MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**AE091B (KSM et al.)** **Joint Defense Reply to** **Government's Response to** Motion To Dismiss Because The Military Commissions Act Unconstitutionally Requires the Convening Authority to Act as Both Prosecutor and Judge of the Defendants 7 November 2012

1. Timeliness: This Reply is timely filed.

2. Relief Requested: Defendants respectfully request dismissal of all charges with prejudice because the Military Commissions Act of 2009 ("MCA" or "Act") and Regulation for Trial by Military Commission ("RTMC") are unconstitutional insofar as they require the Convening Authority to act as both judge and prosecutor of the accused.

3. Overview:

Defendants' motion was based expressly and exclusively on the Due Process Clause of the Fifth Amendment to the Constitution.[1] Yet the government neither mentions the Due Process Clause nor seems to recognize the constitutional status of defendant's arguments.[2]

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[1] *See* AE091 Motion To Dismiss Because The Military Commissions Act Unconstitutionally Requires the Convening Authority to Act as Both Prosecutor and Judge of the Defendants at 1.

[2] Insofar as it fails to argue otherwise, the government has conceded that the Due Process Clause applies generally to this proceeding *See* AE 057(KSM, RBS, AAA, MAH) Motion of Mr. Mohammad, Mr. bin al Shibh, Mr. al Baluchi, and Mr. al Hawsawi to Recognize that the Constitution Governs the Military Commissions at 4-5. If the Due Process Clause requires nothing else, moreover, it requires impartial decision making by those in an adjudicative or quasi-adjudicative position. *In re Murchison,* 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). To its credit, the government acknowledged the applicability of the Clause prior to the enactment of the Military Commissions Act of 2009 ("MCA"). *Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and The Trial of Detainees for Violations of the Law of War*, 111th Cong. 11 (2009) (testimony of

Rather than address the constitutional issue, it instead relies on claims that the process is "fair"[3] because the MCA gives the defendants various statutory and regulatory rights;[4] because it complies with international law;[5] because it separates the duties of the Convening Authority from those of the Chief Prosecutor and the Chief Defense Counsel[6] and specifies the CA's duties by statute and regulation;[7] because it protects against unlawful influence by the CA on the commission participants[8] and on the CA from others;[9] and because the CA's rulings in the instant case have been fair.[10]

The problem with these arguments is that they are all sub-constitutional. Even assuming that they were all correct – which the defendants emphatically do not concede – they would still fail, because the fact that the current system violates the Due Process Clause in one critical respect is sufficient to declare it unconstitutional. A statute need not violate the Constitution in all respects or even most respects to be void.[11] If a single provision is unconstitutional, that provision may not be enforced. If the remainder of the statute cannot operate as Congress

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David Kris, Chief of National Security Division, Department of Justice) ("Mr. Kris: Our analysis, Senator, is that the due process clause applies to military commissions and imposes a constitutional floor on the procedures that would govern such commissions, including against enemy aliens.").

[3] AE091A Government Response to Motion To Dismiss Because The Military Commissions Act Unconstitutionally Requires the Convening Authority to Act as Both Prosecutor and Judge of the Defendants at 3.

[4] *Id.* at 3-4.

[5] *Id.* at 4-5.

[6] *Id.* at 5-6.

[7] *Id.* at 6-8.

[8] *Id.* at 6.

[9] *Id.* at 8.

[10] *Id.* at 12.

[11] *Bismullah v. Gates*, 551 F.3d 1068, 1071 (D.C. Cir. 2009) (quoting *United States v. Booker*, 543 U.S. 220, 258-59 (2005)).

intended without the unconstitutional provision, then the statute falls as a whole.[12] That is the case here.

The government also argues that the MCA CA structure is consistent with the CA structure under the Uniform Code of Military Justice ("UCMJ") and with the historical role of the CA in prior military commissions.[13] Although (as in the case of its other arguments) the government does not tie these claims to any constitutional argument, the defendants addressed the question of facial similarity to the UCMJ in its initial brief and therefore also reply to these points below.

