) Mr. Billingslea emphasized that the "reservations, understandings, and declarations" upon which the United States conditioned its ratification of the Protocol would prevent our military leaders from being "second-guessed" in their personnel decisions. *Id.* at 36; *see also id.* at 70-71 (RADM Fanning) (expressing concern that our commanding officers could be criminally liable for sending the U.S. Navy's 17-year-old sailors into combat). He also emphasized that "the Protocol contains no dispute settlement, enforcement mechanism, or other provision that would lead to the United States being compelled to alter its implementation procedures." *Id.* at 45; *see also id.* at 49 (Mr. Malcolm).

3) Senator Helms also worried that Article 7 might be interpreted as an obligation upon the United States "to provide financial and other assistance to counties that are plagued by the conscription of child soldiers." Senate Exec. Rpt. 107-4 to Accompany Treaty Doc. 106-37, Senate Foreign Relations Committee, at 27 (June 12, 2002). The witnesses, however, assured him that Article 7 is purely precatory and aspirational, and in no way could it be interpreted as imposing a financial obligation—much less the more sweeping obligations the Defense attempts to create from whole cloth. *See id.* at 27-28 (Ambassador Southwick); *id.* at 50 (Mr. Malcolm).

4) Senator Helms also asked whether ratification of the Protocol would expose the United States to allegations from "liberal human rights groups" that might accuse the United States of violating the Protocol "if a 17-year-old soldier gets caught up in a combat situation." *Id.* at 46. And he also asked why the United States should "sign up to a protocol whose chief sponsors and proponents make . . . misleading charges about our country, and attempt to make a comparison or link between the recruiting policies of countries such as the U.S., Canada and Britain, and the forced conscription of 8- and 10-year-olds in Africa and East Asia?" *Id.* at 63.

5) But no Senator or witness ever suggested that the United States could be *accused* of violating—much less could it actually violate—the Protocol by prosecuting an unlawful enemy combatant who may or may not have willingly joined an international terrorist organization.

iii) As explained above, neither the Protocol's text nor its ratification history suggests that the Protocol precludes a State from holding war criminals responsible for their misdeeds. That interpretation is confirmed by international practice, which uniformly ***permits*** the prosecution of so-called "child soldiers."

a) For all of its citations to international materials, the Defense conspicuously fails to cite the only remotely relevant one—namely, the "General Comment," promulgated by the United Nations committee responsible for implementing the Protocol, which addresses the prosecution of avowed "child soldiers" under the Convention. *See* United Nations Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, Doc. CRC/C/GC/10 (Apr. 25, 2007) ("Comment on Juvenile Justice").

1) In its Comment on Juvenile Justice, the U.N. Committee on the Rights of the Child ("CRC") specifically notes that children under the age of 18 "can be formally charged and subject to penal law procedures," so long as they are older than the minimum age of criminal responsibility ("MACR"). *Id.* ¶ 31. The CRC then emphasizes that ***12*** is the "internationally acceptable" MACR. *Id.* ¶ 32. While the CRC emphasizes that, as a policy matter, it would like to see States increase the MACR, the Committee makes very clear that ***international law permits the criminal punishment of anyone over the age of 12***.

2) The CRC's Comment on Juvenile Justice applies to the broader protections afforded by the Convention on the Rights of the Child, which the United States has steadfastly refused to ratify. *See also* Senate Report § 2(1), 148 Cong. Rec. at S5717 ("The United States understands that the United States assumes no obligations under the Convention on the Rights of the Child by becoming a party to the Protocol."). Even for those countries (unlike the United States) that are obligated to afford the rights described in the report, however, the Committee emphasizes that international law permits the prosecution of war crimes committed by juveniles, so long as they were older than 12 and so long as the individual is not "punished with a heavier penalty than the one applicable at the time of his/her infringement of the penal law." *Id.* ¶ 41.[9]

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[9] It also bears emphasis that Article 40 of the Convention—which, again, the United States has not ratified, and by which the United States is not bound—authorizes the prosecution of individuals who were under the age of 18 at the time of their alleged offense(s). Moreover, the Convention requires only that the accused be tried "by a competent, independent and impartial authority ***or*** judicial body in a fair hearing according to law." Article 40(2)(b)(iii) (emphasis added). This provision makes clear that, even under the non-binding Convention, Khadr can be tried either (1) before a "judicial body," such as a federal court, ***or*** (2) before an alternative tribunal—such as a military court—so long as it is competent, independent, and impartial.

(A) As the United States has explained throughout its pleadings in this case, at the time Khadr violated the law of war, he was subject to trial by military commission, before which he would have faced the same or heavier penalties than those he faces here. *See* Military Order of November 13, 2001, 66 Fed. Reg. 57,833. His trial and punishment by military commission under the MCA certainly does not constitute "a heavier penalty than the one applicable at the time of his/her infringement of the penal law." *See also* footnote 7, *supra.*

(B) Moreover, given that the Convention on the Rights of the Child imposes no barrier to Khadr's prosecution, it follows *a fortiori* that the lesser protections afforded by the Protocol do not purport to bar jurisdiction here.

b) The US Campaign to Stop the Use of Child Soldiers ("Campaign")—which includes Human Rights Watch and Amnesty International, amongst others—implicitly agrees that the Protocol does not bar Khadr's prosecution here.

1) In a recent report, the Campaign offered its opinion on numerous areas in which the United States may improve its compliance with the Protocol. *See United States of America: Compliance with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, submission from the US Campaign to Stop the Use of Child Soldiers to the Committee on the Rights of the Child (Nov. 2007). Of critical importance here, however, the Campaign never once suggested that the Protocol would bar the prosecution of a single so-called "child soldier."

2) In fact, the Campaign specifically mentioned Khadr by name and noted that he was one of "a number of [juvenile offenders who] have been transferred [from the battlefield in Afghanistan] to the military detention facility at Guantánamo." *Id.* at 9. Rather than claiming that the Protocol somehow bars Khadr's prosecution for war crimes, the Campaign suggested only that the United States should "adjudicate [Khadr's case] as quickly as possible," "ensure [Khadr's] access to legal counsel," and "ensure compliance with international juvenile justice standards." *Id.* at 10.

3) In short, the remedy Khadr seeks here—dismissal of the charges—is more radical (and legally unsupportable) than even the most ardent human rights groups demand.

iv) As the Defense would have it, the Protocol's prohibition on the recruitment, enlistment, and use of certain soldiers in the U.S. armed forces impliedly also prohibits the trial by military commission of all individuals under the age of 18. To support that argument, the Defense and its *amici* offer 84 pages of briefing without a single citation to a single source that suggests the Protocol means what the Defense claims it does. Under these circumstances, accepting the Defense's argument requires more than the leap of faith necessary to believe that the Protocol's framers hid an elephant in a mousehole. *Cf. Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468 (2001). Rather, this Court "would have to conclude that [the Protocol's framers] not only had hidden a rather large elephant

in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that [the Protocol's framers] even suspected its presence." *Am. Bar Ass'n v. F.T.C.*, 430 F.3d 457, 469 (D.C. Cir. 2005).

C. CUSTOMARY INTERNATIONAL LAW IS INAPPLICABLE AND IRRELEVANT TO KHADR'S CLAIM.

i) As explained above, the Defense can point to nothing in the Protocol that even remotely suggests that it bars Khadr's prosecution. Presumably recognizing that fact, the Defense devotes an inordinate amount of its brief to unofficial studies, law review articles, and reports from groups such as Human Rights Watch. Such sources, of course, do not constitute "law," nor are they necessarily probative of "customary international law." *See The Paquete Habana*, 175 U.S. 677, 700 (1900) (emphasizing that an individual's views may be probative of customary international law *only* insofar as they provide "trustworthy evidence of what the law really is.").

ii) Given that customary international law is founded upon the consent and practices of States, rather than the evolving consensus of law professors, it bears emphasis that the United States has made clear its view that Khadr's prosecution is permissible. That conclusion casts heavy doubt on Khadr's suggestion that customary international law somehow bars this commission's jurisdiction. As the Second Circuit has emphasized:

> While it is not possible to claim that the practice or policies of any one country, including the United States, has any such authority that the contours of customary international law may be determined by reference only to that country, it is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States and/or other prominent players in the community of States could be deemed to qualify as a bona fide customary international law principle.

United States v. Yousef, 327 F.3d 56, 92 n.25 (2d Cir. 2003).

iii) Indeed, the United States is not alone—other countries have, in fact, prosecuted war criminals for acts they committed under the age of 18.

a) The Defense and its *amici* repeatedly and fervently argue to the contrary. *See, e.g.*, Def. Mot. at 2 ("[T]he military judge will be the first in western history to preside over the trial of alleged war crimes committed by a child."); *see also id.* (describing this prosecution as "unprecedented"); *see also id.* at 5 ("[N]o international criminal tribunal established under the laws of war, from Nuremberg [in 1945] forward, has ever prosecuted former child soldiers as war criminals."); Br. of *Amicus Curiae* Sen. Badinter, *et al.*, at 11 ("This trial against Khadr, if it were to go forward, would be the very first time a judge would preside over the war crimes trial of a former child soldier."). One *amicus* would sooner condemn *this Court* for committing a war crime than it would condemn the "Hitler Youth." *See* Br. of *Amicus Curiae* Juvenile Law Center at 22. In

the *amicus*'s view, the Hitler Youth are more appropriately treated as "victims," who need "education and reintegration." *Id.* at 22-23.

b) But the British Military Court at Borken, Germany ***prosecuted a 15-year-old*** member of the Hitler Youth for war crimes. *See Trial of Johannes Oenning & Emil Nix*, Case No. 67, XI L. Rep. Trials of War Criminals 74 (1945). Oenning was tried and convicted by a military court for his involvement in the murder of a Royal Air Force Officer. *Id.* at 74-75. Importantly, Oenning's counsel argued "that the youth had grown up under the Nazi régime and was a victim of its influence." *Id.* at 74. But that argument did ***not*** preclude the military tribunal's jurisdiction, ***nor*** did it exculpate Oenning for murdering a British servicemember. Oenning was sentenced to prison. *Id.*

c) Nor is the *Oenning* case unique. In 1947, the Permanent Military Tribunal at Metz tried a German family—including ***three*** daughters under the age of 18 at the time of the offense—for war crimes. *See Trial of Alois & Anna Bommer & Their Daughters*, IX L. Rep. Trials of War Criminals 62 (1947). The trial provided "confirmation of the principle that laws and customs of war are applicable not only to military personnel . . . but also to any civilian who violates these laws and customs." *Id.* at 65-66. Two of the Bommer daughters were convicted as "war criminals" by the military tribunal and imprisoned, notwithstanding the fact that they were under the age of 18 at the time of their war crimes.[10] *See id.* at 66.

d) Moreover, one scholar has concluded: "In the Belsen case [*Trial of Josef Kramer & 44 Others*, II L. Rep. Trials of War Criminals 1 (1945)], the tribunal had no hesitation imposing substantial terms of imprisonment on a number of accused who were under age at the time of the offense." Stuart Beresford, *Unshackling the Paper Tiger—The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1 Int'l Crim. L. Rev. 33, 68 (2001). For example, it appears that one of the accused, Antoni Aurdzieg, was as young as 16 at the time of his vicious offenses. *See* II L. Rep. Trials of War Criminals at 103, 124; *see also id.* at 24 (Aurdzieg allegedly "killed hundreds of people and demanded valuables from prisoners and if he did not get these he beat them to death."). Aurdzieg was tried and convicted by the British Military Court at Luneburg and sent to prison. *See id.* at 125.

e) Thus, contrary to the arguments of the Defense and its *amici*, this prosecution is certainly not "unprecedented." Def. Mot. at 2.

iv) But even if the Defense could somehow cobble together its bevy of non-legal citations to form an applicable norm under customary international law, it would be irrelevant here, in light of the Government's decision to prosecute Khadr.

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[10] The third Bommer daughter was also charged and tried by the military tribunal as a "war criminal," *see* IX L. Rep. Trials of War Criminals at 66, but she "was acquitted of the charge of receiving stolen goods on the ground of having 'acted without judgment' (sans discernment) on account of her age." *Id.* at 62. Importantly for this motion, however, her age—under 16—did ***not*** defeat the military tribunal's jurisdiction. *See id.* at 66.

a) It is a bedrock principle that customary international law applies only "where there is no treaty, and *no controlling executive . . . act.*" *Paquete Habana*, 175 U.S. at 700 (emphasis added); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 733-34 (2004) (reiterating *Paquete Habana*)[11]; *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992) ("Respondent and his *amici* may be correct that respondent's abduction was 'shocking,' and that it may be in violation of general international law principles. [But respondent's extradition,] as a matter outside of the Treaty, *is a matter for the Executive Branch.*") (emphasis added).

b) Accordingly, one federal court has held:

> [T]he President has the authority to ignore our country's obligations arising under customary international law . . . . Accordingly, customary international law offers plaintiffs no relief in this forum. Any relief in this area must come from the President . . . or Congress.

Fernandez-Roque v. Smith, 622 F. Supp. 887, 903-04 (D. Ga. 1985). Affirming that decision in relevant part, the Eleventh Circuit emphasized that the Attorney General's law-enforcement decisions constitute "controlling executive acts" under *Paquete Habana*, sufficient to preempt any contrary norm under customary international law. *See Garcia-Mir v. Meese*, 788 F.2d 1446, 1455 (11th Cir. 1986).

c) Importantly for this case, criminal prosecutions are "controlling executive acts" that *abrogate* any immunities that might otherwise apply under customary international law. One federal court of appeals has thus emphasized that "by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity" under customary international law. *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997); *see also In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108, 1110 (4th Cir. 1987) ("Head-of-state immunity is a doctrine of customary international law."). Finding "no authority that would empower a court to grant . . . immunity under these circumstances," *id.*, the Eleventh Circuit rejected the defendant's jurisdictional defense.

d) Thus, even if Khadr could colorably claim that customary international law is somehow relevant—which it assuredly is not—he still would be unable to invoke its protections.

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[11] It bears emphasizing that in *Sosa*, the Supreme Court ***reversed*** the Ninth Circuit, which had suggested in a footnote that "unlike treaties . . . principles of customary international law cannot be denounced or terminated by the President and cannot be eliminated from the law of the United States by any Presidential act." *Alvarez-Machain v. United States*, 331 F.3d 604, 260 (9th Cir. 2003) (en banc) (internal quotation marks and citation omitted), *rev'd sub nom.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

D. THE JUVENILE DELINQUENCY ACT IS INAPPLICABLE.

i) Finally, the Defense attempts to invoke the Juvenile Delinquency Act ("JDA"). That statute is inapplicable, however, for at least two reasons.

a) First, the courts have unanimously held that the JDA does not apply to the jurisdiction of military tribunals—even though the JDA does not contain a specific carve-out for court-martial jurisdiction, just as it does not specifically carve-out military-commission jurisdiction. These decisions confirm that, as a matter of statutory interpretation, Congress did not intend the JDA's provisions to apply outside of the federal courts created under Article III of the Constitution.

1) In *United States v. Nelson*, 2 C.M.R. (AF) 841 (1950), for example, the Judge Advocate General Board of Review of the Air Force held that the JDA does not apply to the general court-martial of a 16-year-old enlistee for robbery. The board emphasized that the JDA regulates only the jurisdiction of the federal courts, and that no federal court can interfere with a court-martial. The board also held that any invocation by the Attorney General of the provisions of the Juvenile Delinquency Act in an action before a military court would create a conflict between two subordinates both deriving their authority from the commander in chief, or between one deriving authority from the Constitution and one from the legislative branch of the government. The board thus held that the court-martial was legally constituted and had jurisdiction over the juvenile enlistee, and it upheld the finding of guilty.

2) Similarly, the court in *United States v. Baker*, 34 C.M.R. 91 (C.M.A. 1963), followed *Nelson* and held that the JDA did not bar the court-martial of a 17-year-old member of the Armed Forces for violations of the Uniform Code of Military Justice, including larceny from the post exchange, and theft from mails. The court emphasized that "[t]he plan and language of the Act indicate clearly it is limited to proceedings in the regular Federal courts," and not military tribunals. *Id.* at 93. Thus, the court held:

> So far as the laws directly and specifically applicable to the military establishment are concerned, . . . a seventeen-year-old person who commits an offense can be proceeded against in precisely the same way as an adult, except that he might be accorded some special consideration as to the sentence. Certainly, this has been the uniform practice in the military criminal law.

Id. at 92. *See also United States v. West*, 7 M.J. 570, 571 (A.C.M.R. 1979) (collecting cases and emphasizing that "[f]ew aspects of military law have been clearer" than the inapplicability of the JDA to military tribunals).

b) Second, the JDA applies only where the accused is held in "a State," which the JDA defines as "a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States." *Id.* § 5032, ¶ 2.

1) As section 5032 makes clear, a juvenile covered by the JDA must be tried in a State that has jurisdiction over him, *see id.* § 5032, ¶ 1(1)-(2), or "the appropriate district court of the United States" that embraces the State, *id.* § 5032, ¶ 1; *see also* 28 U.S.C. § 1441(a). The JDA does not provide any means for trying an individual who is not held in a State.

