UNITED STATES OF AMERICA v. OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	P-009 Supplemental Brief in support of the Government's Motion for Findings Instructions on Charges I, II and III 23 July 2010

1. **Timeliness:** This supplemental brief is timely filed in accordance with Rule 3, MILITARY COMMISSIONS TRIAL JUDICIARY RULES OF COURT (2007).

2. **Relief Requested:** The Government respectfully renews its request that the military commission announce, prior to the start of the Government's case-in-chief on the merits, its adoption (or rejection) of the proposed findings instruction for Charges I, II and III (as it pertains to conspiracy to commit murder in violation of the law of war) submitted as part of the Government's 14 November 2008 motion, designated as P-009.

3. **Overview:** Since the Government filed its request for findings instructions on Charges I, II and III (P-009) and the Defense filed its responses thereto (and a Cross-Motion to Dismiss and Strike), Congress has enacted the Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574, adding the words "in violation of the law of war" to the offense of spying,[1] and the Secretary of Defense has issued a new Manual for Military Commissions, containing a revised comment on the meaning of the statutory language "in violation of the law of war." In light of these two developments, it is now even clearer that, as a matter of law, the Government's evidence will prove that accused acted "in violation of the law of war" if it establishes that, while he was an unprivileged enemy belligerent, the accused engaged in a hostile act directed at United States forces. Accordingly, the Government renews its request for the military commission to announce its adoption of the Government's proposed instructions on the "in violation of the law of war" element of Charges I, II and III.

4. B **urden and Persuasion:** The Prosecution bears the burden of establishing by a preponderance of the evidence, that it is entitled to the requested relief. *See* Rule for Military Commissions ("RMC") 905 and 906.

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[1] "(27) SPYING.—Any person subject to this chapter who, *in violation of the law of war* and with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct." 10 U.S.C. § 950t(27)(2009), 123 Stat. 2611 (emphasis added).

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5. **Facts**:

a. The Government filed its request for findings instructions on Charges I, II and III (as it pertains to conspiracy to commit murder in violation of the law of war) on 14 November 2008. The military commission designated that filing P-009.

b. The Defense filed its response (and a cross-motion to dismiss and strike) on 28 November 2008. The Defense filed a supplemental brief on 24 December 2008.

c. Subsequently, on 28 October 2009, Congress enacted the Military Commissions Act (MCA) of 2009, Pub. L. 111-84, 123 Stat. 2574. The Act substituted a new Chapter 47A in title 10, United States Code, for the previous Military Commissions Act. The 2009 MCA added the words "in violation of the law of war" to the offense of spying at 10 U.S.C. § 950t(27).

d. In light of the new MCA, the Secretary of Defense reissued the Manual for Military Commissions (MMC) on 27 April 2010. The 2010 MMC revised the Manual comment on the meaning of the phrase "in violation of the law of war" in the offenses of murder in violation of the law of war and spying, *inter alia.* Part IV, ¶5(15)(c), MANUAL FOR MILITARY COMMISSIONS (MMC)(2010).

e. The military commission has not yet ruled on either the Government's motion or the Defense cross-motion.

6. **Discussion**:

a. When Congress enacted the 2009 MCA, it inserted the words "in violation of the law of war" into the MCA offense of Spying. 10 U.S.C. § 950t(27)(2009)(previously codified at 10 U.S.C. § 950v(b)(27)(2006)). Those words were not previously a part of that offense, though they were, and remain, a part of the offenses of: Intentionally Causing Serious Bodily Injury, 10 U.S.C. § 950t(13); Murder in Violation of the Law of War, 10 U.S.C. § 950t(15); and Destruction of Property in Violation of the Law Of War, 10 U.S.C. § 950t(16).

b. "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). *See also Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995); *Wis. Dep't of Revenue v. Wm. Wrigley, Jr. Co.*, 505 U.S. 214, 225 (1992). Consequently, the military commission should adopt a reading of the phrase "in violation of the law of war" that is consistent across each of the four MCA offenses in which it appears, and that makes sense in each instance.

c. If the military commission reads "in violation of the law of war" consistently across the four MCA offenses in which it appears and in a way that makes sense in each instance, then that phrase cannot refer merely to violations of international law. Why? Because reading that phrase as limited to violations of *international law* would render the 2009 MCA Spying offense nonsensical and internally inconsistent. To be an offense under the MCA, the act of espionage has to be "in violation of the law of war," but spying is not prohibited by either treaty or

customary international law applicable in armed conflict. International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* at 562; Baxter, *So-Called 'Unprivileged Belligerency:' Spies, Guerrillas, and Saboteurs*, 28 Brit. Y. B. Int'l L. 323, 329 (1951)("spies do not violate international law."). Indeed, treaty law explicitly provides for spying. *See* Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Law, *entered into force* Jan. 26, 1910, 36 Stat. 2277 at Arts. 29 - 31. Congress, therefore, must have intended the phrase "in violation of the law of war" to include a broader range of conduct than merely that prohibited by international law.