Finally, it should be noted that the defendants described a number of specific and serious conflicts that the MCA and RMTC's structure allows for, and even compels in certain instances.[14] The government says not a word about those possible (indeed, unavoidable) conflicts, implicitly conceding that they are real possibilities under the current system.

4. Argument:

A. The government never addresses the only issue at stake in this motion, to wit, whether the Convening Authority position established by the Military Commissions Act and the Regulation for Trial by Military Commission satisfies the Due Process Clause of the Fifth Amendment.

The Constitution is the supreme law of the land,[15] and the defendants' motion is based on the Constitution. The government's arguments, which are statutory, regulatory, and historical, therefore cannot and do not contravene the defendants' demonstration that the MCA's unique CA structure violates the Due Process Clause.

(1) Regardless of whether the MCA is otherwise "fair," its unique CA structure violates the Due Process Clause.

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[12] *Id.*
[13] *Id.* at 9-12.
[14] AE091 at 5-7.
[15] *See generally Marbury v. Madison*, 5 U.S. 137 (1803).

The government's primary argument throughout is that the MCA is "fair" because it grants the defendants various statutory and regulatory rights.[16] Defendants strongly dispute that characterization. Regardless of its (dubious) merits, however, the government's "fairness" arguments are fodder for other motions on other days. Defendants have[17] and will challenge the "fairness" of these statutory and regulatory provisions in other motions. The only issue at stake in this motion, however, is whether the CA's simultaneous prosecutorial and judicial functions are consistent with the Due Process Clause as that clause has been interpreted and enforced by the Supreme Court. That is the measure of "fairness" that applies here.

The government's broad "fairness" argument thus misconceives the nature of procedural due process under the Due Process Clause. Procedural due process doesn't simply require "fairness" in some broad and undefined sense. It has specific requirements that can be violated in specific ways, and it is the satisfaction of these requirements that defines "fairness" in the constitutional sense.[18] Thus, when the Supreme Court overturned the verdict in *In re*

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[16] AE091 at 3-5.

[17] *See, e.g.*, AE036 Defense Motion To Declare RMC 703 Unconstitutional Because It Gives the Prosecution Unilateral Notice of and Control over the Defense Fact and Expert Witnesses.

[18] The point is akin Justice Scalia's analysis of the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Supreme Court rejected the proposition that the clause permitted hearsay to be admitted so long as it satisfied some "amorphous notion[] of 'reliability.'" *Id.* at 61. Rather, as Justice Scalia explained, "reliability" is the *aim* of the clause, not its constitutional test. "Reliability" in the constitutional sense is only attained through satisfaction of specific constitutionally mandated procedures, not on the basis of a judge's determination that a statement is "reliable."

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. *Id.*

Murchison[19] because the judge had acted as both grand jury and trial judge, it did not otherwise question the fairness of the proceedings – indeed, the dissenting justices made precisely that point.[20] The defendant in that case had received all of the other constitutional and statutory procedural rights due him. The Supreme Court overturned the verdict nevertheless because the judge's dual roles as prosecutor and trial judge violated the Due Process Clause's requirement of a neutral adjudicator. Whether defendants here receive other statutory rights is similarly irrelevant to the constitutional question presented here, which, as in *Murchison*, is whether the same individual may serve in both prosecutorial and judicial roles in a criminal proceeding.

(2) If the CA role violates the Due Process Clause, the MCA is unconstitutional regardless of other statutory rights and protections it provides and regardless of its status at international law.

The government's argument that "the responsibilities and functions of the convening authority are specified by law and regulation"[21] is a truism that has no bearing on this motion. Indeed, defendants' motion is predicated on that very proposition. The problem, as defendants demonstrate in their initial brief, is that that the "law and regulation" give the CA responsibilities that are incompatible with the Due Process Clause.

