MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. IBRAHIM AL QOSI	**D-018** **Defense Reply to Government Response** to Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder) 14 January 2009

1. **Timeliness:** This Motion is timely filed. *See* R.M.C. 905(b).

2. **Relief Sought:** The Defense respectfully requests that the Court dismiss all charges against Mr. al Qosi because the statute that purports to provide the basis for jurisdiction in this case is unconstitutional.

3. **Law and Argument in Reply:**

1. Congress's Authority is Based in the Constitution and the Bill of Attainder Clause is a Structural Limitation on the Power of Congress to Act.

(1) Despite the Government's assertions, Mr. al Qosi, an individual detained by U.S. Government authorities at Guantanamo Bay for over seven years, has rights under the Constitution of the United States. *Boumediene v. Bush*, 553 U.S. ___, 128 S.Ct. 2229 (2008). This issue has been briefed extensively by the Defense in several previous motions still pending before this Court, and those arguments are reincorporated by reference here.

(2) Ultimately, while the Government argues in its Response that the Constitution is inapplicable to Mr. al Qosi, this argument is not determinative of the issue before this Court. The Constitution is certainly applicable to Congress and Congress is prohibited by the Constitution from passing a bill of attainder. U.S. Const. art. I, § 9, cl. 3. This is a structural limitation on the power of Congress to act. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901). The Government argues that Congress may enact unconstitutional legislation as long as it is only applicable to "alien enemy combatants." Government Response, Section 6(a). This argument fundamentally circumvents Constitutional limitations on Congressional action. Congress's power and authority are based in the Constitution and it can only act in accordance with the Constitution's prohibitions. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *Downes v. Bidwell*, 182 U.S. 244, 276-77 (1901). The Military Commissions Act ("MCA") is a bill of attainder and thus Congress lacked authority to pass the statute. The charges against Mr. al Qosi must therefore be dismissed.

2. Consideration of the Legislative History of the MCA is Essential to a Determination that the MCA is a Bill of Attainder.

(1) The Constitutional prohibition against bills of attainder is intended to prohibit the "punishment without trial of 'specifically designated persons or groups.'" *Serv. Sys. v. Minn. Pub. Interest Rsch. Group*, 468 U.S. 841, 847 (1984) (citing *United States v. Brown*, 381 U.S. 437, 447 (1965)). The draftsmen of the Constitution wanted to prohibit the legislature from making determinations that certain individuals, or groups, were deserving of punishment. Such adjudication by the legislature violates the fundamental principles of separation of powers that define our system of government. It is a determination of guilt by Congress that is prohibited by the Bill of Attainder clause: despite the Government's arguments, the fact that the MCA set up a system of "trials" does not remedy the impermissibility of Congress's action. When Congress made a determination that certain essential procedural rights and protections should be denied to "alien unlawful enemy combatants" – this determination was the adjudication of guilt and imposition of punishment, without judicial trial, that is prohibited by the Constitution.

(2) In establishing a separate system for prosecuting "alien unlawful enemy combatants," Congress reflected its desire to establish a system to prosecute *and convict* members of a specific group of persons because of a Congressional determination that people within that group were a threat to our national security.[1] The legislative history of the MCA is clear: Congress set forth to establish a special system for prosecuting individuals that members of Congress had predetermined were deserving of punishment.[2] The Government attempts to dismiss these arguments by accusing the Defense of "cherry-picking" the words of specific Congressman from the legislative history and from giving a "convenient recitation" of the events surrounding the passage of the MCA. Government Response, 6(b)(16). The Government's attempts to dismiss the importance of the legislative history surrounding the passage of the MCA flies in face of long-standing Supreme Court precedent in which legislative history is highly relevant to determinations regarding whether or not a particular statute was intended to punish a specific group of persons. *Nixon v. Administrator of General Services*, 433 U.S. 425, 480 (1977) (finding that a "recognized test of punishment is strictly a motivational one: whether legislative record evinces a congressional intent to punish.") (citing *United States v. Lovett*, 328 U.S. 303, 308-314 (1946) and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169-170 (1963)); *Trop v.*

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[1] Senator Levin described the bill that was ultimately passed as "the product of negotiations" "with an administration that has been relentless in its determination to legitimize the abuse of detainees *and to distort military commission procedures to ensure criminal convictions*." 152 Cong. Rec. S10244 (statement of Sen. Levin) (emphasis added).

