RECORD OF TRIAL

(and accompanying papers)

of

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

By

MILITARY COMMISSION

Convened by the Convening Authority under 10 USC §948h

(Name of Convening Authority)

Tried at

US Naval Station Guantanamo Bay, Cuba on 11 April 2008 Motions Session

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

UNITED STATES OF AMERICA	}	**D-035** **Ruling on Defense Notice of Motion to Compel Production of Identities of Interrogators** **13 March 2008**
v	}	
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khahi"	}	

1. The commission has considered the defense notice of motion and the oral argument by both sides on 13 March 2008.

2. The government will provide the defense a list of all personnel who conducted interrogations of Mr. Khadr. The personnel will be identified, at least by a number which can be related to the date on which a specific interrogation was conducted. If the defense wishes to interview any specific interrogator, the government will provide a phone number and a time at which the interrogator can be interviewed.

3. If after interviewing any given interrogator the defense believes further relief is necessary, it may so request.

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

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Notice of Defense Motion To Compel Production of Identities of Interrogators** 4 March 2008

1. **Timeliness:** This notice of motion is filed within the timeframe established by the Military Judge's 21 February 2008 e-mail order.

2. **Notice of motion:** On or about 13 March 2008, the defense shall move this Military Commission for an order directing the government to produce the following documents or materials: the names, duty positions, and contact information of all personnel who interrogated or questioned the accused since the time of his capture in Afghanistan.

3. **Summary of basis for motion:** The government's case against Mr. Khadr is based largely upon statements he allegedly made while in U.S. custody. Evidence available to the defense indicates that Mr. Khadr was mistreated while in U.S. custody (particularly while detained at Bagram Airbase). Khadr Affidavit, 22 Feb 08 (Attachment H to Def. Mot. to Compel Discovery (Sgt C) filed 4 Mar 08). At least one of Mr. Khadr's interrogators appears to have been disciplined for abusing detainees at Bagram. (*See generally* D027, Def. Mot. to Compel Discovery (Sgt [redacted]). Moreover, Mr. Khadr's age and condition at the time of his detention and interrogation bear on the reliability of any statements he allegedly made. (*Id.* at ¶¶ 6(a)(1)(x)-(xi).) In order to adequately investigate the reliability of statements Mr. Khadr is alleged to have made, the defense must have access to individuals who interrogated the accused (particularly those responsible for initial interrogations at Bagram) – not just those the government chooses to make known to the defense. The defense requested this information on 9 November 2007. (Def. Discovery Req. of 9 Nov 07, ¶ 29 (Attachment D to D-025 Def. Mot. to Compel Discovery (Eyewitnesses).)

4. **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 a thorough consideration of the issues.

5. **Witnesses and evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

> Khadr Affidavit of 22 Feb 08 (Attachment H to D027, Def. Mot. to Compel Discovery (Sgt C))

Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))

Government Response of 4 December 07 to Defense Discovery Request of 9 Novmeber 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

D027, Attachments A-P

6. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

7. **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.

By: Rebecca S Snyder

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

[redacted]

From: [redacted]

Subject: Ruling - D-035 - US v. Khadr

Attachments: Ruling - D-035.pdf

Ruling - D-035.pdf
(16 KB)

COL Brownback has directed that I send the attached ruling to counsel and other interested persons.

v/r,

LTC [redacted], USAR, JA
Seni[redacted]dvisor
Military Commissions Trial Judiciary

[redacted]

Please forward the attached ruling to the counsel in the case of United States v. Khadr. Please distribute it to other interested parties.

COL Brownback

[redacted]

From: [redacted]

Subject: Filing Designation: D-035 Defense Notice of Motion to Compel Production (ID of Interrogators) - US v. Khadr

All parties,

The filing designation for the 4 MAR 08 Defense Notice of Motion to Compel Production (Identity of Interrogators) AND any related Motions, Responses, or Replies that may follow is D-035 Notice of Motion to Compel Production (ID of Interrogators) - Khadr. A Notice of Motion does not initiate or trigger the response or reply times contained in the RC.

All future communications - whether in hard copy or by email - concerning this motion will use the filing designation as a reference in addition to the name of the filing. See RC 5.3:

3. Filing designation and future communications or filings.

a. Once a filing designation has been assigned, all future communications - whether in hard copy or by email - concerning that series of filings will use the filing designation as a reference in addition to the name of the filing. This includes adding the initial file designations to the style of all filings, the subject lines of emails, and the file names to ALL email attachments. Examples:

* An email subject line forwarding a response to P2 in US v Jones should read: "P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith." The filename of the filings shall be the same as the response being sent.

* The filename of a document that is an attachment to the response should read: "P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith - attachment - CV of Dr Smith."

v/r,

[redacted]

[redacted]

[redacted]tice of Motion to Compel Production (Identity of Interrogators)

[redacted]

I am sending this attachment on behalf of Ms. Snyder and LCDR Kuebler for US v. Khadr. Please find attached the Defense Notice of Motion to Compel Production (Identity of Interrogators) .

[redacted]as attorney work product and/or attorney-client communication or may be protected by another privilege recognized under the law. Do not distribute, forward, or release without the prior approval of the sender or DoD OGC Office of Military Commissions, Office of Chief Defense Counsel. In addition, this communication may contain individually identifiable information the disclosure of which, to any person or agency not entitled to receive it, is or may be prohibited by the Privacy Act, 5 U.S.C. §552a. Improper disclosure of protected information could result in civil action or criminal prosecution

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** To Compel Discovery (Eyewitnesses) 15 January 2008

1. Timeliness: This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court.

2. Relief Sought: The defense respectfully requests that this Commission order the government to produce the requested discovery, namely the identity and most recent contact information for all eyewitnesses to the events forming the basis for the charges against Mr. Khadr

3. Overview: The Defense seeks production of the names and most recent contact information of all eye witnesses to the events that led to Mr. Khadr's arrest and the instant charges against him. The statute and regulations governing this Commission, as well U.S. constitutional precedent and international law, require production of discovery relating to eyewitnesses. The Government has withheld the identity and contact information for as many as approximately forty-three eyewitnesses. The Defense does not know the identity of the individuals present at the events in question, and the government's refusal to produce the requested information impedes the defense's right to "have a reasonable opportunity to obtain witnesses and other evidence" and to examine evidence "material to the preparation of the defense". *See* 10 U.S.C. § 949j; Rule for Military Commission (R.M.C.) 701(c)(1). The government's denial of this discovery request also violates it's obligations under R.M.C. 701(j) not to "unreasonably impede the access of another party to a witness or evidence." The Defense therefore moves for an order from the commission to compel the Government to disclose the identity of and contact information for all eyewitnesses to the firefight that led to Mr. Khadr's arrest.

4. Burden of Proof: The Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. The Defense, however, need not show by a preponderance of the evidence that the requested discovery is material. *See generally, Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555 (1995) (On review, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

5. Facts:

a. The government has provided the Defense with the sworn statements or interview summaries of thirty-two eyewitnesses to the firefight that resulted in the charges at issue here.

Major Groharing stated in an R.M.C. 802 conference held on 9 November 2007 that there were fifty to seventy-five witnesses at the firefight.

b. A disclosed eyewitness interview summary indicates that at least one witness provided the Government with contact information current as of December 2005 for eyewitnesses to the events in question. [redacted] Report of Investigative Activity (RIA) of 6 Dec 05 at 3 (Attachment A).[1]

c. The disclosed eyewitness statements and interview summaries contain inconsistencies.[2]

e. On 09 November 2007, the defense submitted to the government a request for discovery that sought, among other items, the following: "A list of all eyewitnesses to the events forming the basis for the charges." (Def. Discovery Req. of 9 Nov 07, ¶ 3(f)) (Attachment D).

f. Trial counsel responded that:

> The government has provided the Defense with statements from numerous individuals present at the raid resulting in the capture of the accused. The government will assist the Defense with locating a particular individual upon a Defense showing how they expect the witness testimony will be material to the preparation of the Defense.

(Govt Resp. of 4 Dec 07 to Def. Discovery Req., ¶ 3(f)) (Attachment E).

[1] Major Groharing or other members of the prosecution may have personal knowledge of the identity of the undisclosed witnesses as Major Groharing or another member of the Prosecution was present at sixteen of the twenty-five interviews for which summaries were released to the Defense. *See, e.g.*, Report of Investigative Activity of 6 Dec 05 at 1 (Attachment A).

[2] For example, two witnesses who state they were positioned near the front door of the compound where the firefight occurred have differing accounts as to whether, at the outset of the fight, *grenades* were thrown *from* inside the compound, or whether *a grenade* or *one or two* grenades were thrown *into* the compound. *Compare* Soldier #4 RIA of 7 Dec 05 at 2 (grenades were thrown out of the compound) (Attachment B) *with* [redacted] RIA of 7 Nov 05 at 1 (one or two grenades were thrown into the compound) (Attachment C) and [redacted] RIA of 6 Dec 2005 at 1 (a grenade was thrown into the compound) (Attachment A). Other witness statements that support one or the other version, don't mention that issue at all, or state that a grenade was thrown into *and* several were thrown from inside the compound. The statements also differ as to the number of U.S. soldiers wounded at the scene before Combat Air Support was called in.

6. Argument:

a. The M.C.A., R.M.C., Regulations for Trial by Military Commission, the Due Process Clause and International Law Require Disclosure of the Requested Information

(1) Disclosure is Required Under the Statute, Rules and Regulations Governing Military Commissions

(i) The M.C.A. states that "Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense." *See* 10 U.S.C. § 949j. The Regulation echoes the statute. *See* Regulation for Trial by Military Commissions 17-2(a) ("Pursuant to 10 U.S.C.§ 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.").

(ii) Rule 701(c)(1) of the Rules of the Military Commission ("R.M.C.") requires the government to permit the defense to examine documents and things "within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and *which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial" (emphasis added). The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16[3] addressing discovery, for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to "information [that] is at least 'helpful to the defense of [the] accused.'" *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) ("materiality standard is not a heavy burden") (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would "significantly help [ ] in 'uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal'") (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C.1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is "at least helpful to the defense." In addition, R.M.C. 701(e)(1) requires the government to disclose "the existence of evidence known to the trial counsel which reasonably tends to … [n]egate the guilt of the accused of an offense charged."

(iii) As discussed in more detail in part (b) below, eyewitness testimony is evidence that can assist in impeaching or rebutting aspects of the Government's case, and is therefore material. *See United States v. Karake*, 281 F.Supp.2d 302, 309 (D.D.C. 2003) ("[W]hen

[3] The relevant portion of Federal Rule of Criminal Procedure 16 is nearly identical to R.M.C. 701(c)(1). It states: "Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense." Fed. R. Crim. Proc. 16(a)(1)(E)(i).

someone has witnessed the offense, disclosure of his or her identity 'will almost always be material to the defense.'") (quoting *Harris v. Taylor*, 250 F.3d 613, 617 (8th Cir. 2001)). Thus, it must be disclosed under both R.M.C. 701(c)(1) and R.M.C. 701(e)(1).

(2) Disclosure is required under the Due Process Clause

(i) The disclosure requirement under the R.M.C. 701(c) echoes a fundamental principle of U.S. law: The government's failure to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment …." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The government's duty to disclose such evidence encompasses exculpatory evidence, including impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (characterizing impeachment evidence as exculpatory evidence). Such evidence is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id. at* 682. "The message of Brady and its progeny is that a trial is not a mere 'sporting event'; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory." *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986); *see also Bagley*, 473 U.S. at 675 ("The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur").

(ii) The MCA makes *Brady*, at least with respect to exculpatory evidence, applicable to military commissions. *See* 10 U.S.C. § 949j(d)(2). Section 949j(d)(2) of the MCA states that the prosecution must disclose exculpatory evidence that it "would be required to disclose in a trial by general court-martial." *Brady* governs disclosure of exculpatory evidence in general courts-martial. *Mahoney*, 58 M.J. at 349. Therefore, by virtue of MCA § 949j(d)(2), *Brady* applies to military commissions.

(3) Disclosure is Required Under International Law

(i) The Military Commissions Act (M.C.A.) and the Manual for Military Commissions (M.M.C.) incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948(b)(f) ("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.")[4]; R.M.C., Preamble (stating that the Manual for Military Commissions

[4] 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.

"provides procedural and evidentiary rules that [. . .] extend to the accused all the 'necessary judicial guarantees' as required by Common Article 3.") They must, therefore, be read in light of Common Article 3 and international law surrounding that provision.

(ii) The Geneva Convention Relative to the Treatment of Prisoners of War prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See* Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The judicial safeguards required by Common Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949.[5] Article 75(4)(g) provides that, "anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf *under the same conditions as witnesses against him*."[6] (Emphasis added).

(iii) Read in light of international law principles, precedents applying the U.S. Constitution, and the rules governing this Commission, the Government's denial of the Defense request for eyewitnesses in this case ignores fundamental concepts of fairness and places in question the integrity of these proceedings.

b. Eyewitnesses Testimony is Potentially Exculpatory or Impeaching Evidence That Must be Disclosed

(1) It is a fundamental notion of American due process – and one that Congress made applicable to military commissions through MCA § 949j(d)(2), *see* discussion *supra* para. 6(a)(2)(ii) – that the Government must produce in discovery evidence favorable to the accused when that evidence is material to guilt. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). It is also well established that a *Brady* violation arises "where the Government fails to disclose impeachment evidence that could have been used to impugn the credibility of the Government's 'key witness,' *see Giglio v. United States*, 405 U.S. 150, 154-55, 92 S.Ct. 763 (1972), or that could have 'significantly weakened' key eyewitness testimony. *Kyles*, 514 U.S. at 441, 453, 115 S.Ct. 1555." *Conley v. United States*, 415 F.3d 183, 189 (1st Cir. 2005).

---

[5] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 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). 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] 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]." ICTY Statute, *supra* note 8, art. 21(4)(e); ICTR Statute, *supra* note 7, art. 20(4).

(2) Eyewitness identification is generally recognized as a field wrought with complications. *See, e.g.*, *Watkins v. Sowders*, 449 U.S. 341, 349-51 (1981) (Brennan, J., dissenting) (noting that eyewitness identification evidence has "extraordinary impact," and detailing Supreme Court's record of recognizing "the inherently suspect qualities" of such evidence.) Eyewitnesses to events do not necessarily recall the same information, and may witness entirely different aspects of an event. The perceived reliability of eyewitness testimony is the subject of general controversy and challenges at trial.[7] *See United States v. Mathis*, 264 F.3d 321, 333-43 (3d Cir. 2001) (evaluating eyewitness issues as area of expertise and reversing trial court denial of expert on eyewitness observation); *United States v. Brown*, 49 M.J. 448 (C.A.A.F. 1998) (discussing eyewitness testimony in context of admissibility of expert testimony about eyewitness evidence). Numerous courts, including the U.S. court-martial system, have developed specific jury instructions to guide juries in the use of eyewitness evidence. *See United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (developing and requiring use of jury instruction to govern eyewitness evidence); *see also United States v. McLaurin*, 22 M.J. 310, 312 (C.M.A.1986) (recommending use of jury instruction to address eyewitness testimony, as adopted in *Telfaire*); *United States v. Montebalno*, 605 F.2d 56 (2d Cir. 1979) (recommending adoption of *Telfaire* rule); *United States v. Hodges*, 515 F.2d 650 (7th Cir. 1975) (adopting *Telfaire* policy of requiring eyewitness jury instruction); *United States v. Holley*, 503 F.2d 273 (4th Cir. 1974) (same); Military Judge's Benchbook (2003 ed.), § 7-7-2 (Military Jury Instruction regarding "Eyewitness identification and interracial identification"). And Supreme Court precedent has consistently guarded the jury from hearing unreliable eyewitness testimony. *See Watkins*, 449 U.S. at 352 (Brennan, J. dissenting) (outlining Supreme Court precedent limiting use of eyewitness evidence).

(3) Eyewitness evidence is invariably potential *Brady* evidence: one eyewitness may inculpate an individual, while another eyewitness' perspective may provide exculpatory information; an eyewitness may contradict discrete but critical facts offered by another witness (for example in describing an alleged perpetrator); or, an eyewitness may fully challenge another's testimony. It is entirely appropriate, therefore, to request in discovery all eyewitnesses, particularly where the Government has made clear it will introduce in evidence the testimony of eyewitnesses.[8] Failure to provide access to all eyewitnesses *ab initio* deprives the Defense of a fair trial.[9]

---

[7] Indeed, one eyewitness, Major [redacted], had three versions of what occurred immediately after the grenade was allegedly thrown. On 27 August 2002, Major [redacted] wrote an after action report stating that the person who allegedly threw a grenade that killed Sgt Speer was shot by US Forces but did not die. After Action Report of 27 July 2002, at 00766-000586 (Attachment F). The next day, Major [redacted] prepared another report. This time he stated the person who allegedly threw a grenade that killed Sgt Speer was killed by US Forces. Memo re Operation to Postively Identify And Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 02, at 00766-001768 (Attachment G). Another version of this report does not indicate whether the person who allegedly threw the grenade that killed Sgt Speer was dead or alive after being shot by US Forces. Memo re Operation to Postively Identify And Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 02, at 00766-001655 (Attachment H).

[8] The Defense notes that a request for favorable information is not necessary in view of the government's established disclosure obligations that require the release of discovery where impeachment or exculpatory evidence is at issue. *See Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555 (1995) (analyzing *Brady*

(4) Here, there are dozens of eyewitnesses to the central event at issue, namely the firefight that resulted in Mr. Khadr's arrest. The Government is withholding the names and contact information from as many as forty-three eyewitnesses. Considering the plethora of case law addressing the complications involved with eyewitness testimony (as noted above), coupled with the fact that the government is selectively calling certain eyewitnesses to testify at trial, the Defense's request for discovery regarding remaining eyewitnesses is patently material. *Cf. Strickler*, 537 U.S. at 293 ("We recognize the importance of eye-witness testimony."); *Watkins*, 449 U.S. at 352 (Brennan, J. dissenting) ("much eyewitness identification evidence has a powerful impact on juries."). The statements the Defense has received contain conflicting and different observations, and indicate these witnesses were not all in the same location with the same vantage point of events. The Defense therefore must be afforded the opportunity to interview every eyewitness to determine whether any favorable evidence is available. In light of the particularly subjective nature of eyewitness information, obstructing the Defense from interviewing every eyewitness will ensure that the Defense cannot adequately prepare for this trial, and will thereby undermine confidence in any eventual result. *Cf. Kyles*, 514 U.S. at 434 (defining fair trial "as a trial resulting in a verdict worthy of confidence."); *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (same).

c. Conclusion

(1) The Supreme court has said "that the United States Attorney is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Strickler*, 537 U.S. at 281 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). When the prosecution reserves to itself the determination of what evidence ought be considered, it disregards its duty to seek justice, and usurps the role of the court, defense counsel and the trier of fact. *Cf. Brady*, 373 U.S. at 87-88, n. 2. The integrity of these proceedings will be fatally undermined if the defense is not afforded the opportunity to independently investigate the factual allegations at issue in the case. At a minimum, this requires that the defense be allowed to know the identities of individuals who witnessed and/or or participated in the 27 July 2002 firefight. The Commission should therefore grant the requested relief.

---

and affirming that violation of Government's disclosure obligations is implicated even where the Defense never makes a request for favorable evidence). The Defense reminds the Government that its discovery obligation is on-going. *See* R.M.C. 701(a)(5).