d. Understanding the implications of Congress' addition of the phrase "in violation of the law of war" to the Spying offense for the meaning of that phrase, the Secretary of Defense revised the MMC comment interpreting the phrase. The comment now reads:

> For purposes of offenses (13), (15), (16), and (27) in Part IV of this Manual (corresponding to offenses enumerated in paragraphs (13), (15), (16), and (27) of § 950t of title 10, United States Code), an accused may be convicted in a military commission for these offenses if the commission finds that the accused employed a means (e.g. poison gas) or method (e.g. perfidy) prohibited by the law of war; intentionally attacked a "protected person" or "protected property" under the law of war; or engaged in conduct traditionally triable by military commission (e.g. spying; murder committed while the accused did not meet the requirements of privileged belligerency) even if such conduct does not violate the international law of war.

Part IV, ¶5(15), MMC (2010).

e. The Secretary, to whom Congress explicitly delegated authority to prescribe rules and procedures for military commissions under the Act, 10 U.S.C. § 949a, is entitled to deference in this matter, so long as his interpretation is not arbitrary, capricious, or manifestly contrary to the statute . *See Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984); *Nat'l Cable & Telecomm. Ass'n v. Brand X*, 545 U.S. 967, 980-81 (2005).

f. Further, the Secretary's understanding of the phrase is entirely correct as a matter of logic and statutory interpretation. As demonstrated above, Congress cannot have intended to limit the phrase "in violation of the law of war" only to conduct that violates international law, or it would not have added those words to the Spying offense in 2009, thereby rendering that offense internally contradictory and impossible to prove. By that addition, we can see Congress intended the phrase to include additionally wartime conduct of the sort traditionally triable by military commission – which both spying and murder by unprivileged belligerents are. Although spying is not a violation of international law, it is indubitably conduct that the United States has punished during wartime in military commissions, as a violation of the American common law of war.[2]

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[2] If, as the Defense has contended, a military commission may only try violations of international humanitarian law, then a military commission would be without authority to try charges of spying, as spying does not violate

g. Likewise, as demonstrated in our initial brief on the motion, the United States also has a long history of punishing hostile acts – including murder – by unprivileged belligerents in time of war. To cite just two examples, Colonel Winthrop observed in his famed treatise on military law that "persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders . . . may upon capture be *summarily punished* even with death." Winthrop, *Military Law and Precedents* 783 (2d ed. 1920)(emphasis added). Likewise, the famed Lieber Code provided that those who "commit hostilities . . . without commission, without being part and portion of the organized hostile army . . . shall be *treated summarily* as highway robbers or pirates." War Dep't, Gen. Orders No. 100 (Apr. 24, 1863) at Art. 82 (emphasis added). While international humanitarian law now requires States to afford unprivileged belligerents a fair trial, rather than permitting summary punishment as in Winthrop's and Lieber's day, the point remains that unprivileged belligerency may be, and long has been, punished by the United States. This American common law of war is as much a part of the law of war to which Congress referred in the 2009 MCA as international humanitarian law.

h. As noted in *both* the Government's and the Defense's prior briefs on this matter, the question of the meaning of the phrase "in violation of the law of war" is a pure legal question the military commission can, and should, answer in advance of trial on the merits. As noted in the Government's original brief on this matter, the evidence will *not* establish the accused used either a means or method of warfare prohibited by international humanitarian law. Rather, with respect to Charges I, II and III, it will establish he violated the law of war by engaging in hostile acts while he was an unprivileged belligerent. Because significant evidence prejudicial to the accused will be presented on these three charges – much of which would be never be presented to the members if it were not for these charges – it is in the interest of both the Government and the accused that the military commission advise the parties in advance of the start of trial of the legal standard with respect to the "in violation of the law of war" element.[3]

i. For the foregoing reasons, the Government respectfully requests that this military commission announce its adoption (or rejection) of the proposed findings instruction for Charges I, II and III (as it pertains to conspiracy to commit Murder in violation of the Law of War) submitted as part of the Government's 14 November 2008 motion, designated as P-009, and to hold it is legally sufficient to satisfy the element of "in violation of the law of war" that the accused engaged in a hostile act while an unprivileged belligerent.

7. **Certificate of Conference:** The Government has conferred with the Defense on this matter and the Defense indicated that it agrees with the Government's request for the Military Judge to rule on this issue prior to commencement of trial. The Defense, as indicated in previous filings, disagrees with the Government's proposed instruction.

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international humanitarian law. Of course, U.S. history (not to mention the history of most of, if not all of, the other States in the world) is replete with precedents of military tribunals trying and punishing charges of spying.

[3] The Government concurs with the Defense that, should the military commission rule that hostile acts by an unprivileged belligerent are not sufficient to meet the element of "in violation of the law of war" in Charges I, II, and III (as it pertains to conspiracy to commit murder in violation of the law of war), then it would be appropriate for the military commission to dismiss Charges I and II and to strike from Charge III the language alleging conspiracy to commit murder in violation of the law of war.

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8. **Submitted by:**

//s//
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