By the same token, although the aim of the Due Process Clause is undoubtedly fair proceedings, the measure of Due Process "fairness" is whether its specific procedural requirements have been met, not on the basis of a judge's (or the government's) conclusion that the proceeding was "fair." A neutral adjudicator "is a basic requirement of due process." *Murchison*, 349 U.S. at 136. That requirement was not met in this case. That is sufficient to constitute a violation of the Due Process Clause.

[19] 349 U.S. 133 (1955).

[20] *Id*. at 139-140 (Reed, J., and Minton, J., dissenting) ("This conclusion is not rested on any irregularity in the proceedings before either the grand jury or the court. . . . The Court's determination is rested on the sole fact that the same judge first cited petitioners for contempt committed in his presence, and then presided over the proceedings leading to the final adjudication.").

[21] AE091A at 6.

Moreover, for purposes of Due Process Clause analysis, it makes no difference that "Congress has not vested either of these [prosecutorial or judicial] roles in the Convening Authority."[22] Congress cannot avoid the due process issue by the terminology it employs.[23] There is no doubt that under the MCA, the military judge performs judicial functions and the Trial Counsel performs prosecutorial functions.[24] As the government points out, however, under the statute and Regulation for Trial by Military Commission ("RTMC"), the CA both "disposes of charges" through referral or withdrawal and details panel members "who are, in the opinion of the Convening Authority, best qualified" to serve. Those are functions that the D.C. Circuit recognized in *Curry v. Secretary of the Army*[25] to be "prosecutorial" and "judicial," respectively.[26] In any event, the government's assertion that the CA plays no judicial role is difficult to square with the MCA itself, which explicitly refers to his or her "judicial actions."[27]

For the same reasons, nothing in the other "institutional safeguards" against illegal CA actions solves the CA's Due Process Clause problem.[28] On its face, at least, the statute does seek

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[22] *Id*. at 5.

[23] *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584, 611 (2004) (Scalia, J., concurring) (the Sixth Amendment requires a jury trial on all facts essential to the level of punishment "whether the statute calls them elements of the offense, sentencing factors, or Mary Jane"); *Hamdan v. United States*, -- F.3d --, 2012 WL 4874564, *slip op.* at 8 (D.C. Cir 2012) (although Congress stated that Material Support for Terrorism was a war crime at the time of the offenses, "we conclude otherwise.").

[24] AE091A at 5 ("Because Congress has not vested either of these roles in the Convening Authority, the Convening Authority, by statute, is neither "prosecutor" nor 'judge.'").

[25] *Curry v. Secretary of the Army*, 595 F.2d 873 (D.C. Cir. 1979).

[26] *Id*. at 878 (power to refer cases a matter of "prosecutorial discretion"); *id*. (selection of panel members a "judicial action").

[27] 10 U.S.C. § 949b(a)(2) (barring unlawful influence on "the action of any convening, approving, or reviewing authority with respect to their judicial acts"). At the same time, military courts have long recognized that the CA wields prosecutorial powers. *See, e.g., United States v. Green*, 37 M.J. 380, 384-385 (C.M.A. 1993) (referral is a prosecutorial function); *United States v. Fernandez*, 24 MJ 77, 78 (C.M.A. 1987) (same).

[28] AE091A at 8-9.

to shield the CA from unlawful influence.[29] But it also explicitly grants the CA conflicting prosecutorial and judicial powers that violate the Due Process Clause. Unlawful influence protections do not prevent him or her from exercising those powers.

Nor does the fact that the CA's decisions are subject to judicial review matter to the analysis. Were judicial review a sufficient safeguard, then all of the Supreme Court cases overturning rulings by lower court judges and quasi-judicial officials cited in the defendants' initial brief were wrongly decided, because all of those rulings were subject to judicial review -- by the Supreme Court and the various lower courts and judicial officials that considered the rulings on the appellate track to the Supreme Court.[30] The government's reliance on "reviewability" as a solution to Due Process Clause violations amounts to the proposition that if this Commission recognizes that the CA structure violates the Constitution, the Commission must nevertheless allow the proceedings to go forward because a higher court can also consider the constitutional issue. That is not and cannot be the law. The CA's dual roles are a structural problem that must be remedied by the Commission now by declaring the MCA unconstitutional. The fact that such a decision would thereafter be subject to further judicial review in no way relieves the Commission of its own obligation to uphold the Constitution.