[9] As the military judge is aware, just before the arraignment in this case that was held on 8 November 2008, the Government revealed that it had inadvertently discovered that one of the eyewitnesses not previously disclosed to the defense possessed potentially exculpatory information. Had the Government not inadvertently discovered this evidence, the defense would never have known of the witness's existence, let alone the information he possessed.

Disclosure of all eyewitnesses is particularly important here, where "other government agencies" told the prosecutors in the Office of Military Commissions that any exculpatory information would be withheld from the prosecutors. Capt [redacted] email of 15 Mar 04 (Attachment I) ("In our meeting with OGA, they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches).

7. **Oral Argument:** The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that "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 raised by this motion.

8. **Witnesses:** The Defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the Prosecution's response raise issues requiring rebuttal testimony.

9. **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. <u>Attachments</u>:

A. [redacted] Report of Investigative Activity of 7 Dec 05

B. Soldier #4 Report of Investigative Activity of 7 Dec 05

C. [redacted] Report of Investigative Activity of 7 Dec 05

D. Defense Discovery Request of 9 November 2007

E. Government response of 4 December 2007 to Defense Discovery Request of 9 November 2007

F. After Action Report of 27 July 2002

G. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 July 2002, Bates No. 00766-001766-70

H. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 July 2002, Bates No. 00766-001653-57

I. Captain [redacted] and Major [redacted] emails of March 2004

/s/
William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

MILITARY COMMISSION

UNITED STATES OF AMERICA	**Defense Discovery Request**
v.	
OMAR AHMED KHADR	9 November 2007

1. The accused, Omar Khadr, by and through his detailed defense attorney, hereby requests that the government produce and permit the defense to inspect, copy, or photograph each of the items listed in the sections below. The defense requests that the government notify the defense in writing which specific items or requested information or evidence will not be provided and the reason for denial of discovery. The specific items listed below are examples, not limitations, of the items requested under a cited provision. The requested evidence is material to the preparation of the defense and/or is exculpatory. Defense counsel cannot properly provide effective assistance of counsel, nor prepare for trial, without production of the documents and items requested. The requested information is known, or should, with the exercise of due diligence, be known to the United States or its agents. If the government does not intend to provide defense with copies of documents or tangible objects the defense requests a reasonable opportunity to inspect, photograph and photocopy such documents or objects.

DOCUMENTS AND TANGIBLE EVIDENCE

2. All papers which accompanied the charges at preferral and referral, specifically to include, but not be limited to:

    a. The charge sheet and all allied papers, transmittal documents accompanying the charges from one headquarters to another, or which accompanied the charges when they were referred to a military commission;

    b. Any sworn or signed statement relating to an offense charged in this case;

    c. All law enforcement reports whether prepared by military or civilian law enforcement personnel;

    d. Any order purporting to refer the charges to a military commission, convening order, any pretrial advice given in conjunction with such an order, or any order appointing and describing the duties of the convening authority;

    e. Any other qualifying document, order, or statement described in R.M.C. 701(b)(1)(A).

3. Any books, papers, documents, photographs, or copies or portions thereof and the opportunity to inspect tangible objects, buildings, or places that are in the possession,

custody, or control of military authorities, and that are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case in chief, or were obtained from or belong to the accused. R.M.C.701(c)(1). The foregoing shall include, but not be limited to:

a. All drafts of FBI "302" forms and CITF "40" forms provided to the defense.

b. All materials in the possession, custody or control of the government, including, without limitation, intelligence, law enforcement, or other files, relating to the participation of the following individuals in the conspiracy alleged in Charge III:

   i. Usama Bin Laden

   ii. Ayman Al Zawahiri

   iii. Sayeed Al Masri

   iv. Saif Al Adel

   v. Ahmed Said Khadr

c. All materials within the possession, custody and control of the government relating to the investigation and prosecution of [redacted].

d. All materials within the possession, custody and control of the government relating to the investigation and/or prosecution of other individuals for detainee mistreatment or abuse at Bagram Airbase, Afghanistan, between July 2002 and November 2002.

e. All materials within the possession, custody, and control of the government relating to or describing events forming the basis for the charges, including, but not limited to, reports prepared by a non-DoD federal agency referenced in discussions between the prosecution and defense on or about 6 November 2007.

f. A list of all eyewitnesses to the events forming the basis for the charges.

g. Any handwritten statement prepared by the accused.

h. All results of any interrogations or interview of the accused.

i. Any videotape, real-time, or other imagery relating to the events forming the basis for the charges, including, without limitation, any videotape, "gun camera" footage or other recording of said events. R.M.C.701(c)(1).

j. Any physical evidence seized from the site of the 27 July 2002 firefight at or near Khost, Afghanistan, including, but not limited to, circuit boards, watches, or other materials allegedly used to manufacture explosive devices. R.M.C.701(c)(1).

k. Any video or audio tape recording of any interrogation or interview of the accused by any person or entity, including, but not limited to, any video or audio tape recording

of interviews by Canadian intelligence and/or law enforcement officials. R.M.C.701(c)(1).

l. Shrapnel, or other physical evidence seized from the bodies of Christopher Speer and the two Afghan Military Force members identified in the overt acts alleged in Charge III. R.M.C. 701(c)(1).

m. All interrogation manuals, directives, instructions and other policy guidance issued by any agency involved in any aspect of the intention and interrogation of the accused or of any other witness in the case, including individuals whose statements the government provides to the defense through discovery.

4. Any death investigations, homicide reports, pathology reports and all other evidence relating to the deaths of Christopher Speer and the two Afghan Military Force members identified in the overt acts alleged in Charge III. R.M.C. 701(c)(1).

5. The defense requests notification of testing upon any evidence that may consume the only available samples of the evidence and an opportunity to be present at any such testing; and an opportunity to examine all evidence, whether or not it is apparently exculpatory, prior to its release from the control of a government agency or agents. *United States* v. *Mobley,* 31 MJ. 273, 277 (C.M.A. 1990); *United States* v. *Garries,* 22 M.J. 288, 293 (C.M.A. 1986).

6. Please provide all chain of custody documents or litigation packets generated by any law enforcement or military agency in conjunction with the taking or testing of evidence during the investigation of the alleged offenses.

7. Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, that are within the possession, custody, or control of military authorities at all any level, the existence of which is known, or by the exercise of due diligence may become known, to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case in chief at trial. R.M.C. 701(c)(2). This specifically includes, but is not limited to:

a. Copies of the records of any and all medical screenings, physicals, examinations, mental health evaluations, as well as notes prepared by any treating physician, physician's assistant, medic, psychiatrist, psychologist, chaplain, counselor, or other person who has examined the mental or physical condition of the accused at any time since he entered the custody of the United States, including, but not limited to, all files on the accused created or kept by the "Behavioral Sciences Team" mentioned in the document identified by Bates number 00766-012575.

b. The defense does not authorize the government to review or examine any such reports, notes, or other documents as they may be covered by M.C.R.E. 503 or 513, by M.C.R.E. 302, or by common-law privileges and privacy interests with respect to medical treatment. The defense does, however, request that the government order any such material turned over to the defense and provide contact information for any person who obtained or created such reports or other materials.

8. Any statement - oral, written, or recorded - made or adopted by the accused, that are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial. R.M.C. 701(c)(3).

9. All written material that will be presented by the government as evidence at the presentencing proceedings. R.M.C. 701(d)(l).

10. All writings or documents used by a witness to prepare for trial, to include any writings or documents used by any witness to refresh memory for the purpose of testifying, either while testifying or prior to testifying. M.C.R.E. 6l2.

11. A photocopy of the entire CITF or other investigative files, to include all case notes, case agent summaries, interim, final and supplemental CITF reports, interrogation reports, photographs, slides, diagrams, sketches, drawings, electronic recordings, handwritten notes, interview worksheets, and any other information in the CITF case file or associated with this case, including the files of any other government agency not a part of CITF. Additionally, the defense requests the names, current addresses, and current telephone numbers and email addresses of all government and civilian investigators who have participated in the investigation. R.M.C. 701(b)(l)(C); R.M.C. 701(b)(2).

STATEMENTS AND WITNESSES

12. All statements, in any form to include, but not limited to, hand-written, typed or recorded statements or summaries of conversations, concerning the offenses that are in the possession of the government. This includes all statements of any person, not just the accused or potential government witnesses, taken by or given to any person or agency including all civilian or military law enforcement agencies, inspector general investigations, intelligence agencies, military units, or any other agency or person involved in this case. R.M.C. 701(b)(l)(C); R.M.C. 701(c)(l); R.M.C. 701(c)(3).

13. Provide all oral and written statements made by government witnesses relating to this case, R.M.C. 914, 18 U.S.C. § 3500 et. seq.

14. Provide the names, addresses and telephone numbers (commercial and DSN, if applicable) of all witnesses the government intends to call to rebut a defense of alibi or lack of mental responsibility. R.M.C. 701(b)(2)(B). At this time, the defense does not claim that the accused has an alibi defense or that the accused lacked mental responsibility at the time of the charged offense. If such a defense becomes known, the defense will notify the government. The defense cannot make a determination about the latter defense until the government has complied with all discovery requested in paragraph 4 of this request.

15. Provide all hearsay statements, oral or written, intended to be offered at trial under M.C.R.E. 803. Please provide notice of the intent to offer the statement and "the particulars of the evidence" including the time, place and conditions under which the statement was obtained, the name of the declarant and the declarant's telephone numbers and address. M.C.R.E. 803(b).

16. Provide information concerning any immunity or leniency granted or promised by any government witness in exchange for testimony. R.M.C. 701(c)(l); M.C.R.E. 301(c)(2).

17. Any intent by the government to invoke R.M.C. 701(f) or M.C.RE. 505 or 507, as well as the purpose and rationale supporting the invocation of such a privilege. If the government does invoke such privilege, the defense requests immediate compliance with R.M.C. 701(f)(3), 701(f)(5), and 701(f)(6). The defense intends to challenge the government's use of this privilege and, in order to prepare for litigation of the matter, requests the production of summaries of the evidence as contemplated by R.M.C. 701(f)(3) and 701(f)(5).

18. The identity, including name, address, and telephone number, of any informants and/or notice of a government's intent to exercise privilege under M.C.R.E. 507.

19. Disclose all evidence affecting the credibility of government witnesses to include, but not limited to:

    a. Prior civilian and court-martial conviction and all arrests or apprehension of government witnesses. In complying with this discovery request, the defense requests the government check with the National Crime Information Center (NCIC), National Records Center (NRC), and all local military criminal investigatory organizations for each witness. *United States* v. *Jenkins*, 18 M.J. 583, 584-585 (A.C.M.R 1984); R.M.C. 701(c).

    b. Records of nonjudicial punishment, or adverse administrative actions (pending and completed), whether filed in official files or local unit files including, but not limited to, discharge prior to expiration of term of service for any reason, relief for cause actions, letters or reprimand or admonition and negative counseling relating to adverse or disciplinary actions concerning any government witness. R.M.C. 701(c).

    c. All investigations of any type or description, pending initiation, ongoing or recently completed that pertain to alleged misconduct of any type or description committed by a government witness. *United States* v. *Stone,* 40 MJ. 420 (C.M.A. 1994); R.M.C. 701(c).

    d. All evidence in control of or known to the United States concerning the mental status of the accused or any government witness. *United States* v. *Green,* 37 MJ. 88 (C.M.A. 1993). Material sought includes, but is not limited to, medical records reflecting psychiatric diagnosis or treatment or head injury of any type and drug and/or alcohol addiction diagnosis or rehabilitation records. *United States* v. *Brakefield,* 43 C.M.R. 828 (A.C.M.R 1971); *United States* v. *Brickey,* 8 M.J. 757 (A.C.M.R 1980) affirmed 16 M.J. 258 (C.M.A. 1983); *United States* v. *Eschalomi,* 23 M.J. 12 (C.MA 1985); R.M.C. 701(c)(2).

    e. Evidence of character, conduct or bias bearing on the credibility of government witnesses in the control of or known to the United States including, but not limited to: information relating to any past, present, or potential future plea agreements, immunity grants, payments of any kind and in any form, assistance to or favorable treatment with respect to any pending civil, criminal, or administrative dispute

between the government and the witness, and any other matters that could arguably create an interest or bias in the witness in favor of the government or against the defense or act as an inducement to testify to color or shape testimony. *Giglio* v. *United States,* 405 U.S. 15 (1972); R.M.C. 701(c).

f. The current and, if applicable, the former military status of all witnesses to include: the date of separation, the discharge status and a summary of the circumstances explaining any discharge; further, please provide copies of the each government military witnesses' counseling file. R.M.C.701(c).

g. Copies of the official civilian personnel file of any government witness that is a civilian employee of the United States. R.M.C.701(c).

h. The results of any polygraph examinations, including the Polygraph Examiner Report and related polygraph records, the Polygraph Consent Form, the Polygraph Examination Authorization Request, the Polygraph Examination Quality Control Review and any rights certificate executed by the examiner and the subject. *United States v. Mougenel,* 6 M.J. 589 (A.F.C.M.R 1978); *United States v. Simmons,* 38 M.J. 376 (C.M.A.1993); R.M.C. 701(c).

i. Any writing or document used by a witness to prepare for trial. M.C.R.E. 612.

j. The contents of all CITF accreditation files for all CITF investigators who have participated in investigations relating to this case, and similar such files for agents of any other government agency who have have participated in investigations relating to this case. R.M.C.701(c).

20. A copy of the Official Military Personnel File (OMPF) of all witnesses intended to be called by the Government on the Government's case in chief or during the pre-sentencing phase of the trial. R.M.C.701(c)(1).

21. Notice of whether the government intends to impeach any witness with a conviction older than ten years. M.C.R.E. 609(b).

EVIDENCE REGARDING ACCUSED

22. The defense requests the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel and within control of the armed forces, regardless whether the government intends to use the statements at trial. M.C.R.E. 304(d)(1); *United States v. Dancy,* 38 M.J. 1, 4 (C.M.A. 1993).

23. Notice of all evidence seized from the person or property of the accused or believed to be owned by the accused that is intended to be offered at trial.

24. Evidence of any prior identification of the accused at a traditional line up, photo line up, show up, voice identification or other identification process that the government intends to offer against the accused at trial, or failure or misidentification of the accused at any such procedure. R.M.C. 701(c)(1); R.M.C. 701(b)(l)(C); R.M.C. 701(b)(2); R.M.C. 701(e).

25. Provide notice of the general nature of evidence of other crimes, wrongs, or other misconduct, the government intends to offer at trial as well as the government's theory of admissibility concerning the prior conduct. M.C.RE. 404(b).

26. All documents or information regarding any mistreatment of Mr. Khadr at the hands of U.S. or Allied Armed Forces, civilians or contractors of which the government is aware. This includes any recorded allegation of such mistreatment made by the accused, any witness to the mistreatment, or any non-governmental organization (e.g., the International Committee for the Red Cross) that purports to document allegations of mistreatment. M.C.R.E. 304, R.M.C. 701(e).

27. All documents and information related to the capture and/or detention of the accused. This includes documents and information regarding the circumstances of capture, transfer to U.S. authorities (if applicable), subsequent transfers between places of detention (to include means, methods and dates of transfer), the identity of all U.S. Military units and individuals responsible for and involved in his detention, all records regarding the accused's detention up to and including Guantanamo Bay Naval Station, Cuba, and conditions of detention. This should include a detailed chronology showing each and every place in which the accused has been held in confinement from the time of his capture in Afghanistan to the present date. R.M.C. 701(c).

28. The names, duty positions, and contact information of all personnel who ordered, supervised, or directed the confinement of the accused from the time of his capture in Afghanistan to the present date. R.M.C. 703; R.M.C. 701(e).

29. The names, duty positions, and contact information of all personnel who interrogated, questioned, guarded, or otherwise interacted with the accused since the time of his capture in Afghanistan. R.M.C. 703; R.M.C. 701(e).

30. The defense requests that the government provide all documents related to the conditions under which the accused was held from the time of his capture to the present date. This includes, but is not limited to, all written orders, memoranda, directives, SOPs, or other documents that purport to direct agents of the US government in the manner in which the accused should be treated, fed, housed, and given medical attention. This also includes any information relating to mistreatment, abuse, inhumane treatment or conditions, degrading treatment or conditions, cruel or oppressive treatment or conditions, or torture, that is known, suspected, or alleged to have occurred since the date of the accused's capture in Afghanistan. R.M.C. 701(e); R.M.C. 701(c)(l).

31. All documents and information related to considerations and determinations by the United States or its agents concerning the accused's "status" as a detainee (i.e., whether the accused should be given the status of prisoner of war, unlawful enemy combatant, civilian internee, etc.). R.M.C. 701(c)(l).

32. All documents and information related to considerations and determinations by the United States or its agents concerning whether the United States was in a state of "armed conflict" (as that term is defined under international law) with the Taliban, al Qaeda, or any alleged

terrorist organizations, or any nation-states allegedly sponsoring terrorist organizations from approximately 1990 through the present, and whether any such armed conflict was "international", "internal/non-international" or "internationalized" (as those terms are defined under international law) in character. R.M.C.701(c)(l).

33. All interrogation techniques used against detainees in Afghanistan, aboard U.S. vessels, or at the U.S. Naval Base in Guantanamo Bay, Cuba, as well as identification of which methods were used against detainees whose statements and/or testimony the prosecution intends to introduce at trial. This includes techniques used against Mr. Khadr, as well as against any other detainee whose statements and/or testimony the prosecution intends to introduce at trial. M.C.R.E. 304, R.M.C. 701(e), R.M.C. 701(c)(I).

OTHER EVIDENCE MATERIAL TO THE PREPARATION OF THE DEFENSE

34. The defense requests all exculpatory, extenuating, or mitigating evidence known, or, which with reasonable diligence should be known, to the trial counsel that tends to negate the guilt of the accused of any offense charged, reduce the guilt of the accused of an offense charged, or reduce the punishment. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1993); *United States v. Kinzer*, 39 M.J. 559 (A.C.M.R. 1994); *United States v. Sebring*, 44 M.J. 805 (N.M. Ct. Crim App. 1996); R.M.C. 701(e).

35. Request all evidence in rebuttal that is exculpatory in nature or material to punishment. *United States v. Trimper*, 460 M.J. 460 (C.M.A. 1989); *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993); R.M.C. 701(e).

COMMISSION MEMBERS AND PRESIDING OFFICER SELECTION

36. The defense requests the personnel files and officer record briefs of each member of the commission. Additionally, defense requests any questionnaires submitted by trial counsel to each member and the member's responses. R.M.C. 912.

37. All written matters provided to the convening authority concerning the selection of the members detailed to the commission. R.M.C. 912(a)(2).

38. The convening order, all amending orders and all requests to be excused received from commission members and any written documents memorializing the denial or approval of the request. R.M.C. 701(b)(1)(B); R.M.C. 912(a)(2).

39. All documents and information related to the identification, review and appointment of commission members. This request includes all documents and information submitted or considered by agents of the United States, regardless of whether the convening authority or her designees considered such matters. Such documents and information include, but are not limited to, the following:

    a. The process used to select the pool of potential commission members, the requests and content of verbal requests for potential commission members, and any criteria to

be included or excluded in selecting the pool of potential commission members (e.g., rank, gender, combat experience, etc.).

b. Any discussions or interviews of potential commission members that agents of the United States participated in or conducted, including, but not limited to, interview notes.

c. Criteria used in selecting commission members including any communication of any kind made to the convening authority that relate to the qualifications, fitness, availability, character, temperament, or other characteristics of any member.

d. Any public or private writings or statements made by commission members related to military commissions.

e. Any other information bearing on the potential impartiality or bias of commission members. R.M.C. 701(b)(1)(B); R.M.C. 912(a)(2).