2) Here, Khadr is not being held within a State of the United States, the District of Columbia, any commonwealth, territory, or possession of the United States. And there is no federal district court "embracing" the place of his detention. The JDA therefore does not apply.[12]

ii) Congress passed the MCA against the well-settled background principles that the JDA applies only in Article III courts, and that it does not in any way affect the jurisdiction of the military courts. Recognizing that fact, Congress had no need to carve-out the JDA from the MCA. *See, e.g., Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 252 (1992) (holding Congress is presumed to legislate against the backdrop of well-settled judicial interpretations, which "place[] Congress on prospective notice of the language necessary and sufficient to" depart from them); *see also United States v. Merriam*, 263 U.S. 179, 186 (1923); *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979).

iii) The Defense's attempt to invoke the JDA, therefore, should be denied.

7. Oral Argument: The Government does not believe oral argument is necessary to deny the Defense's motion. To the extent this Court requests it, however, the Government will be prepared for oral argument.

8. Witnesses: The Government does not believe that witness testimony is necessary to deny the Defense's motion. To the extent, however, that this Court decides to hear evidence on this motion, the Government respectfully requests the opportunity to call witnesses.

9. Conference: Not applicable.

10. Additional Information: None.

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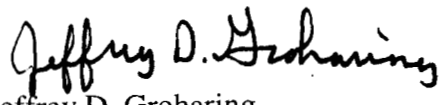
[12] The Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), is not to the contrary. There, the Court held that the federal habeas statute applied to detainees held at a military base in Guantanamo Bay, Cuba. Decisive for the Court was that habeas corpus is "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law." *Id.* at 473 (alteration in original) (quoting *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945)) (internal quotation marks omitted). No such historical lineage attends the JDA, and the *Rasul* Court's historically based opinion therefore has no applicability to the extraterritorial reach of the JDA. And as described above, there is no indication that Congress intended the JDA to apply beyond the Article III courts—much less extraterritorially. *See also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.") (internal quotation marks omitted).

11. Submitted by:



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	D-022
UNITED STATES OF AMERICA	**Defense Reply**
v.	To Government Response to Motion to For Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier
OMAR AHMED KHADR	31 January 2008

1. Timeliness: This Reply is filed within the timeline established by the military judge.

2. Reply:

a. Introduction

(1) Despite trial counsel's strident assertions to the contrary, there is no disagreement over the central issue in this case, what law applies or what options are available to the military judge. The issue, the only issue, before the military judge is whether Congress, when it passed the MCA, intended these law-of-war commissions to act as juvenile courts. Clearly, it did not.

b. Khadr Does Not Claim Immunity From All Prosecution

(1) There is no disagreement about whether Mr. Khadr's status as a child soldier grants him immunity from all prosecution. Trial counsel goes to some length to disprove a point that Mr. Khadr does not contest. As stated in the Motion to Dismiss, there is nothing in the Optional Protocol, customary international law, U.S. federal law or Canadian law that bars the prosecution of a juvenile, even for war crimes. (Def. Mot. at 12, para. 5(c)(4)(iv)). The only question is whether Congress intended this law-of-war commission to be the first to exercise that kind of jurisdiction without so much as debating it in Committee. If the federal government wishes to prosecute Mr. Khadr, it has ample and unambiguous statutory authority to do so under the JDA. 18 U.S.C. § 5031, *et seq.* (Def. Mot at 13, para. 5(d)).

c. Congress Did Not Intend Child Soldiers To Be Tried By These Military Commissions

(1) There is no disagreement that it "is true that 'Congress did not in the MCA grant military tribunals jurisdiction over juvenile crimes by child soldiers.'" (Govt. Resp. at 4, para. 6(A)(i)(a)). There is no disagreement that this legislative silence requires the military judge to choose two between possibilities: "(i) there is no minimum age, be it fifteen or five years old, that a captured detainee must be in order to be tried by military commission; or (ii) Congress' silence presupposes that the minimum age for personal jurisdiction was fixed the same way the military has for hundreds of years – that is at least the minimum age to participate in hostilities

and join the military force on whose behalf he allegedly fought." (Def. Mot. at 3, para. 5(b)(1)). The disagreement is over which option Congress intended.

(a) Trial counsel wants the military judge to believe Congress chose the first option – the MCA "unqualifiedly creates military commission jurisdiction over all unlawful enemy combatants, *irrespective of their age*." (Govt. Resp. at 1, para. 3(a)) (emphasis added). Be it five or fifteen years old, military commission jurisdiction "does not hinge on the age of an alien unlawful enemy combatant." (Govt. Resp. at 4, para. 3(a)(i)).

(b) The problem with this option is not only that it is the kind of "extreme or absurd result" that basic tenets of statutory construction forbid,[1] but that it is so inconsistent with every other area of military, federal and international law.

i) For if Congress really intended to erase all distinction between adults and children, especially with respect to children who are exploited as soldiers, why would it speak out of the other side of its mouth by adopting the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ("Optional Protocol")?

ii) Why would Congress have ratified another treaty which defines the conscription of juveniles under the age of 18 as a form of slavery, on par with using children in sex trafficking and as drug mules? Worst Forms of Child Labour Convention (No. 182), June 17, 1999, 38 I.L.M. 1207.

iii) Why would the United States grant refugee status to applicants seeking asylum on the basis of their status as former child soldiers? *See Lukwago v. Ashcroft*, 329 F.3d 157, 168-69 (3rd Cir. 2003) (noting that applicant "was forced to place his life in jeopardy in battles against government forces ... as a mere 15 year old boy.") (citation omitted).

iv) Why would the Secretary of Defense, with Congressional approval, make no provision for juvenile prosecutions in the Military Commissions Manual, but routinely differentiate between adults and juveniles in the same way that the UCMJ does by, for example, protecting child witnesses and juvenile records? R.M.C. 804, 914A; M.C.R.E. 609(d), Rule 611(d).

v) Why would Congress not even mention the JDA, which, when passed, was described in the Senate Report as a "model code for juveniles" and "an important influence on state and local progress towards a higher standard of juvenile justice"? S. Rep. No. 93-1011, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. at 5312 (1974).

vi) Why would the House of Representatives pass the Child Soldier Prevention Act of 2007 with a vote of 405 to 2? Child Soldier Prevention Act of 2007, H.R. 3887 (2007). Why would this law, in part, define a child soldier as "any person under age 18 recruited

[1] *United States v. Katz*, 271 U.S. 354, 362 (1926) ("General terms descriptive of a class of persons made subject to a criminal statute may and should be limited where the literal application of the statute would lead to extreme or absurd results and where the legislative purpose gathered from the whole Act would be satisfied by a more limited interpretation.").

or used in hostilities by armed forces distinct from the armed forces of a state" and state Congress' intention to "expand ongoing services to rehabilitate recovered child soldiers and to reintegrate them back into their communities"? Why would its counterpart, currently pending in the Senate, have 29 cosponsors from both parties? Child Soldier Prevention Act of 2007, S. 1175 (2007).

vii) Most of all, why would Congress not say so?

(c) Trial counsel attempts to counter the obvious answer to all of these questions by saying that Congress did not want to "lard" the MCA up with "wholly inapplicable and unnecessary provisions." (Govt. Resp. at n.2). The problem with this reasoning is that United States was a principal author and advocate for this very kind of "lard" for the Special Court for Sierra Leone ("SCSL"). Statute of the Special Court, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on January 16, 2002, art. 7 ("SCSL Statute").

i) As the Report of the Secretary General on the SCSL Statute recognized, "The prosecution of children for crimes against humanity and war crimes presents a moral dilemma." Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000 ("SCSL Report") ¶ 32. Accordingly, "[t]he question of child prosecution was discussed at length," *id*. ¶ 34, and three options were debated:

> (1) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility;
>
> (2) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and
>
> (3) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice.

Id. ¶ 33.

ii) The SCSL Statute opted for the latter, laying out in detail that any juvenile prosecution be guided by the promotion of "rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child." SCSL Statute, art. 7(1). Pursuant to that, the Secretary General recommended the appointment of judges and prosecutors with juvenile expertise, and stated that all of these measures were taken to "strike an appropriate balance between all conflicting interests and provide the necessary guarantees of juvenile justice." SCSL Report ¶ 38-39.

iii) Accordingly, the SCSL Statute forbids imprisonment and authorizes only non-punitive, rehabilitative sentences that will foster reintegration for child soldiers. SCSL Statute, art. 7(2). By contrast, this military commission can impose only the sentence of death or confinement in a "penal or correctional institution." MCA § 948u. *See also, United States v.*

Khadr, 07-001 at 13 (CMCR 2007) ("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.").

iv) Like the SCSL Statute, and the statutes for the international criminal tribunals for Rwanda and the former Yugoslavia, the MCA does not simply carve out exceptions to the UCMJ; it establishes a distinct law-of-war commission system for war crime prosecutions. Yet, unlike the Special Court for Sierra Leone, there is no juvenile justice component.

v) That is important because the United States not only commits itself to affording the child soldiers it captures "all appropriate assistance for their physical and psychological recovery *and their social reintegration*," Optional Protocol, art. 6(3),[2] but has long campaigned around the world for the differentiation of juvenile defendants and age-appropriate procedures for their protection. *See* International Covenant on Civil and Political Rights, art 14(4) ("In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.").

d. International Law Supports A Presumption Of Differentiation For Juvenile Justice Systems And An Objective Of Reintegration

(1) There is no disagreement that the "General Comment" of the United Nations committee responsible for implementing the Optional Protocol, the Committee on the Rights of the Child, is "relevant" to what the Optional Protocol means. (Govt. Resp. at 14 paras. 6(B)(iii)(a)(1)-(2) (citing United Nations Committee on the Rights of the Child, *General Comment No. 10: Children's Rights in Juvenile Justice*, Doc. CRC/C/GC/10 (Apr. 25, 2007) ("CRC Comment")).

(a) The paragraphs immediately preceding those cited by trial counsel, for example, are unambiguous as to what the duty to "reintegrate" entails:

> [R]eintegration requires that no actions may be taken that can hamper the child's full participation in his/her community, such as stigmatization, social isolation, or negative publicity of the child. For a child in conflict with the law to be dealt with in a way that promotes reintegration requires that all actions should support the child becoming a full, constructive member of his/her society.

CRC Comment ¶ 29.

(b) With respect to the basic norm of differentiation, the CRC Comment is equally clear that "States establish juvenile courts either as separate units or as part of existing

[2] This policy is by no means new. In 1998, Congress endorsed the creation of the Optional Protocol, setting "18 as the minimum age for participation in conflict" and called upon the Executive Branch to provide "greater support to United Nations agencies and nongovernmental organizations working for the rehabilitation and reintegration of former child soldiers into society." Department of Defense Appropriations Act of 1999, Pub. Law 105-262 § 8128.

regional/district courts. Where that is not immediately feasible for practical reasons, the States parties should ensure the appointment of specialized judges or magistrates for dealing with cases of juvenile justice." CRC Comment ¶ 93.

(c) These comments are not simply some aspirations from "groups such as Human Rights Watch," (Govt. Resp. at 16, para. 6(C)(i)), but reflective of what the United States has uniformly done at both the federal and state levels. *See, e.g.*, 18 U.S.C. Ch. 403; 42 U.S.C. Ch. 72; Br. *Amicus Curiae* of the Juvenile Law Center at n. 1 (listing the juvenile justice statutes in place in all 50 States and the District of Columbia).

(d) While Congress has clearly invested significant resources into the creation of the military commission system, it is an uncontested fact that there is no juvenile commission or "separate unit" for prosecutions of individuals like Mr. Khadr. Nor should the military judge take offense at the observation that, for all of his many qualifications, he is not a "specialized judge" in the area of juvenile justice.

(e) Not only does the MCA provide no special protection, many of its procedures are demonstrably inappropriate for juveniles.[3]

i) Trial counsel's brief is purposefully prejudicial to Mr. Khadr's "reintegration into society" and itself demonstrates the incapacity of this military commission as an appropriate forum for the trial of a juvenile offender. Despite the fact that this motion is on a pure question of law, trial counsel has filled its brief with slanderous accusations taken from an interrogation report that was not only done without the presence of Mr. Khadr's guardian or lawyer, but came at the end of a series of inherently coercive interrogations.[4] The government's

[3] *See, e.g.*, MCA §§ 948b(d)(1)(A) (inapplicability of UMCJ speedy trial provisions) and 948r(c) (relating to the admissibility of statements "in which the degree of coercion is disputed"). Needless to say, indefinite pretrial detention and coercive interrogation of a juvenile would be inconsistent with the "best interests of the child" and the goal of reintegration.

[4] The government attempts a cursory defense of its actions in light of the Optional Protocol's mandate to provide for Mr. Khadr's "physical and psychological recovery and . . . social reintegration." (*See* Govt. Resp. at 9). While the question of whether the government complied with the Optional Protocol *in this case* is not, strictly speaking, relevant to the question of whether the MCA should be deemed to apply to juveniles as a *general* proposition, it is beyond question that the government did not comply with the Protocol in its treatment of Mr. Khadr. The government does not bother to argue that the indefinite detention and repeated coercive interrogation of Mr. Khadr, as well as the government's failure to segregate him from adult detainees, has been consistent with Mr. Khadr's "psychological recovery." The government's non-compliance with the Protocol will likely be the subject of a separate motion should this prosecution continue. In a similar vein, the government congratulates itself on the fact that Mr. Khadr was not summarily executed. (*See* Govt. Resp. at 11 n.7). Elsewhere it has similarly intimated that Mr. Khadr was fortunate not to have been shot on sight. (*See, e.g.*, Govt. Resp. to Def. Mot. to Dismiss Charge IV at 12). The government's repetition of this refrain is curious in light of the fact that Mr. Khadr was "shot on sight" – in the back – twice – while wounded, sitting and leaning against a wall facing away from his attackers – this all according to the government's own evidence. (*See* Attachment B). Indeed, if Mr. Khadr did not, as the government claims, throw a hand grenade before being shot in the back, it would be difficult to describe his near fatal shooting while wounded and *hors de combat* as anything other than something very akin to an attempted summary execution. This could explain the government's

decision to "lard" its brief with these irrelevant allegations appears to be an effort to justify Mr. Khadr's prosecution by a military commission designed for *adult* offenders. Slanderous accusations are not, however, a valid substitute for an appropriate pretrial procedure to determine whether Mr. Khadr should be tried as an adult – something for which Congress would have undoubtedly provided had it intended to authorize prosecution of juveniles by military commission. *Cf.* 18 U.S.C. § 5032.

ii) But the most glaring demonstration of this fact is that if Congress wanted juveniles brought before military commissions, it would have, at a minimum, limited the application of the death penalty. For not only has the juvenile death sentence been prohibited by the U.S. Supreme Court, *Roper v. Simmons*, 543 U.S. 551 (2005), the Fourth Geneva Convention forbids the death penalty for "a protected person who was under eighteen years of age at the time of the offence." GCIV, art. 68. Article 68's prohibition of the juvenile death penalty, as well as the commentary to that provision,[5] demonstrates that the principle of distinction between adults and children was an established feature of the law of armed conflict long before U.S. adoption of the Optional Protocol.

iii) Trial counsel replies that imposing the death penalty "regardless of age" is perfectly appropriate (and therefore supports no inference of Congressional intent) since the Constitution "is inapplicable to Guantanamo Bay." (Govt. Resp. n.2). One need not look too deeply into the decision in *Roper*, however, to see that the prohibition on the juvenile death sentence is now among the most unambiguous of "all the judicial guarantees which are recognized as indispensable by civilized peoples." GCIII, art. 3. *Roper* rooted its decision in the recognition of "certain fundamental rights by other nations and peoples [that] simply underscores the centrality of those same rights within our own heritage of freedom."[6] Moreover, the government's extreme position on the inapplicability of the Constitution to Guantanamo Bay (as evidenced by its "reading" of *Boumediene*) was by no means "well settled" at the time of the MCA's adoption. (Govt. Resp. at 7 n.2). Obviously, *Boumediene* (whatever it stands for) was decided months *after* the MCA's enactment. All that was "well settled" in September 2006 is

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decision to hold him responsible for tossing a hand grenade despite the absence of any eyewitness to the incident (*see* 60 Minutes interview of John Altenberg cited at p. 9 n.5 of the Govt. Resp.) and the fact that at least one other person was alive *and fighting* when Sergeant Speer was mortally wounded. (*See* Attachment B).

[5] The commentary provides that Article 68 "corresponds to similar provisions in the penal codes of many countries, and is based on the idea that a person who has not yet reached the age of eighteen years is not fully capable of sound judgment, does not always realize the significance of his actions and often acts under the influence of others, if not under constraint." 4 International Committee of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 347 (J. Pictet ed. 1958).

[6] The Court further found that "only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. Brief for Respondent 49-50. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty." *Roper*, 543 U.S., at 577.

that Guantanamo Bay is within the "exclusive jurisdiction and control of the United States," *see Rasul v. Bush*, 542 U.S. 466, 476 (2004) (distinguishing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)), and that detainees possessed enforceable rights under the law of armed conflict, including the Geneva Conventions. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).[7]

iv) But even this objection is beside the point because the question is not whether Congress *could* have given trial counsel the power to seek the death penalty against a five year old. The question is whether that is what Congress intended to do when it passed the MCA. It is simply inconceivable that Congress would have intended to authorize imposition of the death penalty on juveniles in contravention of every established legal norm, international and domestic, without so much as a whisper to that effect.

e. Military Law Recognizes Capacity As Necessary For Law-Of-War Commission Jurisdiction

(1) There is no disagreement that Congress passed the MCA against "well-settled background principles" of military law, (Govt. Resp. at 20, para. 6(D)(ii)).

