UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**P-009** **Defense Opposition** To Prosecution's Motion for Reconsideration 10 October 2008

1. **Timeliness**: This Opposition is filed within the timeframe established by the Military Commissions Trial Judiciary Rules of Court and the Military Judge's ruling on the Defense Request for Special Relief.

2. **Relief Sought**: The Prosecution's Motion for Reconsideration should be denied.

3. **Overview**:

> Accused: "If you ask me what the color of this paper is, I will tell you the color is white. You say no, it's black. I say white, you say black. I say fine, it's black. Then you say no, it's white. This is the American government."

(Transcript of Proceedings, 28 April 2008, at 280.)

On August 7, 2008, the United States Government said to Mr. Hamdan: "You are sentenced to 66 months, reduced by credit for pretrial confinement in the amount of 61 months, eight days."

Now the United States Government wants to say to Mr. Hamdan: "Your sentence is NOT 66 months, reduced by credit for pretrial confinement in the amount of 61 months, eight days. In fact, we would like to re-sentence you to a much longer term." No wonder Mr. Hamdan is distrustful of the Government.

Actions speak louder than words. On August 7, 2008, the Administration heralded the verdict in *U.S. v. Hamdan*, releasing a statement to the press emphasizing the fairness of the outcome. Now, 65 days later, the Administration demonstrates that, in fact, it was sorely disappointed in the verdict, because it now seeks to have the Military Judge vacate the sentence

that the Members of the Commission saw fit to impose. The Prosecution's attempt to have the sentencing verdict thrown out is nothing more than "sour grapes" and an unvarnished attempt to impose a longer sentence on Mr. Hamdan than the Commission Members deemed appropriate. In short, the Administration's position is that it should have two opportunities to seek a sentence that it deems long enough, first during the trial based on the evidence and information the Commission Members considered, and then later by changing the evidence and information on which the Members relied.

The Members knew exactly what they were doing when they imposed a sentence that Mr. Hamdan will serve in full by year-end. They understood before they announced their decision that a 66-month sentence would result in Mr. Hamdan being released in five months given the 61-months credit for pretrial confinement he already had received. It would be totally unfair now -- two months after the Commission Members completed their deliberations -- to reassemble the Panel and ask the Members to impose a longer sentence just because the Administration would like to avoid releasing Mr. Hamdan in December. Doing so would make our system of justice appear ridiculous to the rest of the Western World and would demonstrate that the Administration can ignore the Rule of Law when it wishes, and retry a case whenever it thinks the Panel Members were too lenient.

The Prosecution's Motion should be denied. First, the Prosecution not only waived any objection to the instructions the Members received, it also affirmatively concurred that the Members should be informed that whatever sentence they imposed would be reduced by 61 months, eight days credit for pretrial confinement. The Members relied on that instruction in fashioning their sentencing verdict, and the Prosecution should not be allowed to have it both ways -- agreeing that the Members should be made aware on August 7 that their verdict would

be reduced by 61 months, eight days, and then challenging two months later the Members' entitlement to take pretrial credit into account when determining their verdict. Second, the untimely relief sought by the Prosecution now is barred by the Military Commissions Act ("MCA") and the Rules for Military Commissions. Third, the Military Judge was well within his discretion and authority to rule on credit for pretrial credit, and there was no abuse of discretion in the Military Judge's Ruling awarding 61 months, eight days credit.

4. **Burden and Standard of Proof:** The Prosecution correctly acknowledges that it bears the burden of persuasion. RMC 905(c)(2).

5. **Facts:**

A. On 5 August 2008, outside the presence of Commission Members, the Military Judge heard oral argument on Mr. Hamdan's motion for pretrial confinement credit (D-019)[1] (See Attachment A, Trial transcript (unauthenticated) for 5 August 2008 session at 23-29).

B. On 6 August 2008, again outside the presence of the Members, the Military Judge announced a partial ruling on D-019, granting Mr. Hamdan some credit for time served, to be credited against any sentence imposed. In making that ruling, the Military Judge stated that he would "instruct the members" that Mr. Hamdan would be given day-for-day credit for the period from 1 July 2003 to the present; that Mr. Hamdan be given no credit for the period from his capture on 24 November 2001 through 30 June 2003; and that the Members should consider his detention during that earlier uncredited period "as a factor in determining what

[1] Defense Motion for Relief from Punitive Conditions of Confinement and for Confinement Credit D-019, originally was filed on 1 February 2008, and thus had been pending for over seven months at the time it was decided. Prosecution cannot pretend to be surprised that credit for pretrial confinement was considered before the Members deliberated their sentencing verdict.

sentence they consider appropriate." (Attachment A, Trial transcript (unauthenticated) for 6 August 2008 session at 65.)

C. The Prosecution did not object to any aspect of the 6 August ruling. Nor did the Prosecution take any steps to seek interim review of the ruling before it was implemented, or to stay its effect. Indeed, there were no questions from counsel concerning the 6 August ruling, and no objections were made concerning the anticipated instruction to the Members. (*Id.* at 66.)

D. The very next day, 7 August 2008, was to be the last day of trial. Based in part on the manner in which they intended to present oral argument at the end of the sentencing phase, Defense counsel initially requested that the Commission Members not be instructed regarding the pretrial credit that would be applied against any sentence they decided. (Attachment A, Trial transcript (unauthenticated) for 7 August 2008 session at 69-71). The Prosecution did not object to excluding that instruction. Nor did the Prosecution insist that the information not be communicated to the Members. Nor did the Prosecution object to the prior day's ruling that credit for pretrial confinement would be applied.

E. The Military Judge, with the concurrence of counsel, indicated initially that he would not mention pretrial credit to the Commission Members, but rather would instruct them that they should consider Mr. Hamdan's pretrial detention generally and give it the weight they deemed appropriate, without requiring any specific formula to be used with respect to it. (*Id.* at 73-74).

F. During the sentencing phase of trial, the Defense submitted evidence going to the

full range of issues relevant to the Commission Members' sentencing decision, including matters in extenuation and mitigation, factors relating to deterrence, rehabilitative potential, and likelihood of future dangerousness. The evidence included testimony from psychiatrist Dr. Emily Keram, relevant photographic evidence, and an unsworn statement to the Members made by Mr. Hamdan. (*See, e.g.*, Trial transcript (unauthenticated) (6 August 2008 session) at 76-124).

G. Following the introduction of this evidence and oral argument from counsel regarding sentencing, Commission Members were instructed by the Military Judge on their sentencing determination. Specifically, the Military Judge instructed the Members on pretrial confinement credit in precisely the manner agreed upon with counsel: "You should consider the duration of the accused's pretrial confinement or detention, I should say. The law does not require that you use any specific formula in considering this pretrial detention, but it does require that you consider the detention and give it the weight you deem appropriate." (Attachment A, Trial transcript (unauthenticated) for 7 August 2008 session at 100.) There were no objections to the instructions in general or to this sentencing instruction in particular from either the Prosecution or the Defense. (*See* full instructions on sentencing, *id.* at 98-106).

H. Prior to withdrawing for deliberations on sentencing, Commission Members submitted two written questions to the Military Judge. (AE 324, AE 325). Both questions went to the same issue, namely, how long Mr. Hamdan had been detained, and how "time already served" should be expressed in sentencing. (Attachment A, Trial transcript (unauthenticated) for 7 August 2008 session at

107, 113, 115).

I. Based on evidence admitted during trial on the merits, the Commission Members were aware that Mr. Hamdan had been captured in Afghanistan on November 24, 2001, and that he had been transferred to the Guantanamo Bay Naval Station in 2002. The evidence at trial indicated that Mr. Hamdan had been in confinement without interruption since the date of his capture, and that he repeatedly had been interrogated in both Afghanistan and while imprisoned at Guantanamo.

J. The Military Judge disclosed the Members' written questions to the Prosecution and the Defense. Neither side objected to the Military Judge providing an answer to the questions. (Attachment A, Trial transcript for 7 August 2008 session at 113-14).

K. In an 803 session outside the presence of the Members, the Military Judge proposed that in responding to the Members' written questions "we tell them [the Members] the exact answer and exactly what he's going to get credit for and what he's not going to get credit for, and put it in their hands. That's where the burden should be." (*Id.* at 107.) No one suggested the issue be ignored in light of the explicit questions received from the Members.

L. Defense counsel immediately agreed with that proposal, urging that the Members be told that credit would be given for the period from 1 July 2003 to the present, but that they could also consider the detention during the period from November 2001 up until 1 July 2003. (*Id.* at 108.) While the statements from the Prosecution were somewhat opaque, it appears that the concern articulated related to the period from November 2001 through 1 July 2003, specifically, that Mr.

Hamdan should not be given credit for that period. (*See id.* at 111: "[Asst. Trial Counsel]: I think it's appropriate to just tell them, sir, that [Mr. Hamdan's] been in detention since 24 November 2001. But that it is not appropriate for them to give him credit for that time . . . ." The Military Judge restated this by saying "Okay. What I'm going to do then is I'm going to [tell] them that [Mr. Hamdan] was held in detention during that period of time, that I haven't ordered credit for that, but that they should give it the weight they believe it deserves. And then I'll tell them that I've ordered credit for the other period [1 July 2003 to the present], and they should give that the weight it deserves." (*Id.* at 112.) This met with no objection from either side. (*Id.* at 112, 114.) Indeed, the last word on this proposed course of action prior to the delivery of the instruction came from Trial Counsel: "No objection from the government, your honor." (*Id.* at 114.)

N. Based on the parties' concurrence, the Military Judge proceeded in reliance on what everyone understood was an agreed basis. The Military Judge specifically instructed the Members in conformity to that agreed-upon proposal. (*Id.* at 115-116).) Specifically, the Judge explained to the Members that Mr. Hamdan would be given 61 months, 8 days credit for pretrial confinement, which would be credited against and subtracted from whatever sentence the Members returned. (*Id.* at 115-117.) The Defense then requested that, to avoid any confusion, the Military Judge provide an arithmetic example of how that credit would operate, using a hypothetical sentence of confinement for a given number of months. (*Id.* at 118.) That request for clarification elicited no objection from the Prosecution. The Military Judge then gave a specific example of how the credit for time served

would operate. Again, no objection of any sort was raised by the Prosecution before or after this exchange precipitated by the Members' written questions. (*Id.*)

O. The Commission Members then withdrew to decide an appropriate sentence, returning later the same day (7 August 2008) to announce that they had reached a sentence of 66 months total confinement. (*Id.* at 123.) The trial having concluded, the Military Judge then adjourned the Military Commission and dismissed the Members.

P. As of the date of this Opposition, the record of trial has not yet been authenticated.

Q. At the outset of the trial, the Commission Members had been instructed that, at all times prior to rendering a verdict and possible sentence, the Members should avoid publicity about the matters they were to decide, and were to base their verdict and any possible sentence only on the evidence presented in Court and the instructions from the Military Judge.

S. On 24 September 2008, the Prosecution moved for "reconsideration and reversal of the Military Judge's ruling and sentencing instruction that the accused is entitled to credit against the adjudged sentence for time spent in detention . . . prior to trial." (Govt. Motion at 1.) At no time prior to 24 September – 47 days after the sentence was returned, and the trial concluded, and the Members dismissed – did the Prosecution object or otherwise attempt to prevent the Members from reaching a sentence that they fully understood would be offset by 61 months, 8 days.

6. **Law and Argument:** The Prosecution's motion to set aside the sentence as the product of legal error should be denied. To begin with, the Prosecution waived any objection to the sentencing instructions by failing to voice those objections prior to the Members withdrawing to deliberate on the sentence. RMC 1005(f). But even had their objection be properly preserved, both the MCA and the RMC prohibit the reconsideration sought here, as the sentence imposed is legal on its face, no extraneous information prejudicial to the substantial rights of the accused was introduced, and the only purpose the Prosecution hopes to serve by the post-trial session – to increase the severity of the sentence – is expressly prohibited by RMC 1102. Moreover, the Prosecution is simply wrong in asserting that it is beyond the authority of the Military Judge to award credit for pre-trial confinement. As discussed below, "credit for pretrial confinement and/or punishment has a long history in military law," *United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999), and nothing in the MCA or the RMC suggests that military commissions cannot consider pretrial confinement in determining a proper sentence. On the contrary, the MCA calls for military commissions to generally "apply the principles of law . . . [employed] by general courts-martial," and the RMC expressly provides that "the sentence to be adjudged is a matter within the discretion of the military commission." MCA § 949a; RMC 1002. The Prosecution, however, would prefer that no law apply.

In this case, the sentence of 66 months of confinement was imposed with the knowledge and expectation that 61 months, 8 days credit would be given against that sentence. Thus, the reality of the sentencing decision announced by the Members was that they imposed a sentence of 4 months and 22 days of additional confinement for Mr. Hamdan. They knew what they were doing. The Prosecution has identified no valid basis for reconsidering that determination. To the extent the Prosecution claims that it merely wants to remedy a legal error (should the Prosecution acknowledge that it is barred from increasing the severity of the punishment imposed – in reality as well as in form), its Motion fails to demonstrate that the purported error amounts to "plain error," which is the standard applicable here. Indeed, the Prosecution's motion calls for a pointless exercise and a vast waste of time, money, and effort, as all that can occur under the

MCA and RMC is to move a large number of people to Guantanamo for the purpose of expressing the same sentence in different words: "4 months and 22 days," rather than "66 months with a credit of 61 months, 8 days." That is a long way to go for such a trivial result.

A. The Prosecution Waived Any Objections to the Sentencing Instructions

The Prosecution's motion should be denied because its newly-asserted objection that the sentence is the product of legal error has been waived. RMC 1005(f) provides, in pertinent part:

> **Rule 1005. Instructions on sentence**
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> (f) *Waiver.* Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error.

In this case, the Defense initially requested that the Commission Members not be informed about the decision of the Military Judge to grant credit for pre-trial confinement. (Attachment A, Trial transcript (unauthenticated) for 7 August 2008 session at 69.) However, when the Members asked about "time already served" and how that should be expressed in the sentence, neither party objected to instructing the Members about the pre-trial credit. (*Id.* at 113-14). That information then became an integral part of the instructions. After being informed about the award of credit, the Members closed to deliberate, and then returned and announced the sentence. Accordingly, pursuant to RMC 1005(f), the Prosecution waived its objection to the sentencing instructions and to the credit that was one of the most significant elements of the instructions.

B. The Relief Sought by the Prosecution Is Barred by the MCA and the Rules for Military Commissions

Even if the Prosecution had preserved its objection to the sentencing instruction (which, as the record reflects, it did not), the relief requested by the Prosecution is expressly barred by both the MCA and the Rules for Military Commissions.

1. The MCA Prohibits the Re-sentencing Hearing in the Absence of Material Prejudice to the Substantial Rights of the Accused

The Prosecution acknowledges that its motion "presents a pure question of law." (Govt.

Motion at 6.) Under these circumstances, the Military Commissions Act prohibits the review and re-sentencing sought by the Prosecution:

> **§ 950a. Error of Law; lesser included offense**
>
> (a) Error of Law.— A finding or sentence of a military commission under this chapter may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

In this case, the alleged error of law – the decision to award credit for pretrial confinement and to inform the Commission Members of that fact – did not materially prejudice the substantial rights of the accused. Rather, the award of credit was potentially – but not certainly – beneficial to Mr. Hamdan. The decision to inform the Commission Members about the credit in response to their questions was neutral in its effect. It neither helped nor hurt Mr. Hamdan; it simply assisted the Members in assessing an appropriate sentence based on the operation of an important factor at play in the equation. Indeed, had that information not been provided, it is entirely possible that Mr. Hamdan could have been prejudiced by an incorrect assumption on the part of the Members concerning how much credit would be given. Providing this information to the Members simply allowed them to fine-tune their decision to precisely reflect their judgment on the appropriate length of future confinement. It did not materially prejudice Mr. Hamdan. Under such circumstances, the Prosecution's request for re-sentencing based on the alleged error of law is precluded by MCA § 950a.

Although its motion fails to mention the applicable standard, in order to prevail now the Prosecution must show that the Military Judge's instruction providing Mr. Hamdan credit for pretrial confinement amounts to "plain error." *Id.* "[The] Court may exercise its discretion to reverse on a forfeited error only if the error materially prejudices the substantial rights of the appellant, or the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Ruiz*, 54 M.J. 138, 143 (C.A.A.F. 2000) (quotation marks and citation omitted). "Further, the plain-error doctrine is reserved for those circumstances in which a miscarriage of justice would otherwise result." *United States v. Jackson*, 38 M.J. 106, 111

(U.S.C.M.A. 1993) (internal quotation marks and citation omitted) (holding that the Military Judge's jury instructions were erroneous but not sufficiently flawed to constitute "plain error"). Even if the Prosecution were correct that the Military Judge's instruction on pre-trial confinement was legally erroneous – and for reasons identified below, *see* Part 6.C, *infra*, the instruction was wholly appropriate and lawful – the professed error hardly produced a "miscarriage of justice" that "affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Ruiz*, 54 M.J. at 143; *Jackson*, 38 M.J. at 111. Indeed, the Prosecution's request that the Commission Members reconvene for the pointless exercise of pronouncing a new sentence using different arithmetic demonstrates that the claimed error is harmless, at most.

2. The Conditions for Impeachment of a Sentence Set by RMC 1008 Have Not Been Met

The Rules for Military Commissions allow sentences to be impeached in only a limited set of circumstances, none of which is present here. RMC 1008 provides:

> **Rule 1008. Impeachment of sentence**
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> A sentence which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon a member, or unlawful command influence was brought to bear upon any member.

In this case, the sentence imposed by the Members is proper on its face, whether described as 66 months not counting a credit for pretrial confinement, or as the net of 66 months minus 61 months and 8 days. The Prosecution does not contend that a sentence of 4 months, 22 days is either illegal or ambiguous. The only way the Prosecution can plausibly contend that RMC 1008 is satisfied is to maintain that information about the pre-trial credit – provided in response to Members' questions – constituted " extraneous prejudicial information . . . improperly brought to the attention of a member." However, this information was neither "extraneous," "prejudicial," nor "improperly" brought to the Members' attention. It was not extraneous because it was highly pertinent to the sentencing decision that the Members had to

make. They needed that information to assess the degree of punishment that their sentence would impose. In addition, the Prosecution does not maintain, and obviously cannot show, that such information was prejudicial. Indeed, as discussed above, it was perfectly neutral in its operation. Knowing the amount of pre-trial credit awarded, the Members could determine how their sentencing decision would work in practice and precisely tailor the sentence to reflect their judgment on how to best achieve the legitimate ends of sentencing. There was nothing "improper" in providing this information to the Members. It was explained to them at their request, without objection from the Prosecution, in a manner that was procedurally and substantively appropriate.

Neither of the other conditions mentioned in RMC 1008 – outside influence and unlawful command influence – is alleged by the Prosecution. Accordingly, the relief requested by the instant motion is barred by that Rule.

3. The Grounds for Reconsideration of a Sentence – Illegality as Described in RMC 1009 – Are Not Present Here

RMC 1009(a) provides that "[s]ubject to this rule, a sentence may be reconsidered at any time before such sentence is announced in open session of the court." RMC 1009(b) identifies "Exceptions" to that rule, two instances where reconsideration would be appropriate due to the illegality of the sentence. The first exception is where "the sentence announced in open session was less than the mandatory minimum prescribed," and the second is where the sentence "exceeds the maximum permissible punishment." RMC 1009(b)(1) and (2).[2]

The sentence imposed in this case, announced in open court on 7 August 2008, is neither less than any required minimum nor greater than any maximum punishment imposed under the MCA or the RMC. Thus, the reconsideration requested by the Prosecution is unauthorized under RMC 1009. Nor is there any ambiguity in the sentence that would require a post-trial session under RMC 1009(c).

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[2] The rationale for prohibiting reconsideration after a sentence has been announced presumably relates to the fact that, after announcement and adjournment, members are permitted to discuss their deliberations with counsel, to be interviewed by the press, and to read press accounts of the trial and reactions to the verdict and sentence.

4. The Prosecution is Seeking to Increase the Severity of the Sentence in Violation of RMC 1102(c)

RMC 1102(c)(3) provides that post-trial sessions may not be directed by either the Military Judge or the Convening Authority "[f]or increasing the severity of the sentence unless: (A) the commission failed to adjudge a sentence prescribed by the M.C.A. as mandatory . . .; or (B) the adjudged sentence was less than that agreed to by the accused and the convening authority in a pretrial agreement. . . ."

Neither of those conditions is present here. There is no mandatory sentence for a conviction of Material Support for Terrorism. Nor was there any pretrial agreement between the Convening Authority and Mr. Hamdan. The only purpose that could possibly be served by reconsidering the credit granted by the Military Judge is to increase the severity of the sentence. The Prosecution's assurance that it would not seek a sentence greater than the 66 months already imposed is insufficient to avoid the potential of a more severe sentence, as the 66 month sentence was obviously imposed with the expectation that 61 months, 8 days would be subtracted as a credit for time served. Thus, absent an instruction to the Commission that whatever sentence is imposed cannot run beyond 31 December 2008 (66 months minus 61 months, 8 days, from a point starting on the date the sentence was imposed, 7 August 2008), then the reality of the re-sentencing sought by the Prosecution will run afoul of the RMC 1102(c) prohibition on increasing the severity of a sentence. The Prosecution should not be permitted to side-step the RMC and the intention of Congress by arguing that it only seeks modification of the credit rather than the announced sentence. That argument elevates form over substance, ignores the reality of the punishment imposed, and trifles with the considered judgment of the Members.

C. The Military Judge Has the Authority to Award Credit for Pretrial Confinement, and Did Not Abuse His Discretion in Making Such an Award

The Motion for Reconsideration should be denied for the additional reason that the Prosecution is simply wrong in asserting that the Military Judge does not have authority to award Mr. Hamdan credit for pre-trial confinement. The Prosecution's argument is that the MCA and the Manual for Military Commissions ("MMC") do not expressly mention such credit, and

therefore no authority exists for the award. This argument fails on multiple grounds.

First, the absence of express reference to pre-trial confinement credit in the MCA or the MMC does not logically lead to a conclusion that the Military Judge lacks authority to award such credit. As was pointed out by the Defense in its briefing on D-019 (Defense Motion for Relief from Punitive Conditions of Confinement and for Confinement Credit), "credit for pretrial confinement and/or punishment has a long history in military law." *United States v. Rock*, 52 M.J. at 156. The absence of reference to "*Allen*" credit (for legal pretrial confinement) or to "*Pierce*" credit (for nonjudicial punishment) in the UCMJ or the Manual for Courts-Martial has not stopped military courts from awarding such credit on due process grounds. *See United States v. Rock*, 52 M.J. at 156-57 (discussing cases).[3]

The CMCR's decision in *United States v. Khadr* provides a clear example of how the lack of a provision in the MCA or MMC on a particular issue does not indicate that a military commission lacks authority to proceed in a manner consistent with recognized principles of military jurisprudence. In that case, the military judge at the trial court initially ruled that he lacked authority under the MCA to hear evidence and make a determination on personal jurisdiction because there was no provision in the MCA expressly describing such a procedure. The CMCR reversed that decision, explaining that

> Congress, clearly aware of historical court-martial practice, and desiring that military commissions mirror this firmly rooted practice to the maximum extent practicable, would not have deprived military commissions of the ability to independently decide personal jurisdiction absent an express statement of such intent. No such statement is contained anywhere in the MCA.

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[3] The Defense incorporates by reference the argument and authority set out in its briefing on D-019. *See* in particular D-019 – Defense Reply at 3, discussing the decisions of military appellate courts recognizing pretrial confinement and/or punishment credit as an element of military due process. Such considerations of due process are obviously of paramount importance to any "regularly constituted court" committed to the fair and impartial administration of justice. *See* MCA § 948b(f) (indicating that, in enacting the MCA, Congress "appears to have embraced the minimal safeguards guaranteed by Common Article 3," *United States v. Khadr*, CMCR 07-001 at 15 (24 September 2007)). Indeed, in *Khadr*, the CMCR found that due process (and Common Article 3) would be offended were a military commission to accept the Government's argument that a CSRT finding be given dispositive effect on a jurisdictional question. *Id.* at 15 ("Such lack of notice offends our most basic and fundamental notions of due process; therefore it also violates Common Article 3").

* * *

> Accordingly, we may properly find – as clearly indicated in the language of M.C.A. §§ 949a(a) and 948b(c) – that Congress intended for military commissions to "apply the principles of law" and the "procedures for trial [routinely utilized] by general court-martial . . . ."

Khadr, CMCR 07-001 at 23. Thus, the CMCR rejected the narrow reading of the MCA urged by the Prosecution in this case. Awarding credit for pretrial confinement is a "firmly rooted practice" in American military jurisprudence, and consistent with the approach prescribed in *Khadr*, the Military Judge in this case properly determined that he had the authority to "mirror this firmly rooted practice." The Prosecution has advanced no new authority or argument to call that ruling into question.

Moreover, contrary to the Prosecution's contention about the Commission's restricted authority on this issue, both the MCA and the RMC provide military commissions with broad discretion and authority in the imposition of punishments. MCA § 948d(d) provides

> (d) Punishments.— A military commission under this chapter may, under such limitations as the Secretary of Defense may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when authorized under this chapter or the law of war.

The Secretary of Defense has not promulgated any regulation prohibiting a military commission from awarding credit for pretrial confinement. Nor is the imposition of a punishment that takes pretrial confinement into consideration forbidden anywhere in the MCA. Accordingly, the Military Judge did not err in ruling that Mr. Hamdan would be entitled to receive such credit.

Likewise, RMC 1002 provides broad discretion in the imposition of a sentence:

> **Rule 1002. Sentence determination**
>
> Subject to limitations in this Manual, or when appropriate, the limitations in the law of war, the sentence to be adjudged is a matter within the discretion of the military commission. Except as instructed by the military judge, a military commission may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

As noted above, there is no provision in the MMC that prohibits the award of pretrial confinement credit, and no limitation on such an award under the law of war.[4] Under these circumstances, the sentence "is a matter within the discretion of the military commission." There was no abuse of that discretion in this case, much less any legal error in the determination of the sentence. Rather, the sentence imposed reflected the carefully considered judgment of the Commission Members, following proper instruction on how the award for pretrial confinement would operate. Accordingly, the Prosecution's Motion for Reconsideration should be denied.

7. **Request for Oral Argument:** The Defense does not request oral argument.

8. **Request for Witnesses:** The Defense anticipates no need to call witnesses concerning the instant motion.

9. **Attachments:**

A. Selected pages from the Trial transcript in *United States v. Hamdan.*

[4] On the contrary, Article 75 of Additional Protocol I to the Geneva Conventions, which "articulates many of the fundamental guarantees" protected by Common Article 3 (*Khadr*, CMCR 07-001 at 15 n.24), prohibits penalties "except pursuant to a conviction pronounced by an impartial and regularly constituted court." The award of pretrial confinement credit is consistent with this prohibition on penalties absent a conviction under the law of war.

Respectfully submitted,

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