JUDICIAL NOTICE

40. Provide all matters that the government intends to have judicially noticed. M.C.R.E. 201.

41. Provide notice and a legible copy of all law, foreign and domestic, of which the government intends to ask the judge to take judicial notice. M.C.R.E. 201A.

EXPERTS

42. The defense requests notice of, and the curricula vitae for, all expert witnesses the government intends to call in its case-in-chief and during pre-sentencing. The defense requests the government disclose the number of times each expert has been qualified as an expert witness in a military or civilian court, the types of court each witness has testified in (civilian or military), the locations (city and state) of each of these courts and the civil and criminal docketed number of each of those cases. The defense further requests disclosure of any information, or evidence considered by the expert prior to testifying. R.M.C. 705.

COMMAND INFLUENCE

43. The defense requests all statements, oral or written (including e-mail), made by the convening authority in this case or by any officer (military or civilian) superior to the convening authority, whether written or oral, that:

a. withhold from a subordinate commander or from any agent of the government the authority to dispose of the accused's case in a court-martial or federal criminal trial in District Court;

b. provide guidance to any civilian or military authority in this case concerning appropriate levels of disposition and punishment of the offenses, to include types and severity of any restrictions on liberty, either made before or after the offenses at issue in this case; or,

c. indicate that the officer has anything other than an official interest in the matter, *United States* v. *Jeter*, 35 M.J. 442, 445 (C.M.A. 1992); R.M.C. 923; R.M.C. 1008.

44. Disclosure of any information known to government agents that indicates that a person who forwarded the charges with recommendation is now, or has recently been suspected of committing an offense under the UCMJ. *United States* v. *Nix*, 40 M.J. 6 (C.M.A. 1994).

INSTRUCTIONS

45. The defense requests the government provide all proposed instructions it intends to request the commission to use in its instructions to the members and the authority for each instruction.

RULES OF PROCEDURE AND EVIDENCE

46. The defense requests that the government produce the following, which is information material to the defense and without which the defense does not believe it can be effective:

    a. Copies of any drafter's analysis, notes, memoranda, emails, circulars, or any other written communication or information regarding the formulation of the rules of procedure and evidence used in these military commissions, how and why rules were drafted as they were, dissents or objections to the formulation, language, construction, or meaning of these rules, and rights provided under these rules.

    b. Sources of law upon which the drafters of these rules relied.

    c. The identity, job description, and contact information of any person involved in, or consulted regarding, the formulation and drafting of these rules.

EVIDENCE REGARDING INDIVIDUALS HELD BY THE UNITED STATES

47. The identity and photographs of all individuals detained by the United States or coalition countries, presently or in the past, who are believed to be associated with al Qaeda, so that these individuals can be screened by the defense and accused to search for potential witnesses. R.M.C. 703.

48. Copies of all message traffic from the capturing unit, from Central Command, or from any higher U.S. authority regarding the "status" under the Geneva Convention, movement and treatment of Mr. Khadr. R.M.C. 703; R.M.C. 701(c)(l).

49. A list of the names and ISN numbers of all released detainees from Naval Base Guantanamo Bay with accompanying photographs. R.M.C. 703.

50. Access to review and copy all records in the possession of the government regarding the accused and any other detainee to which the defense is granted access. R.M.C. 703; R.M.C. 701(c)(l).

EVIDENCE HELD BY THE CANADIAN GOVERNMENT

51. The defense requests your assistance in obtaining the following information under the control of the Canadian government:

    a. Copies of all audio or video recordings of integrations of the accused conducted by Canadian investigators or diplomatic personnel or in which they participated or observed. R.M.C. 701(c)(3); M.C.R.E. 304.

    b. Interviews of the Canadian investigators involved in the investigation of the accused. R.M.C. 701(c)(3); M.C.RE. 304.

    c. Diplomatic correspondence or other communications between the U.S. and Canadian governments relating to the detention, interrogation, investigation or transfer of the accused.

EVIDENCE OF AND CONTENTS OF MONITORING OF THE ACCUSED IN CONSULTATION WITH HIS COUNSEL OR OF COMMUNICATIONS OF AND BETWEEN COUNSEL

52. The defense requests notice of, reasons for, and the dates, nature, and content of any communication monitored in any way between the accused and his counsel, or any communication between or by counsel for the accused, by any government agency at any time during the processing, trial, or other course of this case. If no such monitoring has occurred, the defense requests a statement to that effect from government counsel.

CONCLUSION

The defense requests equal and adequate opportunity to interview witnesses and inspect evidence. Specifically, the defense requests the trial counsel to instruct all of the witnesses and potential witnesses under military control, including those on any retired list to cooperate with the defense when contacted by the defense for purposes of interviewing these persons or otherwise obtaining information from them. R.M.C. 703. This discovery request is continuing and shall apply to any additional charges or specifications that may be preferred after this request for discovery is served upon the government. Immediate notification is requested on all items the government is unable or unwilling to produce.

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

Rebecca S. Snyder
Assistant Detailed Defense Counsel

-----Original Message-----
From: [redacted] COL, DoD OGC
Sent: Monday, March 15, 2004 11:29
To: [redacted] CAPT, DoD OGC; Lang, Scott, CDR, DoD OGC; [redacted], LtCol, DoD OGC; [redacted] LtCol, DoD OGC; [redacted] MAJ, DoD OGC; [redacted] CPT, DoD OGC; [redacted], LT, DoD OGC; [redacted] Mr, DoD OGC; [redacted] Mr, DoD OGC; [redacted], LtCol, DoD OGC
Cc: [redacted], CW3, DoD OGC; [redacted] CPT, DoD OGC
Subject: Allegations of misconduct and unprofessionalism against Chief Prosecutor
Importance: High

Attachment I

All:

Please read below.

Capt. [redacted] has made some serious allegations against me as the Chief Prosecutor---charges that, if true, mandate that I be relieved of my duties.

Among other things, Capt. [redacted] insists that an "environment of dishonesty, secrecy, and deceit" exists within the entire office.

In an email preceding Capt. [redacted] you will note that Maj. [redacted] voices similar views: he states that he is "disgusted" with the "lack of vision" and "lack of integrity" in the office, and has "utter contempt" for many of the judge advocates serving with us.

Bottom line: Both Capt. [redacted] and Maj. [redacted] believe that what we are doing is so wrong that they cannot "morally, ethically, or professionally continue to be a part of this process."

I am convinced to the depth of my soul that all of us on the prosecution team are truly dedicated to the mission of the Office of Military Commissions---and that no one on the team has anything but the highest ethical principles. I am also convinced that what we are doing is critical to the Nation's on-going war on terrorism, that what we have done in the past---and will continue to do in the future---is truly the "right" thing, and that the allegations contained in these emails are monstrous lies.

It saddens me greatly that two judge advocates---whom I like very much and for whom I have only the greatest respect and admiration---think otherwise. In fairness to all of you, however, it is important that you read what has been written about me and you.

CO[redacted]

-----Original Message-----
From: [redacted], CPT, DoD OGC
Sent: Monday, March 15, 2004 07:56
To: [redacted] COL, DoD OGC
Cc: [redacted], DoD OGC; [redacted], [redacted], CAPT, DoD OGC; [redacted], CPT, DoD OGC
Subject: RE: Meeting with Colonel [redacted] and

Attachment I

myself, 4:00 p.m. today, Col [redacted] office

Sir,

I appreciated the opportunity to meet last Thursday night, as well as the frankness of the discussion. The topics covered and the comments made have been replaying in my mind since we ended the meeting. I have also reviewed Maj Preston's comments in his e-mail below, and I agree with them in every respect.

I feel a responsibility to emphasize a few issues. I do not think that our current troubles in the office stem from a clash of personalities. It would be a simple, common, and easily remedied situation to correct if this were true. People could be reassigned or removed.

It is my opinion that our problems are much more fundamental. Our cases are not even close to being adequately investigated or prepared for trial. This has been openly admitted privately within the office. There are many reasons why we find ourselves in this unfortunate and uncomfortable position - the starkest being that we have had little to no leadership or direction for the last eight months. It appears that instead of pausing, conducting an honest appraisal of our current preparation, and formulating an adequate prosecution plan for the future, we have invested substantial time and effort to conceal our deficiencies and mislead not only each other, but also those outside our office either directly responsible for, or asked to endorse, our efforts. My fears are not insignificant that the inadequate preparation of the cases and misrepresentation related thereto may constitute dereliction of duty, false official statements, or other criminal conduct.

An environment of secrecy, deceit and dishonesty exists within our office. This environment appears to have been passively allowed to flourish, if it has not been actively encouraged. The examples are many, but a few include:

1. CDR [redacted] misrepresentations at the Mock Trial - CDR [redacted] made many misrepresentations at the Mock Trial, to include stating that we had no reason to believe that al Bahlul had suffered any mistreatment or torture. When I confronted him immediately after the mock trial with his notes to the contrary, he admitted that he was aware of abuse allegations related specifically to al Bahlul. Interestingly, it was because of Prof. [redacted] comments at the mock trial that we even began to inquiry into the conditions at the detention camps in AF, which prior to the mock trial had been consciously ignored. Other troubling aspects of the mock trial include, but are not limited to: statements that we would be ready for trial in 3 days, that al Bahlul has maintained from day one that he is a member of AQ, the deliberate and misleading presentation of select statements from al Bahlul, the careful coordination of the schedule to limit meaningful questions, the conscious inclusion of an overwhelming amount of paper in the notebooks, and the refusal to include a proof analysis.

2. Suppressing FBI Allegations of Abuse at Bagram - Over dinner and drinks, KK and Lt [redacted] heard from FBI agents

that detainees were being abused at the Bagram detention facility. Lt [redacted] told KK after dinner that they couldn't report the allegations because it was told to them "in confidence." KK told CDR [redacted], LtCol [redacted] and [redacted] anyway, and all three stated that there was not credible evidence and concluded on their own volition that they should not report the allegation to you or other members of the office. Interestingly, CDR [redacted] recently suggested the Lt [redacted], despite his lack of experience and judgment, be sent to review the CID reports of abuse at Bagram.

3. Refusal to give Mr. Haynes the COLE video -
Mr. Haynes asked CDR [redacted] twice for a copy of the COLE video. I heard CDR [redacted] ask CDR [redacted] whether she should take a copy of the video over to Mr. Haynes. CDR [redacted] told her not to, and that maybe in a few days Mr. Haynes would forget that he asked for it.

4. The disappearance/destruction of evidence -
As I have detailed to you, my copy of CDR [redacted] notes detailing the 302 in which al Bahlul claims torture and abuse is now missing from my notebook. The 302 can not be located. Additionally, [redacted] of the FBI related last week that he called and spoke to CDR [redacted] about the systematic destruction of statements of the detainees, and CDR [redacted] said that this did not raise any issues.

5. "I've known about this for a year."
Hamden's name is on the UN 1267 list, and we only learned of it in Dec. When CDR Lang was confronted with this information, he claimed that he had known about it for the last year. No attempt had been made prior to Dec to discover upon what evidence Hamdan was added to the list, and we still don't know. If he was aware of this fact, one is left to wonder why no inquiry was made with the State Department. He made the same "I've known about this for a year" claim about the Tiger Team AQ 101 brief, although he has had many of us searching for the information contained within it for months.

6. CDR [redacted] misrepresentations at the office
overview of his case. As detailed in a previous e-mail to you, CDR [redacted] made numerous misrepresentations concerning his case at the office meeting to discuss his case, indicating that he either consciously lied to the office, or does not know the facts of his case after 18 months of working on it.

I have discussed each of these specific examples with you, and you told me that you had taken corrective action to some. For example, in reference to paragraph 2, I asked how I was suppose to trust these attorneys to review documents and highlight exculpatory evidence and you responded that "when the time comes" you would put out very direct guidance. I do not believe that ethical behavior is something that can be directed during selective time periods.

These examples are well known to the members of this office, yet there has been no public rebuke of the behaviors. Hence, the environment and behaviors continue to flourish. I am left to wonder why at an office meeting we were not told:

"I understand that misrepresentations are being

made concerning the facts of our cases. If I find out this happens again, the responsible party is going to be fired."

"I understand that evidence is being withheld from our civilian leadership.. If I find out this happens again, someone is going to be fired."

"I understand that allegations of abuse are not being brought to my attention or reported to the appropriate authorities. If I find out this happens again, someone is going to be fired."

"I understand that evidence is being hidden or destroyed. If I find out this happens again, someone is going to be fired."

Even in regards to CDR [redacted] recent behavior towards Maj [redacted] and myself, the office was not told the real reason for why he has been removed as the deputy, only further feeding the underlying animosity and indicating that the action was forced upon you and not really justified - if not, surely you would have taken a less conciliatory stance.

You stated in our meeting last week that what else can you do but lead by example.

In regard to this environment of secrecy, deceit and dishonesty, the attorneys in this office appear to merely be following the example that you have set.

A few examples include:

You continue to make statements to the office that you admit in private are not true. With many of the issues listed here, the modus operandi appears to be for you to make a statement at a meeting, pause, and when no one states a disagreement, assume that everyone is in agreement. To the listener, it is clear that the statements are not true, but we are not to correct, disagree, or question you in front of the office. (For example, when I asked you basic questions concerning conspiracy law at an office briefing, CDR [redacted] called me into his office and told me that my conduct was borderline disrespectful because it put you in an uncomfortable position.)

You have stated for months that we are ready to go immediately with the first four cases. At the same time, e-mails are being sent out admitting that we don't have the evidence to prove the general conspiracy, let alone the specific accused's culpability. In fact, it may be questioned how we are in a better position to prove the general conspiracy today than we were last November at the mock trial. Of course, it should also be noted that we have substantially changed course even since November and now acknowledge that the plan to prove

principal liability for TANBOM, KENBOM, COLE and PENTBOM was misguided to say the least.

We are rushing to put 9 more RTBs together for cases that you admit are not even close to being ready to go trial. We are also being pressed to prepare charge sheets, and you have asked that discovery letter go out on these cases. We are led to believe that representations are being made are that these cases can be prosecuted in short order, when this simply is not true.

You told the AF generals that we had no indication that al Bahlul had been tortured. It was after this statement, which CDR [redacted] quietly allowed to go uncorrected, that I brought up CDR Lang's missing notes to the contrary. You admitted to me that you were aware that al Bahlul had made allegations of abuse.

In our meeting with OGA, they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches. I again brought up the problem that this presents to us in the car on the way back from the meeting, and you told me that the rules were written in such a way as to not require that we conduct such thorough searches, and that we weren't going to worry about it.

You state in a morning meeting that al Bahlul has claimed "in every statement" that he was an AQ member. When I told you after the meeting that this was not true, you simply admitted that you hadn't read the statements but were relying on what CDR [redacted] ad told you. As I have detailed in another e-mail, it does not appear that CDR [redacted] s even aware of how many statements al Bahlul has made, let alone conducted a thorough analysis.

When Maj [redacted] aises concerns about him advising the AA given the potential appearance of partiality, you advised him not to stop giving advice, but to only give advice orally.

CDR [redacted] has emphasized at morning meetings, with you in the office, that we do not need to be putting so many of our concerns in e-mails and that we can just come down and talk. Given the disparity between what is said in causal conversation and the statements made by our leadership in e-mails, it is understandable that we have relied more and more on written communications.

You have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees, and we only needed to worry about building a record for the review panel. In private you have went further and stated that we are really concerned with review by academicians 10 years from now, who will go back and pick the cases apart.

We continue to foster the impression that CITF is responsible for our troubles and lack of evidence, although we have learned in the last few weeks that we haven't even sat down with the case agents to figure out what evidence they have and how they have

gathered it. You acknowledged last week that we will not even try to fix the problems with CITF. What is perhaps most disturbing about the lack of progress by our investigative agents is that it does not appear we have ever adequately explained the deficiencies to the CITF leadership.

Our morning meetings, briefings, and group discussions are short and superficial - it could be argued designed to permit a claim that the office has discussed or debated a certain topic without permitting such meaningful discussions to actually take place. Two prosecutors were scheduled 15 minutes each to go over the facts of their case. Charge sheets are reviewed by the office the afternoon that they are to be taken over to the Deputy AA. The lay down on the general conspiracy is cursory and devoid of meaningful comments or suggestions. The fact that we did not approach the FBI for assistance prior to 17 Dec - a month after the mock trial - is not only indefensible, but an example of how this office and others have misled outsiders by pretending that interagency cooperation has been alive and well for some time, when in fact the opposite is true.

It is claimed that the Tiger Team didn't do "shit" when in fact many of the products (i.e., AQ 101 and the statement of predicate facts) that they put together almost two years ago closely mirror products that have taken us months to put together. In fact, even a cursory review of the Tiger Team materials we now have (after several efforts to get them were sharply rebuffed by our own staff) shows that the Tiger Team had articulated many of the obstacles we now face and had warned that if these obstacles were not removed that prosecutions could not succeed.

As part of this atmosphere that you fostered, Ma[redacted] was publicly rebuked for bringing this issue to the group's attention and you specifically stated that you had reviewed the tiger team materials, there was little if any usable material in them, and that the demise of the tiger team had been the result of an unfortunate personality clash and nothing else. A review of the files shows otherwise.

From June to December, you were only present in the office for brief periods, often less than 4 hours every two weeks. However, you continued to insist that CDR [redacted] spoke for you and directed those who e-mailed you with concerns to address them with CDR [redacted] It is difficult to believe that his deficiencies were unknown at that time, and consequently it is difficult to believe that you were unaware of the fact that we had little to no direction during that time frame. The fact that he directed each of us in the office not to speak to you directly was, and remains to me, astonishing - but does permit one to argue that they were unaware of any difficulties during a critical period of this endeavor.

One justification for the concealment and minimization of the problems has been the often stated proposition that MG Altenburg will be able to remedy many of these problems when he becomes the Appointing Authority. However, you have recently stated that MG Altenburg is a good friend of yours, that you hope he will be heavily reliant on BG Hemingway for a period of time, and that we will not be forwarding any documentation of cases (e.g. proof analysis) to MG Altenburg which suggests that he will not be in a position to exercise independent judgment or oversight.

It is my opinion that the primary objective of the office has been the advancement of the process for personal motivations -- not the proper preparation of our cases or the interests of the American people.

The posturing of our prosecution team chiefs to maneuver onto the first case is overshadowed only by the zeal at which they hide from scrutiny or review the specific facts of their case - thereby assuring their participation.

The evidence does not indicate that our military and civilian leaders have been accurately informed of the state of our preparation, the true culpability of our accuseds, or the sustainability of our efforts.

I understand that part of the frustration with Maj [redacted] discussions with BG Hemingway was that you did not have the opportunity to discuss the matters with him in the first instance. It was clear from the discussions with BG Hemingway that he was unaware of the lack of preparation with our cases prior to signing the charges, or many of the other problems that we have discussed.

You have stated that you are confident that if you told MG Altenburg that we needed more time that he would give it to you. Underlying this comment is the fact that MG Altenburg has not been made aware of the significant shortcomings of our cases and our lack of preparation and cooperation with outside agencies.

I also have significant reason to believe that Mr. Haynes has not been advised in the most accurate and precise way. It appears that even the results and critiques of the mock trial, described like so many other efforts in this office as a "home run," were manipulated to present the maximum appearance of endorsement (for example, the reorganization and bold-face in Lt Col [redacted] critique that was openly discussed in the office)

[redacted]

The comments we have heard in the office appear to revolve around one goal - to get the process advanced to the point that it can not be turned off. We are told that we just need to get defense counsel assigned, because then they can't stop the process and we can fix the problems. We just need to get charges approved because then they can't stop the process and then maybe we can fix the problems.