(a) While Congress did instruct the military judge to treat the interpretation the CAAF[8] has given the UCMJ as nonbinding on the MCA, Congress also made a point of emphasizing that the MCA was "based upon" the UCMJ. MCA § 948b(c). Congress even made a point of emphasizing the many instances where it thought it necessary to diverge from the UCMJ. *See, e.g.*, MCA §§ 3, 4(a)(2), 10 U.S.C. §§ 821, 828, 848, 850, 904, 906, 948b(d). The decisions of the CAAF are therefore the clearest guideposts for how Congress intended the MCA to be applied.

i) The well-settled background principles of personal jurisdiction before court-martials are unambiguous. The UCMJ, like the MCA, contains no express jurisdictional limitation for age and as late as 1956, the UCMJ applied to civilians on equal terms as service members. *See Reid v. Covert*, 351 U.S. 487 (1956). Yet, the CAAF has repeatedly reaffirmed the distinction between those capable and incapable of subjecting themselves to military jurisdiction. *See, e.g., United States v. Brown*, 48 C.M.R. 778 (1974); *United States v. Blanton*, 23 C.M.R. 128 (1957) (before reaching the minimum age of consent, "a person is deemed incapable of changing his status to that of a member of the military establishment.").

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[7] The government also cites to *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), as support for its apparent belief that Congress *could* authorize drawing and quartering as a punishment, provided it did so only for aliens (including children) outside the sovereign territory of the United States. *Verdugo-Urquidez*, however, dealt with the narrow question of whether aliens outside the United States could claim the protections of the Fourth Amendment. *See id.* at 274-75. In short, Congress had no cause to presume that the Eighth Amendment (including its prohibition against the juvenile death penalty) would not apply to Guantanamo Bay.

[8] For the purpose of clarity, references to the Court of Appeals for the Armed Forces and the Court of Military Appeals will both be referred to as the CAAF.

ii) Indeed, this tradition goes back centuries, (Def. Mot. at 4, para. 5(b)(4)), and has been applied by the CAAF even to the Articles of War that governed military prosecutions prior to the enactment of the UCMJ. *See United States v. Ferguson*, 37 C.M.R. 464 (1967). Rather than erase this distinction, Congress manifested its intent to narrow the jurisdiction that these military commissions have from the wider jurisdiction court-martials have under the UCMJ. *See* MCA § 948d(b).

iii) What trial counsel is asking for is a presumption that Congress implicitly expanded military jurisdiction where there was none before. Not only does this contradict the well-settled background principle that "military jurisdiction over civilians is not a matter lightly presumed and must be shown clearly," *United States v. Garcia*, 17 CMR 88, 95 (1954), but the fact that "the law recognizes a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 468 U.S. 325 (1985).

(b) The only counterargument trial counsel can muster is that Mr. Khadr's indictment under the previous military commission system "suggests that Congress was aware of and condoned Mr. Khadr's prosecution." (Govt. Resp. at 6, para. 6(A)(ii)(a)).

i) A mere "suggestion" is not authority "conferred clearly by Federal statute." *United States v. Marker*, 3 C.M.R. 127 (1952); *see also Ex parte Reed*, 100 U.S. 13 (1879) ("Courts-martial are exceptional in their organization, jurisdiction, modes of procedure, and the rules by which findings are made or judgments pronounced. In an ordinary judicial tribunal, nothing, therefore, is to be presumed in their favor.").

ii) Nor does Congressional silence on Mr. Khadr's case or juvenile justice issues generally suggest anything other than Congress never imagining that juvenile offenders would be brought before these commissions. If anything, the fact that former child soldiers are still being held at GTMO has been publicly played down, and even denied. A year before the MCA was passed, Under Secretary of Defense, Matthew Waxman, said at a press conference:

> There's nobody at Guantanamo under the age of 18. There were some individuals there who were and they were handled in a separate facility where they could receive special treatment in light of the fact that they were juveniles. But I think you're actually asking the wrong question. I mean, the question that we should be asking is: Why is it that al-Qaida and the Taliban are recruiting juveniles to commit hostile acts?"

U.S. Detention Policy and Procedures, Foreign Press Center Briefing, July 21, 2005.

(c) No international criminal tribunal established under the laws of war, from Nuremberg forward, has ever prosecuted former child soldiers as war criminals and the government's assertions to the contrary are simply inaccurate.

i) The government misreads the facts when it says that Antoni Aurdzeig, who was tried in the Belsen Case, was 16 when he perpetrated atrocities at the Belsen camp. Trial of Josef Kramer & 44 Others, II L. Rep. Trials of War Criminals 1 (1945). According to transcript of the trial, he was born on 15 September 1924 and was not even transferred to Belsen until 23 March 1945, when he would have been 20 years old.

ii) In the case of the German Daughters, the proceedings against all three girls were "according to Articles 66 and 67 of the French Penal Code." *Trial of Alois and Anna Bommer & Their Daughters*, IX L. Rep. Trials of War Criminals 62 (1947). Mr. Khadr has strongly argued that he should be treated just the same as these "German schoolgirls," since the counterpart in the U.S. Penal Code, the JDA, grants him at a minimum the right to be tried in a federal court under federal law.

iii) The only case trial counsel can find where a juvenile was unambiguously prosecuted and convicted for war crimes is the *Oenning* case, where a British occupation commission, not a law-of-war commission, tried a defendant who shot an unarmed prisoner in cold blood. Even there, it should be noted that the sentence ultimately imposed by the British was only two years longer than the time Mr. Khadr has already served in pre-trial confinement.[9]

(d) Overriding even the two examples trial counsel can find is that these cases were not tried before law-of-war commissions, but occupation commissions "established to try civilians 'as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function.'" *Hamdan*, 126 S.Ct. at 2776.[10]

i) All of the cases trial counsel cites were conducted by an occupying power in occupied territory, identical to the commissions "established, with jurisdiction to apply the German Criminal Code, in occupied Germany following the end of World War II." *Hamdan*, 126 S.Ct. at 2776. These commissions were always be hybrid courts, applying an *ad hoc* mixture of local law and military law as it suited "the exigencies that necessitate[d] their use." *Hamdan*, 126 S.Ct. at n. 26.[11] Most importantly, their personal jurisdiction did not turn on the

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[9] It also may be added that the British did not have the strongest reputation for upholding the rule of law in their treatment of post-war Germany. *See* Harry M. Rhea, Setting the Record Straight: Criminal Justice at Nuremberg, 2007 J. Inst. Just. Int'l Stud. 250, 254 (2007) ("Great Britain put up the biggest fight against an international tribunal and advocated summary executions. … The British spokesman, Lord John Simon, insisted that an international tribunal was impractical since the crimes of the Nazis were a political question and not a legal one[], and that if trials were to be held in determining guilt, there would be no need to prosecute higher-ranking officials such as Hitler, Himmler, Göring, Goebbels, and Ribbentrop, since their guilt had already been established[].") (citations omitted).

[10] The Supreme Court in *Hamdan* identified three types of military commissions: 1) martial law commissions, established in domestic territory pursuant to a declaration of martial law; 2) occupation commissions, established in occupied territories to govern until the civilian courts can be reestablished; and 3) law of war commissions, whose sole competence is to try violations of the laws of war committed by members of one's own or enemy forces. The Supreme Court identified the military commission system at issue in *Hamdan*, as here, as of the third category.

[11] *See* Organization and Procedures of Civil Affairs Division: Military Government of Germany; United States Zone (1947). 12 Fed. Reg. 2191 § 3.6(b):

> (1) Military Government courts shall have jurisdiction over all persons in the occupied territory except persons other than civilians who are subject to military, naval or' air force law and are serving under the command of the Supreme Commander. Allied Expeditionary Force, or any other Commander of any forces of the United Nations,
>
> (2) Military Government Courts shall have jurisdiction over:

status of the defendant but extended "over all persons in the occupied territory." *Madsen v. Kinsella*, 343 U.S. 341, 363 (1952).

ii) The Court in *Hamdan* emphasized that law-of-war commissions, by contrast, such as the commission that tried the Nazi saboteurs in *Quirin*, the international criminal tribunals from Nuremburg through Sierra Leone, and the military commissions Congress created here, were "utterly different" from occupation commissions. *Hamdan*, 126 S.Ct. at 2777.

iii) Trial counsel can point to only two instances where even occupation commissions tried anyone for crimes committed while under the age of 18, and in only one of those, is it clear that the juvenile was tried for violating a law of war (indeed, an unambiguous law of war).[12] They have pointed to no American occupation commission doing the same, and even if they could, those cases would also be irrelevant because the military judge here is not presiding over an occupation commission, but a law-of-war commission.

iv) "[A] military commission not established pursuant to martial law or an occupation *may try only '[i]ndividuals of the enemy's army* who have been guilty of illegitimate warfare or other offences in violation of the laws of war' and members of one's own army 'who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war.'" *Hamdan*, 126 S.Ct. at 2777 (emphasis added).

v) The only precedents that are therefore relevant to the military judge's decision are those that answer the question of when the law recognizes someone to be a member of the army. Without that membership, there is no personal jurisdiction.

f. Congress' Language Demonstrates These Commissions Were Intended For Adult Offenders

(1) Unable to show any basis in the legislative text or military jurisprudence for its conclusion that Congress intended these law-of-war commissions to try children, trial counsel resorts to linguistics.

(i) All offences against the laws and usages of war;

(ii) All offences under any Proclamation, law, ordinance, notice or order issued by or under the authority. of the Military Government or of the Allied Forces;

(iii) All offences under the laws of the occupied territory *or* of any part thereof.

[12] It may be added that the defendant in *Oenning*, though under the age of 18, would not be considered a "child soldier." As a "former-Hitler Youth," he had the legal capacity under international law to join the regular armed forces of the German state until the 1990s. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 77. The ILO Convention and the Optional Protocol, however, in force when Congress passed the MCA, have unambiguously increased the age to 18 for non-state actors and 16 for state parties.

(a) First, trial counsel argues that Congress' failure to use the phrase "adult person" means that it intended these commissions to try children of all ages. (Govt. Resp. at 6, para. 6(A)(i)(b)).

i) This rather redundant phrase only appears in the U.S. Code five times. Two of those times are legal requirements that juveniles not be detained in common with "adult persons" by the federal government, 18 U.S.C. § 5035**,** or a State institution that receives federal funds, 42 U.S.C. § 5633. Two others deal with welfare benefits granted to the elderly and "disabled adult persons." 42 U.S.C. §§ 8002, 8009. The last deals with federal grants for domestic violence prevention. 42 U.S.C. § 3796hh-4.

ii) By contrast, throughout the law, especially in the criminal law, "person" is construed to not include juveniles when it conflicts with the standing legal regime in place for them. *See*, *e.g.*, *Dorszynski v. United States*, 418 U.S. 424, n. 9 (1974) (a law applying to "persons" below the age of 22 did not apply to juveniles under the age of 18, who were covered by the JDA).[13]

iii) If anything, second-guessing Congress' word choices cuts against trial counsel, since Congress did not use the phrase "any person." "Any person" appears in the U.S. Code over seven thousand times and has a jurisprudential pedigree that very well could justify the indiscriminant application of the MCA's jurisdictional provisions, "regardless of age." *See U.S. v. Gonzales*, 520 U.S. 1 (1997) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). But that is not what the statute says.

(b) Second, trial counsel makes the surprising assertion that "such a minimum-age requirement [as the UCMJ has been construed to have] would only serve to limit the universe of 'members' who qualify as 'lawful enemy combatants' – it would do nothing to limit the meaning of 'persons' who qualify as 'unlawful enemy combatants.'" (Govt. Resp. at 6, para. 6(A)(i)(d)(3)).

i) The suggestion seems to be that "members" are somehow distinct from "persons," even though the MCA itself defines a "lawful enemy combatant" as a "*person* who is a member…." MCA § 948a(2).

ii) But the distinction that trial counsel is attempting to make is inexplicable in light of trial counsel's own Recommendation for Referral of Charges in the case of *United States v. Omar Ahmed Khadr*, 5 February 2007. On the first page of trial counsel's recommendation, they state that the jurisdictional basis for trying Mr. Khadr is that he "is an unlawful enemy combatant as a *member* of, or affiliated with, al Qaeda." (*Id*. at 1, para. a).

[13] *United States v. Palmer*, 3 Wheat. 610, 631 (1818) (Marshall, C.J.) ("The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them."); *Lau Ow Bew v. United States*, 144 U.S. 47, 61 (1892) ("The general terms used should be limited to those persons to whom Congress manifestly intended to apply them.").

iii) Indeed, the charges referred repeatedly refer to Mr. Khadr's alleged membership as the basis for his culpability. The conspiracy charge specifically accuses Mr. Khadr of conspiring and agreeing with "Usama bin Laden … and various other *members* and associates of the al Qaeda organization, known and unknown, and willfully join[ing] an enterprise of persons, to wit: al Qaeda." (Charge Sheet at 1). The charges accuse Mr. Khadr being the "personnel" of "al Qaeda, an international terrorist organization." (*Id*. at 3).

iv) Trial counsel cannot even maintain this false distinction in their Response, which refers to "*members* of the al Qaeda terrorist organization," (Govt. Resp. at 2, para. 5(b)), the CSRT having "found that the accused was a *member* of, or affiliated with, al Qaeda," (Govt. Resp. at 4, para. 5(s)), and Congress having no "qualms about prosecutions against *members* of al Qaeda – regardless of their age." (Govt. Resp. at 6, para. 6(A)(ii)).

v) So there is not even consistency, let alone substance, to trial counsel's argument that "Unlike the UCMJ, the MCA does not require unlawful enemy combatants to establish a 'contractual relationship' to become 'members' of any particular organization." (Govt. Resp. at 6, para. 6(A)(i)(3)).[14]

vi) What trial counsel is really attempting to argue is that no military status is required for personal jurisdiction. But that squarely contradicts the Supreme Court's holding that the personal jurisdiction of law-of-war commissions extends "to try only '[i]ndividuals of the enemy's army,'" *Hamdan*, 126 S.Ct. at 2777 (citing Winthrop at 838). It also squarely contradicts the Convening Authority's jurisdictional basis for referring the charges against Mr. Khadr. *See* Gen. Thomas L. Hemmingway, Legal Advisor's Pretrial Advice, 13 April 2007, at 2 ("Khadr is an enemy combatant and a *member* of or affiliated with al Qaeda. The M.C.A. defines such persons as unlawful enemy combatants.") (Attachment A).[15]

[14] Furthermore, there does not need to be a "contractual relationship" to be a "member" of any armed force, even under the UCMJ. *See*, *e.g.*, UCMJ, art. 2(10). Civilians affiliated with an armed force or who otherwise participated in the armed conflict in a capacity that is instrumental to military objectives have historically been treated as members of the armed forces and tried by law-of-war commissions. A "member" does, however, need to have the capacity to join.

[15] While the Legal Advisor's Pretrial Advice was correct in identifying membership in a military organization as a necessary condition for the exercise of jurisdiction by a military tribunal, it was grossly deficient otherwise. The Legal Advisor recommended dismissal of charges sworn on 2 February 2007, which contain numerous background allegations, including Mr. Khadr's date of birth (thus clearly showing him to be a minor at the time of the alleged offenses) and allegations relating to his father's activities and alleged efforts to indoctrinate his son. (*See* 2 Feb 07 Charge Sheet). Indeed, the charge sheet reads more like an indictment of Mr. Khadr's *father* than Mr. Khadr. The Legal Advisor recommended referral of new charges, which omit all of this information, stating that the new charges "are identical in substance and differ only in form." (*See* Attachment A). With this inaccurate statement, the Legal Advisor effectively sidestepped the critical legal issue of whether the MCA could be lawfully applied to a juvenile and relieved himself of the need to advise the Convening Authority regarding significant extenuating factors that would inhere in the prosecution of any juvenile offender and that were otherwise evident from the 2 February 2007 Charge Sheet in this case. *See* Discussion accompanying R.M.C. 406.

vii) Moreover, if trial counsel actually believed its own argument, it would not have made such frequent references to Mr. Khadr's membership in this particular non-state armed force, and his "join[ing] a group of al Qaeda operatives." (Govt. Resp. at 2, para. 5(d)). Indeed, the asserted basis for jurisdiction would be facially invalid, since it is his alleged "membership" after having "joined" the ranks of al Qaeda that makes him an unlawful enemy combatant in the first place.

viii) For the purposes of personal jurisdiction before law-of-war commissions, membership, and the capacity to obtain membership, is everything. This is as true under the MCA as it is under the law that the MCA was "based upon." Congress has repeatedly determined that individuals under the age of 18 simply do not have the capacity to become members of non-state armed forces. Without that capacity, there is no personal jurisdiction.

g. The JDA Applies And Is Controlling

(1) Trial counsel attempts two arguments to rebut the obvious fact that the JDA, by its unambiguous terms, applies to this case and that Congress in no way amended or repealed the JDA when it passed the MCA. Both are without merit.

