

VIA HAND DELIVERY

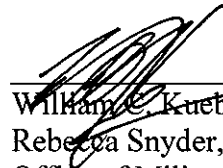
October 31, 2007

Mark J. Langer, Clerk
United States Court of Appeals for
the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

Dear Mr. Langer,

Enclosed for filing please find an original and four copies of Petitioner's Emergency Motion to Stay Military Commission Proceedings. Thank you for your attention to this matter.

Sincerely,



William E. Kuebler, LCDR, JAGC, USN
Rebecca Snyder, Esq.
Office of Military Commissions
Office of the Chief Defense Counsel
1099 14th Street, Suite E
Washington, D.C. 20005
Counsel for Petitioner

Enclosures
cc: Service List

NOT YET SCHEDULED FOR ORAL ARGUMENT

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Case No. 07-1405

OMAR KHADR,
Petitioner

v.

UNITED STATES and
UNITED STATES COURT OF MILITARY COMMISSION REVIEW,
Respondents

**PETITIONER'S EMERGENCY MOTION TO STAY
MILITARY COMMISSION PROCEEDINGS**

Pursuant to Rules 8 and 27 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, Petitioner Omar Khadr moves to stay military commission proceedings in his case pending resolution of his Petition for Review of various decisions of the United States Court of Military Commission Review ("CMCR"). *See* Petition for Review, *Khadr v. United States, et al.*, No. 07-1405, at 1-2 (D.C. Cir. filed Oct. 9, 2007) ("Petition"). As required by Circuit Rule 8(a)(2), the undersigned counsel conferred with Government counsel, who advised that the Government will oppose this motion to stay. This motion is an emergency motion because renewed military commission proceedings are set to commence on November 8, 2007, and accordingly relief is sought on or before November 7, 2007. In support of this stay request, Petitioner states as follows:

INTRODUCTION

1. Petitioner is a Canadian citizen currently in custody at the United States detention facility at Guantánamo Bay, Cuba (“Guantánamo”). On information and belief, Petitioner was captured on the battlefield in Afghanistan in 2002 at the age of 15. Shortly thereafter, he was transferred to Guantánamo, where he has remained detained ever since.

2. Petitioner is one of only four persons to have been charged with “war crimes” under the Military Commissions Act of 1996 (“MCA”), and one of only three currently facing trial before a military commission. Renewed proceedings in Petitioner’s military commission case are set to begin on November 8, 2007. These proceedings will include, at an early stage, a determination by the military judge of whether Petitioner is an “unlawful enemy combatant.” But the military judge’s authority to make such a determination is the very subject of Petitioner’s Petition for Review before this Court.

3. If Petitioner’s military commission proceedings are allowed to go forward before his Petition for Review is heard, Petitioner may suffer the irreparable injury of being designated an “unlawful enemy combatant” by a judge who lacks the authority to make such a determination. And, because such a designation is a jurisdictional prerequisite for the offenses with which Petitioner has been charged, he may further suffer the irreparable injury of being subjected to trial, conviction, and sentencing before a body that lacks jurisdiction to try him. *See* ¶¶ 16-17 *infra*. To prevent these potential injuries and to preserve its jurisdiction, this Court should stay Petitioner’s military commission proceedings pending hearing and adjudication of Petitioner’s Petition for Review.

PROCEDURAL HISTORY

4. On September 7, 2004, a three-member Combatant Status Review Tribunal (“CSRT”) classified Petitioner as an “enemy combatant.” Approximately fourteen months later, in November of 2005, the United States charged Petitioner with various crimes and referred him for trial before a military commission constituted under authority of the President’s Military Commission Order Number 1 of August 31, 2005 (“MCO No. 1”). *See Charges, United States v. Khadr* (Military Commission Case No. 05-0008); Referral, *United States v. Khadr* (Military Commission Case No. 05-0008, filed Nov. 23, 2005) (attached hereto as Ex. A).¹

5. Military commission proceedings in Petitioner’s case continued until the Supreme Court issued its decision in *Hamdan v. Rumsfeld*, holding that military commissions convened under the authority of MCO No. 1 were illegal. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2798 (2006). After this ruling, Petitioner remained in pretrial segregation while the Government sought authorization for newly-constituted military commissions from Congress.

6. In April 2007, the United States charged Petitioner with “war crimes” and referred him to trial pursuant to the newly-enacted Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948a *et seq.*). Each “war crime” charge against Petitioner specifies as its jurisdictional basis that the accused be “a person subject to trial by military commission as an alien *unlawful* enemy combatant,” specifically invoking the jurisdictional prerequisite set forth in the MCA. *See Charges, United States v. Khadr* (dated Apr.

¹ On May 23, 2007, Petitioner filed in the D.C. Circuit a petition for review of the CSRT’s determination under the Detainee Treatment Act of 2005 (“DTA”), Pub. L. No. 109-148 §1005(e)(2), 119 Stat. 2680, 2742 (2005) (codified at 10 U.S.C. § 801 note (supp. 2007)). That petition challenged the validity of the CSRT’s determination that Petitioner was an “enemy combatant,” and also challenged related findings by the CSRT’s Legal Advisor, Director, and others. Petitioner has filed an unopposed motion to abate briefing in that proceeding pending final resolution of *Bismullah v. Gates*, No. 06-1197, -- F.3d --, 2007 WL 2067938 (D.C. Cir. July 20, 2007) (amended Oct. 23, 2007), a case concerning the proper scope of the record in DTA appeals.

24, 2007) (attached hereto as Ex. B) (emphasis added); *see also* 10 U.S.C. § 948d(a) (“A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter . . . when committed by an alien *unlawful* enemy combatant . . .”) (emphasis added).

7. On June 4, 2007, the military judge assigned to preside over Petitioner’s military commission trial dismissed all charges without prejudice for lack of jurisdiction. The judge explained that the MCA “contemplates a two-part system. First, it anticipates that there shall be an administrative decision by the CSRT which will establish the status of a person for purposes of the MCA. The CSRT can find, for MCA purposes, that a person is a lawful enemy combatant or an unlawful enemy combatant. Second, once the CSRT finds that a person is an unlawful enemy combatant, the provisions of the MCA come into play.” *See* June 2007 Military Commission Order on Jurisdiction (attached to Petition as Ex. E). Because Petitioner’s CSRT established only that he was an “enemy combatant”—not an “*unlawful* enemy combatant”—the judge held that the military commission over which he was presiding lacked jurisdiction to try Petitioner under the MCA. He further ruled that the commission was not the proper authority under the MCA to make the “unlawful enemy combatant” determination, and therefore dismissed all charges against Petitioner.

8. On July 4, 2007, the Government filed an appeal with the CMCR under Section 950d of the MCA. Shortly thereafter, Petitioner filed motions challenging both the timeliness of the appeal and the constitution of the tribunal (chiefly, the Secretary of Defense’s authority to delegate judicial appointment power to his Deputy).

9. On September 19, 2007 and September 24, 2007, the CMCR issued rulings denying Petitioner’s motions. *See* CMCR Ruling on Motion to Dismiss (attached to Petition as Ex. C); CMCR Ruling on Motion to Abate (attached to Petition as Ex. B). Also on September

24, 2007, the CMCR issued its opinion addressing the Government's appeal, reversing in part the military judge's decision that the military commission lacked jurisdiction to try Petitioner. The CMCR agreed that the determination of "lawful" or "unlawful" enemy combatant was a critical one, and it held that the military judge was correct to find that the CSRT's determination of "enemy combatant" status was insufficient to support military commission jurisdiction under the MCA. *See* CMCR Opinion of the Court and Action on Appeal by the United States at 8-9 (attached to Petition as Ex. A). It further held, however, that the military judge himself was empowered under the MCA to receive evidence and assess Petitioner's status as an "unlawful enemy combatant." *Id.* at 18.

10. On September 25, 2007, the military judge advised counsel that issuance of the CMCR's decision triggered the thirty-day clock in which "the accused shall be brought to trial" under the Rules for Military Commissions ("RMC"), RMC 707(a)(1). He therefore scheduled Petitioner's arraignment for October 11, 2007. Later that day, Petitioner moved to vacate or, alternatively, request a continuance of the proceedings. The military judge subsequently found that the interests of justice would be served by a continuance and rescheduled the arraignment for November 8, 2007.

11. Also on September 25, 2007, the Government personally served on Petitioner a copy of the CMCR's decisions, together with a Memorandum advising him that, under the Rules for Military Commission, he had the "right to petition the United States Court of Appeals for the District of Columbia Circuit within 20 days of the date of this notification." Department of Defense, Memorandum for Omar Ahmed Khadr (Sept. 25, 2007) (attached hereto as Ex. C) (internal quotation marks omitted). The Memorandum further directed Petitioner that "[t]he petition must be filed directly with the United States Court of Appeals for the District of

Columbia Circuit.” *Id.* To confirm that Petitioner was aware of his rights, the Affidavit of Service in the Memorandum certified that at the time the Memorandum was served on Petitioner, he was “advised of his right to petition the United States Court of Appeals for the District of Columbia Circuit.” *Id.*

12. On October 9, 2007, in full compliance with the procedures set forth in this Memorandum, Rules 908, 1201, and 1205 of the Rules for Military Commission, Regulations 25 and 26 of the Regulation for Trial by Military Commissions, and Section 950g of the Military Commissions Act of 2006, 10 U.S.C. §950g, Petitioner filed a Petition for Review in this Court. The Petition sought review of the CMCR’s jurisdictional decision, insofar as it held that the military judge possessed authority under the MCA to determine whether Petitioner is an “unlawful” enemy combatant for purposes of establishing jurisdiction. He also renewed his objections to the constitution of the CMCR tribunal as expressed in his motion to dismiss the Government’s appeal and motion to abate the proceedings. *See* Petition at 4.

13. On October 10, 2007, Mr. Khadr requested that the military judge hold further military commission proceedings in abeyance pending disposition of his appeal in this Court. The military judge denied the motion, but in so doing, specifically noted the D.C. Circuit’s “authority . . . to issue a stay in this case.” Military Judge Ruling dated Oct. 15, 2007 (attached hereto as Ex. D). Indeed, the Rules for Military Commissions expressly provide that this Court may “order the proceedings [before the military commission] stayed” pending review by this Court. RMC 908(c)(3) (attached to Petition as Ex. F).

ARGUMENT

I. THIS COURT SHOULD STAY PETITIONER'S IMPENDING MILITARY COMMISSION PROCEEDINGS

14. In order to preserve its jurisdiction and prevent potential irreparable injury to Petitioner, this Court should stay Petitioner's impending military commission proceedings pending review and adjudication of his Petition for Review.

15. In determining whether to grant such a stay, this Court must consider whether “(1) there is a substantial likelihood plaintiff will succeed on the merits; (2) plaintiff will be irreparably injured if an injunction is not granted; (3) an injunction will substantially injure the other party; and (4) the public interest will be furthered by the injunction.” *Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007). “A court must balance these factors, and ‘[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.’” *Id.* (quoting *Serono Lab. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998)); see also *CityFed Fin. Corp. v. Office of Thrift Supervision, U.S. Dep’t of Treasury*, 58 F.3d 738, 747 (D.C. Cir. 1995). All four factors weigh heavily in favor of granting a stay here.

A. Petitioner Will Be Irreparably Injured If His Military Commission Proceedings Are Not Stayed

16. As an initial matter, Petitioner will be irreparably injured if a stay is not granted. If the military commission proceedings are allowed to proceed, Petitioner will first be subject to an “unlawful enemy combatant” status determination before a military judge who may lack the jurisdiction to make such a determination. And if the military judge concludes that Petitioner is an “unlawful enemy combatant,” Petitioner will be subjected to trial and potential sentencing and conviction before a body that has no jurisdiction over him. These are not injuries that can be

redressed after the fact. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2006), *rev'd on other grounds*, 126 S. Ct. at 2798 (“[S]etting aside the judgment after trial and conviction insufficiently redresses the defendant’s right not to be tried by a tribunal that has no jurisdiction.”); *see also Hicks v. Bush*, 397 F. Supp. 2d 36, 42 (D.D.C. 2005) (“[P]roceedings which ultimately may be determined to be unlawful cannot be ‘undone.’”); *Hamdan*, 126 S. Ct. at 2772 (“[Petitioner] and the Government both have a compelling interest in knowing in advance whether [Petitioner] may be tried by a military commission that arguably is without any basis in law and operates free from many of the procedural rules prescribed by Congress for courts-martial—rules intended to safeguard the accused and ensure the reliability of any conviction.”).

17. Compounding the potential injury of being subject to an “unlawful enemy combatant” status determination before a judge who lacks the authority to make such a determination, the procedures the military judge has indicated he will use to make this determination are severely truncated and fail to provide even minimal due process—certainly far less due process than the procedures used by CSRTs. For example, the procedures outlined by the military judge do not permit petitioners to conduct any discovery. *See* Order of September 25, 2007 (attached hereto as Ex. E). They require petitioners’ attorneys to submit their rebuttal evidence to the judge before seeing any of the Government’s evidence. *Id.* ¶ 8. And the judge has indicated that he will not entertain arguments based on international, constitutional, or criminal law. *Id.* ¶ 9.

18. Moreover, if the military judge proceeds to determine whether Petitioner is an “unlawful enemy combatant,” and this Court later finds that the judge had no jurisdiction to make that determination, Petitioner will presumably be forced to undergo a second proceeding to

answer the exact same question, and face a second potential trial. The fact of being subjected to two trials is itself injury, and any adverse finding by the military commission in the first proceedings might well prejudice the subsequent proceedings. In addition, if Petitioner's military commission proceedings are not stayed, and this Court determines that a CSRT (rather than the military judge) must make an "unlawful enemy combatant" determination, the CSRT and the military judge may reach inconsistent conclusions—a result that would impair public confidence in proceedings under the MCA.

B. Enjoining Petitioner's Military Commission Proceedings Will Not Substantially Harm The Government

19. The next factor—the effect of the injunction on the other party—also counsels in favor of granting the stay. The Government will not be substantially harmed if the military commission proceedings are stayed. Petitioner has already been detained at Guantánamo for approximately five years. Were proceedings before the military commission stayed, he would simply remain detained pending this Court's resolution of his Petition for Review. There is no time sensitivity associated with bringing Petitioner to trial; indeed, the Government waited more than three years before bringing the first charges against him. Even after the MCA established a new military commission process in October 2006, the Government waited an additional six months before referring new charges to a military commission. After keeping Petitioner detained for more than five years, the Government will not suffer injury as a result of the comparatively short delay necessary for this Court to hear Petitioner's appeal, especially when the Government claims authority to detain Petitioner indefinitely on the basis of his enemy combatant status. *See Hamdan*, 126 S. Ct. at 2805 (Kennedy, J., concurring) ("[T]he circumstances of [Petitioner's] trial present no exigency requiring special speed For roughly four years, [Petitioner] has been detained at [Guantánamo]. And regardless of the outcome of the criminal proceedings at

issue, the Government claims authority to continue to detain him based on his status as an enemy combatant.”).

20. It would waste the resources of all parties and the military commission itself for the commission to proceed with arraignment and trial only to have this Court subsequently determine that the military judge may not make an “unlawful enemy combatant” determination, and therefore that the military commission lacks jurisdiction to try Petitioner on “war crimes” charges based on such a determination. These judicial economy concerns suggest that the Government, too, will benefit from a stay pending this Court’s review of Petitioner’s appeal. If the military commission proceedings are not stayed, the Government may devote considerable resources to trying Petitioner before a body that has no authority to try him. Given the Government’s concern about the limited resources available to prosecute these actions, *see* Government Motion, *Chaman v. Gates*, No. 07-1101 (D.C. Cir. filed Oct. 11, 2007), it would benefit from knowing in advance whether the renewed military commission proceedings in Petitioner’s case are in fact consistent with the Constitution and laws of the United States. Prior courts have recognized the value of staying military commission proceedings pending appeal in similar circumstances. *See Al Sharbi v. Bush*, 430 F. Supp. 2d 1, 2 (D.D.C. 2006) (staying military commissions pending the Supreme Court’s decision in *Hamdan*); *Hicks*, 397 F. Supp. 2d at 45 (same). These stays preserved judicial resources and avoided commission proceedings that would, in the end, have been held invalid. *See Hamdan*, 126 S. Ct. at 2786 (holding the military commission proceedings unlawful).

21. Indeed, the military judge in Petitioner’s case himself agreed with this assessment in ruling on Petitioner’s motion to hold the military commission proceedings in abeyance. Though ultimately denying Petitioner’s motion (but noting this Court’s authority to grant such a

stay), the military judge expressed concern about “the time, money, and energy which might be fruitlessly expended if this case is stayed after proceedings go forward or if the Court of Appeals reverses the CMC in such fashion that actions taken after 29 June 2007 are nullified. One need only look at the effect of federal court rulings in November 2004 (*Hamdan*) and November 2005 (*Hicks*) to see that all parties could suffer harm if proceedings are stayed or nullified after a given amount of effort has been expended.” See Military Judge Ruling dated October 15, 2007 (attached hereto as Ex. D).

C. Enjoining Petitioner’s Military Commission Proceedings Will Further The Public Interest

22. Similarly, the next factor—the public’s interest—weighs in favor of granting a stay. The public has a strong interest in ensuring that military commission procedures conform to law. A rush to try Petitioner before resolving the important threshold issues concerning the military judge’s authority to assess Petitioner’s “unlawful enemy combatant” status and the ongoing jurisdiction of a military commission under such an assessment could undermine public confidence in the military commission process. As was noted in an analogous context in *Hicks v. Bush*, “[i]t is in the public interest to have a final decision, leaving no doubts as to [a] key jurisdictional issue, before Petitioner’s military commission proceedings begin.” 397 F. Supp. 2d at 43. The Government initially waited years to charge Petitioner with war crimes. It is in the interest of all parties and the public to wait the comparatively little additional time needed to ensure that any military commission trial Petitioner faces is fully consistent with the applicable requirements of domestic and international law.

D. Petitioner Is Substantially Likely To Prevail On The Merits Of His Petition for Review

23. In addressing the final factor—whether there is a substantial likelihood plaintiff will succeed on the merits—this Court “is not required to find that ultimate success by the movant is a mathematical probability.” *Washington Metro. Area Transp. Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Indeed, it may “grant a stay even though its own approach may be contrary to movant’s view of the merits.” *Id.* Where, as here, the other factors militate strongly in favor of granting the injunction, it is sufficient if Petitioner has presented a “serious legal question.” *Id.* at 844 (“An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant.”); *see also Telvest, Inc. v. Bradshaw*, 618 F.2d 1029, 1032-33 (4th Cir. 1980) (“If the harm to the plaintiff greatly outweighs the harm to the defendant, then enough of a showing has been made to permit the issuance of an injunction, and plaintiff need not show a likelihood of success on the merits, for a grave or serious question is sufficient.”); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953) (“[I]f the other elements are present (*i.e.*, the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.”).

24. This case certainly presents a serious legal question. Because Petitioner is one of only four individuals to have been charged under the MCA, no court has yet addressed whether a military commission itself can determine that a detainee is an “alien unlawful enemy combatant” subject to military commission trial under the MCA, or whether this determination must be made by a CSRT. *See* Military Judge Ruling dated October 15, 2007 (attached hereto as Ex. D) (noting that “this is the first appeal ever taken to the Court of Appeals from a military

commission”). This question is central to the mechanics and validity of military commission trials. The fact that the military judge and CMC reached conflicting results suggests that the statute is, at minimum, ambiguous, and it is appropriate to maintain the status quo pending this Court’s determination of the proper interpretation of the statute and its legality.

25. Moreover, although the fact that Petitioner’s Petition for Review presents serious legal questions is sufficient to justify a stay, his claims also meet the more demanding standard applicable when the balance of the equities does not strongly favor granting the stay—that is, his claims are substantially likely to succeed on the merits.

26. Succinctly put, the military judge was correct in his June 2007 Order on Jurisdiction: a CSRT determination of “alien unlawful enemy combatant” status is a prerequisite to military commission jurisdiction under the statutory scheme set out in the MCA. The whole of the MCA focuses on the scope and responsibilities of military commissions. If Congress had intended to give the commissions themselves power to make “unlawful enemy combatant” determinations—which, as noted, are jurisdictional prerequisites to trial before a commission—Congress would have said so explicitly. But it did not: the MCA nowhere provides expressly that military commissions themselves may make the threshold finding that triggers their jurisdiction to try detainees for war crimes. *See* MCA § 3, 10 U.S.C. § 948a *et seq.*

27. Moreover, Petitioner’s interpretation of the statute—under which Congress established a two step system that requires a CSRT determination of “unlawful enemy combatant” status prior to any trial before a military commission—renders the MCA consistent with applicable principles of international law. *See Murray v. The Schooner Charming Betsey*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”). Under the Geneva Convention, all

prisoners of war held by the United States, including presumptive prisoners of war, must be tried by court-martial. Geneva Convention Relative to the Treatment of Prisoners of War, art. 102, 75 U.N.T.S. 135, Oct. 21, 1950 (“GPW”). As a result, referring charges to a military commission without a prior determination that a detainee is an *unlawful* enemy combatant not entitled to the protections accorded prisoners of war would violate international law. *See* GPW, art. 5(2) (providing that if “any doubt arise[s]” as to whether persons who have “fallen into hands of the enemy” are prisoners of war, such persons must be afforded prisoner of war status “*until such time as their status has been determined by a competent tribunal*” (emphasis added)).²

28. Reading the MCA to require a CSRT determination of “unlawful enemy combatant” status also makes best sense of Congress’s intent, in the MCA, to establish procedures that provide an adequate substitute for the writ of habeas corpus. *See* 10 U.S.C. § 950j (purporting to strip federal courts of the power to hear habeas petitions based on MCA proceedings); *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (holding that federal courts may be constitutionally stripped of habeas jurisdiction only if there is a substitute collateral remedy which is “[a]dequate” and “[e]ffective” to test the legality of a person’s detention). While the courts have yet to determine whether the MCA’s jurisdiction-stripping provisions are constitutional, the establishment of a two-step process that permits a detainee to raise and immediately appeal threshold jurisdictional issues before proceeding to trial, *see* DTA §

² The MCA’s bar on alien unlawful enemy combatants invoking the Geneva Convention as a source of rights, 10 U.S.C. § 948b(g), does not apply here because Petitioner has not been determined to be an alien unlawful enemy combatant and, in any event, Petitioner need not invoke the Convention as a source of rights for present purposes. Instead, he uses the Convention simply to illustrate the international law background against which the MCA was enacted. Moreover, Congress has expressly recognized that the Geneva Conventions apply to actions under the MCA. 10 U.S.C. § 948b(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.”).

1005(e)(2); Discussion to Rules for Military Commissions 202(b) (attached hereto as Ex. F), is more consistent with an intent to create an adequate and effective substitute for habeas. Whether that attempt to create adequate and effective procedures was successful is not at issue in this case; but the MCA should be read against this congressional intent.

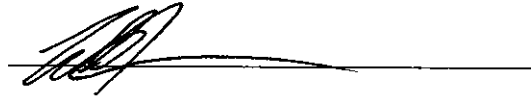
29. Finally—and independently of the foregoing arguments—the Government’s recent indication that it may seek to convene new CSRTs rather than compile the record this Court required in *Bismullah v. Gates*, -- F.3d --, 2007 WL 2067938 (D.C. Cir. July 20, 2007) (amended Oct. 23, 2007), also counsels in favor of granting a stay in this case. See Government Motion, *Chaman v. Gates*, No. 07-1101 (filed Oct. 11, 2007) (requesting a stay to allow “sufficient time” for the Government to “make an assessment of this case and other DTA cases so as to make a determination on whether to convene a ‘new CSRT’”). Should the Government decide to hold a new CSRT for Petitioner, that action would moot the need for the military commission to determine whether he is an “unlawful enemy combatant.” Indeed, it would moot this entire appeal, as there would be no need for this Court to resolve whether or how military commissions might be authorized to make the “unlawful enemy combatant” status determination in the first instance.

CONCLUSION

In light of the serious legal questions presented by Petitioner’s Petition for Review, the irreparable injury Petitioner will suffer without a stay, the fact that the Government will not be harmed by a stay, and the fact that the public will benefit from a stay, Petitioner respectfully moves this Court to stay military commission proceedings in Petitioner’s case pending this Court’s resolution of Petitioner’s appeal of the September 2007 rulings of the CMCR.

Dated: October 31, 2007

Respectfully Submitted,



William C. Kuebler, LCDR, JAGC, USN
Rebecca Snyder, Esq.
Office of Military Commissions
Office of the Chief Defense Counsel
1099 14th Street, Suite 2000 E
Washington, D.C. 20005

Attorneys for Petitioners

Of Counsel:

Karl R. Thompson
Allison Orr Larsen*
Brianne J. Gorod*
O'MELVENY & MYERS LLP
1625 Eye St. NW
Washington, D.C. 20006
(202) 383-5300

**Admitted to practice outside of the District of Columbia;
Supervised by principals of the firm.*

CERTIFICATE OF PARTIES AND DISCLOSURE STATEMENT

The parties and amici before the Court of Military Commission Review were:

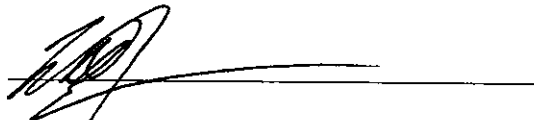
1. Appellant United States of America, represented by Frances A. Gillian (argued); Major Jeffrey D. Groharing, JA, U.S. Army (on brief); Captain Keith A. Petty, JA, U.S. Army (on brief); Lieutenant Clay G. Trivett, Jr., JAGC, U.S. Navy (on brief).
2. Appellee Omar Khadr, represented by Lieutenant Commander William C. Kuebler, JAGC, U.S. Navy (on brief, argued); Rebecca S. Snyder (on brief), Dennis Edney (on brief); Nathan Whitling (on brief, argued).
3. Amicus Curiae for Appellee Omar Khadr: Frank W. Fountain (on brief); Madeline Morris (Professor of Law, Duke University) (on brief); Stephen Bornick (Special Editorial Associate for Professor Morris) (on brief); Landon Zimmer (Special Editorial Associate for Professor Morris) (on brief); Allison Hester-Hadded (law student, Duke University) (on brief).

The parties before this Court are:

1. Petitioner Omar Khadr, represented by Lieutenant Commander William C. Kuebler, JAGC, U.S. Navy; Rebecca S. Snyder.
2. Respondent United States of America represented by John De Pue, Attorney U.S. Department of Justice; Jeffrey Groharing, Department of Defense Office of the Chief Prosecutor.

No corporation, association, joint venture, partnership, syndicate or other similar entity appears as a party or amicus curiae in this proceeding. Thus, no disclosure statement is required by Circuit Rule 26.1

Dated: October 31, 2007



William C. Kuebler, LCDR, JAGC, USN
Office of Military Commissions
Office of the Chief Defense Counsel
1099 14th Street, Suite 2000 E
Washington, D.C. 20005

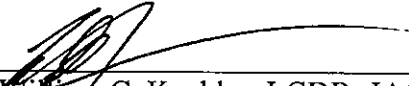
CERTIFICATE OF SERVICE

I certify that on October 31 2007, two true copies of Petitioner's Emergency Motion to Stay Military Commission Proceedings were sent, via Federal Express, to:

John F. DePue
Attorney, Counterterrorism Section
National Security Division
US Department of Justice
950 Pennsylvania Ave, NW Room 1527
Washington DC 20530
(202) 616 0725

Jeffrey D. Groharing
Department of Defense
Office of the Chief Prosecutor
1610 Defense Pentagon, Room 3B688
Washington DC 20301-1610
(703) 602-4215, extension 142

LeRoy F. Foreman
Clerk of Court, Court of Military Commission Review
One Liberty Center
875 N. Randolph Street
Suite 8000
Arlington, VA 22203



William C. Kuebler, LCDR, JAGC, USN
Rebecca Snyder, Esq.
Office of Military Commissions
Office of the Chief Defense Counsel
1099 14th Street, Suite 2000 E
Washington, D.C. 20005
Counsel for Petitioner

A

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

a/k/a Akhbar Farhad

a/k/a Akhbar Farnad

) **CHARGES:**

) **CONSPIRACY;**

) **MURDER BY AN UNPRIVILEGED**

) **BELLIGERENT;**

) **ATTEMPTED MURDER BY AN**

) **UNPRIVILEGED BELLIGERENT;**

) **AIDING THE ENEMY**

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 30, 2005 that Omar Ahmed Khadr (a/k/a Akhbar Farhad, a/k/a Akhbar Farnad, hereinafter Khadr) is subject to his Military Order of November 13, 2001.

2. Khadr's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS (AL QAIDA)

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

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

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

6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

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

9. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa*

(purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to “plunder their money.”

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

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

BACKGROUND

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

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

14. In late 1994, Ahmad Khadr was arrested by Pakistani authorities for providing money to support the bombing of the Egyptian Embassy in Pakistan. While Ahmad Khadr was incarcerated, Omar Khadr returned with his siblings to Canada to stay with their grandparents. Khadr attended school in Canada for one year while his father was imprisoned in Pakistan before returning to Pakistan in 1995.

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

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

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

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

19. After completing his training, Khadr joined a team of other al Qaida operatives and converted landmines into remotely detonated improvised explosive devices, ultimately planting them at a point where U.S. forces were known to travel.

20. U.S. Forces captured Khadr on July 27, 2002, after a firefight resulting in the death of one U.S. service member.

CHARGE 1: CONSPIRACY

21. Omar Ahmed Khadr did, in and around Afghanistan, from on or about June 2002 to on or about 27 July 2002, willfully and knowingly join an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Muhammad Atef (a/k/a Abu Hafs al Masri), Saif al adel, Ahmad Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

22. In furtherance of this enterprise and conspiracy, Khadr and other members of al Qaida committed the following overt acts:

- a. On or about June 2002, Khadr received approximately one month of one-on-one, private al Qaida basic training from an al Qaida member named "Abu Haddi." This training was arranged by Omar Khadr's father, Ahmad Sa'id Khadr, and consisted of training in the use of rocket propelled grenades, rifles, pistols, hand grenades and explosives.
- b. On or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military. Khadr went to an airport near Khost, Afghanistan, and watched U.S. convoys in support of future attacks against the U.S. military.
- c. On or about July 2002, Khadr received one month of land mine training.
- d. On or about July 2002, Khadr joined a group of Al Qaida operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.
- e. On or about July 27, 2002, Khadr and other Al Qaida members engaged U.S. military personnel when military members surrounded their compound.

During the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer. In addition to the death of SFC Speer, two Afghan Militia Force members who were accompanying U.S. Forces were shot and killed and several U.S. service members were wounded.

CHARGE 2: MURDER BY AN UNPRIVILEGED BELLIGERENT

23. Omar Ahmed Khadr did, in Afghanistan, on or about July 27, 2002, murder Sergeant First Class Christopher Speer, U.S. Army, while in the context of and associated with armed conflict and without enjoying combatant immunity, by throwing a hand grenade that caused Sergeant First Class Speer's death.

CHARGE 3: ATTEMPTED MURDER BY AN UNPRIVILEGED BELLIGERENT

24. Omar Ahmed Khadr did, in Afghanistan, between, on, or about June 1, 2002 and July 27, 2002, attempt to murder divers persons, while in the context of and associated with armed conflict and without enjoying combatant immunity, by converting land mines to improvised explosive devices and planting said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.

CHARGE 4: AIDING THE ENEMY

25. Omar Ahmed Khadr did, in Afghanistan, on divers occasions between on or about June 1, 2002 and July 27, 2002, while in the context of and associated with armed conflict, intentionally aid the enemy, to wit: al Qaida.

UNITED STATES

v.

Referral

NOV 23 2005

Don & Heather

John D. Altenburg, Jr.
Appointing Authority
for Military Commissions

B

CHARGE SHEET**I. PERSONAL DATA****1. NAME OF ACCUSED:**

Omar Ahmed Khadr

2. ALIASES OF ACCUSED:

Akhbar Farhad, Akhbar Farnad, Ahmed Muhammed Khali

3. ISN NUMBER OF ACCUSED (LAST FOUR):

0766

II. CHARGES AND SPECIFICATIONS**4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C.****SPECIFICATION:**

See Attached Charges and Specifications.

III. SWEARING OF CHARGES**5a. NAME OF ACCUSER (LAST, FIRST, MI):**

Tubbs II, Marvin W.

5b. GRADE

O-4

5c. ORGANIZATION OF ACCUSER

Office of the Chief Prosecutor, OMC

5d. SIGNATURE OF ACCUSER**5e. DATE (YYYYMMDD)**

20070405

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the 5th day of April, 2007, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Jeffrey D. Groharing

Typed Name of Officer

Office of the Chief Prosecutor, OMC

Organization of Officer

O-4

Grade

Commissioned Officer, U.S. Marine Corps

Official Capacity to Administer Oath

(See R.M.C. 307(b) must be commissioned officer)



Signature



IV. NOTICE TO THE ACCUSED

6. On April 5th, 2007 the accused was notified of the charges against him/her (See R.M.C. 308).

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

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

Jeffrey D. Groharing
Signature

V. RECEIPT OF CHARGES BY CONVENING AUTHORITY

7. The sworn charges were received at 1411 hours, on 6 April 2007 at Arlington, Virginia

Location

For the Convening Authority: Jennifer D. Young
Typed Name of Officer

CW3

Grade

[Signature]

Signature

VI. REFERRAL

8a. DESIGNATION OF CONVENING AUTHORITY

Convening Authority 10USC §948h
Appointed on 6 Feb 2007

8b. PLACE

Arlington, Va

8c. DATE (YYYYMMDD)

20070424

Referred for trial to the (non)capital military commission convened by military commission convening order 07-02
dated 8 March 2007

subject to the following instructions: this case is referred
non-capital; see continuation sheet

☒ Susan J. Crawford
Command, Order, or Direction

Convening Authority 10USC §948h
Official Capacity of Officer Signing

Susan J. Crawford
Typed Name and Grade of Officer

Susan J. Crawford
Signature

VII. SERVICE OF CHARGES

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

Jeffrey D. Groharing

Typed Name of Trial Counsel

0-4

Grade of Trial Counsel

[Signature]
Signature of Trial Counsel

FOOTNOTES

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

CONTINUATION SHEET – MC FORM 458 JAN 2007, Block VI Referral

In the case of UNITED STATES OF AMERICA v. OMAR AHMED KHADR

a/k/a "Akhbar Farhad"

a/k/a "Akhbar Farnad"

a/k/a "Ahmed Muhammed Khali"

The following charges and specifications are referred to trial by military commission:

The Specification of Charge I and Charge I

The Specification of Charge II and Charge II

The Specification of Charge III, as amended, and Charge III

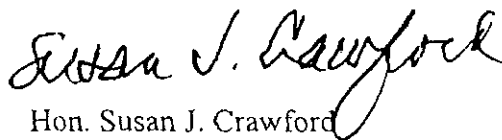
Specifications 1 and 2 of Charge IV, as amended, and Charge IV

The Specification of Charge V and Charge V

This case is referred non-capital.

Date:

4-24-07



Hon. Susan J. Crawford
Convening Authority
for Military Commission

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

CHARGE I: VIOLATION OF 10 U.S.C. §950v(b)(15), MURDER IN VIOLATION OF THE LAW OF WAR

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

CHARGE II: VIOLATION OF 10 U.S.C. §950t, ATTEMPTED MURDER IN VIOLATION OF THE LAW OF WAR

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

CHARGE III: VIOLATION OF 10 U.S.C. §950v(b)(28), CONSPIRACY

Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002 to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahman Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown, and willfully join an enterprise of persons, to wit: al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks, continuing to date against the United States; said agreement and enterprise sharing a common

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criminal purpose known to the accused to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; ~~hijacking or hazarding a vessel or aircraft~~ and terrorism. SFC 4-24-07

In furtherance of this agreement or enterprise, Omar Khadr knowingly committed overt acts, including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi.", consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.
2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
3. In or about July 2002, Khadr attended one month of land mine training.
4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.
5. On or about July 27, 2002, Khadr ~~and/or other suspected al Qaeda members~~ engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members. SFC 4-24-07
6. Khadr ~~and/or the other suspected al Qaeda members~~ threw and/or fired grenades at nearby coalition forces resulting in numerous injuries. SFC 4-24-07
7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

**CHARGE IV: VIOLATION 10 U.S.C. §950v(b)(25), PROVIDING MATERIAL
SUPPORT FOR TERRORISM**

Specification 1: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from at least June 2002 through on or about July 27, 2002, intentionally provide material support or resources to wit: personnel, himself, to al Qaeda, an international terrorist organization founded by Usama bin Laden, in or about 1989, and known by the accused to be an organization that engages in terrorism, said al Qaeda having engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks, continuing to date against the United States; said conduct taking place in the context of and associated with armed conflict.


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The accused provided material support or resources to al Qaeda including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi.", consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.
2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
3. In or about July 2002, Khadr attended one month of land mine training.
4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.
5. On or about July 27, 2002, Khadr ~~and/or other suspected al Qaeda members~~ ^{SC 4.24.07} engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.
6. Khadr ~~and/or the other suspected al Qaeda members~~ ^{SC 4.24.07} threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.
7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

Specification 2: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, from at least June 2002 through on or about July 27, 2002, intentionally provide material support or resources to wit: personnel, himself, to be used in preparation for, or carrying out an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, and that the conduct of the accused took place in the context of and was associated with an armed conflict.

The accused provided material support or resources in support of acts of terrorism including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi.", consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.
 2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
- 

3. In or about July 2002, Khadr attended one month of land mine training.
4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where, based on previous surveillance, U.S. troops were expected to be traveling.
5. On or about July 27, 2002, Khadr ~~and/or other suspected al Qaeda members~~ engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members. *S/C 4-24-07*
6. Khadr ~~and/or the other suspected al Qaeda members~~ threw and/or fired grenades at nearby coalition forces resulting in numerous injuries. *S/C 4-24-07*
7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

CHARGE V: VIOLATION OF 10 U.S.C. §950v(b)(27), SPYING

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

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C

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

Date: 25 SEP 07

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

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

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

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

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

AFFIDAVIT OF SERVICE AND NOTIFICATION OF RIGHTS

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

Michelle A. Hansen 04
Typed/Printed Name/Grade

Michelle A. Hansen
Signature

JTF-GTMO / SJA
Organization

APD AE 09360
Address of Organization

D

From: Pete Brownback [mailto:abnmj@cfl.rr.com]
Sent: Monday, October 15, 2007 09:58
To: Chappell, Danny, LTC, DoD OGC
Cc: Bley, Natalie, Ms, DoD OGC
Subject: Ruling - US v. Khadr - Request to Hold Proceedings in Abeyance

LTC Chappell,

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

COL Brownback

Counsel in the case of United States v. Khadr,

1. References:

a. Email, LCDR Kuebler, October 10, 2007 11:18 AM, Subject: Petition for Review filed with USCA for DC Circuit -- request to hold proceedings in abeyance ICO U.S. v. Khadr.

b. Email, LCDR Kuebler, October 10, 2007 12:16 PM, Subject: U.S. v. Khadr -- request for abeyance (additional matters).

c. Email, CPT Petty, October 12, 2007 11:30 AM, Subject: Government Response to Defense Request, containing the Government Response.

d. Email, LCDR Kuebler, October 12, 2007 12:38 PM, Subject: RE: Government Response to Defense Request.

e. Petition for Review to the Court of Appeals for the District of Columbia Circuit, Khadr v. Court of Military Commission Review, 9 October 2007.

f. United States v. Khadr, Court of Military Commission Review, 24 September 2007 (AE 026).

2. The commission has considered the references and has further considered the requirements of the M.C.A., the M.M.C., and the Regulation for Trial by Military Commission. In its consideration, the commission gave no weight to the matters referred to in the third unnumbered subparagraph of paragraph 4D of the Government Response.

3. In making its determination, the commission takes no position on and makes no ruling concerning the question of jurisdiction of the Court of Appeals for the District of Columbia Circuit to hear the appeal (Reference 1e).

4. The commission has considered the open-ended nature of the defense request. "(T)he defense respectfully requests the Military Judge to hold further military commission proceedings in abeyance pending disposition of the matter by the U.S. Court of Appeals." (Paragraph 2, Reference 1a). There is no time-certain that the commission could consider as an end-point for this request. The "disposition" by the Court of Appeals could come on 12 October 2007 or 12 October 2008. Such an unlimited abeyance can not be reconciled with the commission's duties under R.M.C. 707.

5. a. The commission has also considered the defense proposition that the military commission would be acting irregularly and in an unprecedented manner if it were to continue while there was an appeal pending before the Court of Appeals:

"...it would clearly be irregular and unprecedented for multiple courts to exercise jurisdiction over this case at the same time. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.)." (Paragraph 2a, Reference 1a.)

b. The commission is aware of its authority to grant continuances in this case. It has done so at least twice.

c. The commission is further aware of the authority of the Court of Appeals to issue a stay in this case.

d. The commission agrees that it would be unprecedented if the commission held sessions while an appeal was pending at the Court of Appeals in that this is the first appeal ever taken to the Court of Appeals from a military commission. Unprecedented, however, does not mean improper or unlawful.

e. The commission does not agree with the fundamental proposition of the defense position - that the commission has some duty to stay its proceedings while waiting for the Court of Appeals to act on the appeal. To the contrary, the commission finds that it has a duty to proceed with the case in a judicious manner, absent a stay imposed by the Court of Appeals (or another body).

6. The law of this case is that the commission must comply with the ruling of the Court of Military Commission Review (Reference 1f). While counsel may seek to make continuing arguments at the appellate level, the commission is bound by the ruling from its superior court.

7. The commission has also considered the time-management and resource-management problems discussed in paragraphs 1 and 2 of Reference 1b. The commission is not unsympathetic with the demands placed on counsel, on both sides, by competing trial and appellate-level proceedings. However, the commission finds that there is no current level of activity which would require the commission to intervene.

8. a. Of greater concern to the commission are the matters discussed in paragraph 1e of Reference 1d. The commission is concerned with the time, money, and energy which might be fruitlessly expended if this case is stayed after proceedings go forward or if the Court of Appeals reverses the CMCR in such fashion that actions taken after 29 June 2007 are nullified. One need only look at the effect of federal court rulings in November 2004 (*Hamdan*) and November 2005 (*Hicks*) to see that all parties could suffer harm if proceedings are stayed or nullified after a given amount of effort has been expended.

b. However, the situations in *Hamdan* and *Hicks* are not analogous to the current situation in this case. The commission has set one session in this case. The matters to be covered in the session scheduled do not approach, in terms of time, money, and energy required to prepare for them, the matters which were involved in, for example, *Hicks* (57 defense pretrial motions - with government responses and defense replies).

c. Further, in both *Hamdan* and *Hicks*, each case was before a court which had asserted jurisdiction over the accused. Such previously asserted jurisdiction by a federal court is not present in this case.

9. The commission has a great concern with the fact that Mr. Khadr has not stated on the record in open court his desires concerning counsel. That is a matter which must be addressed on the record as soon as possible.

10. a. The commission also has a great concern with the initial or threshold determination as to whether Mr. Khadr is subject to the jurisdiction of the military commission.

b. Counsel appear to have a misunderstanding of what this determination might entail or what it might exclude. This determination will be focused solely on 948d(a) of the M.C.A. This determination will not address other possible motions or attacks upon the jurisdiction of the commission. Counsel for both sides will be free, following the initial or threshold determination, to make motions concerning the jurisdiction of the commission over Mr. Khadr and whatever other motions they might choose to make.

11. a. The commission does not find that the matters raised by the defense in references 1a, 1b, and 1d are sufficient to cause it to abate the proceedings at this time.

b. The commission does not preclude further requests by the defense in the event that circumstances change significantly from those outlined in references 1a, 1b, and 1d.

c. The commission finds that denying the request for abeyance is in the public interest.

d. The commission will allow the defense to request that the commission consider the matters raised in references 1a, 1b, and 1d when determining any future motion or trial schedule.

12. The defense request to abate the proceedings is denied.

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

E

From: Pete Brownback [mailto:abnmj@cfl.rr.com]
Sent: Tuesday, September 25, 2007 15:56
To: Chappell, Danny, LTC, DoD OGC
Cc: Edmonds, Matthew, SSG, DoD OGC; Bley, Natalie, Ms, DoD OGC
Subject: Initial Notice - US v. Khadr Trial Proceedings Following CMCR Ruling

LTC Chappell,

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

COL Brownback

Counsel in the case of United States v. Khadr,

1. Chronology:

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

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

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

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

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

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

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

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

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

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

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Rules for Military Commissions

Discussion to Rule 202(b).

Military commissions have personal jurisdiction over alien unlawful enemy combatants. *See* 10 U.S.C. § 948c. The M.C.A. recognizes, however, that with respect to individuals detained at Guantanamo Bay, the United States relies on the Combatant Status Review Tribunal (“C.S.R.T.”) process to determine an individual’s combatant status. The C.S.R.T. process includes a right of appeal to the United States Court of Appeals for the District of Columbia Circuit. Because the C.S.R.T. process provides detainees with the opportunity to challenge their status, the M.C.A. recognizes that status determination to be dispositive for purposes of the personal jurisdiction of a military commission. The M.C.A. provides that an individual is deemed an unlawful enemy combatant for purposes of the personal jurisdiction of a military commission if the individual has been determined to be an unlawful enemy combatant by a C.S.R.T. or other competent tribunal. Where combatant status of the accused may otherwise be relevant, the parties may establish the accused’s status by evidence adduced in accordance with the commission rules. The determination of an individual’s combatant status for purposes of establishing a commission’s jurisdiction does not preclude him from raising any affirmative defenses, nor does it obviate the Government’s obligation to prove beyond a reasonable doubt the elements of each substantive offense charged under the M.C.A. and this Manual.

Combatant Status Review Tribunal. The M.C.A. provides that an alien determined to be an unlawful enemy combatant by a C.S.R.T. shall be subject to military commission jurisdiction, whether the C.S.R.T. determination was made “before, on, or after the date of the enactment” of the M.C.A. *See* 10 U.S.C. § 948a(1)(ii). At the time of the enactment of the M.C.A., C.S.R.T. regulations provided that an individual should be deemed to be an “enemy combatant” if he “was part of or supporting al Qaeda or the Taliban, or associated forces engaged in armed conflict against the United States or its coalition partners.” The United States previously determined that members of al Qaeda and the Taliban are unlawful combatants under the Geneva Conventions.

Other Competent Tribunal. The M.C.A. also provides that an individual shall be deemed an “unlawful enemy combatant” if he has been so determined by a competent tribunal established consistent with the law of war. *See* 10 U.S.C. § 948a(1)(ii).

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