If the appropriate decisionmakers are provided accurate information and determine that we must go forward on the path we are currently on, then all would be very committed to accomplishing this task. However, it instead appears that the decisionmakers are being provided false information to get them to make the key decisions, to only learn the truth after a point of no return.

It is at least possible that the appropriate officials would be more concerned about approving charges, arraigning accuseds, and signing more RTBs prior to the arguments in front of the Supreme Court if they knew the true state of the cases and the position they will be left in this fall.

[It is also unclear how the steadfast refusal to have the prosecutors co-located with the CITF agents is in the interests of the American people or the preparation of the cases, and could be motivated by anything but a purely personal issue with someone involved in the process. You have admitted that both organizations productivity would be greatly increased.]

To address at least some of the underlying issues, the following may be proposed:

1. After fully informing the sages or invitees to the Mock Trial of the deficiencies we now acknowledge, solicit their recommendations and suggested courses of action.

2. Before MG Altenburg signs in -- taking on the AA responsibility and further damaging his lucrative private practice -- fully and accurately brief him on the status of our cases, our theories of liability, and the likely timetable in which we would be able to prepare cases after al Bahlul and al Qosi.

3. Fully and accurately brief Mr. Haynes and DOJ on the status of our cases, our theories of liability, and the likely timetable in which we would be able to prepare cases after al Bahlul and al Qosi.

4. Take immediate action within the office to develop a comprehensive prosecution strategy.

5. Take immediate action within the office to establish an environment that fosters openness, honesty, and ethical behavior.

6. Replace current prosecutors with senior experienced trial litigators capable of maintaining objectivity while zealously preparing for trial.

Instead, what I fear the reaction to Maj [redacted] and my concerns will simply be a greater effort to make sure that we are walled off from the damaging information - as we are aware has been attempted in the past.

I would like to conclude with the following --
when I volunteered to assist with this process and was assigned to this office, I expected there would at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged. It is difficult to believe that the White House has approved this situation, and I fully expect that one day, soon, someone will be called to answer for what our office has been doing for the last 14 months.

I echo Ma[redacted]belief that I can not morally, ethically, or professionally continue to be a part of this process. While many may simply be concerned with a moment of fame and the ability in the future to engage in a small-time practice, that is neither what I aspire to do, nor what I have been trained to do. It will be expected that I should have been aware of the shortcomings with this endeavor, and that I reacted accordingly.

v/r,

Capt [redacted]

-----Original Message-----
From: [redacted] MAJ, DoD OGC
Sent: Thursday, March 11, 2004 16:19
To: [redacted], CAPT, DoD OGC
Cc [redacted], COL, DoD OGC
Subject: RE: Meeting with Colonel [redacted] and myself, 4:00 p.m. today, Col [redacted] office

Ma'am

While I appreciate the sentiment, I have to tell you that I don't see a lot of use continuing to talk about this stuff, unless your looking at reassigning us out of this office. I don't intend to speak for [redacted] although I know he feels the same way, but for me I sincerely believe that this process is wrongly managed, wrongly focused and a blight on the reputation of the armed forces. I don't have anything knew to say. I am pretty sure that everyone in the world knows my sentiments about this office and this process.

Certainly there have been some unfortunate symptomatic issues like Cdr [redacted] ecently heightened animosity towards [redacted] nd I'm not going to let that one go either), but my fundamental

concerns here have nothing to do with personality conflicts or intellectual disagreements.

I don't think that anyone really understands what our mission is, but whatever we are doing here is not an appropriate mission. I consider the insistence on pressing ahead with cases that would be marginal even if properly prepared to be a severe threat to the reputation of the Military Justice System and even a fraud on the American people - surely they don't expect that this fairly half-assed effort is all that we have been able to put together after all this time.

At the same time, my frank impression of my colleagues is that they are minimizing and/or concealing the problems we are facing and the potential embarassment of the Armed Forces (and the people of the United States) either because they are afraid to admit mistakes, feel powerless to fix things, or because they are more concerned with their own reputations than they are with doing the right thing. Whether I am right or wrong about that, my utter contempt for most of them makes it impossible for me to work effectively.

Frankly, I became disgusted with the lack of vision and in my view the lack of integrity long ago and I no longer want to be part of the process - my mindset is such that I don't believe that I can effectively participate - professionally, ethically, or morally.

I lie awake worrying about this every night. I find it almost impossible to focus on my part of the mission - after all, writing a motion saying that the process will be full and fair when you don't really believe it will be is kind of hard - particularly when you want to call yourself an officer and a lawyer. This assignment is quite literally ruining my life.

I really see no way to fix this situation other than reassignment. I don't want to be an obstacle to anyone, but I'm not going to go along with things that I think are wrong - and I think this is wrong. It's not like I'm going to change my opinion in order to "go along with the program." I'm only going to persist in doing what I think is right and at some point that is going to lead to even harder feelings. Half the office thinks we are traitors anyway and frankly I think they are gutless, simple-minded, self-serving, some, or all of the above so you can see how that's going to go...

I know even well-meaning people get tired of hearing this, but the fact is that I really can't stomach doing this and I really don't want to waste time talking about it.

PS: [redacted] not back yet. I think he was at FBI this afternoon.

-----Original Message-----
From: [redacted] CAPT, DoD OGC
Sent: Thursday, March 11, 2004 13:36

To: [redacted] MAJ, DoD OGC; Carr, John, CPT, DoD OGC
Cc: [redacted] COL, DoD OGC
Subject: Meeting with Colonel [redacted] and myself, 4:00 p.m. today, Col E[redacted] office

Major [redacted] and Captain [redacted]

Captain [redacted] and I had a long talk this morning. Based on his expressions of concern for some unresolved issues, including both ethical matters and person

Attachment I

[redacted]

From: [redacted]
Sent: Thursday, February 28, 2008 6:36 PM
To: [redacted]
Cc: [redacted]

Subject: Re: D-025 - Defense Motion to Compel Discovery (Eyewitnesses) - U.S. v. Khadr
Signed By: [redacted]

Sir,

1. The Government, consistent with the Military Judge's suggestion at the 21 FEB 08 RMC 802 conference, is looking closely at the current Defense Discovery request.

2. The Government notes that the Defense in D-025 is requesting information that has in large part already been provided to the Defense by the Government.

3. The Government notes that in D-025 the Defense does not, with any degree of specificity, indicate which "eyewitnesses" it is referring to, thereby making the Government's task more difficult.

4. Notwithstanding the lack of specificity in the Defense request, the Government is in the process of putting together a list of contact information of "eyewitnesses" currently in the possession of the Prosecution. Although not conceding that it is required, once assembled, this list will be forwarded to the Defense.

V/r,

[redacted]Army
Prosecutor
Offi[redacted]ns
[redacted]

-----O
From: [redacted]
Sent[redacted]:37 PM
[redacted]iam,
Subject: U.S. v. Khadr - Defense Motion to Compel Discovery (Eyewitnesses)

[redacted]

1. Please find for filing with the commission in the case of US v. Khadr the attached defense motion to compel discovery.

V/r
Ms. Snyder

Rebecca S. Snyder
Attorney
Office of Military Commissions
nsel
[redacted]

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** **To Compel Discovery** (Documents Relating to Charge III) 3 March 2008

1. Timeliness: This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court and the Military Judge's email order of 21 February 2008.

2. Relief Sought: The defense respectfully requests that this Commission order the government to produce intelligence reports and other documents in the possession, custody or control of the government tending to show that any of the individuals identified in Charge III as alleged co-conspirators did not agree to engage in one or more of the attacks listed in charge III. Such documents include, but are not limited to, the intelligence reports cited in footnotes 182-84 of Chapter Seven of The 9/11 Commission Report.

3. Overview:

a. The defense seeks information tending to show that the alleged co-conspirators did not agree to engage in one or more of the attacks alleged to be part of the conspiracy alleged in Charge III. This tends to undercut the government's argument that a single, large-scale conspiracy existed and, instead, tends to show that the attacks alleged in Charge III were part of separate conspiracies. The requested documents are exculpatory in nature and material to the preparation of the defense because they support the argument that the scope and scale of the conspiracy alleged in Charge III is much smaller and that the nature of the conspiracy is much less aggravating than the government alleges. Joining a conspiracy whose purpose is to engage in political terrorist attacks on the scale of those alleged from 1998 to 2002 is certainly more aggravating than conspiring to plant IEDs in the context of an armed conflict and engage in combat when approached by enemy military forces engaging in both ground and air assaults. If Mr. Khadr is convicted of Charge III and the defense succeeds in convincing the members that the nature, scope and scale of the alleged conspiracy is much different and smaller than the government claims, then Mr. Khadr would likely be sentenced to less confinement for Charge III than he otherwise would. The requested documents meet the minimal standard for production of being "helpful to the defense of [the] accused." Indeed, they are key to the defense's ability to test the government's case and to the factfinders' ability to weigh the evidence. Thus, the requested documents must be disclosed under R.M.C. 701(c)(1) and (e)(1).

4. Burden of Proof: The Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. R.M.C. 905(c)(2)(A). The Defense, however, need not show by a preponderance of the evidence that the requested discovery is material. *See generally, Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (On review, "[t]he question is not whether the defendant would more likely than not have received a different verdict with

the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

5. Facts:

a. On 9 November 2007, the defense submitted to the government a request for discovery that sought, among other items, the following: "All materials in the possession, custody and control of the government, including, without limitation, intelligence, law enforcement, or other files, relating to the participation of the following individuals in the conspiracy alleged in Charge III: i. Usama Bin Laden; ii. Ayman Al Zawahiri; iii. Saeyyd Al Masri; iv. Saif Al Adel; v. Ahmed Said Khadr." (Def. Discovery Req. of 9 Nov 07, ¶ 3(b)) (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses)).

b. The government responded that: "The government has provided to the defense copies of statements made, specifically by Usama bin Laden and Ayman al Zawahiri, and other documents that it intends to use as evidence in the prosecution of the case in chief that relate to the conspiracy alleged in Charge III. The government has provided all documents that relate to the accused's involvement (if any) with Usama Bin Laden, Ayman Al Zawahiri, Sayeed Al Masri, Saif Al Adel and Ahmed Said Khadr. (Govt Resp. of 4 Dec 07 to Def. Discovery Req., ¶ 3(b)) (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses)).

c. According to the 9/11 Commission Report prepared by the National Commission on Terrorist Attacks, Sheikh Saeed al Masri and Sayf al Adl – listed as Mr. Khadr's alleged co-conspirators in Charge III, alleging conspiracy – opposed the 9/11 attacks on the United States. The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 251-52 (2004) [hereinafter 9/11 Report] (Attachment A). The 9/11 report cites the following sources for this conclusion:

- Intelligence report, interrogation of detainee, May 30, 2002 (the 9/11 report listed this source as an example, suggesting there are additional sources containing similar information);

- Intelligence report, interrogation of KSM, Oct. 27, 2003;

- Intelligence report, interrogation of detainee, June 20, 2002;

- Intelligence report, interrogation of detainee, June 27, 2003;

- Intelligence report, interrogation of KSM, Sept. 26, 2003;

- Intelligence report, interrogation of KSM, Jan. 9, 2004;

- Intelligence reports, interrogations of detainee, June 27, 2003, Dec. 26, 2003;

- Intelligence report, interrogation of detainee, Oct. 7, 2003;

- Intelligence reports, interrogations of KSM, Oct. 27, 2003, Sept. 27, 2003;

- Intelligence report, interrogation of KSM, Jan 9, 2004.

9/11 Report at 532 n.182-84.

6. Discussion:

a. The M.C.A., R.M.C., Regulations for Trial by Military Commission, the Due Process Clause and International Law Require Disclosure of Documents Tending to Show that the Alleged Co-conspirators did not Agree to Engage in One or More of the Attacks Alleged to be Part of the Conspiracy Alleged in Charge III

(1) The MCA and Rules and Regulations Governing Military Commissions Require Disclosure

(i) The M.C.A. states that "Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense." *See* 10 U.S.C. § 949j. The rules and regulation echo the statute. *See* R.M.C. 703(a) ("The defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules."); Regulation for Trial by Military Commissions 17-2(a) ("Pursuant to 10 U.S.C.§ 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.").

(ii) Rule for Military Commission ("R.M.C.") 701(c)(1) requires the government to permit the defense to examine documents and things "within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and *which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial." (Emphasis added). The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16[1] governing discovery in the context of the Classified Information Procedures Act (CIPA), for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to "information [that] is at least 'helpful to the defense of [the] accused.'" *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) ("materiality standard is not a heavy burden") (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would "significantly help [ ] in 'uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal'") (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C.1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the

[1] The relevant portion of Federal Rule of Criminal Procedure 16 is nearly identical to R.M.C. 701(c)(1). It states: "Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense." Fed. R. Crim. Proc. 16(a)(1)(E)(i).

prosecution to turn over any information that is "at least helpful to the defense." In addition, R.M.C. 701(e)(1) requires the government to disclose "the existence of evidence known to the trial counsel which reasonably tends to … [n]egate the guilt of the accused of an offense charged."

(iii) In Charge III, the government alleges that the attacks on American Embassies in Kenya and Tanzania in August 1998, the USS Cole attack in October 2000, the 9/11 attacks on the United States, Mr. Khadr's alleged involvement in improvised explosive devices ("IEDs") in July 2002, Mr. Khadr's alleged killing of Sgt Speer during a four-hour firefight that ensued when U.S. troops encircled the compound where Mr. Khadr was staying in July 2002, and other unspecified attacks are all part of a single conspiracy as opposed to separate conspiracies. Evidence tending to show that not all of the alleged co-conspirators agreed to participate in each of the alleged attacks, undercuts the government's argument that a single massive conspiracy existed. *See United States v. Jones*, 36 M.J. 778, 779 (A.C.M.R. 1993) ("The essential element of the offense of conspiracy is that there is an agreement with one or more persons to commit a criminal act."). Evidence showing that the participants in each alleged attack were different, tends to show that the alleged attacks were part of separate conspiracies.

(iv) The requested documents are material to the preparation of the defense because they are relevant to the nature, scope and scale of the conspiracy alleged. Joining a conspiracy whose purpose is to engage in political terrorist attacks on the scale of those alleged from 1998 to 2002 is certainly more aggravating than conspiring to plant IEDs in the context of an armed conflict and engage in combat when approached by enemy military forces engaging in both ground and air assaults. If Mr. Khadr is convicted of Charge III and the defense succeeds in convincing the members that the scope and scale of the alleged conspiracy is much smaller and the gravity of the conspiracy is much less aggravating than the government claims it is, then it is very possible that Mr. Khadr would be sentenced to less confinement for this offense than he otherwise would.

(v) There is no question that the requested records meet the minimal standard of being "helpful to the defense of [the] accused" and negate the government's case against Mr. Khadr. Indeed, they are key to the defense's ability to test the government's case and to the factfinders' ability to weigh the evidence. Mr. Khadr is entitled to the requested discovery not only as a matter of fundamental fairness, but also to ensure that the instant proceedings elicit the truth and provide a fair trial worthy of confidence. *Cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (defining fair trial "as a trial resulting in a verdict worthy of confidence"); *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (same). Therefore, documents tending to show that the alleged co-conspirators did not agree to engage in one or more of the attacks alleged to be part of the conspiracy alleged in charge III must be disclosed under R.M.C. 701(c)(1) and (e)(1).

(2) <u>The Due Process Clause & MCA § 949j(d)(2) Require Disclosure</u>

(i) The disclosure requirement under the R.M.C. 701(c) echoes a fundamental principle of U.S. law: The government's failure to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment …." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The government's duty to disclose such evidence encompasses exculpatory evidence, including impeachment evidence. *United States v.*

Bagley, 473 U.S. 667, 675 (1985) (impeachment evidence falls within *Brady* rule); *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (characterizing impeachment evidence as exculpatory evidence). Such evidence is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id. at* 682. "The message of Brady and its progeny is that a trial is not a mere 'sporting event'; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory." *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986); *see also Bagley*, 473 U.S. at 675 ("The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.").

(ii) The MCA makes *Brady*, at least with respect to exculpatory evidence, applicable to military commissions. *See* 10 U.S.C. § 949j(d)(2). Section 949j(d)(2) of the MCA states that the prosecution must disclose exculpatory evidence that it "would be required to disclose in a trial by general court-martial." *Brady* governs disclosure of exculpatory evidence in general courts-martial. *Mahoney*, 58 M.J. at 349. Therefore, by virtue of MCA § 949j(d)(2), *Brady* applies to military commissions.

(iii) Because the requested records will corroborate the defense claim that Mr. Khadr was not part of a single massive conspiracy as alleged by the government they are "exculpatory" in nature, and there is a "reasonable probability" that the disclosure of this evidence will yield a different result in the instant proceedings. *See Bagley*, 473 U.S. at 676, 682 ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). If the defense is denied access to that information, then counsel will be hamstrung in its ability to investigate and prepare the defense case. Such an outcome would obviously prejudice Mr. Khadr's most fundamental rights, but would also pervert the cause of justice and fair process. *Brady* and its progeny – made applicable to military commissions by MCA § 949j(d)(2) – therefore require disclosure of the requested records, independent of R.M.C. 701(c)(1)'s broader discovery provision.

(3) International Law Requires Disclosure

(i) The Military Commissions Act (M.C.A.) and the Manual for Military Commissions (M.M.C.) incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948(b)(f) ("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.")[2]; R.M.C., Preamble (stating that the Manual for Military Commissions

[2] 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

"provides procedural and evidentiary rules that [. . .] extend to the accused all the 'necessary judicial guarantees' as required by Common Article 3.") They must, therefore, be read in light of Common Article 3 and international law surrounding that provision.

(ii) The Geneva Convention Relative to the Treatment of Prisoners of War prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See* Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The judicial safeguards required by Common Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949.[3] Article 75(a) provides that the procedures for trial "shall afford the accused before and during his trial all necessary rights and means of defense."[4]

(iii) Read in light of international law principles, precedents applying the U.S. Constitution, and the rules governing this Commission, the Government's denial of the Defense request for the documents at issue ignores fundamental concepts of fairness and places in question the integrity of these proceedings.

---

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] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 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). 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.

[4] The ICTY and the ICTR similarly provide "minimum guarantees" for the accused to "be entitled to a fair and . . . hearing." 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, art. 21(2), 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); Statute of the International Tribunal for Rwanda, art. 20(2), *adopted by* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

b. Denial of the Requested Documents Will Necessarily Result in Counsel Failing to Provide Competent Representation

(1) Failure to grant the defense request for discovery will deprive Mr. Khadr of competent representation by precluding the Defense from inquiring into possible challenging the nature, scope and scale of the conspiracy alleged in Charge III. Governing military ethics rules require Mr. Khadr's military counsel to provide "competent" representation. "Competent representation requires . . . access to evidence." JAGINST 5803.1C (9 Nov 04). "[I]nvestigation is an essential component of the adversary process." *Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)). Thus, the adversarial process will not function properly if the defense counsel fails to investigate his client's case or is denied access to evidence within the control of the government that is relevant to the investigation. *See id*. Here, the government's view of what evidence is relevant and material to the preparation of the defense is so narrow as to necessarily cause defense counsel to fail to provide competent representation to Mr. Khadr. Accordingly, this Commission should order the government to produce the requested documents.

c. Conclusion

(1) The Supreme court has said "that the United States Attorney is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Strickler*, 537 U.S. at 281 (quoting *Berger v. United States,* 295 U.S. 78, 88 (1935)). When the prosecution reserves to itself the determination of what evidence ought be considered, it disregards its duty to seek justice, and usurps the role of the court, defense counsel and the trier of fact. *Cf. Brady*, 373 U.S. at 87-88, n. 2. The integrity of these proceedings will be fatally undermined if the defense is not afforded the opportunity to independently investigate the factual allegations at issue in the case. At a minimum, this requires that the defense be allowed access to intelligence reports and other documents in the possession custody or control of the government tending to show that any of the individuals identified in Charge III as alleged co-conspirators did not agree to engage in one or more of the attacks listed in charge III. The Commission should therefore order the government to produce these documents.