(a) Primarily, trial counsel seeks to expand the CAAF's holding in *United States v. Baker*, 34 C.M.R. 91 (1963), to support the proposition that the JDA "does not apply to the jurisdiction of military tribunals – even though the JDA does not contain a specific carve-out for court-martial jurisdiction, just as it does not specifically carve out military commission jurisdiction." (Govt. Resp. at 19, para. 6(D)(i)(a)).

i) As an initial matter, their argument depends on the military judge rejecting their reminders elsewhere that the "judicial construction and application of [the UCMJ] are not binding on military commissions." (*See* Govt. Resp. at 5, paras. 6(A)(i)(d), 6(A)(i)(d)(1)). *Baker* was quite explicitly a judicial construction and application of the UCMJ, nearly twenty years after Congress first enacted the JDA. Insofar as trial counsel identifies the CAAF's determination that someone must have the capacity to be a solider to be tried as one as "among the features of the UCMJ that Congress singled out as inapplicable to military tribunals under the MCA," *id.*, there is ample reason, if not more, for the military judge to conclude that the MCA did not "carve-out" an exception to the JDA.

ii) More importantly, *Baker* simply does not say what trial counsel says it does. *Baker* held that Congress had superseded all other federal law when it enacted the UCMJ, including the JDA, because the UCMJ was intended to be a comprehensive framework to regulate members of the military establishment. "All persons on active duty in the armed forces are subject to the Uniform Code. Article 2(1), 10 USC § 802. And, *all subject to the Uniform Code* can be tried by court-martial for a violation of its punitive Articles." *Baker*, 34 C.M.R at 92.

iii) The CAAF's analysis in *Baker* was identical to *Blanton* and *Brown* and is the same common sense reasoning that compels the military judge to dismiss the charges here:

> Service in the armed forces is not just a job with the Federal Government; it represents a change of status from civilian to serviceman. *United States v. Klunk*, 3 USCMA 92, 11 CMR 92; *United States v. Williams*, 302 US 46 (1937). One of the most important consequences of the change is in the area of criminal liability. Civilians are subject only to the general penal code, whereas service personnel are subject also to the Uniform Code of Military Justice.

iv) This logic is encoded into UCMJ Article 2, which identifies the source of military jurisdiction as the "voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces." It is that capacity that conditions "a change of status from civilian to member of the armed forces."

v) Indeed it was fifteen-year-olds' lack of capacity, "their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives," that made their crimes, even heinous crimes perpetrated in civilian life, undeserving of the death penalty. *Thompson v. Oklahoma*, 487 U.S. 815, n. 23 (1988). If that capacity is lacking to fight for the U.S. on the battlefield, to form a binding contract or to consent to getting a tattoo, then that capacity is lacking to carve oneself out from the coverage of the JDA.

(b) Secondarily, trial counsel attempts to avoid the applicability of the JDA with an erroneous claim that the JDA requires the juvenile to be "tried in a State that has jurisdiction over him, see id. Sec 5032 ¶ 1(1)-(2), or 'the appropriate district court of the united states' that embraces the State." (Govt. Resp. at 20, para. 6(D)(i)(b)(1)). Trial counsel go on to quote the word "embracing," which is not found anywhere in the JDA, for the proposition that it does not apply because "there is no federal district court 'embracing' the place of his detention." *Id*.

i) Trial counsel's description of the JDA is patently misleading. There is no requirement that a State "embrace" a district court. The very purpose of the JDA is to deal with juveniles who commit crimes in places, such as Indian reservations, military bases and foreign territory, where "the juvenile court or other appropriate court of a State does not have jurisdiction." 18 U.S.C. § 5032 ¶ 1(1).

(A) Indeed, the lack of any State jurisdiction is one of three possible findings the Attorney General must make in order for the federal government to proceed criminally against a juvenile. The second, very instructive here, is that "the State does not have available programs and services adequate for the needs of juveniles." The third is that "there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction."

(B) Only after making one of these findings, may a prosecution proceed and, without reference to any State or anything a State could "embrace," it requires that "*any proceedings* against him shall be in *an appropriate* district court of the United States." 18 U.S.C. § 5032 (emphasis added).

(C) This is why the Operational Law Handbook instructed JAGs in the field that juveniles abroad are subject to the JDA. *See* International and Operational Law Department,

The Judge Advocate General's Legal Center and School, *Operational Law Handbook*, JA 422, 139 (2006). This is why, even after Congress expanded UCMJ jurisdiction over civilians in the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, H.R. 4200 (2004), the DoD's implementing regulations still treat the JDA as controlling over juveniles abroad who are criminally detained.[16]

ii) But even if Congress had limited the JDA's application to "States" so defined as any "possession of the United States," (Govt. Resp. at 19, para. 6(D)(i)(b)), there is perhaps no better example of a "possession of the United States" than Guantanamo Bay.

(A) As the military judge is well aware, GTMO is land leased by the United States from the Cuban government. "Possession" as defined in part by Black's Law Dictionary is "the right under which one may exercise *control* over something to the exclusion of all others."

(B) The lease between Cuba and the United States is a grant of possession stronger than most, insofar as it grants the United States "*complete* jurisdiction and *control* over and within said areas." Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval stations; February 23, 1903, art 3.

h. Conclusion

(1) In short, Congress did not amend the JDA when it passed the MCA and nothing prevents its application here. Trial counsel is proceeding against Mr. Khadr in the face of a controlling federal statute and an overwhelming body of military, federal and international law that draws the line of consent at 18 years old if someone wants to join a non-state armed force. Congress intended to establish law-of-war commissions, which by law and custom only have jurisdiction over individuals who, at a minimum, had the capacity to give their consent to being on the battlefield. No cutting and pasting of the statutory language or slights of hand with

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[16] The Combatant Commander must:

5.5.5. Determine the suitability of the locations and conditions for the temporary detention of juveniles who commit violations of the Act within the Commander of the Combatant Command's area of responsibility. The conditions of such detention must, at a minimum, meet the following requirements:

> 5.5.5.1. Juveniles alleged to be delinquent shall not be detained or confined in any institution or facility in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges;
>
> 5.5.5.2. Insofar as possible, alleged juvenile delinquents shall be kept separate from adjudicated delinquents; and
>
> 5.5.5.3. Every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, and medical care, including necessary psychiatric, psychological, or other care and treatment. (See 18 U.S.C. the JDA (reference (h)).)

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punctuation can hide the fact that if the federal government wants to prosecute Mr. Khadr, it must either persuade Congress to amend the MCA or proceed against him lawfully in a federal court.

3. **Attachments:**

A. Legal Advisor's Pretrial Advice

B. CITF Report of Investigative Activity, dated 17 March 2004

By:

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Detailed Assistant Defense Counsel

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** for Appropriate Relief (Strike Murder in Violation of the Law of War from Charge III) 18 January 2008

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

2. **Relief Requested:** Mr. Khadr moves to strike "murder in violation of the law of war" as an object of the conspiracy alleged in Charge III.

3. **Overview:**

a. Murder in violation of the law of war must be struck as an object of the conspiracy alleged in Charge III. The Military Commission has no jurisdiction to try Mr. Khadr for conspiracy to commit murder in violation of the law of war alleged in Charge III because the government does not allege a conspiracy to commit a killing that that violates the law of war; the specification fails to state an offense with respect to this alleged object of the conspiracy. The MCA requires the object of the conspiracy to be an offense subject to trial by military commission. At the time of Mr. Khadr's alleged conduct, military commissions could only be used to try violations established by statute or by the law of war. At the time the alleged offense occurred in this case, neither U.S. law nor the international law of war proscribed murder as such as an offense triable by military commission. The Uniform Code of Military Justice (U.C.M.J.) set forth the applicable U.S. law at the time and, under the U.C.M.J., the only offenses triable by military commission were aiding the enemy and spying—not murder. Likewise, treaties and international practice confirm that murder, on the theory the government alleges, does not violate the law of war. Thus, conspiracy to commit murder in violation of the law of war alleged in Charge III cannot be tried by military commission.

b. The enactment of the 2006 Military Commissions Act ("MCA") does not alter this conclusion because both U.S. and international law provide that individuals must be tried under the law as it existed at the time of their alleged offense. The relevant provision of the MCA prohibits intentional killing "in violation of the law of war." 10 U.S.C. §950v(15). The law of war prohibits certain modes of warfare and attacks on certain protected persons, but the allegations against Mr. Khadr do not include any of this prohibited conduct. Put simply, because killing a soldier in combat is not a violation of the law of war, it is also not an offense made triable by military commission under the MCA. It is irrelevant that the Manual for Military Commissions ("MMC") states otherwise. *See* MMC, Part IV, para. 6(a)(15)(c). The MCA does not give the Executive Branch the authority to exercise its rulemaking power in a manner that would expand the class of conduct triable by military commission. Indeed, Congress expressly states that the statute is merely "declarative of existing law." Further, even if the Executive Branch did have such authority, the MMC's newly expanded definition of "murder in violation

of the law of war" could not be applied to Mr. Khadr even through a conspiracy charge, because doing so would violate the U.S. and international law prohibitions on *ex post facto* legislation.

c. Accordingly, because Mr. Khadr has not been charged with a violation triable by military commission, this commission lacks jurisdiction to try him for conspiracy to commit murder in violation of the law of war alleged in Charge III. *See* R.M.C. 907(b)(1).

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

5. **Facts:** This motion presents a question of law. However, the following facts, which are a matter of record in these proceedings, are germane to the Commission's disposition of this motion.

a. The President signed the MCA into law on October 17, 2006. P.L. 109-366, 120 Stat. 2600.

b. The government preferred charges against Mr. Khadr under the MCA on 2 February 2007. *See* Sworn Charge Sheet (2 Feb 2007) [hereinafter Sworn Charges] (Attachment A). Charges were re-preferred, with amendments, on 5 April 2007. These amended charges were referred to this Military Commission on 24 April 2007. *See* Charge Sheet (24 Apr 2007) [hereinafter Charge Sheet].

c. The Government alleges that Mr. Khadr conspired to commit murder in violation of the law of war in June and July of 2002. *See* Charge Sheet. The government has alleged that Mr. Khadr committed these offenses at the age of 15. *See* Sworn Charges.

d. Mr. Khadr is not alleged to have committed any acts forming the basis for this prosecution occurring after the date of the MCA's enactment. *See* Charge Sheet.

6. **Argument: "Murder In Violation Of The Law Of War" Must Be Struck As An Object Of The Alleged Conspiracy Because It Is Not An Offense Triable By Military Commission**

a. The Object Of The Conspiracy Must Be An Offense Triable By Military Commission

(1) Assuming for the purpose of this motion that conspiracy is an offense triable by military commission,[1] for the charge to state an offense, the object of the alleged conspiracy must be a "substantive offense[] triable by military commission." MCA § 950v(b)(28). The government has alleged "murder in violation of the law of war" as one of the objects of the alleged conspiracy. (*See* Charge Sheet.) As discussed below, the government has not alleged an agreement to commit a killing that violates the law of war. As a result, the charged object of

[1] The defense raises this motion in the alternative to its motion to dismiss Charge III for lack of subject matter jurisdiction (D-010) filed on 7 December 2007.

"murder in violation of the law of war" is not triable by military commission. Thus, it is not a valid object of the conspiracy. Accordingly, this Commission does not have jurisdiction to try Mr. Khadr for conspiracy to commit murder in violation of the law of war.

b. "Murder In Violation Of The Law Of War" As Alleged By The Government Was Not An Offense Triable By Military Commission At The Time Of The Alleged Conduct

(1) As the Supreme Court made clear in *Ex Parte Quirin*, the first question in a military commission case is "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal." 317 U.S. 1, 29 (1942).[2] At the time of the alleged conduct, military commissions could also try an accused for a statutory violation expressly made triable by military commission. 10 U.S.C. § 821 (1998).

(2) Mr. Khadr has not been charged with violating any statue in effect at the time of his alleged offenses. Nor could he have been so charged: as noted above, the Uniform Code of Military Justice (U.C.M.J.) set forth the applicable U.S. law at the time of Mr. Khadr's alleged offense, and there is no dispute that under the U.C.M.J. only aiding the enemy and spying—and not murder—are triable by military commission. Accordingly, this Commission has authority to try Mr. Khadr for conspiracy to commit murder only if murder is a violation of the law of war. However, as discussed below, it is not. This Commission therefore has no jurisdiction to try Mr. Khadr for conspiring to commit murder in violation of the law of war, and this object of the alleged conspiracy must be struck.

(A) Murder Is Not A Violation Of The Law Of War

(i) Mr. Khadr is charged with conspiring to commit murder in violation of the law of war. 2007 Charge Sheet. The overt acts that relate to this object of the conspiracy allege that Mr. Khadr planted improvised explosive devices where U.S. troops were expected to be traveling, killed two Afghan Militia Force members by engaging in small arms fire and killed Sergeant First Class Christopher Speer by throwing a grenade. *Id*. Two of these overt acts are the basis for Charges I and II alleging murder and attempted murder in violation of the law of war. *Id*. No other basis for the alleged conspiracy to commit murder in violation of the law of war can be gleaned from the charge sheet or discovery.

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[2] *See also Hamdan*, 126 S. Ct. at 2777 ("[A] law-of-war commission has jurisdiction to try only two kinds of offense: 'Violations of the laws and usages of war cognizable by military tribunals only,' and '[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.'") (citing W. Winthrop, Military Law and Precedents 839 (rev. 2d ed. 1920)); *id.* (noting that it "is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge 'properly set[s] forth, not only the details of the act charged, but the circumstances conferring *jurisdiction.*'" (citing Winthrop at 842 (emphasis in original)); *In re Yamashita*, 327 U.S. 1, 13 (1946) ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is a violation of the law of war.").

(ii) For an offense to constitute a violation of the "law of war," it must be recognized as an offense against the law of war by "'universal agreement and practice' both in this country and internationally." *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006) (plurality op.) (quoting *Ex Parte Quirin*, 317 U.S. at 30); *see also, e.g.*, *The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.").

(iii) A review of the relevant sources reveals that killing an enemy in combat, without more, does not meet this high standard and thus does not amount to a violation of the law of war. Accordingly, conspiring to kill an enemy combatant is also not a law of war violation.

(a) <u>The Alleged Agreement to Commit Murder Does Not Violate the Law of War Because it Does Not Involve A Prohibited Mode or Object of Killing</u>

1. The prohibitions on killing embodied in the law of war take two forms: certain means of warfare are banned, and certain objects of attack are forbidden.[3] Neither of these proscriptions applies to Mr. Khadr's alleged conduct: the charge against Mr. Khadr does not allege that he agreed to murder a protected person or agreed to kill using prohibited means.

2. First, the law of war prohibits only certain methods of killing, none of which form the basis for the charge at issue. Attacks with certain weapons, such as blinding lasers or poisonous gas, are not permitted.[4] Soldiers are likewise not allowed to employ "human shields" by using the presence of civilians to deter an enemy from attacking.[5] Similarly, soldiers may not engage in "perfidy," defined as "inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with an intent to betray that confidence."[6] But the alleged agreement to murder does not involve any of these illegal forms of combat. Rather, Mr. Khadr is alleged to have agreed to kill other soldiers with a hand grenade, small arms fire and explosive

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[3] *See* Major Richard Baxter, *So-Called Unprivileged and Belligerency: Spies, Guerrillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 326 (1951); Norman A. Goheer, The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent is not a War Crime, Bepress Legal Series Working Paper 1871, at 12 (Nov. 8, 2006), *available at* http://law.bespress.com/expresso/eps/1871; *see also* 1 International Committee of the Red Cross, Customary International Humanitarian Law 569 (Jean Marie Henckaerts & Louise Doswald-Beck eds., 2005) (listing war crimes compiled from a variety of international legal sources).

[4] *See* Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), International Red Cross Conference, 13 October 1995; Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, Feb. 8. 1928, 94 L.N.T.S. 65.

[5] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 28, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[6] Perfidy is listed as a war crime in military manuals throughout the world, including in the U.S. Army Field Manual. See Goheer, supra . 9, at 14.

devices—common weapons used in warfare. That does not constitute killing using prohibited means.

3. Mr. Khadr has also not been charged with agreeing to kill a protected individual. The law of war condemns attacks against vulnerable individuals, such as wounded soldiers, sick soldiers, civilians, prisoners of war, medical personnel not engaged in fighting, and soldiers who have laid down their arms—all "protected persons" under the fourth Geneva Convention.[7] The killing of these individuals, even in a time of war, is prohibited and constitutes a violation of the law of war.[8]

4. The face of the charge sheet demonstrates, however, that the alleged agreement to commit murder is based only on an alleged agreement to kill enemy soldiers. The law of war plainly does not prohibit killing enemy soldiers, as doing so is, almost by definition, a fundamental element of armed conflict.[9] For this reason, unqualified "murder" is not listed as an offense in the Geneva Conventions or the Hague Conventions—two treaties the Supreme Court has called "the major treaties on the law of war." *Hamdan*, 126 S. Ct. at 2781.[10] In fact, "[n]o treaty (including the statutes governing international courts such as the International Criminal Court, International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda) suggests that targeting a combatant is unlawful. Rather combatants are only protected from attack when they are *hors de combat* because they have surrendered, are sick or wounded and not carrying the fight, are shipwrecked, or have parachuted from a disabled aircraft."[11]

5. In sum, Mr. Khadr has not been charged with agreeing to kill using a prohibited means of killing, or agreeing to kill a protected person. Rather, he is alleged to have agreed to kill enemy soldiers using commonly employed weapons. Such conduct does not violate the law of war.

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[7] Common Article 3, Geneva Conventions of 1949; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), art. 4, 12-14, 6 U.S.T. 3217, 75 U.N.T.S. 31; Geneva Convention IV art. 4.

[8] *Id.*

[9] Peter Rowe, *Murder and the Law of War*, 42 N. Ir. Legal Q. 216 (1991) ("[A] fundamental effect of war is the killing of enemy soldiers.").

[10] *See also* Jack Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 Am. J. Int'l L. 56, 61 (2007) ("[A]bsent some other violation, a war crime based solely on the killing of a combatant who is engaged in hostilities is problematic under the Geneva Convention."). Further, murder is not listed as an offense triable by the International Criminal Court in the Rome Statute, a statute with more than 120 signatory nations that "provides the most comprehensive, definitive, and authoritative list of war crimes." Robert Cryer, I*nternational Criminal Law v. State Sovereignty: Another Round?* 16 Eur. J. Int'l L. 979, 990 (2005).