Finally, if the MCA violates the Constitution, it is irrelevant whether it complies with Common Article 3 of the Geneva Conventions.[31] The Constitution supersedes international law wherever they conflict.[32] Thus, even if the MCA did satisfy Common Article 3 (which it does not),[33] that fact would have no bearing on the Due Process Clause issue.

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[29] 10 U.S.C. § 949b(a)(2).

[30] *See, e.g.*, *Murchison*, *supra*; *Tumey v. Ohio,* 273 U.S. 510 (1927).

[31] AE091A at 4-5 (citing 1949 Geneva Conventions, Common Article 3, ¶ (1)(d)).

[32] *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988) ("'Whatever force appellant's argument might have in a situation where there is no

B. For constitutional purposes, the MCA CA role is distinct from the CA role in both the UCMJ and prior military commissions.

In *Curry v. Secretary of the Army*, the D.C. Circuit held that, although "the [Convening Authority] system established in the UCMJ would be inconsistent with due process if instituted in the context of a civilian criminal trial,"[34] the special circumstances in which the UCMJ CA operated—including, *inter alia*, the UCMJ's purpose of guaranteeing good order and discipline rather than criminal punishment in the ordinary sense, the CA's pressing military command duties, and his or her responsibility to the accused—justified the UCMJ's deviation from regular due process. In their initial brief, the defendants demonstrated that, in contrast with the UCMJ, none of these justifications applied to the role of the CA under the MCA.[35]

In response, the government cites sources showing that "historically, military commissions convened under the common law of war were generally 'conducted according to the rules and forms governing courts-martial.'"[36] Assuming that was true, it does not undercut the defendants' argument. Defendants do not deny that historically, military commissions were generally modeled on courts-martial, nor that Congress relied on the historical structure of military commissions, including the CA, in enacting the MCA. Rather, defendants' point is that, despite their surface similarities to the MCA, UCMJ and historical military commissions'

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applicable treaty, statute, or constitutional provision, it has long been settled in the United States that the federal courts are bound to recognize any one of these three sources of law as superior to canons of international law.'") (quoting *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959)).

[33] Defendants explain elsewhere how the MCA fails to satisfy Common Article 3's "regularly constituted court" requirement. See AE104(AAA) Motion to Dismiss The Charges Because The Military Commission Act of 2009 Exceeds Congress' Power Under the Define and Punish Clause at 16-21. That issue is not before the Commission here.

[34] *Curry*, 595 F.2d at 877.

[35] AE091 at 8-12.

[36] AE091A at 9 (citing William Winthrop, MILITARY LAW AND PRECEDENTS 841 (rev. 2d ed. 1920)).

underlying constitutional *justifications* for deviating from ordinary due process do not apply to MCA military commissions.[37]

The government has thus mistaken the MCA's constitutional flaw for its constitutional strength. Because it lacks UCMJ CA's underlying justifications, the MCA CA is unconstitutional precisely *because* it is modeled on the UCMJ CA's simultaneous prosecutorial and judicial roles; that similarity is not, as the government appears to believe, evidence of its constitutionality. Thus, in the court-martial scenario, it is the responsibilities that go along with the CA's status as commander of a military unit and the need to ensure "[o]bedience, discipline, and centralized leadership and control"[38] that provides the justification for his or her simultaneous prosecutorial and judicial roles.[39] As the defendants demonstrated in their initial brief, the MCA CA has no such responsibilities and no such need for good order and discipline.[40]

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[37] Indeed, these differences are compelled by the different purposes of the two different constitutional provisions that authorize Congress to enact the two systems. As the defendants explained in their initial brief, trial by court-martial is authorized by the Regulation and Government Clause of Article I, section 8, while trial by law-of-war military commissions is authorized by the Define and Punish Clause. *Compare* Const., art. I, § 8, cl. 14 *with* Const., art. I, § 8, cl. 10; *see* AE091 at 8-9.