7. **Oral Argument:** The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that "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 raised by this motion.

8. **Witnesses & Evidence:** The Defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the Prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following evidence for this motion:

Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))

Government Response of 4 December 07 to Defense Discovery Request of 9 Novmeber 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

Attachment A: The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 251-52, 251-52 n.182-84 (2004)

9. 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 The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States 251-52, 251-52 n.182-84 (2004)

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

THE 9/11 COMMISSION REPORT

Attachment A

of the alert, word had begun to spread that an attack against the United States was coming. KSM notes that it was generally well known by the summer of 2001 that he was planning some kind of operation against the United States. Many were even aware that he had been preparing operatives to go to the United States, leading some to conclude that al Qaeda was planning a near-term attack on U.S. soil. Moreover, Bin Ladin had made several remarks that summer hinting at an upcoming attack and generating rumors throughout the worldwide jihadist community. Bin Ladin routinely told important visitors to expect significant attacks against U.S. interests soon and, during a speech at the al Faruq camp, exhorted trainees to pray for the success of an attack involving 20 martyrs. Others have confirmed hearing indications of an impending attack and have verified that such news, albeit without specific details, had spread across al Qaeda.[180]

Although Bin Ladin's top priority apparently was to attack the United States, others had a different view. The Taliban leaders put their main emphasis on the year's military offensive against the Northern Alliance, an offensive that ordinarily would begin in the late spring or summer. They certainly hoped that this year's offensive would finally finish off their old enemies, driving them from Afghanistan. From the Taliban's perspective, an attack against the United States might be counterproductive. It might draw the Americans into the war against them, just when final victory seemed within their grasp.[181]

There is evidence that Mullah Omar initially opposed a major al Qaeda operation directly against the United States in 2001. Furthermore, by July, with word spreading of a coming attack, a schism emerged among the senior leadership of al Qaeda. Several senior members reportedly agreed with Mullah Omar. Those who reportedly sided with Bin Ladin included Atef, Sulayman Abu Ghayth, and KSM. But those said to have opposed him were weighty figures in the organization—including Abu Hafs the Mauritanian, Sheikh Saeed al Masri, and Sayf al Adl. One senior al Qaeda operative claims to recall Bin Ladin arguing that attacks against the United States needed to be carried out immediately to support insurgency in the Israeli-occupied territories and protest the presence of U.S. forces in Saudi Arabia. Beyond these rhetorical appeals, Bin Ladin also reportedly thought an attack against the United States would benefit al Qaeda by attracting more suicide operatives, eliciting greater donations, and increasing the number of sympathizers willing to provide logistical assistance.[182]

Mullah Omar is reported to have opposed this course of action for ideological reasons rather than out of fear of U.S. retaliation. He is said to have preferred for al Qaeda to attack Jews, not necessarily the United States. KSM contends that Omar faced pressure from the Pakistani government to keep al Qaeda from engaging in operations outside Afghanistan. Al Qaeda's chief financial manager, Sheikh Saeed, argued that al Qaeda should defer to the Taliban's wishes. Another source says that Sheikh Saeed opposed the operation, both out of deference to Omar and because he feared the U.S. response to an

attack. Abu Hafs the Mauritanian reportedly even wrote Bin Ladin a message basing opposition to the attacks on the Qur'an.[183]

According to KSM, in late August, when the operation was fully planned, Bin Ladin formally notified the al Qaeda Shura Council that a major attack against the United States would take place in the coming weeks. When some council members objected, Bin Ladin countered that Mullah Omar lacked authority to prevent al Qaeda from conducting jihad outside Afghanistan. Though most of the Shura Council reportedly disagreed, Bin Ladin persisted. The attacks went forward.[184]

The story of dissension within al Qaeda regarding the 9/11 attacks is probably incomplete. The information on which the account is based comes from sources who were not privy to the full scope of al Qaeda and Taliban planning. Bin Ladin and Atef, however, probably would have known, at least, that

- The general Taliban offensive against the Northern Alliance would rely on al Qaeda military support.
- Another significant al Qaeda operation was making progress during the summer—a plot to assassinate the Northern Alliance leader, Ahmed Shah Massoud. The operatives, disguised as journalists, were in Massoud's camp and prepared to kill him sometime in August. Their appointment to see him was delayed.[185]

But on September 9, the Massoud assassination took place. The delayed Taliban offensive against the Northern Alliance was apparently coordinated to begin as soon as he was killed, and it got under way on September 10.[186]

As they deliberated earlier in the year, Bin Ladin and Atef would likely have remembered that Mullah Omar was dependent on them for the Massoud assassination and for vital support in the Taliban military operations. KSM remembers Atef telling him that al Qaeda had an agreement with the Taliban to eliminate Massoud, after which the Taliban would begin an offensive to take over Afghanistan. Atef hoped Massoud's death would also appease the Taliban when the 9/11 attacks happened. There are also some scant indications that Omar may have been reconciled to the 9/11 attacks by the time they occurred.[187]

Moving to Departure Positions

In the days just before 9/11, the hijackers returned leftover funds to al Qaeda and assembled in their departure cities. They sent the excess funds by wire transfer to Hawsawi in the UAE, about $26,000 altogether.[188]

The hijackers targeting American Airlines Flight 77, to depart from Dulles, migrated from New Jersey to Laurel, Maryland, about 20 miles from Washington, D.C. They stayed in a motel during the first week in September and spent

recently, Binalshibh has claimed that he neither called nor sent a letter to KSM, but rather passed a verbal message via Essabar. Intelligence report, interrogation of Binalshibh, Apr. 8, 2004. On Binalshibh's communication to Essabar, see Intelligence reports, interrogations of Binalshibh, Dec. 17, 2002; Nov. 6, 2003; Apr. 8, 2004.

174. On Binalshibh's travel, see FBI report, "Summary of Penttbom Investigation," Feb. 29, 2004 (classified version), p. 84. On Binalshibh's communication with Atta, see Intelligence report, Documents captured with KSM, Sept. 24, 2003; Intelligence report, interrogation of Binalshibh, Sept. 11, 2003. On Atta's call to his father, see Intelligence report, re Atta, Sept. 13, 2001. On Jarrah's letter, see German BKA report, investigative summary re Jarrah, July 18, 2002, p. 67.

175. Shortly after 9/11, Abdullah told at least one witness that the FBI was asking questions about his having received a phone a call from Hazmi in August. FBI report of investigation, interview, Sept. 24, 2001. In a July 2002 FBI interview, Abdullah asked whether the FBI had taped the call. FBI report of investigation, interview of Mohdar Abdullah, July 23, 2002. Also on possibility of Hazmi-Abdullah contact shortly before 9/11, see Danny G. interviews (Nov. 18, 2003; May 24, 2004). On the change in Abdullah's mood, see FBI report of investigation, interview of Mohdar Abdullah, July 23, 2001. On the sudden interest of Abdullah and Salmi in proceeding with marriage plans, see FBI report of investigation, interview, Sept. 24, 2001; FBI report of investigation, interview of Samir Abdoun, Oct. 21, 2001. On anticipated law enforcement interest in gas station employees and September 10, 2001, meeting, see FBI report of investigation, interview, May 21, 2002.

176. Intelligence report, interrogation of detainee, Feb. 5, 2002.

177. Intelligence reports, interrogations of KSM, Aug. 14, 2003; Feb. 20, 2004.

178. Intelligence reports, interrogations of KSM, June 3, 2003; Feb. 20, 2004; Apr. 3, 2004.

179. Intelligence reports, interrogations of detainee, Nov. 27, 2001; Feb. 5, 2002. Intelligence report, interrogation of detainee, May 30, 2002.

180. Intelligence report, interrogation of KSM, Jan. 9, 2004; Intelligence report, interrogation of detainee, June 27, 2003; Intelligence report, interrogation of detainee, Feb. 5, 2002. KSM also says that he and Atef were so concerned about this lack of discretion that they urged Bin Ladin not to make any additional remarks about the plot. According to KSM, only Bin Ladin, Atef, Abu Turab al Jordani, Binalshibh, and a few of the senior hijackers knew the specific targets, timing, operatives, and methods of attack. Intelligence reports, interrogations of KSM, Oct. 27, 2003; Feb. 23, 2004. Indeed, it was not until midsummer that Egyptian Islamic Jihad leader Ayman al Zawahiri learned of the operation, and only after his group had cemented its alliance with al Qaeda and Zawahiri had become Bin Ladin's deputy. Intelligence report, interrogation of KSM, Jan. 9, 2004.

181. See Intelligence report, interrogation of KSM, July 24, 2003.

182. On Omar's opposition, see, e.g., Intelligence report, interrogation of detainee, May 30, 2002, in which the detainee says that when Bin Ladin returned after the general alert during July, he spoke to his confidants about Omar's unwillingness to allow an attack against the United States to originate from Afghanistan. See also Intelligence report, interrogation of KSM, Oct. 27, 2003. There is some discrepancy about the position of Zawahiri. According to KSM, Zawahiri believed in following the injunction of Mullah Omar not to attack the United States; other detainees, however, have said that Zawahiri was squarely behind Bin Ladin. Intelligence report, interrogation of detainee, June 20, 2002; Intelligence report, interrogation of detainee, June 27, 2003; Intelligence report, interrogation of KSM, Sept. 26, 2003.

183. Intelligence report, interrogation of KSM, Jan. 9, 2004; Intelligence reports, interrogations of detainee, June 27, 2003; Dec. 26, 2003. On Abu Hafs's views, see Intelligence report, interrogation of detainee, Oct. 7, 2003.

184. Intelligence reports, interrogations of KSM, Oct. 27, 2003; Sept. 27, 2003, in which KSM also says Bin Ladin had sworn bayat to Omar upon first moving to Afghanistan, following the Shura Council's advice. KSM claims he would have disobeyed even had the council ordered Bin Ladin to cancel the operation. Intelligence report, interrogation of KSM, Jan. 9, 2004.

185. See Intelligence report, interrogation of KSM, July 24, 2003.

186. Abdul Faheem Khan interview (Oct. 23, 2003); see also Arif Sarwari interview (Oct. 23, 2003).

187. Intelligence reports, interrogations of KSM, May 8, 2003; July 24, 2003.

188. FBI report, "Hijackers Timeline," Dec. 5, 2003 (citing 315N-NY-280350, serial 3112; Western Union records; 315N-NY-280350-302, serials 28398, 37864). In addition, Nawaf al Hazmi attempted to send Hawsawi the debit card for Mihdhar's bank account, which still contained approximately $10,000. The package containing the card was intercepted after the FBI found the Express Mail receipt for it in Hazmi's car at Dulles Airport on 9/11. FBI report, "Summary of Penttbom Investigation," Feb. 29, 2004, p. 61.

189. FBI report, "Hijackers Timeline," Dec. 5, 2003 (citing 315N-NY-280350-WF, serial 64; 315N-NY-280350-BA, serials 273, 931, 628; 315N-NY-280350-302, serials 10092, 17495).

190. FBI report, "Hijackers Timeline," Dec. 5, 2003 (citing 315N-NY-280350, serials 6307, 9739). In the early morning hours of September 11, Jarrah made one final call to Senguen from his hotel. FBI report, "Hijackers Timeline," Dec. 5, 2003. The conversation was brief and, according to Senguen, not unusual. FBI electronic communication, Penttbom investigation, Sept. 18, 2001, pp. 5–6.

191. FBI report, "Hijackers Timeline," Dec. 5, 2003 (citing 315N-NY-280350-FD-302; 315N-NY-280350-

UNITED STATES OF AMERICA	**D026**
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 Motion to Compel Discovery** **(Documents Relating to Charge III)** **10 March 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 e-mail order of 21 February 2008.

2. Relief Requested: The Government respectfully submits that the Defense's motion to compel discovery with respect to documents relating to Charge III ("Mot. to Compel") should be denied.

3. Overview:

a. The Defense misstates the relevance and materiality standards in *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989). Under the correct reading of *Yunis*, the information sought by the Defense is not discoverable because it is neither relevant nor material to the offense charged.

b. The Defense improperly invokes the Due Process Clause, which is inapplicable to the accused. As a result, the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), does not apply to the accused as a matter of constitutional law. Further, the accused overstates the extent to which *Brady* is incorporated into the Military Commissions Act of 2006 ("MCA") and the Manual for Military Commissions ("MMC"). In any event, neither *Brady*, nor the MCA or MMC, requires that *non*-exculpatory material be produced to the Defense, which is the only material the Defense seeks.

c. Although the Defense purports to rely on various principles of international law, the accused may not invoke the Geneva Conventions in general, or Common Article 3 in particular, in these proceedings. *See* 10 U.S.C. § 948b(g). In any event, even if there were some conflict between the MCA and pre-existing international law, the MCA would apply because it is a subsequently enacted statute.

d. Finally, the Defense's claim that not granting the instant motion will result in an incompetent defense is baseless. The MCA and MMC carefully define the evidence to which the Defense is entitled, and the Defense has proffered no basis for its assertion that implementing the MCA and MMC will deprive the accused of a fair trial.

4. Burden and Persuasion: As the moving party, the Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. *See* Rules for Military Commissions ("RMC") 905(c)(1), 905(c)(2)(A).[1]

5. Facts:

a. Except as set forth herein, the Prosecution does not controvert the facts cited in section 5 of the Defense's motion.

6. Discussion:

a. THE DEFENSE MISSTATES THE RELEVANCE AND MATERIALITY STANDARDS FROM *YUNIS*

i. The Defense misstates the standard it must meet in order to succeed in this motion. RMC 701(c) provides that

> the Government shall permit the defense counsel to examine . . . [a]ny . . . documents . . . which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense . . . .

As the discussion note to RMC 701(c) elucidates, the starting point for defining what is "material to the preparation of the defense" is *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989). In *Yunis*, the D.C. Circuit set forth a three-step analysis (of which only the first two are applicable for the present motion) for determining when the Government must disclose information to the Defense. In order for such information to be discoverable, the Defense must show that the requested information is both *relevant* and *material* to its case. *See id.* at 621-22.[2]

---

[1] The Defense cites *Kyles v. Whitley*, 514 U.S. 419 (1995), for the proposition that "[o]n review, '[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" Mot. to Compel at 1-2 (second alteration in original). That standard, however, is an *appellate* standard—the Court in *Kyles* was analyzing what showing was required to reverse a judgment. Here, the question is whether the Defense has met its burden, by a preponderance of the evidence, as to whether the documents sought are either material to the preparation of the defense or exculpatory. In determining whether the Defense has made a sufficient showing, the applicable standard is preponderance of the evidence. *See* RMC 905(c)(1).

[2] Under *Yunis*, where the requested information is classified and the Government asserts privilege under the Classified Information Protection Act ("CIPA"), the court may permit disclosure of the evidence only after balancing the defendant's interest in disclosure against the Government's need to keep the information secret. *See id.* at 625. This balancing test occurs only after the Defense has proven the relevance and materiality of the requested information. *See id.* Under the MCA and MMC, however, the Government's authority to withhold discovery with respect to classified evidence is even broader than under CIPA. *See* 10 U.S.C. § 949d(f)(1); RMC 701(f). In any event, at present, the Government has not asserted the national security privilege with respect to the information sought by the Defense. Were the

ii. The first step in the *Yunis* inquiry is relevance. In *Yunis*, the D.C. Circuit applied Federal Rule of Evidence 401, which provides that evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Yunis*, 867 F.2d at 622 (quoting Fed. R. Evid. 401) (internal quotation marks omitted). There, the Court of Appeals noted that granting an accused access to his own statements generally requires only a minimal showing of relevance. *See id.* at 621-22. The court determined that the defendant in that case had failed to meet even this lower standard of relevance since "[n]othing in the classified documents in fact goes to the innocence of the defendant *vel non*, impeaches any evidence of guilt, or makes more or less probable any fact at issue in establishing any defense to the charges." *Id.* at 624.

iii. In the instant case, there can be no doubt that the information requested by the Defense fails to satisfy the above standard of relevance. As an initial matter, we note that the Defense does not benefit from the lower threshold cited in *Yunis*, since the statements of the accused are not at issue. Nonetheless, the Defense maintains that it must merely show that the information is "at least helpful to the defense" for it to be discoverable. Mot. to Compel at 4. This bit of legerdemain by the Defense is a misreading of the actual quotation from *Yunis*, which states that the defendant "is entitled *only* to information that is at least 'helpful to the defense of [the] accused.'" *Yunis*, 867 F.2d at 623 (emphasis added; alteration in original) (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)). That is, for information to be relevant it is *necessary*, but not sufficient, that the information be helpful to the defense. Rather, as *Yunis* makes clear, the "relevant" and "helpful to the defense" inquiries are distinct. *See id.* at 622.

iv. The Supreme Court in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), also set a higher relevance standard than that which the Defense claims should apply here. In *Valenzuela-Bernal*, the Supreme Court rejected the analysis of the Court of Appeals that a constitutional violation had occurred where the Government deprived the defense of evidence that could have produced a "conceivable benefit" to the defense. *See id.* at 862. Instead, the Supreme Court held that *Roviaro*'s test of materiality is the proper standard. *See id.* at 870-71. The Court elaborated upon this standard by explaining that there is no reversible error with respect to conviction unless there is "a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Id.* at 874. So, too, here, Defense counsel has failed to demonstrate that the information sought would have a reasonable likelihood of affecting the outcome in this case.

b. THE MATERIAL SOUGHT BY THE DEFENSE IS IRRELEVANT AND IMMATERIAL UNDER *YUNIS*

i. The terrorist attacks indentified in the charge sheet against the accused were pled to prove the existence of an armed conflict between al Qaeda and the United

---

Government to assert such a privilege, numerous other obstacles would be raised to the Defense's instant motion.