[11] Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi J. Int'l L. 511, 520 n.44 (citing, *inter alia*, Convention between the United States and other Powers respecting the Laws and Customs of War on Land, art 23(c), 36 Stat 2277 (1907); Geneva Convention I, art. 12.

(b) Mr. Khadr's Status As An "Enemy Combatant" Does Not Alter The Conclusion that His Alleged Conduct Does Not Violate the Law of War

1. The government will likely contend that Mr. Khadr was not participating in the armed conflict in Afghanistan as a traditional soldier, but rather as an "unlawful enemy combatant," and that this unprivileged status alone makes any agreement to kill a violation of the law of war. *See* Manual for Military Commissions (MMC), Part IV, para. 6(a)(15)(c) (explaining that "[f]or the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy."). That argument fails.

2. Merely holding the status of an "unlawful" combatant[12] does *not* mean that by causing a soldier's death the combatant has violated the law of war. The law of war does not recognize "status crimes:" the mere fact that a person is an "unlawful" combatant does not automatically subject him to liability under the law of war if he kills a lawful combatant. Rather, an "unlawful" combatant who kills another person will violate the law of war *only* if he does so using a prohibited means, or if the victim is a protected person. As discussed above, Mr. Khadr is not alleged to have used either a prohibited means of killing, or to have killed a protected person. He therefore did not violate the law of war, and his alleged status as an "unlawful" combatant cannot, by itself, alter this conclusion.

3. The position set forth in the MMC relies on a fundamental misunderstanding of the significance of "lawful" combatant status. The primary significance of that status is to render a person immune from domestic liability for acts that would ordinarily be punishable under domestic law. Thus, "lawful" or privileged combatants are not liable under domestic law for killing other human beings in combat because causing another's death is an inevitable part of war. *See United States. v. Lindh*, 212 F.Supp.2d 541, 554 (E.D. Va 2002). Unprivileged, unlawful combatants do not share in this privilege; when they kill another, they must face the normal consequences of doing so, including possible prosecution for murder under domestic law.[13] These consequences, though, are not a result of violating the law of war. If an unprivileged person kills a combatant, he may—unlike a lawful combatant—be subject to a murder charge under domestic law,[14] but he will not, without more, be subject to liability for

[12] Mr. Kahdr does not admit that he is an unlawful enemy combatant. He reserves the right to challenge this Commission's prima facie jurisdiction in the future. *United States v. Khadr*, No. 07-001 at 21 (C.M.C.R. Sept. 24, 2007).

[13] *See* Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi J. Int'l L. 511, 520 ("civilians who directly participate [in war] may be punished for their actions because they lack the 'combatant privilege' to use force against lawful targets").

[14] The CMCR's decision in this case reflects this well-established distinction in international law. In holding that "[u]nlawful 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," *Khadr*, CMCR 07-001, at 6 (emphasis added), the CMCR made clear that Mr. Khadr's status as a lawful or unlawful combatant was relevant to his ability to claim combatant immunity if tried under *domestic* law. Indeed, immediately following the above passage, the CMCR cites *United States v. Lindh*, 212 F. Supp. 2d 541, 554 (E.D. Va. 2002), a case in which the accused was tried in

committing a war crime. Rather, as discussed, "[a] war crime inherently requires an overt infraction of the law of war, not just committing a domestic crime without combatant immunity."[15]

4. The MCA, by its plain terms, makes clear that it is not a "domestic law" in the relevant sense—*i.e.*, it does not purport to govern the relations between civilians within the sovereign's territory. Rather, it expressly incorporates the "law of war" and proscribes only "murder *in violation of the law of war*." 10 U.S.C. § 950v(15) (emphasis added). It does not purport to reach murders conducted by individuals outside the context of armed conflict, as do our domestic laws.

5. As a result, even if it is ultimately determined that Mr. Khadr is an unprivileged combatant, that determination would mean only that he could be tried for conspiracy to commit murder under U.S. law. It does not mean that he could be tried by military commission for violating the "law of war."

6. In sum, Mr. Khadr is not alleged to have agreed to commit an attack against a protected person or through a prohibited means, and his potential status as an "unprivileged" enemy combatant has no relevance to the international law question of whether he violated the law of war. This Commission therefore has no subject matter jurisdiction to try Mr. Khadr for conspiracy to commit murder in violation of the law of war. Thus, murder in violation of the law of war must be struck as an object of the conspiracy.

c. Mr. Khadr's Alleged Conduct Does Not Violate the MCA, And Even If It Did, He Could Not Be Held Liable For Newly-Minted War Crimes Defined By That Statute

(1) The fact that Mr. Khadr has been charged under the MCA does not alter this analysis. *See* 2007 Charge Sheet (charging Mr. Khadr with a violation of the MCA, 10 U.S.C. §950v(b)(15)). Simply put, the MCA cannot provide a basis for jurisdiction in this case because Mr. Khadr's alleged conduct is not prohibited by the plain text of the act.

(2) Congress did not list "murder" as an offense to be tried by a military commission under the MCA; rather, it prohibited the more specific "murder in violation of the law of war." 10 U.S.C. §950v(15). This modifying clause confirms what is stated explicitly elsewhere in the statute: that in enacting the MCA, Congress intended only to codify "offenses that have

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federal district court for violations of U.S. law, *id.* at 547—not war crimes—and the question at issue was whether Lindh was immune from prosecution by virtue of the combatant immunity privilege. *Id.* at 544.

[15] Norman A. Goheer, The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent is not a War Crime, Bepress Legal Series Working Paper 1871, at 12 (Nov. 8, 2006), *available at* http://law.bespress.com/expresso/eps/1871. *See also Mohammed Ali v. Public Prosecutor*, 1968 All ER 488 (1968) (Malaysia Privy Council holding that a member of the Indonesian army who attacked an enemy while wearing civilian clothes in Singapore could be tried under Malaysian domestic law because he did not comply with the requirements of the Third Geneva Convention and was not operating as a member of the Indonesian forces at the time).

traditionally been triable by military commissions." 10 U.S.C. § 950p(a). Indeed, Congress was careful to point out that the MCA "does not establish new crimes that did not exist before its enactment." *Id.*[16] The MCA thus provides this Commission with jurisdiction over a murder or conspiracy to commit murder charge only when the alleged conduct constitutes a violation of the "law of war."

(3) However, as previously discussed, Mr. Khadr's charged conduct does not violate the law of war. *See supra* at 3-8. Accordingly, it falls outside the scope of the MCA, which only prohibits conduct traditionally proscribed by the "law of war." This commission therefore lacks jurisdiction to try Mr. Khadr for conspiracy to commit murder.

(4) It is true that the rules in the MMC, promulgated by the Secretary of the Defense, state that "for the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy," implying that an "unlawful" combatant violates the law of war any time he kills a combatant. *See* MMC, Part IV, para. 6(a)(15)(c) (cross-referencing para. 6(a)(13)(d)). But, as discussed above, that assertion is simply false: one's status as a privileged or unprivileged combatant is irrelevant to determining whether one violated the law of war. *See* supra at 5-6. The MMC's "interpretation" of the MCA is thus flatly inconsistent with the statute's plain language, which specifically limits murder offenses to those that violate the law of war.

(5) Because of this, the MMC's interpretation of the MCA exceeds the Executive's authority and should be given no effect. Congress gave the Executive Branch the authority to define the elements of the offenses listed in the MCA. 10 U.S.C. § 949a(a). But in exercising this authority, it is settled that the Executive may not define the elements in such a way as to *expand* the scope of a crime. *See Loving v. United States*, 517 U.S. 748, 768 (1996) ("We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, *and the regulations "confin[e] themselves within the field covered by the statute.*") (emphasis added); *see also Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 21 (D.C. 2000) (holding that an agency has no "authority to promulgate [a] rule . . . [when it] exceed[s] the scope of the authority delegated by Congress"). The Executive certainly may not define these elements in such a way as to *violate* a clear congressional command. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Here, Congress plainly stated that

[16] To read § 950p as a declaration that all the offenses listed in the M.C.A. did, in fact, exist prior to adoption of the M.C.A. violates the bedrock separation of powers principle. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") This interpretation should be avoided because it would raise serious constitutional concerns. The Supreme Court has long recognized the "'cardinal principle' of statutory interpretation," *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), that a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936).

it did not intend for the MCA to create new crimes, but only to codify existing violations of the law of war. 10 U.S.C. § 950p(a). The MMC rules passed by the Secretary of the Defense purport to expand the scope of the law of war. The Secretary therefore exceeded his authority under the MCA, and this rule in the MMC should be given no effect.

(6) Moreover, even if the Executive did have the authority to expand the scope of the MCA in direct contravention of Congress's express limitations, and the MMC's interpretation of the MCA somehow rendered the act of killing an enemy soldier without having met the requirements for lawful combatancy triable by military commission, that newly-defined provision could not be applied in this case because the MCA was not enacted until four years *after* Mr. Khadr allegedly committed the offenses with which he is charged. As discussed above, at the time of the charged conduct, Mr. Khadr could not have been tried by military commission for his alleged offense. *See supra* at 2-6. Thus, applying the MCA (as interpreted by the MMC) to his case would violate the U.S. and international law prohibition on *ex post facto* legislation. *See Collins v. Youngblood*, 497 U.S. 37, 43 (1990); U.S. Const. art. I, § 9, cl.3 ("No . . . ex post facto Law shall be passed."); *Kring v. Missouri*, 107 U.S. 221, 227 (1882) (noting that the Convention attached "[s]o much importance" to the ex post facto prohibition "that it is found twice in the Constitution"); *see, e.g.*, Rome Statute for the International Criminal Court, *opened for signature* July 17, 1998, art. 22, 2187 U.N.T.S. 3 (entered into force July 1, 2002) (providing that "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, *a crime within the jurisdiction of the Court*." (emphasis added)); Protocol I, art. 75(4)(c) ("No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.") (recognized as customary international law by the U.S. in W. Hays Parks et al., Unclassified Memorandum for Mr. John H. McNeill, Assistant General Counsel (International), OSD (May 8, 1986) (entitled 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications).

(7) This prohibition on *ex post facto* legislation recognizes the fundamental unfairness in holding individuals accountable for consequences that they could not have foreseen at the time of their alleged offense. Assuming Mr. Khadr could be tried in a U.S. federal court for conspiracy to commit murder, he could not have foreseen in 2002 that the offenses with which he is accused would be triable by military commission in 2006, or foreseen the significantly different consequences that would result from that fact. Trying Mr. Khadr in a military commission for conspiracy to commit "murder in violation of the law of war" as defined by the MMC, rather than in a U.S. court for conspiracy to commit murder (*see* 18 U.S.C. § 1114), violates the *Ex Post Facto* Clause in two respects. First, it retroactively changes the "criminal quality attributable to an act," *Beazell v. Ohio*, 269 U.S. 167, 170 (1925), and, second, it impermissibly alters the "nature or amount of the punishment imposed for its commission." *Id.*

(8) First, Mr. Khadr faces prosecution before an entirely different adjudicative body with entirely different rules than would have been the case had he been tried in federal court. In particular, because he faces trial before a commission rather than a court, Mr. Khadr will be (1) unable to receive the protections of the Juvenile Delinquency Act (the "JDA"), 18 U.S.C. §§

5031 *et seq.*; and (2) subject to adjudication absent procedural protections such as the right to a grand jury indictment, the right to the protections of the Federal Rules of Evidence, and the right to trial before a jury of his peers who, before conviction, would have to agree unanimously that the evidence proved his guilt beyond reasonable doubt.

(9) Second, this retroactive change alters the "nature or amount of the punishment imposed for its commission." *Beazell*, 269 U.S. at 170. It deprives Mr. Khadr of the protections against arbitrary sentencing provided by federal sentencing law, and deprives him of the certain right to appeal his sentence. Under federal law, courts are required to consider a number of different factors, including the "nature and circumstances of the offense and the history and characteristics of the defendant," to ensure that the sentence imposed is "no greater than necessary." 18 U.S.C. § 3553. Under the MCA, by contrast, any person convicted of conspiracy shall be punished by death "if death results to one or more of the victims under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct." 10 U.S.C. § 950v(b)(28). The MCA thus vests nearly unbridled discretion in the military commission to make the determination as to what sentence is appropriate in any given case, and the military commission is under no obligation analogous to that of federal courts to consider possible grounds, unique to Mr. Khadr's case, which might warrant a reduced sentence.

(10) By purporting to change retroactively the "criminal quality attributable to an act" and the "nature or amount of the punishment imposed for its commission," *Beazell v. Ohio*, 269 U.S. 167, 170 (1925), the MCA—if applied as interpreted by the MMC to Mr. Khadr's alleged conduct—would violate the U.S. Constitution's *Ex Post Facto* Clause, and would therefore be without legal effect. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("[W]hen the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description.").

(11) And if courts-martial provide the appropriate benchmark, *see Hamdan*, 126 S. Ct. at 2791 (holding UMCJ requires courts-martial rules be applied to military commissions unless impracticable), applying the MCA to Mr. Khadr still violates the *Ex Post Facto* Clause. The MCA *explicitly* breaks from *court-martial* procedures in key respects, which render its application to Mr. Khadr violative of the *Ex Post Facto* Clause. In Section 948b(d) ("Inapplicability of Certain Provisions"), the MCA identifies three crucial UCMJ protections that do *not* apply, including "any rule of courts-martial relating to speedy trial," 10 U.S.C. § 948b(d)(1)(A), the rules "relating to compulsory self-incrimination," *id.* § 948b(d)(1)(B), and those relating to pretrial investigation, *id.* § 948b(d)(1)(C). The problem is aggravated by language purporting to authorize the Secretary of Defense to prescribe rules tracking *court-martial* principles of law and rules of evidence only insofar "as the Secretary [of Defense] considers practicable or consistent with military or intelligence activities." *Id.* § 949a(a).[17] The very same section of the MCA notes that the Secretary may prescribe that under certain

[17] While the defense takes the position that the Secretary was, in effect, required to prescribe rules of evidence and procedure based on court-martial practice except where deviation was specifically mandated by Congress, (*see* Def. Mot. to Dismiss for Lack of Jurisdiction (Common Article 3), D-021), those deviations are themselves sufficient to render application of the MCA to Mr. Khadr an *Ex Post Facto* violation.

circumstances the "hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission." *Id.* § 949a(b)(2)(E). This includes, notably, the admission in certain circumstances of coerced testimony. *Id.* § 948r. Other rules that have been modified from those applicable to courts-martial, making it easier for the government to obtain a conviction, include the use of secret or classified evidence that the defendant cannot see or rebut in order to establish guilt, *id.* § 949d; a limited opportunity to call witnesses, *id.* § 949j; and expanded grounds for interlocutory appeals of rulings unfavorable to the government, *id.* § 950d. In responding, the Government may list purported rights available to Mr. Khadr under the military commission system, but the relevant question is not what rights the MCA provides – it is what rights it takes away. As discussed above, the retroactive application of the MCA to Mr. Khadr's case deprives him of many rights that are routinely provided in U.S. courts and courts-martial.

(12) Thus, whether the appropriate benchmark is trial in an Article III court or by court-martial, applying the MCA to Mr. Khadr violates the *Ex Post Facto* Clause because it "aggravate[s]" the consequences for the conduct Mr. Khadr is alleged to have committed. *Beazell v. Ohio*, 269 U.S. 167, 170 (1925).

d. Conclusion

(1) Military commissions have long been defined, in large part, by their limited jurisdiction. Neither U.S. nor international law recognized the killing of an enemy soldier by an unlawful combatant as one of the narrow category of crimes triable by military commission at the time the charged conduct is alleged to have occurred. The MCA requires the object of the conspiracy to be an offense subject to trial by military commission. And since the alleged theory of murder is not an offense subject to trial by military commission, conspiracy to commit murder in violation of the law of war was also not an offense subject to trial by military commission at the time of the alleged conduct. Because both U.S. and international law recognize that an individual must be tried according to the law in effect at the time of his alleged offense, the MCA, which was not enacted until more than four years *after* the alleged conduct occurred in this case, cannot serve as a basis for jurisdiction over Mr. Khadr. Accordingly, the military commission does not have jurisdiction to consider a charge of conspiracy to commit murder in violation of the law of war. Therefore, this Commission should strike "murder in violation of the law of war" as an object of the conspiracy alleged in Charge III.

7. **Oral Argument:** The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h). Oral argument will allow for thorough consideration of the issues raised by this motion and assist the Court in understanding and resolving the complex legal issues presented.

8. **Witnesses and Evidence:** Sworn Charge Sheet (2 Feb 2007).

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

10. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military

Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

11. **Attachment:**

A. Sworn Charge Sheet (2 Feb 2007)

By: Rebecca S Snyder
William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

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

_____
(day) (month) (year)

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

SUBJECT: Notification of the Swearing of Charges

1. You are hereby notified that criminal charges were sworn against you on the ____ day of _____, 2007, pursuant to the Military Commissions Act of 2006 (MCA) and the Manual for Military Commissions (MMC). A copy of this notice is being provided to you and to your detailed defense counsel.

2. Specifically, you are charged with the following offenses:

MURDER IN VIOLATION OF THE LAW OF WAR

ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

CONSPIRACY

PROVIDING MATERIAL SUPPORT FOR TERRORISM

SPYING

(Read the charges and specifications to the accused. If necessary, an interpreter may read the charges in a language, other than English, that the accused understands.)