[38] *Curry*, 595 F.2d at 877; *see also* Manual for Courts-Martial, Part I (Preamble), ¶ 3 (2012) ("Nature and Purpose of Military Law") ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

[39] AE091 at 9-10; *see Curry*, 595 F.2d at 878.

[40] AE091 at 8-9, 11-12. The government generally misreads *Curry* in this manner. The fact that "in reaching its determination of constitutionality, the *Curry* court enumerated the precautions that Congress enacted in the UCMJ to guard against the improper exercise of command influence" and that the MCA incorporates various provisions parallel to the ones discussed in *Curry*, AE091A at 14-15, actually supports the defendants' argument, because it was precisely those procedures that the D.C. Circuit stated would *violate* the Due Process Clause outside of the unique circumstances of military justice. *Curry*, 595 F.2d at 877. Finally, the government claims that the defense "fails to acknowledge that the [*Curry*] Court held that determining appropriate due process depends upon 'an analysis of the interest of the individual and those of the regime to which he is subject.'" AE091A at 13 (quoting *Curry*, 595 F.2d at 876). That is incorrect. *See* AE091 at 12.

The government makes three responses to these arguments. The first is to point to the long history of military commissions that, like the MCA, were modeled on courts-martial. The government's suggestion is that this history demonstrates that the CA role in military commissions is well-established.[41] The government again has mistaken form for content, however. Historically, prior to the enactment of the MCA of 2006, military commissions were indeed modeled on courts-martial, including their CA structure. That similarity, however, was premised and justified, like the UCMJ, on the CA's command functions and responsibilities, functions and responsibilities that the MCA CA entirely lacks. This shared justification is clear from the government's own authorities. Winthrop could not be clearer on this point. He explained that, because military commissions were only convened during the exigencies of war, they could be convened in any manner that a military commander deemed necessary.[42] The commander-CA's license, however, was strictly limited by jurisdictional rules to the period and theater of his or her actual war-fighting, [43] and justified only by his or her combat responsibilities.[44] The Supreme Court has also repeatedly treated the military commission CA's commander status as a jurisdictional prerequisite of a lawful military commission.[45]

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[41] AE091A at 9-10.

[42] Winthrop, MILITARY LAW AND PRECEDENTS, at 835. Thus, he explained, although the uniform practice in the United States had been to empanel only military officers, "[s]trictly legally they might indeed be composed otherwise should the commander will it -- as, for example, in part of civilians or of enlisted men." *Id*. Similarly, with regard to the number of panel members, a military commission could "legally be composed of any number in the discretion of the convening authority." *Id.*

[43] *Id*. at 835.

[44] Winthrop explained that "[t]hese [jurisdictional limitations] . . . have their origin in the fact that war, being an exceptional status, can authorize the exercise of military power and jurisdiction only within the limits -- as to place, time, and subjects – of its actual existence and operation." *Id.* at 837.

[45] *See In re Yamashita*, 327 U.S. 1, 9-10 (1946); *Hamdan v. Rumsfeld*, 548 U.S. 557, 598 (2006) (opinion of Stevens, J.) (noting the government's agreement that Winthrop's treatise accurately stated the law governing military commissions, and that law of war commissions were limited to

The MCA is thus absolutely unique in military tribunal history – the history of both courts-martial and military commissions – in granting the power to convene tribunals to a civil servant without a single one of the trappings of command responsibility that have always justified that role in the past.

Second, the government responds that the function of law of war military commissions, like that of courts-martial, is also "disciplinary," and concludes from this that the same rationales that justify the dual roles of the UCMJ CA also justify the MCA CA's dual roles.[46] The government's sole proof of this is a single use of the term "disciplinary" by the Supreme Court in *Ex Parte Quirin*.[47] But the Supreme Court nowhere states or intimates that it believed that the purposes of military commissions is the "good order and discipline" of enemy belligerents; to the contrary, it refers in the same passage and throughout the opinion to the trial of "offenses against

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"offenses committed within the field of command [theater of war] of the convening commander"). The Supreme Court in *Yamashita* devoted a section of its opinion to demonstrating that the convenor of Yamashita's commission, General Styer, had the required command authority:

> The authority to create the Commission. General Styer's order for the appointment of the commission was made by him as Commander of the United States Armed Forces, Western Pacific. His command includes, as part of a vastly greater area, the Philippine Islands, where the alleged offenses were committed, where petitioner surrender as a prisoner of war, and where, at the time of the order convening the commission, he was detained as a prisoner in custody of the United States Army. The Congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war to which we have referred, sanctioned their creation by military command in conformity to long established American precedents. Such a commission may be appointed by any field commander, or by any commander competent to appoint a general court martial, as was General Styer, who had been vested with that power by order of the President.

Yamashita, 327 U.S. at 9-10.

[46] AE091A at 10-11.

[47] *Id*. at 10 (quoting *Ex Parte Qurin*, 317 U.S. 1, 328-329 (1942)). The *Quirin* language is also quoted in *In re Yamashita*. 327 U.S. at 11.

the law of nations," a term that refers solely to criminal violations.[48] Apart from that, as defendants explained previously, the notion of imposing good order and discipline on enemy belligerents in the same manner as the commander's own troops is senseless.[49] Against these arguments, a single and unexplained use of an ambiguous term hardly demonstrates that the purpose of the two tribunals is in fact the same.

Finally, the government isolates the defendants' statement that "the Convening Authority under the MCA is a civilian position in a civilian bureaucracy whose *only* responsibilities are judicial and prosecutorial"[50] and argues that, historically, civilian officials—especially the President—have in fact frequently convened military commissions.[51] With respect to commissions convened by the President, his or her role as Commander-in-Chief gives her the command authority necessary to convene commissions, as Winthrop recognized long ago.[52] More broadly, defendants' point is not that the convening authority must be a military commander, but that it is the *functions and responsibilities* of a commander, military or civilian, that have always authorized the deviation from standard due process. The same rationale would apply to a civilian, for example a Secretary of War during war-time, charged with prosecuting a war effort and who of necessity therefore assumes commander-like responsibilities (allocating resources, ensuring good order and discipline among the fighting force, and so on). The point is

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[48] *See id*. at 329 ("Congress has authorized trial of offenses against the law of war before such commissions."). Notably, the Define and Punish Clause gives Congress the power to define and punish "Piracies and Felonies committed on the high Seas" as well as "Offenses against the Law of Nations." Const., art. I, § 8, cl. 10. The government can hardly argue that the power to punish "Piracies and Felonies" is anything but the power to impose criminal punishment, and under the interpretive canon *noscitur a sociis*, the Founders must have similarly intended punishment of "Offenses against the Law of Nations" to refer to criminal punishment as well.
[49] AE091 at 11.
[50] *Id*.
[51] AE091A at 11 & n.2.
[52] Winthrop, MILITARY LAW AND PRECEDENTS, at 835 ("The President, as Commander-in-chief, may of course assemble military commissions as he may assemble courts-martial.").

not the formal status of the CA – military or civilian – but the functions and responsibilities with which he or she is charged.

Again, nothing in the MCA CA's role requires any commander responsibilities or functions, nor does the statute or RTMC grant him or her any. It therefore follows that nothing exempts the MCA CA from the ordinary requirements of the Due Process Clause, and that therefore the MCA CA structure is unconstitutional.[53]

5. List of Attachments:

A. Certificate of Service

Very respectfully,

//s//
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[53] The government also argues that to date the current CA's decisions have been fair. AE091A at 12. Defendants do not concede that claim, but the issue itself is irrelevant to the present motion, which challenges the MCA and RTMC on their face, not as applied. The current CA's decision making may be the subject of another motion, however.

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CERTIFICATE OF SERVICE

I certify that on the 7th day of November, 2012, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

//s//
JAMES G. CONNELL, III,
Learned Counsel