States and as proof of a criminal conspiracy to kill Americans, both soldiers and civilians, throughout the world. Whether the attacks were part of a series of separate conspiracies or part of a broader conspiracy is irrelevant. The attacks were alleged with respect to the enterprise that the accused joined (al Qaeda)—an enterprise devoted to violating the law of war. Even if al Qaeda had committed only one of the specifically identified attacks, the accused could nevertheless be found guilty under the MCA and MMC of the offense of conspiracy. *See* 10 U.S.C. § 950v(b)(28); MMC IV-6(28).

ii. Moreover, even if it were true that the various co-conspirators identified in the charge sheet disagreed with certain tactics that were employed to effectuate the mission of killing Americans, or disagreed with the timing, mode or manner of how the attacks would be carried out (after previously agreeing that Americans should be killed), that would not make those conspirators anything less than conspirators. Nor would it suggest that those persons are any more innocent of conspiring than would be the case if two people agreed to kill someone, and one conspirator shot the victim on Monday while the other conspirator thought the victim was to be stabbed, not shot, on Tuesday. This is especially true when applied to an organization such as al Qaeda, whose intentions and goals are well publicized and known to all of its members, but whose operational security for terrorist attacks dictates that very few individuals know all aspects of the plot. Furthermore, it is important to note that the 9/11 Commission report cited by the Defense comes in regard to a *third* in a series of attacks targeting and killing American civilians.

iii. In addition, the Defense collapses the relevance and materiality requirements of *Yunis*. For example, in its Motion to Compel, the Defense argues that "[t]he requested documents are material to the preparation of the defense because they are relevant" to the conspiracy charge. Mot. to Compel at 4. This explanation of alleged relevance is void of any showing of materiality. In order to show that evidence is material it must be helpful or beneficial to the Defense. *Yunis*, 867 F.2d at 618. Here, because the information sought can have no impact on the accused's guilt or innocence, it is not material to the outcome of this case.

c. THE ACCUSED HAS NO RIGHTS UNDER THE DUE PROCESS CLAUSE, AND THE DEFENSE MISDESCRIBES THE NON-APPLICABILITY OF *BRADY*

i. The Defense invokes the "fundamental principle of U.S. law" that "[t]he government's failure to disclose 'evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Mot. to Compel at 4 (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). However, as the Prosecution has previously explained, *see, e.g.*, Government's Response to the Defense's Motion to Dismiss for Lack of Jurisdiction (Equal Protection) at 4-8 (18 Jan. 2008), the Due Process Clause does not apply to the accused.

ii. The Supreme Court has squarely held that alien enemy combatants held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no rights under the Due Process Clause. For example, 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 rights under 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).

iii. 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 easily rejected the argument that alien enemy combatants should have more rights than our servicemen and women, and held instead that the Fifth Amendment had no application to alien enemy combatants detained outside the territorial borders of the United States. *See id.* at 784-85 ("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.") (citation omitted).

iv. 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) (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"). 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)).

v. 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).

vi. In light of these principles, the accused cannot credibly claim any constitutional protections, including those of the Due Process Clause. 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.[3] 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)

[3] 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.

(U.S. naval base in Bermuda, controlled by United States under lease with Great Britain, was outside United States sovereignty).[4]

vii. Despite the accused's previous suggestion that *Rasul* extended constitutional rights to alien enemy combatants held at Guantanamo Bay, Cuba, *Rasul* did nothing of the sort. The *Rasul* Court's determination that persons detained at Guantanamo are "within 'the territorial jurisdiction' of the United States," 542 U.S. at 480, was only with respect to the habeas statute, and *not* with respect to rights guaranteed by the Constitution: "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." *Id.* at 481 (emphasis added). Thus, *Rasul*'s 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 *Constitution* to apply extraterritorially in such circumstances. *See id.* at 475-79, 484; *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).

viii. Accordingly, because the Due Process Clause has no applicability to the accused, *Brady* and its progeny do not apply to the accused as a matter of constitutional law. Nevertheless, the accused argues that *Brady* applies based on the text of the MCA. In particular, the accused cites section 949j(d)(2) as evidence that Congress incorporated *Brady* into these military commissions. The accused, however, is mistaken.

ix. Section 949j(d)(1) provides that "[a]s soon as practicable, trial counsel shall disclose to the defense the existence of any evidence known to trial counsel that reasonably tends to exculpate the accused." This section also provides that "[w]here exculpatory evidence is classified, the accused shall be provided with an adequate substitute." *Id.* Section 949j(d)(2) glosses the term "evidence known to trial counsel" by explaining that, "in the case of exculpatory evidence, [it] means exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of this title."

x. Contrary to the Defense's claim, this section does not incorporate *Brady* into the MCA. *Brady* is never cited in the MCA, nor is it cited in the Manual for Military Commissions. The MMC makes clear that the Defense's right to obtained witnesses or other evidence exists only "as provided in these rules." RMC 703(a). RMC 701(e), which governs the production of exculpatory evidence by the Government, provides that trial counsel must "disclose to the defense the existence of [exculpatory] evidence known to the trial counsel." "[E]vidence known to the trial counsel" is, consistent with the

[4] 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.

MCA, defined by reference to "exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of this title." *Id.*[5]

xi. Neither the MCA nor the MMC incorporates *Brady*, its progeny nor any of *Brady*'s remedial aspects. It is therefore incorrect to state—as the Defense does—that "[t]he MCA makes *Brady*, at least with respect to exculpatory evidence, applicable to military commissions." Mot. to Compel at 5. Rather, the only aspect of courts-martial practice that is incorporated into military commissions by MCA § 949j(d)(2) and RMC 701(e) is the degree of due diligence required of trial counsel before a piece of evidence is deemed "known to trial counsel." *See* RMC 701(e) Discussion Note. "Exculpatory evidence," on the other hand, is defined purely by reference to the plain language of RMC 701(e), namely, as evidence that "reasonably tends to: (1) [n]egate the guilt of the accused of an offense charged; (2) [r]educe the degree of guilt of the accused of an offense charged; or (3) [r]educe the punishment." As described below, the evidence sought by the accused fails to meet this clear definition of exculpatory evidence.

d. THE ACCUSED IS NOT ENTITLED UNDER RMC 703(e) TO THE INFORMATION SOUGHT BECAUSE IT IS NOT EXCULPATORY

i. The accused is charged with conspiracy under two separate theories of liability: One charge in the specification is that he "willfully join[ed]an enterprise of persons, to wit: al Qaeda . . . that has engaged in hostilities against the United States," to commit various offenses triable by military commission, including "attacking civilians; attacking civilian objects, murder in violation of the law of war; destruction of property in violation of the law of; and terrorism." *United States v. Khadr*, Referred Charges, at 1-2 (24 Apr. 2007). The charge sheet also lists examples of other illegal acts engaged in by al Qaeda, including the attacks against the American embassies in Kenya and Tanzania in 1998, the attack on the USS Cole in 2000 and the terrorist attacks of 9/11. *See id.* at 1.

ii. The information sought by the accused is not exculpatory. An example of potentially exculpatory evidence would be evidence that tends to show, for example, that the accused did not actually join al Qaeda, or that he did not know the criminal purpose of the enterprise or did not join it willfully. By contrast, whether the various participants in the attacks by al Qaeda were the same persons or different persons is irrelevant to the charge. Irrelevant material is obviously not exculpatory.

iii. The accused is also charged with "conspir[ing] and agree[ing]" with several named and unnamed members of al Qaeda to commit various violations of the law of war. *See Khadr*, Referred Charges, at 1. Whether these other members of al Qaeda were part of the same or different conspiracies is again irrelevant. The relevant facts are those that tend to show whether the accused conspired to commit violations of the law of war and committed an overt act in furtherance thereof. *See* 10 U.S.C.

---

[5] In addition, as previously noted, *see supra* note 2, RMC 701(e) is further qualified by RMC 701(f), governing the national security privilege. The Defense does not once in its brief acknowledge the existence of RMC 701(f). In any event, were the Government to assert the national security privilege with respect to the information at issue, further obstacles would be raised to the Defense's motion.

§ 950v(b)(28); MMC IV-6(28). Because the accused's guilt under Charge III does not turn on whether the participants in the attacks were the same or different, evidence with respect to such facts is irrelevant and, *a fortiori*, not exculpatory.

iv. The Defense's attempt to impose further roadblocks to this case ever reaching trial by requesting irrelevant and immaterial information is meritless. Even were the Defense correct that the Government has documents that demonstrate that the bombing of the USS Cole, the attacks of 9/11, and the various other offenses cited in the charge sheet were part of separate conspiracies, that would not in any way mitigate the accused's guilt and would not be exculpatory. Because the evidence sought by the accused is not exculpatory, he has no right to it under either MCA § 949j(d) or RMC 701(e).

e. THE ACCUSED MAY NOT ASSERT ANY RIGHTS UNDER THE GENEVA CONVENTIONS, AND INTERNATIONAL LAW DOES NOT GRANT THE ACCUSED ANY RIGHTS THAT CONFLICT WITH THE MCA OR MMC THAT ARE ENFORCEABLE IN THIS COMMISSION

i. The Defense claims that the MCA and MMC "incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions." Mot. to Compel at 5. As previously discussed, however, the accused may not invoke the protections of Common Article 3 in this proceeding. *See* 10 U.S.C. § 948b(g) ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."); *see generally* Government's Response to the Defense's Motion to Dismiss for Lack of Jurisdiction (Common Article 3) (24 Jan. 2008). As the Prosecution has previously explained, Congress and the President jointly determined that the MCA meets all requirements of Common Article 3 and the Geneva Conventions, and therefore expressly provided that the accused may not seek to invoke any additional rights that might arguably be found in the Geneva Conventions. *See* 10 U.S.C. § 948b(f).

ii. 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 such as the Geneva Conventions 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.

iii. In enacting the MCA and delegating authority to the Secretary of Defense to promulgate the MMC, Congress and the President clearly intended that these instruments would wholly define the rights of the accused in this proceeding. Any principles of international law that may be to the contrary can have no effect in this court. *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. 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").

iv. Similarly, even if Common Article 3 potentially applied 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.

v. 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 discovering and admitting evidence. 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.

vi. This likewise answers the accused's argument in footnote 2 of his motion that principles of constitutional avoidance require the Military Judge to disregard the framework that Congress and the President so carefully articulated in the MCA in favor of the accused's preferred reading of international law. Congress has surely not mandated that this court review the MCA and MMC with a fine-tooth comb looking for compliance *vel non* with Common Article 3. Rather, Congress and the President have emphatically stated that the MCA and MMC *comply* with Common Article 3. *See* 10 U.S.C. § 948b(f). As discussed in our prior brief, *see* Government's Response to the Defense's Motion to Dismiss for Lack of Jurisdiction (Common Article 3) at 12-24, that determination by Congress and the President is surely correct. However, even if it were not, the MCA and MMC were enacted *subsequent* to Common Article 3, and therefore it is the MCA and MMC that must govern in the event of any inconsistency with Common Article 3.[6]

vii. With respect to the Defense's other arguments, including the non-applicability of Additional Protocol I to the Geneva Conventions, we respectfully refer the Military Judge to our earlier arguments on this subject. *See, e.g.*, Government's Response to the Defense's Motion to Dismiss for Lack of Jurisdiction (Common Article 3) at 6 n.1.

f. DENYING THE DEFENSE'S MOTION AND ENFORCING THE DISCOVERY AND EVIDENTIARY PROVISIONS OF THE MCA AND MMC WILL NOT RENDER THE DEFENSE INCOMPETENT

i. The Defense's final argument is that the accused will receive incompetent representation if the Military Judge does not grant him every piece of information he seeks. *See* Mot. to Compel at 7 ("Failure to grant the defense request for discovery will deprive Mr. Khadr of competent representation . . . ."). However, the Defense is entitled only to evidence as provided under the MCA and MMC. *See* 10 U.S.C. § 949j(a)

[6] We note that the accused in footnote 4 states that "[t]he ICTY and the ICTR similarly provide 'minimum guarantees' for the accused to 'be entitled to a fair and . . . hearing.' [sic]" Mot. to Compel at 6 n.4 (omission in original). This statement—whatever its degree of accuracy—is irrelevant, since the accused is not being tried before the ICTY or ICTR.

("Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence *as provided in regulations prescribed by the Secretary of Defense*.") (emphasis added); RMC 703(a) ("The defense shall have reasonable opportunity to obtain witnesses and other evidence *as provided in these rules*.") (emphasis added).

ii. Congress and the President certainly understood that a competent defense requires access to material and exculpatory evidence, subject to national security interests. The MCA and MMC implement that conclusion and define what evidence the accused may have access to. The Defense's implicit claim seems to be that the evidence available to it under the MCA and MMC fails to provide the accused with competent representation. However, Congress and the President have carefully defined what evidence the Defense is entitled to. That determination, which post-dates the various standards of competent representation to which the Defense cites, is the standard that governs this commission's decisions as to what evidence is discoverable or admissible. The accused's motion attempts to subvert this careful standard by asking this court to superimpose some vague standard in terms of what evidence the Defense is entitled to, while ignoring the generous and careful evidentiary provisions set forth in the text of the MCA and MMC. This court should reject the instant motion and follow the clear rules of the MCA and MMC.

g. CONCLUSION

i. Because the evidence sought by the accused is neither relevant, material nor exculpatory, he has no right to it under the MCA or MMC. In addition, Congress has provided that the accused may not invoke the Geneva Conventions in general, or Common Article 3 in particular, before this commission, thus defeating any attempt by the accused to invoke such sources of international law. Finally, the discovery and evidentiary provisions of the MCA and MMC are robust and fair, and enforcing them will not render the accused's defense incompetent.

ii. As a final matter, the Prosecution must note that the Defense alleges in its motion that the Government's denial of the Defense's request for information "ignores fundamental concepts of fairness and places in question the integrity of these proceedings." Mot. to Compel at 6. These baseless allegations must stop. While there will no doubt be disagreements between the Defense and Prosecution as to what discovery is required under the MCA, such disagreements fall far short of undermining the "integrity" of this proceeding and its participants. The MCA is the law of the Nation, and was overwhelmingly passed by Congress, operating pursuant to its Article I, §8 authority, before being signed into law by the Commander in Chief of our Armed Forces. The Prosecution believes it has provided, and will continue to provide, all materials that the MCA obligates the Prosecution to disclose. We understand that the Defense disagrees, and that this issue will be litigated. That is how our justice system was designed to work. However, by continually calling into question the integrity of the proceedings and of the Prosecution for following the MCA and MMC, the Defense disrespects this court, and calls into question the integrity of our Congress, our Commander in Chief, and fellow military officers, all of whom are sworn to uphold the

law. Such words will no doubt have a lasting effect on the world's perception of American military justice, and have no place in a motion to compel the production of information that the Prosecution has a good faith basis for not producing.

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 compel discovery 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: The Defense conferred with the Prosecution regarding the requested relief and the Prosecution objected.

10. Additional Information: None.

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

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

John F. Murphy
Assistant Prosecutor
Assistant U.S. Attorney

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Notice of Defense Motion To Compel Production of Physical Evidence** 4 March 2008

1. **Timeliness:** This notice of motion is filed within the timeframe established by the Military Judge's 21 February 2008 e-mail order.

2. **Notice of motion:** On or about 13 March 2008, the defense shall move this Military Commission for an order directing the government to produce the following documents or materials: Any physical evidence seized from the site of the 27 July 2002 firefight at or near Khost, Afghanistan, including, but not limited to, circuit boards, watches, or other materials allegedly used to manufacture explosive devices.

3. **Summary of basis for motion:**

a. The defense seeks production of physical evidence seized from the site of the 27 July 2002 firefight, which it requested from the government on 9 November 2007. (Def. Discovery Req. of 9 Nov 07, ¶ 3(j) (Attachment D to D-025 Def. Mot. to Compel Discovery (Eyewitnesses).) The government alleges, *inter alia*, that Mr. Khadr participated with others in an effort to manufacture explosive devices for use against U.S. forces. The defense should be afforded the opportunity to examine and independently test any physical evidence seized from the site. Such items are therefore material to the preparation of the defense.

b. The government has not produced any physical evidence to date on the basis that it "has provided all relevant physical evidence or photographs thereof known to trial counsel that are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief." (Govt Resp. of 4 Dec 07 to Def. Discovery Req. of 9 Nov 07, ¶ 3(j) (Attachment E to D-025, Def. Mot. to Compel Discovery (Eyewitnesses).) But the government's discovery obligation is not limited to physical evidence "known to trial counsel." Instead, the government is required to produce all physical evidence relating to the charges in this case that are in the possession of any governmental agency. *See* R.M.C. 701(c)(1) (stating trial counsel must produce evidence "within the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel"); *see also Kyles v. Whitley*, 514 U.S. 419, 432, 437, (1995) (prosecutors have an affirmative duty to disclose such evidence and a duty to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *see also United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir.1992) (holding that prosecutor has the obligation to search files of governmental agencies "closely aligned with the prosecution" whenever there is "some reasonable prospect or notice of finding exculpatory evidence.");

United States v. Crivens, 172 F.3d 991, 996 (7th Cir. 1999) ("prosecutors may not simply claim ignorance of *Brady* material"). This duty is particularly important here, where "other government agencies" told prosecutors in the Office of Military Commissions that any exculpatory information would be withheld from the prosecutors. Capt [redacted] email of 15 Mar 04 (Attachment I to D-025, Def. Mot. to Compel Discovery (Eyewitnesses)) ("In our meeting with OGA, they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches.").

4. **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 a thorough consideration of the issues.

5. **Witnesses and evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))

Government Response of 4 December 07 to Defense Discovery Request of 9 Novmeber 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

Capt Carr email of 15 Mar 04 (Attachment I to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

6. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

7. **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.

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Notice of Defense Motion To Compel Production of Documents Evidencing Communications between the U.S. and Canadian Governments

4 March 2008

1. **Timeliness:** This notice of motion is filed within the timeframe established by the Military Judge's 21 February 2008 e-mail order.

2. **Notice of motion:** On or about 13 March 2008, the defense shall move this Military Commission for an order directing the government to produce the following documents or materials: Diplomatic correspondence or other communications between the U.S. and Canadian governments relating to the detention, interrogation, investigation, or transfer of the accused.

3. **Summary of basis for motion:** Attachment A is a diplomatic note from the Canadian government to the U.S. government, dated 13 September 2002. Open media accounts suggest extensive communication between U.S. and Canadian government officials after Mr. Khadr's initial detention regarding the circumstances surrounding his capture. (Attachments B through E.) Based on whatever materials it had reviewed, the Canadian government believed, on 13 September 2002, that there was "some ambiguity as to what role Mr. Khadr may have played" in the 27 July 2002 firefight.[1] In light of the foregoing, materials relating to early communications with the Canadian government may provide evidence of statements or reports by government agents inconsistent with its ultimate theory in this case.[2] The defense requested these documents on 9 November 2008. (Def. Discovery Req. of 9 Nov 07, ¶ 51(c) (Attachment D to D-025 Def. Mot. to Compel Discovery (Eyewitnesses).) To date, the government has not produced the requested documents.

4. **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 a thorough consideration of the issues.

[1] This in spite of strong public statements by the U.S. Government that Mr. Khadr had thrown a hand grenade causing the death of a U.S. soldier. (*See* Attachment C.)

[2] The defense additionally incorporates arguments made and documents submitted in support of D-020, Defense Special Request for Relief from Terms of Protective Order No. 001.

5. **Witnesses and evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

Attachments A through E

Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))

Government Response of 4 December 07 to Defense Discovery Request of 9 Novmeber 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

6. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

7. **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.

8. **Attachments:**

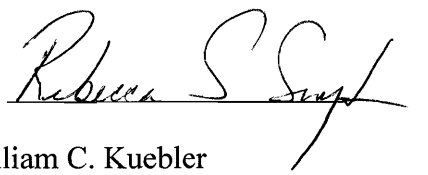
A. Diplomatic Note No. 0293, dated 13 Sep 02

B. Agence France Presse article, dated 5 Sep 02

C. Ottawa Citizen article, dated 10 Sep 02

D. Edmonton Journal article, dated 17 Sep 02

E. Canadian Press article, dated 7 Sep 02

By: 

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

Canadian Embassy Ambassade du Canada

Note No. 0293

The Embassy of Canada presents its compliments to the United States Department of State and has the honour to refer to the Department of States' diplomatic note dated September 09,2002 concerning the matter of a Canadian citizen who is currently a Person Under Control (PUC) at Bagram Airbase in Afghanistan.