[2] *See e.g.* 152 Cong. Rec. H7936 (statement of Rep. Hunter) ("I say that I can't think of any better way to honor the fifth anniversary of September 11 than by establishing a system to prosecute the terrorists who on that day murdered thousands of civilians and who continue to seek to kill Americans both on and off the battlefield."; 152 Cong. Rec. H7944 (statement of Rep. Sensenbrenner) ("As we consider this legislation, it is important to remember, first and foremost, that this bill is about prosecuting the most dangerous terrorist[s] that America has ever confronted, individuals like Khalid Sheikh Mohammed, the mastermind of the 9/11 attacks, or Ahbd Nashiri, who planned the attack on the USS Cole."); 152 Cong. Rec. S10395 (statement of Sen. Cornyn) ("I hope my colleagues ... will send a clean bill to be reconciled with the House version and sent to the President right away so that before too long we can see that some of the war criminals who sit detained in Guantanamo Bay may be brought to justice, people like Khalid Shaikh Mohammed, who was the mastermind of the 9/11 plot that killed nearly 3,000 Americans.")

Dulles, 356 U.S. 86, 96 (1958) ("the controlling nature of such statutes normally depends on the evident purpose of the legislature."); *Selective Serv. Sys*, 468 U.S. at 849-850, 852-855. The context of the MCA's passage is highly relevant to the determination before this court. *Selective Serv. Sys*, 468 U.S. at 852 (citing *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)).

(3) It is thus crucial for this Court to examine the legislative history of the MCA. That history reflects Congressional desire to prosecute and convict a group of persons that Congress believed had already committed acts of terrorism against the United States. Congressional debate reflects a desire to assure the American people that "terrorists" would be convicted for grave atrocities like the attacks on September 11th. *See, e.g.*, 152 Cong. Rec. H7937 (statements of Rep. Hunter) ("This system...will allow for the expeditious prosecution of people who attacked our country." "Without this action, [the] United States has no effective means to try and punish the perpetrators of September 11th, the attack on the USS Cole and the embassy bombings."). The emotions and concerns that are reflected in Congressional debate reflect a Congressional intent to "punish": it is this desire and intent that is determinative in finding that the MCA is an impermissible bill of attainder.

(4) As discussed in the Defense's Motion to Dismiss, the MCA imposes a number of specific punishments on "alien unlawful enemy combatants" that deprive this group of procedural rights, including the fundamental right to a fair trial. Specific punishments imposed by the MCA include, but are not limited to: depriving targeted individuals all rights under the Geneva Conventions, MCA § 948b(g); suspending rules that bar hearsay evidence, MCA § 949a(b)(2); allowing coerced testimony to be introduced into evidence even if the evidence is obtained as a result of cruel, inhuman, or degrading treatment (if the 'degree of coercion' involved is disputed), MCA § 948r; imposing significant limitations on a individual's ability to call witnesses in his defense, MCA § 949j, RMC 703(c)(2); depriving targeted individuals of the right to bring an action addressing or redressing egregious treatment at the hands of one's jailers, MCA § 7(a).

(5) These are not the only punishments imposed on "alien enemy combatants." Much of the legislative history reflects Congressional debate about the decision deprive "alien unlawful enemy combatants" of the writ to habeas corpus relief. MCA § 7(a). While this provision of the MCA was struck down by *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), the legislative history regarding the habeas-stripping provision is highly relevant to a finding that Congress sought to deprive people *it believed to be terrorists* of the right to challenge their detention. *See, e.g.*, 152 Cong. Rec. S 10271 (statement of Senator Kyl) ("I would like to reiterate the most important reason why I believe that Congress needs to bring an end to the habeas litigation involving war-on-terror detainees. Keeping captured terrorists out of the court system is a prerequisite for conducting effective and productive interrogation."); 152 Cong. Rec. S 10274 (statement of Senator Bond) ("There is no need for further review processes for these enemy combatant detainees. ...These people are not U.S. citizens...they, are by definition, aliens engaged in supporting terrorist hostilities against the U.S...."); 152 Cong. Rec. S 10362-63 (statement of Senator Bond) ("These people flew airplanes into buildings for heaven's sake, or should I say for hell's sake.")

(6) Another essential consideration is the fact that Congress passed the Act knowing that it provided for the ongoing detention of "alien unlawful enemy combatants" who might

never be brought before a military commission, knowing that they had no other legal avenue to challenge their detention. *See, e.g.*, 152 Cong. Rec. H. 7940 (statement of Rep. Nadler) ("the President under this bill has the ability...to point their finder at anybody in this country or abroad, as long as he is not a citizen, and say you are an enemy combatant because I say so; and because I say so, we are going to throw you in jail forever and you have no right to have a military commission.") The Supreme Court has said that a statute that imposes deprivations because of fears of future misconduct may violate the Bill of Attainder clause. *Brown*, 381 U.S. at 458-459. Congress's determination that "alien unlawful enemy combatants" might be detained indefinitely, without trial, reflects a legislative determination, and adjudication, that such individuals were deserving such treatment without further procedural due process.

(7) Notably, the legislative history of the MCA reflects the fact that several members of Congress understood that the majority was imposing punishment in violation of the Constitution of the United States and expressed deep reservations regarding these procedural deprivations. Their concerns are an important part of the relevant legislative history. They reflect the contemporary understanding that the majority of Congress was acting hastily and in violation of fundamental values central to our system of Government. *See e.g.*, 152 Cong. Rec. H. 7939-40 (statement of Rep. Nadler) ("...we have created two systems of justice. First of all, it doesn't have so many rights. You can appeal from the military tribunal, but the military tribunal can hear hearsay evidence and it can hear evidence obtained under coercion, if not torture." "This is un-American. It is against all our traditions, to be able to say that people have no rights.")); 152 Cong. Rec. S. 10356 (statement of Senator Leahy) ("We hundred Members in the Senate, we privileged men and women, are supposed to be the conscience of the Nation. We are about to put the darkest blot possible on this Nation's conscience."); 152 Cong. Rec. S. 10357 (statement of Senator Leahy) ("If we vote today to abolish rights of access to the justice system to any alien detainee who is suspected – not determined , not even charged; these people are not even charged, just suspected – of assisting terrorists....that will remove that checks in our legal system that provide against arbitrarily detaining people for life without charge. It will remove the very mechanism the Constitution provides to stop the Government from overreaching and lawlessness.") 152 Cong. Rec. S. 10357 (statement of Senator Leahy) ("Abolishing habeas corpus for anyone the Government thinks might have assisted enemies of the United States is unnecessary and morally wrong, a betrayal or the most basic values of freedom for which America stands.")

3. <u>The Government's Response Misrepresents Supreme Court Precedent on Bills of Attainder</u>.

(1) The Government's Response mischaracterizes the Defense's argument with regard to *Brown v. United States*, and in doing so, misstates the Supreme Court's findings in *Nixon v. Administrator of General Services*. The Government notes the Defense's citations to *Brown* and states that "[t]he Defense fails...to mention that *Brown* is not the Supreme Court's final word regarding the Bill of Attainder Clause." Government Response, 6(b)(5). The Government then argues that the Supreme Court, in *Nixon* "abandoned *Brown*'s reasoning in

favor of a rather different formula for deciding bill of attainder cases."[3] Government Response, 6(b)(5). This is simply untrue.

(2) As discussed in the Defense's Motion to Dismiss, the Supreme Court in *Brown* recognized that legislatures are particularly likely to enact bills of attainder when a particular group of people is believed to be a threat to national security. *Brown*, 381 U.S. at 453. The Supreme Court found that statutes that impose "preventative" punishment, because of an impermissible legislative adjudication that a particular group of people is believed to pose a future threat, are unconstitutional bills of attainder. *Id.* at 458-459. The Supreme Court in *Nixon* observed that *Brown* "established that punishment is not restricted purely to retribution for past events, but may include inflicting deprivations on some blameworthy or tainted individual in order to prevent his future misconduct." *Nixon,* 433 U.S. at 476, n. 40 (citing *Brown,* 381 U.S. at 458-459). *See also Selective Serv. Sys*, 468 U.S. at 851-852 (reaffirming Brown). In *Nixon*, the Supreme Court also cited *Brown* in its observation that the prohibition against bills of attainder reflects the fear of the Constitutional framers that legislatures might cater to the "momentary passions" of a "free people, in times of heat and violence...." *Nixon*, 433 U.S. at 480, n. 45. Despite the Government's efforts to dismiss the case, *Brown* is still important Supreme Court precedent on the Bill of Attainder clause.

Respectfully submitted,

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[3] The Government's Response further mischaracterizes the Defense's citations to *Brown*, stating that the Defense relies on *Brown* for the proposition that "the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality." Government Response 6(b)(5). Contrary to the Government's assertion, the Defense has not argued that legislation may not impose "undesired consequences" on an individual or class. The Defense, consistent with Supreme Court precedent, has argued that the Bill of Attainder clause is violated when those "undesired consequences" are properly characterized as punishments imposed on that individual or class. Whether "undesired consequences" are "punishments" is dependent upon the "highly particularized context" of each case. *Selective Serv. Sys.*, 468 U.S. at 852 (citing *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)).