AFFIDAVIT OF NOTIFICATION

I hereby certify that a copy of this document was provided to the named detainee this ____ day of _____, 2007.

_____	_____
Signature	Organization
_____	_____
Typed or Printed Name and Grade	Address of Organization

Attachment A

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED:
Omar Ahmed Khadr

2. ALIASES OF ACCUSED:
Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):
0766

II. CHARGES AND SPECIFICATIONS

4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.

SPECIFICATION:

See Attached Charges and Specifications.

III. SWEARING OF CHARGES

5a. NAME OF ACCUSER (*LAST, FIRST, MI*)	5b. GRADE	5c. ORGANIZATION OF ACCUSER
Tubbs II, Marvin W.	0-4	Office of the Chief Prosecutor, OMC

5d. SIGNATURE OF ACCUSER	5e. DATE (YYYYMMDD)
MC	20070202

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 2nd day of February, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Jeff Groharing
Typed Name of Officer

Office of the Chief Prosecutor, OMC
Organization of Officer

0-4
Grade

Commissioned Officer, U.S. Marine Corps
Official Capacity to Administer Oath
(See R.M.C. 307(b) must be commissioned officer)

Jeffrey D. Groharing
Signature

MC FORM 458 JAN 2007

Attachment A

IV. NOTICE TO THE ACCUSED

6. On February 2, 2007 the accused was notified of the charges against him/her (See R.M.C. 308).

Jeff Groharing, Major, U.S. Marine Corps
Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges

Office of the Chief Prosecutor, OMC
Organization of the Person Who Caused Accused to Be Notified of Charges

Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at _____ hours, on _____, at _____

_____.
Location

For the Convening Authority: _____
Typed Name of Officer

_____
Grade

_____
Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY	8b. PLACE	8c. DATE (YYYYMMDD)

Referred for trial to the (non)capital military commission convened by military commission convening order _____

_____.

_____ subject to the following instructions[1]: _____

_____

By _____ of _____.
Command, Order, or Direction

_____ _____
Typed Name and Grade of Officer *Official Capacity of Officer Signing*

_____
Signature

VII. SERVICE OF CHARGES

9. On _____, _____ I (caused to be) served a copy these charges on the above named accused.

_____ _____
Typed Name of Trial Counsel *Grade of Trial Counsel*

_____
Signature of Trial Counsel

FOOTNOTES

[1]See R.M.C. 601 concerning instructions. If none, so state.

MC FORM 458 JAN 2007

Attachment A

UNITED STATES OF AMERICA	)	**CHARGES**
	)	
	)	**Murder in Violation of the Law of War**
	)	
	)	**Attempted Murder in Violation of the Law of War**
v.	)	
	)	
	)	**Conspiracy**
	)	
OMAR AHMED KHADR	)	**Providing Material Support for Terrorism**
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	**Spying**
a/k/a "Ahmed Muhammed Khali"	)	

INTRODUCTION

1. The accused, Omar Ahmed Khadr (a/k/a Akhbar Farhad, a/k/a Akhbar Farnad, a/k/a Ahmed Muhammed Khali, hereinafter "Khadr"), is a person subject to trial by military commission for violations of the law of war and other offenses triable by military commission, as an alien unlawful enemy combatant. At all times material to the charges:

JURISDICTION

2. Jurisdiction for this Military Commission is based on Title 10 U.S.C. Sec. 948d, the Military Commissions Act of 2006, hereinafter "MCA;" its implementation by the Manual for Military Commissions (MMC), Chapter II, Rules for Military Commissions (RMC) 202 and 203; and the final determination of the Combatant Status Review Tribunal of September 7, 2004, that Khadr is an unlawful enemy combatant as a member of, or affiliated with, al Qaeda.

3. The accused's charged conduct is triable by a military commission.

BACKGROUND

4. Khadr was born on September 19, 1986, in Toronto, Canada. In 1990, Khadr and his family moved from Canada to Peshawar, Pakistan.

5. Khadr's father, Ahmad Sa'id Khadr (a/k/a Ahmad Khadr a/k/a Abu Al-Rahman Al-Kanadi, hereinafter Ahmad Khadr), co-founded and worked for Health and Education Project International-Canada (HEPIC), an organization that, despite stated goals of providing humanitarian relief to Afghani orphans, provided funding to al Qaeda to support terrorist training camps in Afghanistan. Ahmad Khadr was a senior al Qaeda member and close associate of Usama bin Laden and numerous other senior members of al Qaeda.

6. In late 1994, Ahmad Khadr was arrested by Pakistani authorities for providing money to support the bombing of the Egyptian Embassy in Pakistan. While Ahmad Khadr was incarcerated, Omar Khadr returned with his siblings to Canada to stay with their grandparents.

Attachment A

Khadr attended school in Canada for one year while his father was imprisoned in Pakistan before returning to Pakistan in 1995.

7. In 1996, Khadr moved with his family from Pakistan to Jalalabad, Afghanistan.

8. From 1996 to 2001, the Khadr family traveled throughout Afghanistan and Pakistan, including yearly trips to Usama bin Laden's compound in Jalalabad for the Eid celebration at the end of Ramadan. While traveling with his father, Omar Khadr saw or personally met senior al Qaeda leaders, including Usama bin Laden, Doctor Ayman Al-Zawahiri, Muhammad Atef (a/k/a Abu Hafs al Masri), and Saif al Adel. Khadr also visited various al Qaeda training camps and guest houses.

9. After al Qaeda's terrorist attacks against the United States on September 11, 2001, the Khadr family moved repeatedly throughout Afghanistan.

10. In the summer of 2002, Khadr received one-on-one, private al Qaeda basic training, consisting of training in the use of rocket propelled grenades, rifles, pistols, grenades, and explosives.

11. After completing his training, Khadr joined a team of other al Qaeda operatives and converted landmines into remotely-detonated improvised explosive devices, ultimately planting these explosive devices to target U.S. and coalition forces at a point where they were known to travel.

12. U.S. Forces captured Khadr on July 27, 2002, after a firefight resulting in the death of three members of the U.S. led coalition and injuries to several other U.S. service members.

GENERAL ALLEGATIONS

13. Al Qaeda ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

14. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaeda.

15. A purpose or goal of al Qaeda, as stated by Usama bin Laden and other al Qaeda leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of forcing the United States to withdraw its forces from the Arabian Peninsula and to oppose U.S. support of Israel.

16. Al Qaeda operations and activities have historically been planned and executed with the involvement of a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

17. Between 1989 and 2001, al Qaeda established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and

Attachment A

supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

18. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans,*" in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.

19. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

20. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

21. In or about 2001, al Qaeda's media committee created As Sahab ("The Clouds") Media Foundation, which has orchestrated and distributed multi-media propaganda detailing al-Qaeda's training efforts and its reasons for its declared war against the United States.

22. Since 1989 members and associates of al Qaeda, known and unknown, have carried out numerous terrorist attacks, including but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

23. Following al Qaeda's attacks on September 11, 2001, and in furtherance of its goals, members and associates of al Qaeda have violently opposed and attacked the United States or its Coalition forces, United States Government and civilian employees, and citizens of various countries in locations throughout the world, including, but not limited to Afghanistan.

24. On or about October 8, 1999, the United States designated al Qaeda a foreign terrorist organization pursuant to Section 219 of the Immigration and Nationality Act, and on or about August 21, 1998, the United States designated al Qaeda a "specially designated terrorist" (SDT), pursuant to the International Emergency Economic Powers Act.

CHARGE 1: VIOLATION OF PART IV, M.M.C. SECTION 950v(15), MURDER IN VIOLATION OF THE LAW OF WAR

25. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, unlawfully and intentionally murder U.S. Army Sergeant First Class Christopher Speer, in violation of the law of war, by throwing a hand grenade at U.S. forces resulting in the death of Sergeant First Class Speer.

CHARGE II: VIOLATION OF PART IV, M.M.C., SECTION 950t, ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

26. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, between, on, or about June 1, 2002, and July 27, 2002, while in the context of and associated with armed conflict and without enjoying combatant immunity, attempt to commit murder in violation of the law of war, by converting land mines into improvised explosive devices and planting said improvised explosive devices in the ground with the intent to kill U.S. or coalition forces.

CHARGE III: VIOLATION OF PART IV, M.M.C., SECTION 950v(28), CONSPIRACY

27. Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from on or about June 1, 2002 to on or about July 27, 2002, willfully join an enterprise of persons who shared a common criminal purpose, said purpose known to the accused, and conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al adel, Ahmad Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown, to commit the following offenses triable by military commission to include: attacking protected property; attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; hijacking or hazarding a vessel or aircraft; and terrorism.

28. In addition to paragraph 27, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet.

29. Additionally, in furtherance of this enterprise and conspiracy, Khadr and other members of al Qaeda performed overt acts, including, but not limited to the following:

a. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi." This training was arranged by Omar Khadr's father, Ahmad Sa'id Khadr, and consisted of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

b. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

c. In or about July 2002, Khadr attended one month of land mine training.

d. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

Attachment A

e. On or about July 27, 2002, near the village of Ayub Kheil, Afghanistan, U.S. forces surrounded a compound housing suspected al Qaeda members. Khadr and/or other suspected al Qaeda members engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members. Khadr and/or the other suspected al Qaeda members also threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

f. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

CHARGE IV: VIOLATION OF PART IV, M.M.C., SECTION 950v(25), PROVIDING MATERIAL SUPPORT FOR TERRORISM

30. Specification I: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to an international terrorist organization engaged in hostilities against the United States, namely al Qaeda, which the accused knew to be such organization that engaged, or engages, in terrorism, that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

31. In addition to paragraph 30, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

32. Specification II: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, from about June 2002 through on or about July 27, 2002, provide material support or resources to be used in preparation for, or carrying out an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, and that the conduct of the accused took place in the context of and was associated with an armed conflict, namely al Qaeda or its associated forces against the United States or its Coalition partners.

33. In addition to paragraph 32, this specification realleges and incorporates by reference the general allegations contained in paragraphs 13 through 24 of this charge sheet. This specification also realleges and incorporates by reference the allegations contained in paragraphs 29(a) through 29(f) above.

Attachment A

CHARGE V: VIOLATION OF PART IV, M.M.C., SECTION 950v(27), SPYING

34. Specification. In that Omar Ahmed Khadr, a person subject to military commission as an alien unlawful enemy combatant, did in Afghanistan, in or about June 2002, collect certain information by clandestine means or while acting under false pretenses, information that he intended or had reason to believe would be used to injure the United States or provide an advantage to a foreign power; that the accused intended to convey such information to an enemy of the United States, namely al Qaeda or its associated forces; that the conduct of the accused took place in the context of and was associated with an armed conflict; and that the accused committed any or all of the following acts: on at least one occasion, at the direction of a known al Qaeda member or associate, and in preparation for operations targeting U.S. forces, the accused conducted surveillance of U.S. forces and made notations as to the number and types of vehicles, distances between the vehicles, approximate speed of the convoy, time, and direction of the convoys.

Attachment A

UNITED STATES OF AMERICA	D 23
v.	**GOVERNMENT'S RESPONSE**
OMAR AHMED KHADR **a/k/a "Akhbar Farhad"** **a/k/a "Akhbar Farnad"** **a/k/a "Ahmed Muhammed Khali"**	**To the Defense's Motion For Appropriate Relief (Strike Murder in Violation of the Law of War from Charge III)** **25 January 2008**

1. Timeliness: This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's scheduling order of 28 November 2007.

2. Relief Requested: The Government respectfully submits that the Defense's motion to strike "murder in violation of the law of war" as an object of the conspiracy alleged in Charge III ("Def. Mot.") should be denied.

3. Overview: The Defense argues that, under the law of war, terrorists may kill American soldiers with impunity. To state that argument is to demonstrate its absurdity. While it is certainly true that the law of war evolved to handle armed conflicts involving *lawful* combatants (i.e., those who mutually respect the rules, conventions, and customs of warfare), it does not follow that terrorists who flout those rules—as the accused is alleged to have done—may take advantage of them and receive combatant immunity. Moreover, the law of war has long prohibited "treacherous" killing, and nothing could be more treacherous than an individual who lies in wait, dressed as a civilian, before attacking and killing a law-abiding American. Because murder has been a cognizable violation of the law of war for centuries, Khadr's ex post facto claims are baseless. The motion to dismiss should be denied.

4. Burden and Persuasion: The Defense bears the burden of raising the special defense that he is entitled to combatant immunity. *See United States v. Khadr*, CMCR 07-001, at 7 (Sept. 24, 2007). The Prosecution bears the burden of demonstrating the factual basis for jurisdiction by a preponderance of the evidence. *See* Rule for Military Commissions ("RMC") 905(c)(2)(B).

5. Facts:

a. From as early as 1996 through 2001, the accused traveled with his family throughout Afghanistan and Pakistan. During this period, he paid numerous visits to and at times lived at Usama bin Laden's compound in Jalalabad, Afghanistan. While traveling with his father, the accused saw and personally met many senior al Qaeda leaders including, Usama bin Laden, Doctor Ayman al Zawahiri, Muhammad Atef, and

Saif al Adel. The accused also visited various al Qaeda training camps and guest houses. *See* AE 17, attachment 2.

b. On 11 September 2001, members of the al Qaeda terrorist organization executed one of the worst terrorist attacks in history against the United States. Terrorists from that organization hijacked commercial airliners and used them as missiles to attack prominent American targets. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds of millions of dollars in property, and severe damage to the American economy. *See The 9/11 Commission Report,* FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 4-14 (2004).

c. After al Qaeda's terrorist attacks on 11 September 2001, the accused received training from al Qaeda on the use of rocket propelled grenades, rifles, pistols, grenades, and explosives. *See* AE 17, attachment 3.

d. Following this training the accused received an additional month of training on landmines. Soon thereafter, he joined a group of al Qaeda operatives and converted landmines into improvised explosive devices ("IEDs") capable of remote detonation.

e. In or about June 2002, the accused conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

f. In or about July 2002, the accused planted improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

g. On or about 27 July 2002, U.S. forces captured the accused after a firefight at a compound near Khost, Afghanistan. *See* AE 17, attachment 4.

h. Before the firefight had begun, U.S. forces approached the compound and asked the accused and the other occupants to surrender. *See id.*, attachment 5.

i. The accused and three other individuals decided not to surrender and instead "vowed to die fighting." *Id.*

j. After vowing to die fighting, the accused armed himself with an AK-47 assault rifle, put on an ammunition vest, and took a position by a window in the compound. *Id.*

k. Near the end of the firefight, the accused threw a grenade that killed Sergeant First Class Christopher Speer. *See id.*, attachment 6. American forces subsequently shot and wounded the accused. After his capture, American medics administered life-saving medical treatment to the accused.

l. Approximately one month later, U.S. forces discovered a videotape at the compound where the accused was captured. The videotape shows the accused and other al Qaeda operatives constructing and planting improvised explosive devices while wearing civilian attire. *See id.*, attachment 4.

m. During an interview on 5 November 2002, the accused described what he and the other al Qaeda operatives were doing in the video. *Id.*, attachment 1.

n. When asked on 17 September 2002 why he helped the men construct the explosives, the accused responded "to kill U.S. forces." *Id.*, attachment 6.

o. The accused related during the same interview that he had been told the U.S. wanted to go to war against Islam. And for that reason he assisted in building and deploying the explosives, and later he threw a grenade at an American. *Id.*

p. During an interrogation on 4 December 2002, the accused agreed that his use of land mines as roadside bombs against American forces was also of a terrorist nature and that he is a terrorist trained by al Qaeda. *Id.*, attachment 3.

q. The accused further related that he had been told about a $1,500 reward being placed on the head of each American killed, and when asked how he felt about the reward system, he replied: "I wanted to kill a lot of American[s] to get lots of money." *Id.*, attachment 8. During a 16 December 2002 interview, the accused stated that a "jihad" is occurring in Afghanistan, and if non-believers enter a Muslim country, then every Muslim in the world should fight the non-believers. *Id.*, attachment 9.

r. The accused was designated as an enemy combatant as a result of a Combatant Status Review Tribunal ("CSRT") conducted on 7 September 2004. *See* AE 11. The CSRT also found that the accused was a member of, or affiliated with, al Qaeda. *Id.*

s. On 5 April 2007, charges of Murder in violation of the law of war, Attempted Murder in violation of the law of war, Conspiracy, Providing Material Support for Terrorism and Spying were sworn against the accused. After receiving the Legal Adviser's formal "Pretrial Advice" that Khadr is an "unlawful enemy combatant" and thus that the military commission had jurisdiction to try the accused, those charges were referred for trial by military commission on 24 April 2007.

6. Discussion:

A. THE MCA CONCLUSIVELY ESTABLISHES JURISDICTION

i. The Defense asserts that Congress cannot create military commission jurisdiction for murder in violation of the law of war because, in the Defense's view, Congress does not have the power to do so. That assertion is patently incorrect.

ii. The Constitution vests Congress with the exclusive authority "[t]o *define* and *punish* . . . Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10 (emphasis added). Exercising that authority in the Military Commissions Act of 2006 ("MCA"), Congress unequivocally declared murder in violation of the law of war to be a crime triable and punishable by military commissions.

a. The MCA codifies "offenses that have traditionally been triable by military commissions." 10 U.S.C. § 950p(a). One such offense, triable by a military commission, is murder committed in violation of the law of war. *See id.* § 950v(b)(15).

b. Congress's authority to "define and punish . . . "Offense[] against the Law of Nations" was recognized even by the plurality opinion in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). There, four justices would have held that the petitioner in that case could not be tried for conspiracy before a military commission created by military order because conspiracy was not a recognized violation of the law of war. *See id.* at 2785 (plurality op.). In so holding, the plurality emphasized Congress's at-that-time unexercised authority to define conspiracy as a violation of the law of war: "There is no suggestion that Congress has, in exercise of its constitutional authority to 'define and punish . . . Offences against the Law of Nations,' U.S. Const., Art. I, § 8, cl. 10, positively identified 'conspiracy' as a war crime." *Id.* at 2779 (plurality op.) (alteration in original). The plurality further noted that numerous provisions of U.S. law support the proposition that Congress is authorized by the Constitution to define violations of the law of war, including 10 U.S.C. § 904 (authorizing the crime of "aiding the enemy" to be triable by military commission), 10 U.S.C. § 906 (same for spying) and 18 U.S.C. § 2441 (defining various war crimes and grave breaches of Common Article 3 of the Geneva Conventions). *See Hamdan*, 126 S. Ct. at 2779 n.33 (plurality op.); *see also id.* at 2780 (plurality op.) (violations of the law of war may be defined by statute).

c. Moreover, numerous authorities have recognized that the Offenses Clause entitles Congress to substantial deference in defining violations of the law of nations:

> [E]ven assuming that the acts described in [18 U.S.C. §§ 2332 & 2332a] are not *widely* regarded as violations of international law, it does not necessarily follow that these provisions exceed Congress's authority under [Article I, Section 8,] Clause 10. Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to "define" such offenses. Hence, provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power to *define* offenses against the law of nations. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820) (Story, J.) ("Offenses . . . against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. . . . [T]herefore . . . , there is a peculiar fitness in giving the power to define as well as to punish."); Note, Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 Cornell L. Rev. 599, 611 (1987) ("Congress may define and punish offenses in international law, notwithstanding a lack of consensus as to the nature of the crime in the United States or in the world community.").

United States v. Bin Laden, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000) (emphasis in original; first, second and third alterations added) (footnote omitted), *criticized on other grounds by United States v. Gatlin*, 216 F.3d 207, 212 n.6 (2d Cir. 2000); *see also* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L.J. 121, 142 (2007) ("We might assume . . . that Congress, representing the United States' sovereign lawmaking body within the international system, has at least some leeway to aid in the development of the category of international offenses by pushing the envelope beyond where it already is."); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 335 (2001) ("While it might be unclear in some cases whether particular conduct violates international law, courts are likely to afford Congress substantial flexibility in making this determination, given that Congress is expressly given the power to 'define.'"). In fact, the accused does not cite even a single case in which Congress's codification of a law-of-war violation has been reversed, nor are we aware of any. *Cf. United States v. Furlong*, 18 U.S. (5 Wheat) 184, 198 (1820) (discussing in dicta Congress's authority under the Offenses Clause, but limiting its holding to Congress's legislative intent with respect to the statute at issue).

d. Here, Congress has exercised its constitutional authority to define and codify offenses against the law of war, including with respect to murder. *See Hamdan*, 126 S. Ct. at 2774-75; *id.* at 2780 (plurality op.). Accordingly, because murder is a violation of the law of war, it has been properly charged as an object of the conspiracy in Charge III. The Defense's motion therefore should be denied.

B. MURDER IN VIOLATION OF THE LAW OF WAR IS A WAR CRIME, TRIABLE BY MILITARY COMMISSION

i. The MCA reflects Congress's exercise of its authority to "define and punish" murder and its attempt as "Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10. Congress's judgment is firmly rooted in U.S. law and international law and custom, both of which recognize that a combatant commits murder when he kills another person in a manner that is not sanctioned by the laws of war.

ii. As an initial matter, the Defense is wrong about the appropriate standard for defining violations of the law of war.

a. In the Defense's view, "[f]or an offense to constitute a violation of the law of war, it must be recognized as an offense against the law of war by 'universal agreement and practice both in this country and internationally.'" Def. Mot. at 4 (quoting the Court's plurality opinion in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006)).

b. But the Defense can point to *no case*—and certainly nothing in the *non-binding* plurality opinion in *Hamdan*[1]—that suggests "universal agreement and practice"

[1] Any portion of an opinion that commands only a four-Justice plurality is not a binding precedent. *See, e.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987) ("[W]e are not bound by [a plurality opinion's] reasoning."); *see also Horton v. California*, 496 U.S. 128, 136 (1990) (reaffirming

is the minimally acceptable standard for defining violations of the law of war. The Court has held that the line between unlawful combatants (like Khadr) and lawful ones is rooted in "universal agreement and practice," *see Ex Parte Quirin*, 317 U.S. 1, 30 (1942), but it has never suggested that *Quirin*'s dictum established a floor. To the contrary, as the Defense itself appears to concede, the standard is one of ***general acceptance***. *See* Def. Mot. at 4 (noting the force of the law of war derives from the fact that "'it has been generally accepted as a rule of conduct'") (quoting *The Paquete Habana*, 175 U.S. 677, 711 (1900)). Even the non-binding plurality opinion in *Hamdan* required nothing more than "a substantial showing" that the law of war has "acknowledged" a given offense. *See* 126 S. Ct. at 2780 (plurality). The Defense's suggestions (and selective quotations) to the contrary are belied by the very cases it cites.[2]

Murder in Violation of the Law of War

iii. The Defense concedes, *see* Def. Mot. at 4-5, that killing through "prohibited means" constitutes a violation of the law of war. One of those "prohibited means"—which is as old as the law of war itself—is murder committed by a combatant who fails to fight as a lawful belligerent.[3] As Justice Iredell noted in 1795, "hostility committed without public authority" is "not merely an offence against the nation of the individual committing the injury, *but also against the law of nations . . . .*" *Talbot v. Janson*, 3 U.S. 133 (1795) (Iredell, J., concurring) (emphasis added).

a. Individuals "who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment." U.S. Army Field Manual No. 27-10, Article 80, 18 July 1956 (citation omitted). *See also id.*, Articles 81, 82. Historically, summary execution of those caught committing acts of unlawful

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that a plurality view that does not command a majority is not binding precedent); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 300 n.7 (D.C. Cir. 2006) (A plurality opinion "is not binding precedent but a 'considered opinion' that 'should be the point of reference for further discussion of the issue.'") (quoting *Texas v. Brown*, 460 U.S. 730, 737 (1983) (opinion of Rehnquist, J.)).

[2] In its reply brief on the motion to dismiss Charge I (*see* pp. 3-6 & nn. 5 & 8), the Defense argues at length that *only* international law is relevant to determining the contours of the law of war. Again, however, that assertion is belied by the very cases that the Defense cites so heavily. As the plurality opinion in *Hamdan* emphasized, the line between unlawful combatants, like Khadr, and lawful ones is, "by 'universal agreement and practice' both ***in this country*** and internationally, recognized as an offense against the law of war." 126 S. Ct. at 2780 (plurality op.) (emphasis added). The notion that domestic law is "irrelevant" (Reply Br. Mot. to Dismiss Charge I at 4) is patently and demonstrably false.

[3] The Defense argues—notably, without citation—that the law of war does not recognize "status crimes." Def. Mot. at 6. The Supreme Court, however, has held that the distinction between "lawful" and "unlawful" combatant status is founded in the "universal agreement of law and practice" under the law of war. *Ex parte Quirin*, 317 U.S. 1, 30 (1942). And unlawful combatants can be forced to stand trial before military commissions for *precisely* those "acts which render their belligerency unlawful." *Id.* Moreover, the Government did not criminally charge Khadr simply on the basis of his "status"; rather, he is charged with *committing murder* while maintaining the status of an unlawful enemy combatant.

belligerency, sometimes termed "unlawful combatants" or "unprivileged belligerents," has not been uncommon. *See, e.g.*, *United States v. List* ("Hostage Case"), 11 Trials of War Criminals 1223 (GPO 1950).

b. Colonel Winthrop—in a treatise that the Supreme Court has called the "the Blackstone of Military Law," *Hamdan*, 126 S. Ct. at 2777 (quoting *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957) (plurality))—noted:

> Irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death.

Winthrop, *Military Law and Precedents*, 783 (1895, 2d ed. 1920). During the Civil War, military commissions were used frequently to try and punish unlawful combatants "who engaged in the killing . . . of peaceable citizens *or soldiers*." *Id.* at 784 (emphasis added). Critically for purposes of this motion, many were sentenced to death "for homicide." *Id.* at 784 n.57. *See also id.* at 839 (emphasizing that murder was one of the crimes "most frequently brought to trial before military commissions" during the Civil War).

c. Similarly, in a 143-year-old opinion, which remains binding on the Executive Branch, the Attorney General emphasized that "[a] bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war." 11 Op. Atty. Gen. 297, 314 (1865).

d. Lieber's Code, General Order No. 100, War Department, April 24, 1863, recognized the distinction between lawful and unlawful combatants as well. Under Article 57, "[s]o soon as a man is armed by a sovereign government, and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses." By contrast, those who "commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army . . . shall be treated summarily as highway robbers or pirates." Article 82.

i. Notwithstanding the bedrock principles enunciated in Lieber's Code, the Defense claims—incredibly—that Khadr's status as an *unlawful* combatant "is irrelevant to determining whether [Khadr] *violated the law* of war." Def. Mot. at 8 (emphasis added). That is akin to arguing that one's status as a licensed driver is irrelevant to determining whether one may lawfully operate a motor vehicle.

ii. As Lieber makes plain, only lawful combatants can lawfully "commit hostilities." Those, such as Khadr, who "divest[] themselves of the character or appearance of soldiers . . . shall be treated summarily as highway robbers or pirates."

e. Given that unlawful belligerents historically could be summarily

punished—and even executed—under the law of war, it follows *a fortiori* that they may be tried by military commissions. Thus, the Supreme Court has held:

> By universal agreement and practice the law of war draws a distinction 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.*

Quirin, 317 U.S. at 30 (emphasis added).

f. Here, Khadr has been charged with committing murder without combatant immunity and in violation of the law of war. Specifically, Khadr unlawfully engaged in combat by fighting outside of responsible command, by fighting without wearing a distinctive emblem, by failing to carry his arms openly, and by flaunting the laws and customs of war by feigning to be a non-combatant. *Compare* Hague Regulations, Annex, Art. 1.

1. Under the law of armed conflict, only a lawful combatant enjoys "combatant immunity" or "belligerent privilege" for the lawful conduct of hostilities during armed conflict. *See, e.g., Padilla v. Bush*, 233 F. Supp. 2d 564, 592 (S.D.N.Y 2002), *rev'd on other grounds*, 542 U.S. 426 (2004). Those considered "lawful combatants" under the law of war cannot be prosecuted for belligerent acts—including the killing of an enemy soldier—if they abide by the law of armed conflict. *See id.* at 592 (*citing United States v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002)).

2. Here, Khadr has failed to challenge the *prima facie* evidence that he is an unlawful combatant. *See* Def. Mot. at 6 n.12.

g. Unlawful or unprivileged combatants—such as Khadr—violate the laws of war when they commit war-like acts, such as murder. The CMCR emphasized that proposition by noting that unlawful combatants may be "treated as criminals under the domestic law of the capturing nation," ***including the Military Commissions Act***, "for any and all unlawful combat actions." *Khadr*, CMCR 07-001, at 6. The CMCR reiterated the permissibility of Khadr's trial before military commission by citing passages from *Lindh* and *Quirin*, both of which emphasize that "'[u]nlawful combatants are . . . subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.'" *Khadr*, CMCR 07-001, at 6 (quoting *Quirin*, 317 U.S. at 30, and citing *Lindh*, 212 F. Supp. 2d at 554, the latter of which block-quoted the same language from *Quirin*).

Treacherous Killing

iv. Even for otherwise lawful combatants (which Khadr is not), one example of murder in violation of the law of war is the "treacherous[]" killing of "individuals

belonging to the hostile nation or army." Annex to Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907, Art. 23, ¶ 3 ("Hague Regulations"). Such killings have long been held to violate the laws of war, including under the Fourth Hague Convention, and they have violated the War Crimes Act since 1997, *see* Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. 105-118, § 583, 111 Stat. 2386, 2436 (26 Nov. 1997), long before Khadr treacherously killed Sergeant First Class Speer.

a. For example, Article 37(1)(c) of Additional Protocol I to the Geneva Conventions prohibits killing through "perfidy," including the murder of an adversary by an individual "feigning . . . civilian, non-combatant status." Although the United States has not ratified Protocol I, it views the perfidy provisions of Article 37 as reflecting customary international law. *See U.S. Army Operational Law Handbook* 15, 25 (J. Rawcliffe & J. Smith eds., 2006).

b. The Army's *Operational Law Handbook* similarly defines unlawful combatants to include "civilians who are participating in the hostilities or who otherwise engage in unauthorized attacks or other combatant acts." *Id.* at 17.

c. The Judge Advocate General's *Law of War Handbook* also emphasizes that attacking a soldier while feigning non-combatant status constitutes a war crime. *See* Int'l & Operational Law Department, *Law of War Handbook*, § 5(A)(2)(f), at 192 (Keith E. Puls et al. eds., 2005) ("Attacking enemy forces while posing as a [non-combatant] civilian puts all civilians at hazard.") (internal quotation marks and citations omitted).

d. Similarly, U.S. Air Force Pamphlet 110-31 prohibits "[p]erfidy or treachery," which includes murder by a combatant who "feign[s] . . . civilian, noncombatant status." U.S. Air Force Pamphlet 110-31, at 5-12.

e. Building on these and other materials, Article 8(2)(b)(xi) of the Rome Statute of the International Criminal Court similarly prohibits "killing or wounding treacherously individuals belonging to the hostile nation or enemy." *See also* Knut Dörmann, *Elements of War Crimes* 240-45 (2002).

f. These sources establish an irrefutable consensus, as a matter of United States and international law, that murder committed by an individual—like Khadr—who takes up arms without satisfying the conditions for lawful combat is a violation of the law of war. He was therefore appropriately charged, especially in light of the well-settled principle that "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Application of Yamashita*, 327 U.S. 1, 17 (1946).

Conclusion

v. The Defense is correct that "[t]he law of war plainly does not prohibit killing enemy soldiers," Mot. to Dismiss I at 4, but that is only true when the killing is done by a

soldier who fights under responsible command, wears a distinctive emblem, carries his arms openly, and obeys the laws and customs of war.[4] *See* Hague Regulations, Annex, Art. 1. To receive the protections afforded by the law of war for killing in combat, a person must conform to the requirements for lawful combatants that the laws of war prescribe.

a. In the Defense's view, by contrast, anyone can kill an American serviceman under any battlefield circumstances, so long as he does not use certain narrowly proscribed methods, which (conveniently enough for Khadr) do not include guerilla tactics.

b. That contention does violence to both the law of war and common sense. The law of war does not condone, much less immunize, killing undertaken in a manner that flouts its requirements for lawful combat—which is why it clearly recognizes the crime of unlawful killing, even where the target is a soldier. The Defense's argument to the contrary relies upon egregious misunderstandings and misinterpretations, under which the law of war somehow protects killing by terrorists, who openly flaunt the conventions, norms, customs, and rules that govern the conduct of warfare.

c. Because Khadr was an unlawful combatant under any conceivable interpretation of the law of war, his alleged killing is not even arguably immunized as lawful combat by those same laws. Hence, the charge of murder as alleged against Khadr is a cognizable war crime, which is properly heard before this Court.

C. THE DEFENSE'S EX POST FACTO ARGUMENTS ARE BASELESS

i. The Defense claims that the United States Constitution's Ex Post Facto Clause somehow precludes Khadr's trial before a military commission. That argument must be rejected.

a. The Supreme Court has made clear that an alien enemy combatant held outside the sovereign borders of the United States who has no connection to the United States other than his confinement possesses no rights under the Constitution. For instance, in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a group of German nationals—who were captured in China by U.S. forces during World War II and imprisoned in a U.S. military base in Germany—sought habeas relief in federal court. Although the military base in Germany was controlled by the U.S. Army, *id.* at 766, the Supreme Court held that these prisoners, detained as enemies outside the United States, had no right under the Constitution either to petition for a writ of habeas corpus or to the protection of the Fifth Amendment, *see id.* at 782-85. This is so because the prisoners "at no relevant time were within any territory over which the United States is *sovereign*, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Id.* at 777-78 (emphasis added).

[4] Khadr, of course, has not invoked this—or any other—basis for combatant immunity.

b. The Court further noted that to invest nonresident alien enemy combatants with rights under the Due Process Clause would potentially put them in "a more protected position than our own soldiers," who are liable to trial in courts-martial, rather than in Article III civilian courts. *Id.* at 783. The Court rejected the argument that alien enemy combatants should have more rights than our servicemen and women, and instead held that the Fifth Amendment had no application to alien enemy combatants detained outside the territorial borders of the United States:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.

Id. at 784-85 (citation omitted).

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

d. Furthermore, even when an alien is found within United States sovereign territory, the alien's lack of *voluntary* connection to the Nation denies him protection under the Constitution. As the Supreme Court explained in *Eisentrager*, the alien has been accorded an "ascending scale of rights as he increases his identity with our society," 339 U.S. at 770, and the privilege of litigation has been extended to aliens "only because permitting their presence in the country implied protection," *id.* at 777-78. Thus, an alien seeking constitutional protections must establish not only that he has come within territory over which the United States has sovereignty, but also that he has developed substantial voluntary connections with this country. *See Verdugo-Urquidez*, 494 U.S. at

271-72; *accord Jifry v. FAA*, 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.") (citing cases). In *Verdugo-Urquidez*, the Supreme Court held that a nonresident alien, who had no previous significant voluntary connection with the United States and was involuntarily transported to the United States and held against his will, had no Fourth Amendment rights with respect to the search of his property abroad by U.S. agents. 494 U.S. at 271. The Court reasoned that "this sort of presence [in the United States]—lawful but *involuntary*—is not of the sort to indicate any substantial connection with our country." *Id.* (emphasis added).

e. In light of these principles, the accused cannot reasonably claim any constitutional protections, including with respect to the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3. The accused is an alien who has no voluntary connection to the United States. Furthermore, he is detained at Guantanamo Bay, Cuba, and it is clear that Guantanamo is outside the sovereign territory of the United States. As the Supreme Court noted in *Rasul v. Bush*, 542 U.S. 466 (2004), under the 1903 Lease Agreement executed between the United States and Cuba, "'the United States recognizes the continuance of the *ultimate sovereignty of the Republic of Cuba* over the [leased areas],' while 'the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.'" *Id.* at 471 (emphasis added; other alterations in original) (quoting Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, art. III, T.S. No. 418 (6 Bevans 1113) ("1903 Lease")). Indeed, in framing the question before it for review, the Court in *Rasul* expressly recognized a distinction between "ultimate sovereignty" and "plenary and exclusive jurisdiction" at Guantanamo.[5] 542 U.S. at 475 (internal quotation marks omitted); *see id.* ("The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"). *Cf. United States v. Spelar*, 338 U.S. 217, 221-22 (1949) (lease for military air base in Newfoundland "effected no transfer of sovereignty with respect to the military bases concerned"); *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380-81 (1948) (U.S. naval base in Bermuda, controlled by United States under lease with Great Britain, was outside United States sovereignty).[6]

f. *Rasul*, moreover, did not extend constitutional rights to alien enemy combatants held at Guantanamo Bay, Cuba. Rather, its holding was clearly limited to whether Congress intended a federal statute to cover aliens held at a place such as Guantanamo, and said nothing as to whether the *Framers* could ever have intended the

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[5] Indeed, the 1903 Lease prohibits the United States from establishing certain "commercial" or "industrial" enterprises over Guantanamo, a restriction wholly inconsistent with control congruent with sovereignty. *See* 1903 Lease, art. II.

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

Constitution to apply extraterritorially in such circumstances. *See* 542 U.S. at 475-79, 481, 484 ("Considering that [28 U.S.C.] § 2241 draws no distinction between Americans and aliens held in federal custody, there is little reason to think that *Congress* intended the *statute's* geographical coverage to vary depending on the detainee's citizenship.") (emphasis added); *see also Rasul v. Myers*, No. 06-5209, slip op. at 31 (D.C. Cir. 11 Jan. 2008) ("[I]n *Rasul*, the Supreme Court, significantly, did not reach the issue of whether Guantanamo detainees possess constitutional rights and instead based its holding on 28 U.S.C. § 2241 only.") (citing *Rasul*, 542 U.S. at 478-84).

g. By contrast, with respect to the *Constitution*, the Supreme Court has clearly, and repeatedly, held that alienage *is* a relevant factor in determining whether constitutional rights should be extended extraterritorially to nonresidents. As the Supreme Court noted in *Eisentrager*, "Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection." 339 U.S. at 769; *see also Verdugo-Urquidez*, 494 U.S. at 273 (rejecting the contention "that to treat aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment to the United States Constitution"); *Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."). Moreover, "even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens," *Eisentrager*, 339 U.S. at 769, to say nothing of alien enemies. Indeed, "[a]t common law 'alien enemies have no rights, no privileges, unless by the king's special favour, during the time of war.' [1 Blackstone * 372, 373]." *Id.* at 775 n.6 (second alteration in original) (quoting *Citizens Protective League v. Clark*, 155 F.2d 290, 294 (D.C. Cir. 1946)) (internal quotation marks omitted); *see also Case of the Three Spanish Sailors*, (1779) 96 Eng. Rep. 775, 776 (C.P.) (petitioners were "alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus"); *Moxon v. The Fanny*, 17 F. Cas. 942, 947 (D. Pa. 1793) (courts "will not even grant a habeas corpus in the case of a prisoner of war, because such a decision on this question is in another place, being part of the rights of sovereignty").

h. Accordingly, alien enemy combatants, such as the accused, held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no constitutional rights. *See, e.g.*, *Eisentrager*, 339 U.S. at 784-85. Moreover, even if the U.S. naval base at Guantanamo Bay, Cuba, were deemed for constitutional purposes to be U.S. territory—contrary to the lease agreement itself—nonresident aliens held there would still lack constitutional rights since they do not have the sort of *voluntary* contacts with the United States required to give rise to rights under the U.S. Constitution. *See, e.g.*, *Verdugo-Urquidez*, 494 U.S. at 271 ("[T]his sort of presence—lawful but *involuntary*—is not of the sort to indicate any substantial connection with our country.") (emphasis added); *Jifry*, 370 F.3d at 1182 ("The Supreme

Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections.").

i. In *Boumediene v. Bush*, the D.C. Circuit held that "[a]ny distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held, is immaterial to the application of [constitutional rights]." 476 F.3d 981, 992 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3067 (2007). The *Boumediene* court specifically rejected any contention that *Rasul* somehow compels a different result. *See id.* at 992 n.10 ("The *Rasul* decision, resting as it did on statutory interpretation, *see* 542 U.S. at 475, 483-84, could not possibly have affected the constitutional holding of *Eisentrager*. Even if *Rasul* somehow calls *Eisentrager*'s constitutional holding into question, as the detainees suppose, we would be bound to follow *Eisentrager*."). The D.C. Circuit has direct review over this court, *see* 10 U.S.C. § 950g, and its decisions are binding. *See also Rasul*, No. 06-5209, slip op. at 32 ("*Boumediene* does not conflict with *Rasul* and remains the law of this Circuit."); *cf. Agostini v. Felton*, 521 U.S. 203, 237-38 (1997).

j. As a nonresident alien with no connections to the U.S. other than his mere confinement at Guantanamo Bay, Cuba, the accused therefore has no standing to bring an ex post facto challenge on behalf of either himself or other alien unlawful enemy combatants subject to the MCA who may themselves possess rights under the Constitution (including legal permanent residents of the United States). *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987). This court need proceed no further to reject the accused's claim that his ex post facto rights have been violated.

k. Nor is the accused's argument any stronger when framed as a structural claim—that the Ex Post Facto Clause represents a substantive limit on Congress's power from which he benefits, regardless of whether he himself possesses constitutional rights. Rather, *Eisentrager*'s holding that alien enemy combatants detained outside the United States do not enjoy constitutional protections is not confined to particular clauses of the Constitution, such as the Fifth Amendment. Rather, as the D.C. Circuit recognized in *Boumediene v. Bush*, *Eisentrager* stands for the broader proposition that limitations on Congress set forth in the Constitution do not apply at all *vis-à-vis* nonresident alien enemy combatants detained outside the United States. *See* 476 F.3d at 993.

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

individual rights. *Id.* at 993-94. It held instead that the Ex Post Facto and Suspension Clauses, like other constitutional provisions such as the Fifth Amendment, do not apply to detainees such as the accused, notwithstanding that the former clauses do not expressly reference "individuals" or "rights." *Id.* Accordingly, under the binding precedent of *Eisentrager* and *Boumediene,* the accused cannot claim the protection of the Ex Post Facto Clause.[7]

m. In any event, any consideration of the accused's claims must take account of the fact that Congress passed and the President signed the MCA *precisely because* the Supreme Court invited the politically accountable branches to do so *with respect to this very defendant. See Hamdan*, 126 S. Ct. at 2774-75; *see also id.* at 2799 (Breyer, J., concurring) ("*Nothing* prevents the President from returning to Congress to seek the authority he believes necessary [to try Hamdan before a military commission].") (emphasis added). Were the accused to prevail in his argument that a prosecution for conspiracy is barred by the Ex Post Facto Clause, the Supreme Court's invitation to Congress and the President to authorize a system of military commissions would be transformed into a fool's errand. This Court need proceed no further to reject Khadr's constitutional claims.

ii. Nor does the Defense cite a single binding international obligation against ex post facto legislation.

a. The Defense relies wholly upon the Rome Statute—which the United States has emphatically refused to ratify—and Article 75 of the Additional Protocol. According to the Defense, Article 75 has been "recognized as customary international law by the U.S.," Def. Mot. at 9—notwithstanding the fact that Khadr is not entitled to the protections of the Geneva Conventions (much less the broader protections afforded by the Additional Protocol), *see* 10 U.S.C. § 948b(g), and notwithstanding the fact that the United States has steadfastly refused to ratify the Protocol.[8] For this proposition, the

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[7] In *Downes v. Bidwell*, 182 U.S. 244 (1901), which pre-dates both *Eisentrager* and *Boumediene*, the Supreme Court held that "when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description.*" *Id.* at 277. However, *Downes* concerned only the applicability of "the revenue clauses of the Constitution . . . to our newly acquired territories." *Id.* at 249. *Downes* has no relevance with respect to the constitutional rights enjoyed by alien enemy combatants held outside the territorial sovereignty of the United States in Guantanamo Bay, Cuba. The controlling cases on that point are *Boumediene* and *Eisentrager*, which held that alien enemy combatants detained outside the United States do not enjoy the structural or other protections of the Constitution.

[8] The United States refused to ratify Protocol I because it opposed extending the protections of the Geneva Conventions to terrorists and associated unlawful combatants, who flout the Conventions' strictures. As President Reagan explained:

> We must not, and need not, give recognition and protection to terrorist groups as the price for progress in humanitarian law. . . . The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors.

Defense cites an "unclassified memorandum" by a handful of Department of Defense employees. Needless to say, such unpublished musings—which, even on their face, simply comprise ***personal opinions***—do not amount to binding declarations as to what is customary international law.[9] Khadr's suggestion that such an "unclassified memorandum" constitutes the view of the United States is a drastic overstatement, to say the least.

b. In any event, even if binding, any international-law principles are irrelevant in light of the MCA. Khadr has not cited one case for the proposition that Congress is bound by international law. As the Supremacy Clause makes clear, it is the *Constitution* that is the supreme law of the land, and not an "unclassified memorandum" by an employee of the Department of Defense or the Rome Statute. *See* U.S. Const. art. VI, cl. 2. There is no question that Congress may statutorily depart from international law. *See, e.g., TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) ("Never does customary international law prevail over a contrary federal statute."); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) ("[C]lear congressional action trumps customary international law and previously enacted treaties."); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) ("Statutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law to the extent of the inconsistency."); *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) (explaining that international law is relevant to U.S. courts "where there is no treaty and no controlling executive or legislative act or judicial decision").

iii. Moreover, even on its own terms, Khadr's ex post facto claim is meritless. The Supreme Court has emphasized that the Ex Post Facto Clause is implicated only where (1) Congress "retroactively alter[s] the *definition* of crimes or increase[s] the punishment for criminal acts," *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), or (2) the statute "disadvantage[s] the offender affected by [it]," *id.* at 41. Neither condition is met here.

President Ronald Reagan, Letter of Transmittal to the Senate of Protocol II additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977 (Jan. 29, 1987). Regardless of whether "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,'" *United States v. Khadr*, No. 07-001, at 15 n.24 (C.M.C.R. Sept. 24, 2007), it is perverse to argue that the United States should be bound, as a matter of customary international law, to provide terrorists and associated unlawful combatants the same protections it has steadfastly refused to grant them as a matter of treaty law.

[9] The "unclassified memorandum" expresses only its authors' personal opinions that Article 75's "fundamental guarantees" are part of customary international law; it does *not* purport to put forth the view of the United States. The memorandum provides only that "***[w]e*** view the following provisions as already part of customary international law." Unclassified Memorandum at 1 (emphasis added); *see also id.* (expressing "***our views***") (emphasis added); *id.* at 2 ("***we*** regard the following" as CIL) (emphasis added); *id.* ("The above lists are in the nature of ***an advisory opinion on our part***.") (emphasis added). It is a bedrock legal principle that an individual's views may be probative of customary international law *only* insofar as they provide "trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

a. First, the MCA does not "retroactively alter the definition of" murder in violation of the law of war.

1. As explained above, that offense has been a well-established war crime for centuries. And under the law of war, unlawful combatants like Khadr faced military commissions (at best) and summary execution (at worst) for openly flaunting the rules and customs that govern armed conflict. Thus, the MCA does not "retroactively alter the definition of" or "increase the punishment for" murder in violation of the law of war, within the meaning of the Ex Post Facto Clause.

2. It is well established that changes to judicial tribunals and provisions governing venue or jurisdiction do not implicate the Ex Post Facto Clause, much less violate it. Courts have therefore long held that the Clause does not apply to the abolition of old courts and the creation of new ones, *see, e.g.*, *Duncan v. State*, 152 U.S. 377 (1894), the creation or alteration of appellate jurisdiction, *see, e.g.*, *Mallett v. North Carolina*, 181 U.S. 589 (1901), the transfer of jurisdiction from one court or tribunal to another, *see, e.g.*, *People ex rel. Foote v. Clark*, 119 N.E. 329 (Ill. 1918), or the modification of a trial panel, *see, e.g.*, *Commonwealth v. Phelps*, 96 N.E. 349 (Mass. 1911). Indeed, the Supreme Court has "upheld intervening procedural changes [under the Ex Post Facto Clause] *even if application of the new rule operated to a defendant's disadvantage in the particular case*." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.28 (1994) (emphasis added).[10] The rationale for these decisions is clear: The Ex Post Facto Clause applies only to laws that retroactively alter the definition or consequences of a criminal offense—not to *jurisdictional* provisions that affect where or how criminal liability is adjudicated.

b. Second, Khadr cannot conceivably claim that he has been "disadvantaged" by the MCA's passage.

1. As explained above, banditti, jayhawkers, guerillas and their modern-day equivalents are traditionally liable to be shot immediately upon their capture. Where such individuals have instead been tried, the United States has prosecuted them based upon offenses under the common law of war. Indeed, the MCA represents one of the first attempts of the United States to set out clearly, in its domestic law, the law of war offenses triable by military commissions. The fact that Congress chose expressly to define these law of war offenses does not amount to the creation of "new" offenses for purposes of the Ex Post Facto Clause. To the contrary, Khadr is certainly better off based upon the clarity provide by Congress and the extensive array of procedural protections provided by the MCA, the likes of which no unlawful combatant has ever enjoyed in the history of warfare.

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[10] Thus, the MCA's evidentiary rules—including, for example, the broad admissibility of hearsay—do not violate the Ex Post Facto Clause. The accused, like the Government, can rely upon those rules to introduce evidence, and in that sense, the MCA's rules are closely akin to retroactive procedural changes that the Court has approved in the past. *See, e.g.*, *Carmell v. Texas*, 529 U.S. 513, 546 (2000) (noting that the legislature may retroactively alter rules governing the admissibility of evidence where doing so does not uniformly prejudice the defendant).

2. For example, unlike his historical predecessors, Khadr enjoys the statutory right to an adversarial proceeding, the right to both civilian and military defense counsel, *see* 10 U.S.C. §§ 948k, 949a(b)(1)(C), the right "to present evidence in his defense, 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," *id.* § 949a(b)(1)(A), the right to be present at all sessions of the military commission, *see id.* § 949a(b)(1)(B), the presumption of innocence, *id.* § 949*l*(c), and, if he is convicted, the right to appellate counsel, *id.* § 950h, and the right to review of his sentence by the convening authority, *id.* § 950(b), the Court of Military Commission Review, *id.* §§ 950c(a), 950f, the D.C. Circuit, *id.* § 950g(a), and the Supreme Court of the United States through writ of *certiorari*, *id.* § 950g(d).

3. Further, the MCA makes clear that murder is, and has been, a violation of the law of war, and therefore has traditionally been triable by military commission: "The provisions of this subchapter [which include the offense of murder] codify offenses that have traditionally been triable by military commissions. This chapter does *not* establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission." 10 U.S.C. § 950p(a) (emphasis added). Accordingly, murder is, and was at the time of the accused's offense, a violation of the law of war. It therefore may be tried in a military commission. *See Hamdan*, 126 S. Ct. at 2777 (plurality); *see also* 10 U.S.C. § 950p(b) ("Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, *they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.*") (emphasis added). Because the MCA has codified only existing offenses and regulates past conduct under the same substantive standards that previously applied to it, neither the Act nor its application in this case violates the Ex Post Facto Clause.

4. Instead of summary execution, and far from any unfairness, Khadr enjoys more legal process than any unlawful combatant ever detained or tried in any prior conflict anywhere in the world. Whatever an ex post facto violation may entail, this is certainly not it.

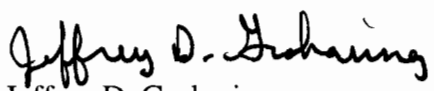
7. Oral Argument: The Government disagrees that the issues presented by these motions are "complex." Def. Mot. at 11. In light of the fact that the MCA directly, and conclusively, addresses the issue presented, the Prosecution believes that the motions should be readily denied. To the extent, however, that the Military Judge orders the parties to present oral argument, the Government will be prepared to do so.

8. Witnesses and Evidence: All of the evidence and testimony necessary to deny these motions is already in the record.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

11. Submitted by:



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