The Embassy of Canada appreciates the assistance the Department of State in providing some additional information which we assume refers to Mr Omar Khadr. We are, however, concerned that the Department of State has not officially confirmed that the information provided relates specifically to Mr. Khadr and would respectfully request again that the appropriate American authorities confirm that Mr. Omar Khadr is being detained by the American forces in Afghanistan.

The Canadian authorities have obtained information on the circumstances surrounding the detention of Mr Omar Khadr and it is our understanding that this information is being examined by appropriate American authorities. We would emphasize that from the information that has come to our attention, [redacted] suggests that

000184

Attachment A

there is some ambiguity as to the role that Mr Khadr may have played in those events. We would hope that those ambiguities would be clarified and resolved before any decisions are taken with respect to the future status of Mr Khadr.

The Embassy of Canada would further urge the American authorities to consider the fact that Mr. Omar Khadr, at the time the events in question took place, was less than sixteen years of age. Under various laws of Canada and the United States, such an age provides for special treatment of such persons with respect to legal or judicial processes. As such, the Government of Canada believes that it would be inappropriate for Mr. Omar Khadr to be transferred to the detention facilities at the American naval base at Guantanamo Bay, Cuba. From the information that is available to the Government of Canada, such a facility would not be an appropriate place for Mr. Omar Khadr to be detained.

The Government of Canada would appreciate if arrangements could be made for further discussions between appropriate officials on Mr. Khadr prior to any decisions being taken with respect to his future status and detention.

Attachment A

The Embassy of Canada avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

WASHINGTON, D.C.

September 13, 2002

000186

Attachment A

240 of 290 DOCUMENTS

Agence France Presse -- English

September 5, 2002 Thursday

SECTION: International News

LENGTH: 244 words

HEADLINE: Canadian whose father was once helped by Canadian PM arrested in Afghanistan

DATELINE: OTTAWA, Sept 5

BODY:

A Canadian citizen has been arrested in Afghanistan and is now in the custody of US troops in that country, the Canadian Foreign Ministry announced Thursday.

Foreign Minister Bill Graham told reporters that the 16-year-old -- identified as Omar Khadr -- was taken into custody at the end of July.

On August 20, after receiving word from the Americans that the youth was a Canadian citizen, Canada sought consular access to the boy on August 30 but has so far failed to be able to interview him.

Prime Minister Jean Chretien said it was not clear what charges the teen -- who is said to have both Pakistani and Canadian citizenship -- is facing.

But Canadian sources, speaking on condition of anonymity, said the youth had been arrested on suspicion of killing a US soldier in Afghanistan.

The sources also said the boy's father had been linked by US intelligence services to al-Qaeda chief Osama bin Laden.

The youth is reportedly the son of Ahmed Saed Khadr, who is also a Canadian citizen.

Chretien refused to go into detail on the arrest Thursday.

But it could prove to be a source of potential embarrassment as he prepares for a meeting next Monday with US President George W. Bush.

In 1996, Pakistan released the elder Khadr after Chretien called on then-Pakistani Prime Minister Benazir Bhutto to intervene. Ahmed Saed Khadr had been arrested a year earlier in connection with a bomb blast at the Egyptian embassy in Islamabad.

LOAD-DATE: September 6, 2002

122 of 290 DOCUMENTS

Ottawa Citizen

September 10, 2002 Tuesday Final Edition

SECTION: News; Pg. A18

LENGTH: 427 words

HEADLINE: Canada denied access to teen in Afghanistan: U.S. won't admit it's holding 15-year-old, but does say a teen it's detaining threw the grenade that killed a U.S. soldier

SOURCE: The Canadian Press

BYLINE: Lois Abraham

BODY:
The U.S. State Department has rejected consular access by Canada to a Canadian teen alleged to have killed a U.S. serviceman in a firefight in Afghhanistan.

It added, however, that if any "enemy combatant" claiming Canadian citizenship was to be transferred to the U.S. naval base at Guantanamo Bay, Cuba, the Canadian government would be notified.

At the same time, without specifically naming 15-year-old Omar Khadr, the U.S. military alleged that his last act in a firefight with coalition forces in Afghanistan was to rise up and throw a hand grenade that killed an American serviceman.

Col. Roger King, a U.S. military spokesman based in Bagram, released the information yesterday on the firefight in July that resulted in Omar Khadr being detained by U.S. forces in Afghanistan.

"According to the reports of the action we have available, the last surviving enemy in that compound -- who is the person that we eventually detained -- as his last act at the firefight rose up with a pistol and hand grenade and engaged the coalition forces, threw the grenade, " Col. King said.

Omar was detained by American soldiers July 27 after the badly wounded teen was found at the site of an ambush near Khost, Pakistan, east of the Afghanistan border, which killed one U.S. soldier and injured several others.

Although Col. King would not name Omar, he referred to a person who was the subject of "news reports that came out about a teenager who was of Canadian citizenship and it was specifically connected in this news report to the firefight on the 27th of July, in the vicinity of Khost."

Reynald Doiron, a Foreign Affairs spokesman, said his department had sent a diplomatic note Aug. 30 to U.S. authorities seeking consular access to Omar.

In a reply received yesterday, the U.S. State Department rejected the request.

It is customary for U.S. authorities to refuse to give details about detainees captured during fighting in Afghanistan. In its note, the U.S. Department of State did not acknowledge American forces in Afghanistan were holding Omar.

"We're staying in touch with the U.S. authorities to determine if and when the decision to transfer Mr. Khadr to Guantanamo Bay is made and we'll go from there," Mr. Doiron said.

"We have expressed our concerns about that. We can only say at this time that we're monitoring the situation."

Mr. Doiron cautioned that "the U.S. colonel's statement plus the U.S. State Department reply are not a confirmation that the investigation is complete. We have to wait and see what will stem from that."

LOAD-DATE: September 10, 2002

22 of 290 DOCUMENTS

Edmonton Journal (Alberta)

September 17, 2002 Tuesday Final Edition

SECTION: Top Copy; Pg. A2

LENGTH: 254 words

HEADLINE: Canada wants answers on teen

SOURCE: Journal News Services

DATELINE: Ottawa

BODY:
Criticizing Washington for ignoring basic human rights, Canada has asked American officials to take into account the age of a Canadian teen captured by U.S. troops in Afghanistan.

Canadian officials met with U.S. authorities in Washington on the weekend, asking for further details on Omar Khadr, 15, who was captured after a firefight with al-Qaeda forces.

He is being held in Bagram, Afghanistan and could be transferred to a detention facility in Cuba as an enemy combatant.

"We sought further clarification from them concerning his whereabouts and, also, we presented them with our views concerning the possible transfer of a minor to Guantanamo Bay," said Foreign Affairs spokesman Reynald Doiron.

In a diplomatic note sent to Canadian officials last week, the Americans "responded in a very oblique manner," refusing to even confirm that Khadr was in their custody, Doiron said.

Typically, international law requires that people detained abroad have access to representatives of their own government. The U.S. has labelled certain prisoners enemy combatants since the war on terrorism began and has held them without charges or access to lawyers.

"Should a minor be subjected to this?" Doiron asked. "If they have specific charges, then let it come out in the open and let him then have unrestricted access to legal counsel."

Khadr, the son of an alleged al-Qaeda financier, was captured July 27 after reportedly being wounded during a battle in which a U.S. soldier was killed and four others wounded.

LOAD-DATE: September 17, 2002

1 of 27 DOCUMENTS

Barrie Examiner (Ontario)

September 7, 2002 Saturday
Final Edition

SECTION: NATIONAL/WORLD; Pg. A6

LENGTH: 201 words

HEADLINE: Canada looking for proof from U.S.: Say there's no evidence teen held by U.S. forces was a combatant

BYLINE: Canadian Press

DATELINE: OTTAWA

BODY:

OTTAWA (CP) -- The United States military has provided no evidence that a teenaged Canadian being detained in Afghanistan was an active combatant, the Foreign Affairs Department said Friday.

Omar Khadr, 15, was detained by American soldiers July 27 after the badly wounded teen was found at the site of an ambush that killed one U.S. soldier and injured several others.

"Only when the Americans tell us what kind of evidence they gather, or lack thereof, will we know what the next step is going to be," Reynald Doiron, a Foreign Affairs spokesman, said Friday.

"He was wounded. Was he there at the wrong time, wrong place, wrong people? Or was he an active participant? We don't know."

The department is similarly in the dark about Khadr's older brother, Abdul Rahman Khadr, 19, who was captured by the anti-Taliban northern alliance in November and is being held by the Afghan government.

Doiron said Canadian authorities only learned of Abdul this summer.

Formal diplomatic notes have been forwarded on behalf of both brothers, requesting information about any charges against them, their legal status, and asking whether the detainees wish to meet with Canadian consular officials.

There has been no response.

LOAD-DATE: February 28, 2006

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** **To Compel Discovery** (Documents Relating to Investigation and Prosecution of Detainee Abuse) 4 March 2008

1. Timeliness: This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court and the Military Judge's e-mail order of 21 February 2008.

2. Relief Sought: The defense respectfully requests that this Commission order the government to produce the requested discovery: all materials within the possession, custody or control of the government relating to the investigation and prosecution of abuse and mistreatment of detainees at Bagram Airbase, Afghanistan (hereinafter "Bagram"), between July 2002 and November 2002.

3. Overview:

a. The defense seeks production of information relating to detainee abuse that occurred at Bagram at or near the time that the accused was confined there. Mr. Khadr was detained at Bagram from July 2002 until the end of October 2002. Mr. Khadr was subjected to repeated, coercive interrogations at Bagram (as a critically wounded, 15-year old boy), which allegedly resulted in inculpatory statements on which the government intends to rely at trial. At least one of Mr. Khadr's principal interrogators was prosecuted for abusing detainees. This was part of a larger pattern of detainee abuse at Bagram, which resulted in the deaths of two detainees. The government investigated these allegations as part of criminal investigations into misconduct of Bagram interrogators. The defense must have access to these materials if it is to corroborate Mr. Khadr's allegations of abuse, investigate possible bases for suppressing his statements, and, if those statements are admitted, introduce evidence bearing on their reliability.

4. Burden of Proof: The Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. R.M.C. 905(c)(2)(A). The Defense, however, need not show by a preponderance of the evidence that the requested discovery is material. *See generally, Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (On review, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

5. Facts:

a. On 9 November 2007, the defense submitted to the government a request for discovery that sought, among other items, the following:

(1) "All materials within the possession, custody and control of the government relating to the investigation and/or prosecution of other individuals for detainee mistreatment or abuse at Bagram Airbase, Afghanistan, between July 2002 and November 2002."

(2) "All documents or information regarding any mistreatment of Mr. Khadr at the hands of U.S. or Allied Armed Forces, civilians or contractors of which the government is aware. This includes any recorded allegation of such mistreatment made by the accused, any witness to the mistreatment, or any non-governmental organization (e.g., the International Committee for the Red Cross) that purports to document allegations of mistreatment. M.C.R.E. 304, R.M.C. 701(e)."

(3) "[A]ll documents related to the conditions under which the accused was held from the time of his capture to the present date. This includes, but is not limited to, all written orders, memoranda, directives, SOPs, or other documents that purport to direct agents of the US government in the manner in which the accused should be treated, fed, housed, and given medical attention. This also includes any information relating to mistreatment, abuse, inhumane treatment or conditions, degrading treatment or conditions, cruel or oppressive treatment or conditions, or torture, that is known, suspected, or alleged to have occurred since the date of the accused's capture in Afghanistan. R.M.C. 701(e); R.M.C. 701(c)(l)." (*See* Def. Discovery Req. of 9 Nov 07.)

b. On 4 December 2008, the prosecution denied the defense request, claiming that the requested information was either "not relevant," not otherwise within the scope of discovery, or that any materials responsive to the request had been previously provided to the defense. (*See* Gov't Resp. to Def. Discovery Req. of 4 Dec 07.)

c. Materials provided to the defense in discovery show that at least one of Mr. Khadr's principal interrogators (Sgt. [redacted] was prosecuted for detainee abuse while stationed at Bagram. (*See* Def. Mot. to Compel Discovery (Sgt. [redacted] and attachments submitted in support thereof.) (hereinafter "Sgt C Mot."). Other documents provided in discovery, and indeed, numerous open-source media accounts, show that Sgt [redacted]'s conduct was part of a larger pattern of abuse and maltreatment of Bagram detainees, which was investigated by the U.S. Government. (*See* Sgt [redacted] Mot., attachment B.)

6. <u>Argument</u>:

a. The M.C.A., R.M.C., Regulations for Trial by Military Commission, the Due Process Clause and International Law Require Disclosure of Documents Relating to the Investigation of Allegations of Detainee Abuse at Bagram

(1) <u>The MCA and Rules and Regulations Governing Military Commissions Require Disclosure</u>

(i) The M.C.A. states that "Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense." *See* 10 U.S.C. § 949j. The rules and regulation echo the statute. *See* R.M.C. 703(a) ("The defense shall have reasonable opportunity

to obtain witnesses and other evidence as provided in these rules."); Regulation for Trial by Military Commissions 17-2(a) ("Pursuant to 10 U.S.C.§ 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.").

(ii) Rule for Military Commission ("R.M.C.") 701(c)(1) requires the government to permit the defense to examine documents and things "within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and *which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial." (Emphasis added). The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16[1] governing discovery in the context of the Classified Information Procedures Act (CIPA), for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to "information [that] is at least 'helpful to the defense of [the] accused.'" *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) ("materiality standard is not a heavy burden") (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would "significantly help [ ] in 'uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal'") (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C. 1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is "at least helpful to the defense." In addition, R.M.C. 701(e)(1) requires the government to disclose "the existence of evidence known to the trial counsel which reasonably tends to … [n]egate the guilt of the accused of an offense charged."

(iii) The Military Commission Rules of Evidence ("M.C.R.E.") explicitly acknowledge the materiality of records such as those Mr. Khadr requests. M.C.R.E. 304(a)(1) provides that "[a] statement obtained by use of torture shall not be admitted into evidence against any party or witness, except against a person accused of torture as evidence that the statement was made." M.C.R.E. 304(c) similarly places restrictions on the admission of "statements allegedly produced by coercion," providing in relevant part that:

> When the degree of coercion inherent in the production of a statement offered by either party is disputed, such statement may only be admitted in accordance with this section.

[1] The relevant portion of Federal Rule of Criminal Procedure 16 is nearly identical to R.M.C. 701(c)(1). It states: "Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense." Fed. R. Crim. Proc. 16(a)(1)(E)(i).

> (1) As to statements obtained before December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) the interests of justice would best be served by admission of the statement into evidence.
>
> (2) As to statements obtained on or after December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; (B) the interests of justice would best be served by admission of the statement into evidence; and (C) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment.

M.C.R.E. 304(c).

(iv) The requested records are material for several reasons. First, they are clearly material to whether or not Mr. Khadr's statements are admissible under the evidentiary rules. The requested discovery therefore is critical to the defense's ability to move for suppression of statements under M.C.R.E. 304(a)(1) or 304(c) on either the basis of torture or coercion resulting in unreliable statements. Indeed, the Discussion accompanying M.C.R.E. 304(c) explicitly provides that information such as that requested by the defense is material: "In evaluating whether [a statement made before December 30, 2005] 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.*" (Emphasis added).

(v) Second, they are material for the purpose of developing additional corroborating evidence regarding Mr. Khadr's claims of [redacted][2]

(vi) Third, any mistreatment Mr. Khadr may have suffered in the hands of prison guards or interrogators in the early days of his incarceration is also relevant to the determination whether coercion existed in later interrogations; Mr. Khadr would have no reason to doubt, during any interrogation, that the interrogators could again engage in physical abuse. *See Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) (recognizing confession can be involuntary as a result of psychological, as well a physical, coercion); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) ("[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the

[2] *See generally* Khadr Affidavit, 22 Feb 08 (Attachment H to Sgt [redacted] Mot.) (The government has not yet determined whether any portions of Mr. Khadr's affidavit are classified. Therefore, the defense has been instructed to redact all portions that could potentially be classified. The redacted copy is attached. An unredacted copy will be delivered to the Commission in Guantanamo Bay.)

only hallmark of an unconstitutional inquisition."); *Columbe v. Connecticut*, 367 U.S. 568, 605-06 (1961) ("'There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men.'") (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949)).

(vii) Mr. Khadr's knowledge of the mistreatment of other detainees by guards and interrogators gives rise to a coercive environment and affects the reliability of his statements. *See Fulminante*, 499 U.S. at 287; *Blackburn*, 361 U.S. at 206; *Columbe*, 367 U.S. at 605-06 (quoting *Watts*, 338 U.S. at 52). The requested documents will likely corroborate Mr. Khadr's claims that he knew other detainees were mistreated and that this made him afraid of the interrogators.[3]

(viii) One pervasive fact increasing the relevance of the requested discovery is the fact that Mr. Khadr was a minor at the time of his arrest (it is uncontested that he was 15 years old at the time); this increases the likelihood that mistreatment by interrogators and guards resulted in unreliable statements. *See Colorado v. Connolly*, 479 U.S. 157, 164 (1986) (the mental condition of the defendant is a factor in determining whether the defendant's statement was coerced); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."); *cf. Schneckloth v. Bustamante*, 412 U.S. 218, 226 (1973) (applying a 'totality of the circumstances' test to determining voluntariness of a confession).

(ix) Another pervasive fact lowering the threshold for the type of treatment that may result in coercive or tortured statements is Mr. Khadr's medical condition at the time of his interrogations. Early in the firefight on 27 July 2002, Mr. Khadr suffered injuries to his eyes and other parts of his body. Khadr Affidavit, ¶¶ 3, 25. Shrapnel was embedded in his eyes. *Id*. And he was shot in the back at two or three times during the firefight, resulting in two cavernous exit wounds in his upper left chest large enough to see deep into his chest cavity. *See* Photo of Mr. Khadr 00766-000977 (Attachment I to Sgt C Mot.); Undated Document Titled IIR-6-034-0258-03, 00766-000194 (Khadr "was shot 3 times") (Attachment J to Sgt C. Mot.). One soldier who participated in the firefight saw Mr. Khadr laying on the ground wounded and wrote in his journal that "[Khadr's] missing a piece of his chest and I can see his heart beating." Journal at 00766-001380 (Attachment K to Sgt [redacted] Mot.). Mr. Khadr's chest wounds were infected, swollen, and still seeping blood nearly seven months after the firefight, and Mr. Khadr was in the hospital receiving treatment for the gunshot wounds ten months after the firefight.[4] The defense is unaware of how many surgeries Mr. Khadr endured or how long his injuries remained painful.[5]

---

[3] In Bagram, I would always hear people screaming, both day and night. Sometimes it would be the interrogators [redacted], and sometimes it was the prisoners screaming from their treatment. I know a lot of other detainees who were [redacted] by the skinny blonde guy. Most people would not talk about what had been done to them. This made me afraid. Khadr Affidavit, ¶ 29.

[4] *See* Report of Investigative Activity of 3 June 03 at 1, 00766-000154 (Khadr was interrogated during a June 2003 hospitalization due to infections to his gunshot wounds and hospitalization

(x) There is no question that the requested records meet the minimal standard of being "helpful to the defense of [the] accused" and negate the government's case against Mr. Khadr. Indeed, they are key to the defense's ability to test the government's case and to the factfinders' ability to weigh the evidence. Mr. Khadr is entitled to the requested discovery not only as a matter of fundamental fairness, but also to ensure that the instant proceedings elicit the truth and provide a fair trial worthy of confidence. *Cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (defining fair trial "as a trial resulting in a verdict worthy of confidence"); *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (same). The public record is replete with numerous alleged or charged cases of detainee mistreatment and torture at Bagram Airbase.[6] (*See, e.g.*, Attachment B to Sgt [redacted] Mot.) These publicly available documents demonstrate that there was a regular pattern and practice, if not an official policy, of mistreatment of detainees. Mr. Khadr's discovery requests are designed to obtain more detailed evidence of such a policy and practice and to identify corroborating witnesses for the defense. However, the publicly available records are merely a small subset of the information in the prosecution's control that would assist the defense in developing evidence to corroborate that Mr. Khadr's alleged statements were extracted under duress. By asking for records relating to other cases of detainee abuse at Bagram, Mr. Khadr is likely to obtain the names of potential witnesses who would corroborate his testimony that his statements were obtained by coercion by testifying that they were subjected to similar coercive techniques at about the same time at Bagram. Such corroborating evidence is clearly material to the preparation of the defense and also tends to negate the government's evidence of Mr. Khadr's guilt. The alleged inculpatory statements made by Mr. Khadr are a key part of the government's case-in-chief. Obviously, evidence corroborating that Mr. Khadr made that statement under duress tends to undercut the reliability of that statement. The requested records therefore are key to the defense's ability to test the government's case and to the factfinder's ability to weigh the evidence.

(xi) United States case law further confirms the materiality of the records requested by Mr. Khadr. In *United States v. Karake*, Rwandan defendants in a federal criminal case moved to suppress inculpatory statements they had made to Rwandan and United States officials on the

---

was expected to last six more weeks) (Attachment L to Sgt [redacted] Mot); Report of Investigative Activity of 12 Mar 2003 at 1, 00766-000151 (Attachment M to Sgt [redacted] Mot.) (Khadr was scheduled to have surgery on his chest wounds on 13 Mar 2003); Report of Investigative Activity of 20 Feb 03 at 1, 00766-000146 (Attachment N to Sgt [redacted] Mot.) (Khadr's wounds swelled to the point of bursting); Report of Investigative Activity of 17 Feb 03 at 2, 00766-000145 (Attachment O to Sgt [redacted] Mot.) (blood was seeping from Khadr's wounds); Report of Investigative Activity of 6 Jan 2003 at 2, Bates No. 00766-000140 (Attachment P to Sgt [redacted] Mot.) (Khadr complained to interrogators of pain from his chest and shoulder injuries).

[5] The prosecution has represented to the defense that it is in the process of obtaining and producing Mr. Khadr's medical records.

[6] A search in the LEXIS data base using the terms "Bagram," "detainee," and "abuse" on 4 March 2008 produced 2106 results.

ground that their statements were "the product of physical and psychological coercion, resulting from both their conditions of confinement and their treatment while in Rwandan custody." 443 F. Supp. 2d 8, 12 (D.D.C. 2006). During an evidentiary hearing on the defendants' motion to suppress, third-party witnesses who had been held at the same Rwandan detention facility as the defendants testified that they had been mistreated and subjected to coercive interrogations at the facility. *See id*. at 12-13, 69-70. The defense offered the third-party witnesses' testimony in order to corroborate defendants' claims that "systematic and repeated physical abuse" caused them to make the inculpatory statements. *Id*. at 59, 69. The court found "the corroboration of defendants' testimony" to be "compelling," observing that "[t]wo other witnesses testified about their personal experiences while at Kami [the detention center] in years prior to defendants' detention; former high-ranking officials . . . [who held office] during the relevant time period provided information regarding the abuses at Kami; and State Department reports and other reports to U.S. government officials documented rampant human rights violations, including specific reports of torture at Kami." *Id*. at 61. In addition, the court found "unpersuasive" the government's argument that the court should "disregard . . . as out of time" the testimony of the two witnesses who had been tortured at Kami, noting that the same Rwandan authorities had controlled the prison during the times that the defendants and the third-party witnesses were incarcerated there. *Id*. at 71-72. The Court also considered other evidence corroborating the defendants' claims of coercion, including U.S. government reports on "numerous serious" human rights abuses by the Rwandan government, including abuses at the detention center where the defendants had been held. The court determined that such corroborating evidence created an inference that the practices and conditions that the two witnesses experienced endured throughout the period in which the defendants were held at the facility. *Id*. at 71. Finally, the court credited "[f]urther evidence of continuing abuse and torture," provided by two former Rwandan government ministers "who learned about the serious problems at Kami" over the relevant time period. *Id*. at 71-72. Such corroborating evidence led the Court to grant defendants' motions to suppress coerced inculpatory statements made by defendants to investigators. As in the *Karake* case, the requested discovery would corroborate Mr. Khadr's position that his alleged inculpatory statements should be suppressed because they were obtained by government coercion.

(xii) Finally, even if Mr. Khadr's alleged inculpatory statements are not suppressed in this case, disclosure of the requested information will still be critical to the preparation of the defense case. The alleged inculpatory statements made by Mr. Khadr are a key part of the government's case-in-chief, particularly given that there are no eyewitnesses who saw Mr. Khadr throw the grenade that allegedly killed Sgt Speer. Obviously, evidence corroborating that Mr. Khadr made inculpatory statements under duress tends to undercut the reliability of those statements. If his statements are admitted into evidence, it is essential that Mr. Khadr be able to develop and introduce evidence at trial to demonstrate to the factfinder that they are not reliable. *Cf. United States v. Graves*, 23 U.S.C.M.A. 434, 436 (C.M.A. 1975) ("[I]f the matter [voluntariness of a confession] is placed in issue before the jury, the Government must present evidence sufficient to establish, beyond a reasonable doubt, that the inculpatory statement was voluntary. Once the issue is raised, the military judge has a *sua sponte* duty to instruct the court members to reject the accused's confession in toto if they are not satisfied, beyond a reasonable doubt, of the voluntariness of the statement."). Such evidence may be developed by the defense during cross-examination or introduced during the defense case. And the documents Mr. Khadr seeks could help in uncovering evidence for use at trial. If the defense is not permitted to

develop and introduce such evidence, the factfinder may place unwarranted weight on a putative "confession" that was obtained by coercion – perhaps even torture. If the defense is not permitted access to that evidence of coercion, it will be crippled in its ability to develop its case. And moreover, the factfinder will make decisions based on incomplete and one-sided information.

(2) The Due Process Clause & MCA § 949j(d)(2) Require Disclosure

(i) The disclosure requirement under the R.M.C. 701(c) echoes a fundamental principle of U.S. law: The government's failure to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment …." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The government's duty to disclose such evidence encompasses exculpatory evidence, including impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 675 (1985) (impeachment evidence falls within *Brady* rule); *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (characterizing impeachment evidence as exculpatory evidence). Such evidence is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id. at* 682. "The message of Brady and its progeny is that a trial is not a mere 'sporting event'; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory." *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986); *see also Bagley*, 473 U.S. at 675 ("The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.").

(ii) The MCA makes *Brady*, at least with respect to exculpatory evidence, applicable to military commissions. *See* 10 U.S.C. § 949j(d)(2). Section 949j(d)(2) of the MCA states that the prosecution must disclose exculpatory evidence that it "would be required to disclose in a trial by general court-martial." *Brady* governs disclosure of exculpatory evidence in general courts-martial. *Mahoney*, 58 M.J. at 349. Therefore, by virtue of MCA § 949j(d)(2), *Brady* applies to military commissions.[7]

[7] The requested documents are also relevant to assess whether Mr. Khadr's statements violate his due process right not to be convicted on the basis of involuntary statements. *But see Boumediene v. Bush*, 476 F.3d 981 (2007), *cert. granted* 127 S. Ct. 3078 (2007). The use of coerced confessions – whether deemed otherwise reliable or not – as evidence to convict an accused violates due process. *See Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S.Ct. 917 (1963) (due process violated where coerced confession used at trial). "The ultimate test [with respect to the admissibility of confessions] remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker?" *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). A court looks at the totality of the circumstances, including "the characteristics of the accused and the details of the interrogation," to determine whether the statement is voluntary. *Schneckloth v. Bustamante*, 412 U.S. 218, 226, 93 S.Ct. 2041 (1973) (establishing 'totality of the circumstances' test to determine voluntariness of a confession). The totality of circumstances encompasses psychological, as well as physical coercion as well-settled Supreme Court cases "have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient." *Arizona v. Fulminante*, 499 U.S.

(iii) The government intends to rely upon Mr. Khadr's allegedly inculpatory statements as evidence of his guilt. Because the requested records will likely corroborate the defense claim that Mr. Khadr's statements were obtained by coercion, they are likely "exculpatory" in nature, and there is a "reasonable probability" that the disclosure of this evidence will yield a different result in the instant proceedings. *Bagley*, 473 U.S. at 676, 682 ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). If the defense is denied access to that information, then counsel will be hamstrung in its ability to investigate and prepare the defense case. As a result, Mr. Khadr could be convicted on the basis of a putative "confession" that is nothing more than a fabrication extracted under duress. This risk is of particular concern here, where there are no eye witnesses to the alleged facts forming the basis for the murder charge. Such an outcome would obviously prejudice Mr. Khadr's most fundamental rights, but would also pervert the cause of justice and fair process. *Brady* and its progeny – made applicable to military commissions by MCA § 949j(d)(2) – therefore require disclosure of the requested records, independent of R.M.C. 701(c)(1)'s broader discovery provision.

(3) International Law Requires Disclosure

(i) The Military Commissions Act (M.C.A.) and the Manual for Military Commissions (M.M.C.) incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948(b)(f) ("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.")[8]; R.M.C., Preamble (stating that the Manual for Military Commissions "provides procedural and evidentiary rules that [. . .] extend to the accused all the 'necessary judicial guarantees' as required by Common Article 3.") They must, therefore, be read in light of Common Article 3 and international law surrounding that provision.

279, 287, (1991); *see also Columbe v. Connecticut,* 367 U.S. 568, 605-06 (1961) (quoting *Watts v. Indiana* 338 U.S. 49, 52 (1949)); *Blackburn v. Alabama,* 361 U.S. 199, 206 (1960). To conform to seminal constitutional principles, therefore, any statements used against an accused must be the product of free will. *See Culombe,* 367 U.S. at 602.

[8] 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.

(ii) The Geneva Convention Relative to the Treatment of Prisoners of War prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See* Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The judicial safeguards required by Common Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949.[9] Article 75(a) provides that the procedures for trial "shall afford the accused before and during his trial all necessary rights and means of defense."[10]

(iii) Read in light of international law principles, precedents applying the U.S. Constitution, the rules governing this Commission, and the Government's denial of the Defense request for documents relating to the investigation and prosecution of allegations of abuse and mistreatment of detainees at Bagram ignores fundamental concepts of fairness and places in question the integrity of these proceedings.

b. Denial of the Requested Documents Will Necessarily Result in Counsel Failing to Provide Competent Representation

(1) Failure to grant the defense access to the requested documents will deprive Mr. Khadr of competent representation by precluding the defense from inquiring into possible challenges to the voluntariness of his statements and possibly the ability to impeach government witnesses. *Cf. Smith v. Wainright*, 777 F.2d 609, 617 (5th Cir 1985) (discussing defense counsel failure to move for suppression of confession in assessing ineffective assistance of counsel claim). Governing military ethics rules require Mr. Khadr's military counsel to provide "competent" representation. "Competent representation requires . . . access to evidence." JAGINST 5803.1C (9 Nov 04). "[I]nvestigation is an essential component of the adversary

---

[9] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 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 [redacted], Chief, International Law Branch, DAJA-IA, et. al., to Mr. [redacted], Assistant General Counsel (International), OSD (8 May 1986) (stating art. 75 of Additional Protocol I is customary international law). 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.

[10] The ICTY and the ICTR similarly provide "minimum guarantees" for the accused to "be entitled to a fair and . . . hearing." 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, art. 21(2), 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); Statute of the International Tribunal for Rwanda, art. 20(2), *adopted by* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

process." *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)). Thus, the adversarial process will not function properly if the defense counsel fails to investigate his client's case or is denied access to evidence within the control of the government that is relevant to the investigation. *See id.* Here, the government's view of what evidence is relevant and material to the preparation of the defense is so narrow as to necessarily cause defense counsel to fail to provide competent representation to Mr. Khadr. Accordingly, this Commission should order the government to produce the requested documents.

c. Conclusion

(1) The Supreme court has said "that the United States Attorney is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Strickler*, 537 U.S. at 281 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). When the prosecution reserves to itself the determination of what evidence ought be considered, it disregards its duty to seek justice, and usurps the role of the court, defense counsel and the trier of fact. *Cf. Brady*, 373 U.S. at 87-88, n.2. The integrity of these proceedings will be fatally undermined if the defense is not afforded the opportunity to independently investigate the factual allegations at issue in the case. At a minimum, this requires that the defense be given documents relating to the investigation and prosecution of allegations of detainee abuse and mistreatment at Bagram.

7. Oral Argument: The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that "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 raised by this motion.

8. Witnesses & Evidence: The Defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the Prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))

Government Response of 4 December 07 to Defense Discovery Request of 9 November 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

Sgt C Mot. and attachments submitted in support thereof

9. 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. **Attachments:** None.

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Notice of Defense Motion To Compel Production of Manuals and SOPs Relating to Interrogation Techniques Employed on the Accused** 4 March 2008

1. **Timeliness:** This notice of motion is filed within the timeframe established by the Military Judge's 21 February 2008 e-mail order.

2. **Notice of motion:** On or about 13 March 2008, the defense shall move this Military Commission for an order directing the government to produce the following documents or materials: Manuals, directives or standard operating procedures detailing the interrogation methods employed by intelligence and/or law enforcement agencies in interrogations of Mr. Khadr.

3. **Summary of basis for motion:** Since the government's case against Mr. Khadr is based largely on statements allegedly made in the course of interrogation, the reliability of the information obtained by use of techniques employed in those interrogations is at issue. Mr. Khadr was been detained for over five years and subjected to repeated interrogations. Knowledge of the techniques employed is essential to a determination of the reliability of Mr. Khadr's statements. The defense requested this information on 9 November 2007. (Def. Discovery Req. of 9 Nov 07, ¶ 3(m) (Attachment D to D-025 Def. Mot. to Compel Discovery (Eyewitnesses).) The government has not produced the requested information to date.

4. **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 a thorough consideration of the issues.

5. **Witnesses and evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

> Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))
>
> Government Response of 4 December 07 to Defense Discovery Request of 9 Novmeber 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

6. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

7. **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.

By: Rebecca S Snyder

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Notice of Defense Motion To Compel Production of Video and/or Audio Recordings of Interrogations of the Accused and Photos of Accused** 4 March 2008

1. **Timeliness:** This notice of motion is filed within the timeframe established by the Military Judge's 21 February 2008 e-mail order.

2. **Notice of motion:** On or about 13 March 2008, the defense shall move this Military Commission for an order directing the government to produce the following documents or materials: (a) Any video or audio tape recording of any interrogation or interview of the accused by any person or entity, including, but not limited to, any video or audio tape recording of interviews by Canadian intelligence and/or law enforcement officials; and (b) any photographs of the accused in the possession, custody or under the control of the government.

3. **Summary of basis for motion:**

a. Since so much of the government's case against Mr. Khadr is predicated on statements allegedly made under interrogation, video or audio tapes of those interrogations are clearly material to the preparation of the defense. It appears, at a minimum, that tape recordings of interrogations by Canadian government officials exist. (*See* documents submitted in support of D-020, Defense Special Request for Relief from Terms of Protective Order No. 001.) The defense requested these materials from the government on 9 November 2007. (Def. Discovery Req. of 9 Nov 07, ¶¶ 3(k), 51(a) [hereinafter Def. Discovery Req.] (Attachment D to D-025 Def. Mot. to Compel Discovery (Eyewitnesses).) On 4 December 2007, government stated that it "is reviewing this request and will provide the requested items if we determine it is required under R.M.C. 701." (Govt Resp. of 4 Dec 07 to Def. Discovery Req. of 9 Nov 07 (Attachment E to D-025, Def. Mot. to Compel Discovery (Eyewitnesses).) The government has not produced the requested materials to date.

b. The government intends to rely on Mr. Khadr's statements at trial. The admissibility of these statements depends largely on whether they were obtained through torture or coercion. *See generally* D027, Def. Mot. to Compel Discovery (Sgt [redacted]) for discussion of how Mr. Khadr's physical condition relates to the admissibility of his statements. Particularly given Mr. Khadr's life-threatening injuries, which caused him great pain for more than a year after the injuries due to repeated surgery and complications in the healing process, his physical condition bears directly on whether particular treatment by interrogators and guards rendered his statements unreliable and, therefore, inadmissible. Photographs and videotapes were taken of him in Bagram when bandages were changed daily, upon his arrival at Guantanamo Bay, and when he was weighed. Khadr Affidavit of 22 Feb 08 ¶¶ 16, 37, 60 (Attachment H to D027, Def. Mot. to Compel Discovery (Sgt [redacted]). Mr. Khadr has been interrogated routinely throughout most of his detention. The requested photographs will be helpful to the defense in determining the nature and extent of Mr. Khadr's injuries and his physical condition generally while he was

interrogated at various points during his confinement. The defense requested such photographs from the government on 9 November 2007. Def. Discovery Req. ¶ 3. With one exception, the government has not produced any photographs of Mr. Khadr to date. The only photograph of Mr. Khadr was taken while he was lying on the battlefield shortly after he received life-threatening gunshot wounds to his chest. *See* Photo of Mr. Khadr 00766-000977 (Attachment I to Def. Mot. to Compel Discovery (Sgt C) filed 4 Mar 08).

4. **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 a thorough consideration of the issues.

5. **Witnesses and evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

Documents submitted in support of D-020, Defense Special Request for Relief from Terms of Protective Order No. 001

Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))

Government Response of 4 December 07 to Defense Discovery Request of 9 Novmeber 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

Khadr Affidavit of 22 Feb 08 (Attachment H to Def. Mot. to Compel Discovery (Sgt[redacted] filed 4 Mar 08)

Photo of Mr. Khadr (Attachment I to Def. Mot. to Compel Discovery (Sgt[redacted] filed 4 Mar 08)

6. **Certificate of conference:** The defense and prosecution have conferred. The government intends to produce one video of Mr. Khadr. The defense is not aware of the contents of this video or when it was taken. The prosecution otherwise objects to the relief requested.

7. **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.

Rebecca S. Snyder

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Notice of Defense Motion To Compel Production of Classified Report** 4 March 2008

1. **Timeliness:** This notice of motion is filed within the timeframe established by the Military Judge's 21 February 2008 e-mail order.

2. **Notice of motion:** On or about 13 March 2008, the defense shall move this Military Commission for an order directing the government to produce the following documents or materials: a report referenced in paragraph 3e of the Defense Discovery Request dated 9 November 2007.

3. **Summary of basis for motion:** The report is a classified document prepared by a U.S. Government agency detailing (as the defense understands it) events surrounding the 27 July 2002 firefight after which the accused was taken into custody by U.S. forces. One document provided in connection with this matter already shows that the report may contain information that is at the very least "helpful" to the defense, and at most, exculpatory. It is therefore material to the preparation of the defense.

4. **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 a thorough consideration of the issues.

5. **Witnesses and evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

Attachment A (classified document)

Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))

Government Response of 4 December 07 to Defense Discovery Request of 9 Novmeber 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

6. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

7. **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.

8. **Attachment:**

A Classified Document to be filed with the Military Commission during the next hearing in Guantanamo Bay

By: Rebecca S Snyder

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel