MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

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**	**AE 625 (MAH)** **Defense Motion to Dismiss Because the Military Commissions Act of 2009 Is a Bill of Attainder** **Filed: 12 April 2019**

1. **Timeliness:** This motion to dismiss is timely filed.[1]

2. **Relief Sought:** The Defense seeks dismissal, with prejudice, of the charges against Mr. al Hawsawi because the Military Commissions Act (MCA) is an unconstitutional bill of attainder.[2]

3. **Overview:** Article I, Section 9, Clause 3 of the U.S. Constitution provides a limit on Congress's lawmaking authority, namely, that "[n]o Bill of Attainder or ex post facto Law shall be passed."[3] There is no exception because "[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."[4] Although it is "rarely litigated, the Bill of Attainder Clause nonetheless has real bite."[5] "Under the now prevailing case law, a law is prohibited under the bill of attainder clause 'if it (1) applies with specificity, and (2)

[1] *See* R.M.C. 905(c).
[2] *See United States v. Brown*, 381 U.S. 437, 440 (1965) (holding that laws which are bills of attainder are void).
[3] *See* U.S. Const. art. I, Sec. 9, cl. 3.
[4] *United States v. Morrison*, 529 U.S. 598, 607 (2000), *quoting Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).
[5] *Kaspersky Lab., Inc. v. United States Department of Homeland Security*, 909 F.3d 446, 453 (D.C. Cir. 2018).

imposes punishment,'"[6] (3) without the benefit of a judicial trial.[7]

Congress violated the Bill of Attainder Clause in passing the MCA, because: (1) the MCA was created to apply to easily ascertainable members of a group, namely, alleged alien members of al Qaeda and persons responsible for the attacks of 11 September 2001; (2) the MCA was designed to legislatively punish this group by stripping them of the rights they would have been entitled to as criminal defendants in United States courts, or as accused in "regularly constituted" Law of War military commissions;[8] and (3) Congress stripped these rights without the benefit of a judicial trial.

4. **Burden of Proof:** As this motion challenges the Commission's exercise of jurisdiction, the Government has the burden of proof under R.M.C. 905(c)(2)(B). On a Bill of Attainder challenge moreover, binding precedent dictates that the Government has the additional burden of proving, by clear and convincing evidence, that Congress' purpose in passing the MCA was non-punitive.[9]

5. **Facts:**

a. Three days after the attacks of 11 September 2001, on 14 September 2001, a joint session of Congress passed the Authorization for Use of Military Force (AUMF) authorizing the President of the United States "to use all necessary and appropriate force against those nations,

---

[6] *Foretich v. Morgan*, 351 F.3d 1198, 1217 (D.C. Cir. 2003), *quoting BellSouth Corp. v. FCC (Bell South II)*, 162 F.3d 678, 683 (D.C. Cir. 1998).
[7] *Foretich*, 351 F.3d at 1216, *quoting Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977).
[8] *See Hamdan v. Rumsfeld*, 548 U.S. 557, 620 (2006) (finding that "the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.").
[9] *See Foretich*, 351 F.3d at 1221, *quoting BellSouth II*, 162 F.3d at 683 ("Under this functional test, the nonpunitive aims must be 'sufficiently clear and convincing' before a court will uphold a disputed statute against a bill of attainder challenge.")

organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on 11 September 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[10]

b. On 13 November 2001, President Bush established military commissions in which he specifically targeted non-citizen members of al Qaeda or those aliens who engaged in, aided or abetted, or conspired to commit an act of international terrorism.[11] These military tribunals were subsequently used only to try alleged members of al Qaeda detained by the United States at Guantanamo Bay, Cuba.

c. When, in June 2006, the U.S. Supreme Court invalidated the presidential military commissions (in *Hamdan v. Rumsfeld*),[12] Congress took up the call to adopt a commissions scheme targeted at alleged perpetrators of 9/11. Thus, nine weeks after the *Hamdan* decision, on 6 September 2006, President Bush announced that his administration had been working with members of both parties in the House and Senate to create "legislation to specifically authorize the creation of military commissions to try terrorists for war crimes."[13] During this speech, President Bush stated:

> I'm announcing today that Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA

---

[10] Joint Resolution To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States (Short Title: Authorization for Use of Military Force), Pub. L. 107-40, 115 Stat. 224 (14 Sep 2001).
[11] Military Order of 13 November 2001— Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 222 (16 Nov 2001).
[12] *Hamdan v. Rumsfeld*, 548 U.S. 557, 634 (2006) (invalidating Presidential tribunals because they did not comply with Common Article 3 of the Geneva Conventions of 1949).
[13] President George W. Bush, Address on the Creation of the Military Commissions to Try Suspected Terrorists (6 Sep 2006) (transcript available in Selected Speeches of George W. Bush 2001-2008, https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf.

> custody have been transferred to the United States Naval Base at Guantanamo Bay.… As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice.[14]

d. Senator Mitch McConnell introduced legislation, which Congress approved on 29 September 2006. Less than three weeks later, on 17 October 2006, the President signed into law the Military Commissions Act of 2006.[15] Like President Bush's prior military commission order, this law applied only to "alien unlawful enemy combatants engaged in hostilities against the United States"[16] and has been used only to try alleged members of al Qaeda detained by the United States at Guantanamo Bay, Cuba.

e. As shown below, members of Congress debating the 2006 MCA made statements specifically referring to the accused in this case, and expressing the desire that they not receive the rights of civilian or military accused in U.S. courts.

f. In 2009, Congress adopted several amendments to the MCA. One matter remained constant in the new, 2009 MCA: the statute targets just one group, and thus continues to apply only to any "alien unprivileged enemy belligerent [who] has engaged in hostilities against the United States or its coalition partners; has purposefully and materially supported hostilities against the United States or its coalition partners; or was a part of Al Qaeda at the time of the alleged offense under [chapter 47A of Title 10, U.S. Code]."[17] Also, like the Military Commission Order of 2001, and the MCA of 2006, the MCA of 2009 has been used only to try alleged members of al Qaeda detained by the United States at Guantanamo Bay, Cuba.

---

[14] *Id.*
[15] *See* Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 (17 Oct 2006).
[16] 10 U.S.C. § 948b.
[17] 10 U.S.C. § 948a(7).

6. **Law and Argument.**

A. **Legal Standards for Identifying Unconstitutional Bills of Attainder**

Bills of attainder share three essential elements: (1) specificity to an individual or group, and (2) the imposition of some form of punishment[18] (3) without judicial trial.[19]

(1) **Specificity**

To be a bill of attainder, an Act of Congress must designate specific groups or individuals for punishment.[20] "The element of specificity may be satisfied if the statute singles out a person or class by name or applies to 'easily ascertainable members of a group.'"[21]

In *United States v. Brown*, the statute in question imposed its punishment upon a named group—members of the Communist Party—and so met the "specificity" requirement.[22] The statute in *United States v. Lovett* named specific individuals and also met this element.[23]

In other cases, the specificity requirement is met when the targeted individual or group is

[18] *See Kaspersky Lab*, 909 F.3d at 455.
[19] *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847 (1984), *cited in ACORN v. United States*, 618 F.3d 125, 136 (2d Cir. 2014); see also *United States v. Brown*, 381 U.S. 437, 445 (1965); *United States v. Lovett*, 328 U.S. 303, 315 (1946); *Cummings v. Missouri*, 71 U.S. 277, 323 (1866).[20] *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847 (1984), *cited in ACORN v. United States*, 618 F.3d 125, 136 (2d Cir. 2014); see also *Brown*, 381 U.S. at 445.
[20] *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847 (1984), *cited in ACORN v. United States*, 618 F.3d 125, 136 (2d Cir. 2014); see also *Brown*, 381 U.S. at 445.
[21] *Hettinga v. United States*, 677 F.3d 471, 477 (D.C. Cir. 2012), *citing Foretich v. Morgan*, 351 F.3d 1198, 1217 (D.C. Cir. 2003).
[22] *United States v. Brown*, 381 U.S. 437, 450 (1965) ("The statute does not set forth a generally applicable rule . . . Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party.").
[23] *United States v. Lovett*, 328 U.S. 303, 308 (1946) (noting that the act in question specified thirty-nine individuals who could not be paid with federal funds); *id.* at 316 ("[the act] thus clearly accomplishes the punishment of *named* individuals without a judicial trial") (emphasis added).

"described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons."[24] "When past activity serves as 'a point of reference for the ascertainment of particular persons ineluctably designated by the legislature' for punishment, [an] Act may be an attainder."[25] Thus, in *Ex Parte Garland*, in the aftermath of the Civil War, Congress singled out all persons who had fought for, held office under, or even "voluntarily supported" a government hostile to the United States, and forbade them from practicing law in federal court.[26] Even though the statute swept in almost all of the adult population of the Confederate States at the time, the Supreme Court nonetheless found it specific enough to constitute a Bill of a Attainder, and thus constitutionally unacceptable.[27] More recently, in *Foretich v. Morgan*, the D.C. Circuit addressed a law in which Congress sought to forbid any parent from obtaining visitation rights in a very specific set of circumstances.[28] The circumstances were *so* specific that the D.C. Circuit found them to be aimed at a specific person, and so to violate the Bill of

---

[24] *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 86 (1961), *cited in Hettinga*, 677 F.3d at 477.
[25] *Selective Service System v. Minnesota Public Research Group*, 468 U.S. 841, 848 (1984), *citing Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 86 (1961); *Cummings v. Missouri*, 71 U.S. 277, 324-25 (1866).
[26] *Ex Parte Garland*, 71 U.S. 333, 376-77 (1866). As the free population of the Confederate States of America exceeded 5.5 million, a large proportion of whom presumably "supported" its government, an act need not specify a *small* group to be a Bill of Attainder. *See* U.S. Government Printing Office, 1860 *Census: Population of the United States* (1864), *available at* https://www.census.gov/library/publications/1864/dec/1860a.html, *cited in Confederate States of America: Demographics*, Wikipedia, https://en.wikipedia.org/wiki/Confederate_States_of_America#Demographics (last visited 9 April 2019).
[27] *Garland*, 71 U.S. at 377.
[28] *Foretich*, 351 F.3d at 1217. The circumstances were that: "(1) the minor child in a pending custody case has attained 13 years of age; (2) the child has resided outside of the United States for not less than 24 consecutive months; (3) any party to the case has denied custody or visitation to another party in violation of a court order for not less than 24 consecutive months; (4) any party to the case has lived outside of the District of Columbia during that period of denial of custody or visitation; and (5) the child has asserted that a party to the case has been sexually abusive with him or her." *Id.*

Attainder clause.[29]

(2) **Punishment**

Historically, bills of attainder meant parliamentary acts or royal decrees sentencing named persons to death without the benefit of a judicial trial.[30] However, Article I, Section 9, Clause 3 of the U.S. Constitution "sweeps more broadly"[31] and embraces legislative deprivations of life, liberty, or property,[32] to include the barring of individuals or groups from participation in specified employment or vocations.[33] More generally, punishment can include the "deprivation of any rights, civil or political, previously enjoyed . . ."[34]

In *Cummings v. Missouri*, the Supreme Court considered a Missouri constitutional amendment that prevented anyone from holding various "offices of trust," to include corporate offices, teaching positions, and holding property in trust for churches, without first taking an oath that he or she had had never "given aid, comfort, countenance, or support to persons engaged in any such hostility [against the United States]."[35] The state prosecuted Father Cummings, a Catholic priest, for teaching and preaching without having taken this oath.[36] The Supreme Court found that this deprivation of his ability to practice his calling was "punishment" sufficient to violate the Bill of Attainder clause. "The disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment. We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from

[29] *Id.* at 1217.
[30] *See Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 473 (1977).
[31] *Kaspersky*, 909 F.3d at 454.
[32] *See Lovett*, 328 U.S. at 317-18.
[33] *See Nixon*, 433 U.S. at 474.
[34] *Brown*, 381 U.S. at 448.
[35] *Cummings*, 71 U.S. at 316-17.
[36] *Cummings*, 71 U.S. at 316.

him anything less than these is no punishment at all.'"[37] "Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty, or property, but also embracing deprivation or suspension of political or civil rights . . . the disabilities prescribed by the provisions of the Missouri constitution [are] in effect punishment . . ."[38]

In *United States v. Lovett*, the U.S. Supreme Court found that Congress had violated the Bill of Attainder Clause when it passed the Urgent Deficiency Appropriation Act of 1943.[39] This time the group targeted by the legislation were suspected communists. Congress believed that many "subversives were occupying influential positions in the Government and elsewhere and that their influence must not remain unchallenged."[40] The Act mandated that "no salary or compensation should be paid [thirty-nine named] respondents out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 15, 1943 again appointed to jobs by the President with the advice and consent of the Senate."[41] This deprivation of opportunities to serve in the Government was "punishment, and of a most severe type."[42]

---

[37] *Cummings*, 71 U.S. at 320. The fact that the punishment was "indirect" (punishing him for not taking the oath, instead of punishing him directly for somehow supporting or assisting the rebellion) did not change the character of the act: "The legal result must be the same, for what cannot be done directly cannot be done indirectly. . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." 71 U.S. at 325.

[38] *Cummings*, 71 U.S. at 322. On the same day it decided *Cummings*, the Court decided *Ex parte Garland*, invalidating an Act of Congress which required attorneys to take a similar oath in order to practice in federal court. *Ex Parte Garland*, 71 U.S. 333, 377 (1866).

[39] *Lovett*, 328 U.S. 303, 315 (1946).

[40] *Lovett*, 328 U.S. at 308.

[41] *Lovett*, 328 U.S.. at 305.

[42] *Lovett*, 328 U.S. at 316. The Court went on to note that this kind of punishment was normally inflicted for conviction of "odious and dangerous crimes, such as treason; acceptance of bribes by members of Congress; or by other government officials; and interference with elections by Army and Navy officers." *Id.* (statutory citations omitted).

The Court addressed another anti-communist law in *United State v. Brown.*[43] Archie Brown was convicted of violating the Labor-Management Reporting and Disclosure Act of 1959, which made it a crime for a member of the Communist Party to serve as an officer or (except in clerical or custodial positions) as an employee of a labor union.[44] Depriving such persons of the ability to hold union office constituted "punishment."[45]

(3) **Without Judicial Trial**

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial."[46] The Bill of Attainder clause is construed broadly "as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."[47]

A person may lose important rights after being tried and convicted of some preexisting crime, but may not lose them by simple act of the legislature. Thus, in *United States v. Lovett*, Congress deprived specified persons of the ability to serve in Government. In deciding that this was "punishment, and of a most severe type," the Supreme Court pointed out that this punishment *could* be (and in fact was) imposed on persons convicted of serious crimes, such as treason or bribery.[48] But it could not be imposed by act of Congress.

---

[43] *Brown*, 381 U.S. 437.
[44] *United States v. Brown*, 381 U.S. 437, 438, 440 (1965).
[45] *Brown*, 381 U.S. at 458. The Government in that case tried to argue that the purpose of the prohibition was "prevention" (of debilitating strikes) rather than "retribution" (for Party membership). The Supreme Court found this to be a distinction without a difference. "It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *Id.*
[46] *Cummings v. Missouri*, 71 U.S. 277, 323 (1866); *United States v. Lovett*, 328 U.S. 303, 315 (1946); *United States v. Brown*, 381 U.S. 437, 448-49 (1965).
[47] *United States v. Brown*, 381 U.S. 437, 442 (1965).
[48] *Lovett*, 328 U.S. at 316. The court noted that this kind of punishment was normally inflicted

If an act deprives a class of persons of important rights by legislative fiat, but allows judicial trials to see whether a person falls within that class, the act is still a bill of attainder. Thus, in *Cummings v. Missouri*, Father Cummings "was indicted and convicted in one of the circuit courts of the State of the crime of teaching and preaching as a priest and minister of [the Roman Catholic] religious denomination without having first taken the oath."[49] The state constitutional provision that deprived him of these rights was a bill of attainder, notwithstanding the "formality" of his trial for violating it.[50] The attainder lay in the deprivation of rights, not the fact of a trial or the proceedings of that trial.

Likewise, in *United States v. Brown*, the defendant was indicted and convicted in the U.S. District Court Northern District of California for violating the Labor-Management Reporting and Disclosure Act of 1959 by holding union office despite his past membership in the Communist Party.[51] The Supreme Court nonetheless affirmed the reversal of his conviction, finding the Act to be a bill of attainder, while recognizing that the Bill of Attainder Clause is meant to prevent punishments "without judicial trial."[52] Brown's punishment lay in being deprived of the right to hold union office based on his past membership in the Communist Party.[53] That he received a trial to determine whether he had held such office was of no moment in the Court's decision.

B. **The Military Commissions Act of 2009 Fails the Test**

Congress violated the Bill of Attainder Clause in passing the MCA, because: (1) the

---

for conviction of "odious and dangerous crimes, such as treason; acceptance of bribes by members of Congress; or by other government officials; and interference with elections by Army and Navy officers." *Id.* (statutory citations omitted).

[49] *Cummings*, 71 U.S. at 316.

[50] *See Cummings*, 71 U.S. at 329.

[51] *United States v. Brown*, 381 U.S. 437, 440 (1965).

[52] *Brown*, 381 U.S. at 440, 449.

[53] *Brown*, 381 U.S. at 458.

MCA was created to apply to easily ascertainable members of a group, namely, aliens who are alleged members of al Qaeda detained at Guantanamo Bay, Cuba, to specifically include those alleged to be responsible for the 9/11 attacks; (2) the MCA was designed to inflict punishment on this group without judicial trial by stripping the group members of the rights they would have been entitled to as criminal defendants in United States courts or in a "regularly constituted" tribunal under the Uniform Code of Military Justice (UCMJ);[54] and (3) it took these rights without judicial trial.

(1) **The MCA is Specific to a Group of Persons (Specificity Prong)**

"The element of specificity may be satisfied if the statute singles out a person or class by name *or* applies to 'easily ascertainable members of a group.'"[55] "There can be no serious dispute"[56] that the MCA was designed to apply to the alleged 9/11 principals. Indeed, this Commission has already found it to be so.[57]

The President sent the 2006 MCA to Congress, with the specific purpose of trying these individuals: "As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice."[58] The legislative discussion surrounding military commissions (as discussed at length below) makes it clear that Congress further intended the

[54] *See Hamdan*, 548 U.S. at 620 ("the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.").
[55] *Foretich v Morgan*, 351 F.3d 1198, 1217 (D.C. Cir. 2003), *quoting United States v. Lovett*, 328 U.S. at 315.
[56] *Foretich*, 351 F.3d at 1217.
[57] AE 502BBBB, Ruling: Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, dated 25 Apr 2018, p. 6, *interpreting* 10 U.S.C. § 948d, *citing Bahlul v. United States*, 767 F.3d 1, 14 n.8 (D.C. Cir. 2014)(en banc).
[58] President George W. Bush, Address on the Creation of the Military Commissions to Try Suspected Terrorists (6 Sep 2006), *available at* https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf.

MCA to apply to aliens being detained by the United States at Guantanamo Bay, Cuba, and specifically, to those Guantanamo detainees alleged to be responsible for the 9/11 attacks. The President's speech, when he signed the MCA into law, identifies explicitly the group targeted by the legislation: "With the bill I'm about to sign, the men our intelligence officials believe orchestrated the murder of nearly 3,000 innocent people will face justice."[59]

The text of the MCA is also clear that it is directed at the 9/11 attacks, as jurisdiction is anchored on the date of the attacks: "A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter . . . whether such offense was committed before, on, or after September 11, 2001."[60] The MCA also criminalized "hijacking or hazarding a vessel or aircraft" and "terrorism" as war crimes to cover the 9/11 attacks, even though no such "war crimes" had existed before 9/11.[61] Additionally, Congress' decision to limit the jurisdiction of tribunals to "aliens"—though Law of War Military Commissions can proceed against citizens, if their jurisdiction is otherwise proper[62]—likewise tends to show that Congress intended the MCA to apply only to those being detained at Guantanamo Bay, Cuba.[63]

---

[59] President Bush Signs Military Commissions Act of 2006 (17 Oct 2006). Available at https://georgewbush-whitehouse.archives.gov/news/releases/2006/10/text/20061017-1.html.
[60] 10 U.S.C. § 948d; *see* AE 502BBBB, p. 6 (finding that this statutory language was specifically designed by Congress to target the alleged 9/11 perpetrators for prosecution).
[61] *See* AE 490, Defense Motion to Dismiss Charges I, VI, VII Due to Lack of Jurisdiction Based on *Ex Post Facto* Violation, filed 3 February 2017, p. 8 ("Indeed, the charge of hijacking as a war crime is obviously designed to apply to this specific case—but the statute was only passed in 2006, five years after the 9/11 attacks that are the subject of this trial. *See* 10 U.S.C § 950v(b)(23) (2006). A more egregious act of *ex post facto* legislation cannot be imagined.").
[62] *Ex Parte Quirin*, 317 U.S. 1, 44 (1942) (enemy spies and saboteurs—including one U.S. citizen—were subject to trial by military commission, not because of their alienage, but because of their status under the Law of War).
[63] *See* 10 U.S.C. § 948c (limiting jurisdiction to aliens). *Compare Foretich v. Morgan*, 351 F.3d 1198, 1217 (D.C. Cir. 2003) (act applied only to a minor child who had resided outside the United States for 24 consecutive months, though its ostensible purpose—protecting children

The D.C. Circuit, sitting *en banc*, has already found that Congress intended this specificity. "Supporters and opponents of the legislation alike agreed that the 2006 MCA's purpose was to authorize the trial by military commission of the 9/11 conspirators."[64] The Court of Military Commissions Review (CMCR) also agrees, as it holds that "President Bush and President Obama and two Congresses determined that no statute of limitations should apply to the offenses committed on September 11, 2001."[65] This Commission did the same when it ruled that the MCA was enacted with the specific intent "to authorize trial by military commission of the 9/11 conspirators."[66]

While the CMCR ruled in *Bahlul* that a similarly worded designation in the MCA of 2006 was merely a "status" determination,[67] it overlooked that similar Congressional "status" determinations have been found unconstitutional under a bill of attainder analysis when they single out groups for disparate treatment:

> It was not uncommon for English acts of attainder to inflict their deprivations upon relatively large groups of people, sometimes by description [status] rather than name. . . We cannot agree that the fact that [the Act] inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named individuals takes it out of the category of bills of attainder.[68]

In addition, the MCA imposes military commission jurisdiction (taking away important

---

from abusive parents—would apply equally to children who had never left the country).

[64] *Bahlul*, 767 F.3d at 14.

[65] *United States v. Khalid Shaikh Mohammad*, 280 F. Supp. 3d 1305, 1313 (C.M.C.R. 2017).

[66] AE 502BBBB, p. 6, *quoting Al Bahlul*, 767 F.3d at 14 n.8.

[67] *United States v. al Bahlul*, 820 F. Supp. 2d 1141, 1252 (C.M.C.R. 2011), *vacated on rehearing en banc*, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013), *affirmed in part, vacated in part, remanded to panel* 767 F.3d 1, 31 (D.C. Cir. 2014), *vacated in part*, 792 F.3d 1, 22 (D.C. Cir. 2015), *affirmed in part without majority rationale on rehearing en banc*, 840 F.3d 757, 758-59 (D.C. Cir. 2016) (per curiam). Note that in *Al Bahlul*, the C.M.C.R. did not have before it some of the facts in this case, such as a defendant accused of supporting the 9/11 attacks, or a judicial ruling that the Act specifically targeted such persons.

[68] *Brown*, 381 U.S. at 461.

trial rights, as shown below) on anyone who was "a part of al Qaeda at the time of the alleged offense under this chapter."[69] This language also targets a specific group in exact analogy with the statute at issue in *United States v. Brown*, which unconstitutionally deprived persons of the right to hold union office based on their membership in the Communist Party.[70]

Laws passed by Congress must apply with general applicability: "[Congress] cannot specify the people upon whom the sanction it prescribes is to be levied. Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals."[71] To do otherwise would allow Congress to rule upon a group's blameworthiness, which is a task the Constitution assigns to "politically independent judges and juries."[72]

Here, Congress has passed a law that it very clearly aimed at a specific class of people: aliens who are deemed a "part of al Qaeda." It specifically targeted the alleged conspirators of 9/11. The MCA squarely meets the specificity prong of the Bill of Attainder test when applied to Mr. al Hawsawi, an alien alleged 9/11 conspirator detained at Guantanamo Bay, Cuba.

(2) **The MCA is Designed to Inflict Punishment on this Group (Punishment Prong)**

The second prong of the bill of attainder test examines whether Congress imposes a form

[69] 10 U.S.C. §948a(7).
[70] *United States v. Brown*, 381 U.S. 437, 439, 452 (1965) "("The statute does not set forth a generally applicable rule . . . Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party." *Id.* at 450. Mr. al Hawsawi and Mr. al Baluchi previously argued that this language includes an implicit requirement of "hostilities" (i.e., armed conflict). AE 502E(MAH), filed 5 May 2017, at 12 n.7; AE 502D (AAA), filed 12 May 2017, p. 6-8. But as the Commission has now found that Congress mandated a finding of hostilities, "partship" in al Qaeda becomes an easy and additional way to take trial rights from persons allegedly connected with 9/11.
[71] *Brown*, 381 U.S. at 461.
[72] *Brown*, 381 U.S. at 445.

of legislative punishment on the identified group.[73] "Punishment" is undefined[74] but has been found to include such relatively minor things as deprivations of pay, restrictions on practicing specific employments or vocations, or on holding office in labor unions,[75] as well as more serious punishments up to and including death.[76] Punishment has also been found to include the "deprivation of any rights, civil or political, previously enjoyed . . ."[77] In determining whether a statute imposes "punishment" under the Bill of Attainder Clause, the Supreme Court instructs courts to conduct three necessary inquiries:

> (1) whether the challenged statute falls within the historical meaning of legislative punishment [historical test]; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes [function test]; and (3) whether the legislative record evinces a congressional intent to punish [motivation test].[78]

"The Court has applied each of these criteria as an independent - though not necessarily decisive - indicator of punitiveness" and "a statute need not fit all three factors to be considered a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill

---

[73] *See Kaspersky Lab, Inc., v. United States Department of Homeland Security*, 909 F.3d 446, 455 (D.C. Cir. 2018). "It is the job of the courts to "prevent[ ] Congress from circumventing the clause by cooking up newfangled ways to punish disfavored individuals or groups." *Id.* at 454, *quoting BellSouth Corp. v. FCC*, 144 F.3d 58, 65 (D.C. Cir. 1998).

[74] *Kapersky Lab*, 909 F.3d at 454 ("each bill of attainder case has turned on its own highly particularized context."), *quoting Flemming v. Nestor*, 363 U.S. 603, 616 (1960).

[75] *See United States v. Lovett*, 328 U.S. 303 317-19 (1946) (deprivation of pay); *Con Edison Co. of New York, Inc., v. Pataki*, 292 F.3d 338, 349 (2d Cir. 2002) (restriction on practicing trade or profession); *Brown*, 381 U.S. at 458 (restriction on holding union office).

[76] *See Nixon v. Administrator of General Services*, 433 U.S. 425, 473-74 (1977) (noting that historical bills of attainder imposed punishments up to and including death).

[77] *Brown*, 381 U.S. at 448.

[78] *See Kaspersky Lab*, 909 F.3d at 455 (internal quotations and citations omitted); *see also, BellSouth Corp. v. FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998), *quoting Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852 (1984), *in turn quoting Nixon v. Administrator of General Services*, 433 U.S. 425, 475-76 (1977).

of attainder claim.'"[79]

(i) **Whether the legislative record evinces a congressional intent to punish (Motivation Test)**

"It makes little sense to view [an] Act in isolation, divorced from the legislative process that produced it."[80] The motivation tests requires courts to review the legislative history to inquire "whether the legislative record evinces a congressional intent to punish."[81] "Courts conduct this inquiry by reference to legislative history, the context or timing of the legislation, or specific aspects of the text or structure of the disputed legislation."[82]

In the case of the MCA, the legislative record, the context and timing of the legislation, and the text of the legislation combine to reveal unequivocally that Congress's motivation was to punish the alleged 9/11 perpetrators with legislation stripping those charged of the rights they would otherwise have as criminal defendants. The history shows, the Bill which became the Military Commissions Act of 2006, was introduced to Congress two weeks after the President's speech announcing the transfer of "Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA custody" to Guantanamo Bay, Cuba. The President declared that "[a]s soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice."[83] The Bill advancing the President's proposed military

[79] *Foretich v. Morgan*, 351 F.3d 1198, 1218 (D.C. Cir. 2003), *quoting Consolidated Edison Co. v. Pataki*, 292 F.3d 338, 350 (2d Cir. 2002).
[80] *Foretich*, 351 F.3d at 1215.
[81] *Nixon*, 433 U.S. at 478.
[82] *Foretich*, 351 F.3d at 1225.
[83] President George W. Bush, Address on the Creation of the Military Commissions to Try Suspected Terrorists (6 Sep 2006) (transcript available in Selected Speeches of George W. Bush 2001-2008, https://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf.

commissions was submitted to Congress two weeks later,[84] and Congress approved it just a week after its proposal.[85]

Members of Congress who voted in favor of the President's proposed military commissions act did not even attempt to conceal the fact that their motivation was to punish the alleged 9/11 perpetrators by stripping them of rights they would have enjoyed as criminal defendants in federal court or court-martial:[86]

> So, here we have the attacks on the Twin Towers in New York and on the Pentagon and on the Flight 93 in Pennsylvania. But all of that changed after September 11. We started treating the enemy as the terrorists that they are. Now some here are trying to go back by treating these terrorists like criminals. Once again, we seem to be in denial that we are, in fact, at war. We cannot deal with this enemy with criminal law. We need to use all the tools available to us. I think the President set up a commission to deal with these enemy combatants the way they should be dealt with.[87]
>
> And let's be sure that these extraordinary protections that we provide to American soldiers and American civilians . . . that we don't give them to people who have no respect for our law and are committed to killing innocent men and women and children.[88]
>
> [A]n American citizen accused of a crime, where certainly the desire and the order of business is to protect that individual against unjust charges, and to make sure that the full panoply of the Bill of Rights applies to that individual. Different considerations apply when you are talking about a declared enemy of the U.S., and particularly an unlawful combatant, someone who doesn't wear the

[84] *See* S3930, 109th Cong. (22 Sep 2006).
[85] Bill Tracking Report, 109 Bill Tracking S3930.
[86] As noted above, Common Article 3 of the Geneva Conventions of 1949 guarantees that persons tried by military commission must be afforded a "regularly constituted court." To be regularly constituted, a military commission must guarantee the rights of a Soldier at court-martial, and commission procedures can only deviate from military procedure on the basis of "practical need." *Hamdan v. Rumsfeld*, 548 U.S. 557, 632-33, 645 (2006), *interpreting* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, para. 1(d), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
[87] Future of Military Commissions: Hearing before the S. Armed Serv. Comm., 109th (2006) (statement of Sen. Inhofe).
[88] *Id.* (statement of Sen. Sessions).

> uniform, someone who doesn't respect the law of wars, and who targets innocent civilians in the pursuit of their ideology.[89]
>
> Khalid Shaikh Mohammed currently awaits prosecution. That prosecution cannot happen until we act. . . . we should not try terrorists in the same way as our uniformed military or common civilian criminals.[90]
>
> We have no intention to try to accord aliens engaged as unlawful combatants with all the rights and privileges of American citizens.[91]
>
> I can't think of a better way to honor the fifth anniversary of September 11 than by establishing a system to prosecute the terrorists who on that day murdered thousands of innocent civilians and who continue to seek to kill Americans, both on and off the battlefield.…. Who are we dealing with in military commissions? I have shown the picture of Khalid Sheikh Mohammed, who is alleged to have designed the attack against the United States that was carried out on 9/11.[92]
>
> As we consider this legislation, it is important to remember first and foremost that this bill is about prosecuting the most dangerous terrorists America has ever confronted. Individuals like Khalid Sheik Mohammed, the mastermind of the 9/11 attacks, or Ahbd al-Nashiri, who planned the attack on the USS *Cole*.[93]

Congress had the opportunity to vote on military commissions again in 2009, when it amended the Military Commissions Act as part of the National Defense Authorization Act for Fiscal Year 2010.[94] Again, members of Congress revealed their motivation to punish the alleged 9/11 perpetrators with the Military Commission Act:

> Congress created the military commissions system 3 years ago, on

---

[89] Military Commissions Act of 2006. 152 Cong. Rec. S10274 (2006) (statement of Sen. Cornyn).
[90] *Id.* at S10243 (statement of Sen. Frist).
[91] *Id.* at S10262 (statement of Sen. Warner).
[92] Military Commissions Act of 2006. 152 Cong. Rec. H7533 (2006) (statement of Rep. Hunter).
[93] *Id.* at H7545 (statement of Rep. Sensenbrenner).
[94] *See* Congressional Research Service, The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues 2 (4 Aug 2014). Available at: https://fas.org/sgp/crs/natsec/R41163.pdf.

> a bipartisan basis, precisely to deal with prosecutions of al-Qaida terrorists consistent with U.S. national security, with the expectation that they would be used for that purpose. The Senate reaffirmed this view 2 years ago when it voted 94 to 3 against transferring detainees from Guantanamo stateside, including 9/11 coconspirators. We reaffirmed it, again, earlier this year when we voted 90 to 6 against using any funds—any funds—from the war supplemental to transfer any of the Guantanamo detainees to the United States. Just this summer, the Senate reaffirmed the view that military commissions are the proper forum for bringing enemy combatants to justice when we approved, without objection, an amendment to that effect as part of the Defense authorization bill. Sometimes it seems like the only people who do not believe that men such as 9/11 mastermind Khalid Shaikh Mohammed should be treated as enemy combatants are working in the administration.[95]

Weeks after passing the MCA of 2009, Congress objected to the President's proposal to bring the alleged 9/11 perpetrators to trial before a federal court in the United States, reaffirming that Congress's motivation in passing the MCA was to punish this group of non-citizens by subjecting them to a deprivation of rights in the military commissions system:

> [T]here is a fundamental error of judgment—in fact, in its way, an act of injustice—that these individuals, suspected terrorists being held at Guantanamo Bay, Cuba, suspected in this case, according to our amendment, of having been involved in the attacks of 9/11 on the United States which resulted in the deaths of almost 3,000 people, that these individuals would be tried in a regular U.S. Federal court as if they were accused of violating our criminal laws. They are not common criminals or uncommon criminals; they are suspected of being war criminals. As such, they should not be brought to prosecution in a traditional Federal court along with other accused criminals. Citizens of the United States have all the right to the protections of our Constitution in the Federal courts, article III courts of the United States. These are suspected terrorist war criminals who are not entitled to all the protections of our Constitution and whose prosecution should not be confused with a normal criminal law prosecution. They are war criminals. They ought to be tried according to all the rules that prevail for war

[95] Military Commission Amendment, 155 Cong. Rec. S10386 (2009) (statement of Sen. McConnell).

criminals, including, of course, the Geneva Conventions.[96]

Khalid Shaikh Mohammed and other terrorists, simply put, should not be brought to the United States. They should not be granted the same rights and privileges as American criminal defendants. They should stay at Guantanamo Bay and be prosecuted through the military commissions…[97]

By the way, Ramzi Yousef did not get the death penalty. And he went to talk to his Uncle Khalid Sheikh Mohammed about flying airplanes into buildings, and look what happened. Moussaoui did not get the death penalty because a lot of evidence was held to be inadmissible in a Federal court. If they are true enemies of war, the best venue to try them is, as we did in World War II, by military tribunals. And the rules of evidence, as you know, Judge, I was a Federal prosecutor in the Justice Department, Southern District of New York, U.S. Attorney, one of the finest in the country. But the fact is you bring them on American soil, give them all rights under the Constitution, as my good friend from Arizona stated, why does Khalid Sheikh Mohammed get constitutional rights?[98]

Why does he [Khalid Sheikh Mohammed] get American citizens' rights? He has not been to America. He masterminded this. He was captured overseas in a foreign country. He's in Guantanamo right now, and the Constitution gives us in Congress the right to set up a military tribunal commission system, which we did. . . . We need to treat these people as the war criminals that they are, that they have admitted to be; otherwise, we put our Nation at great risk.[99]

All three of us come here instinctively tonight because we are so repulsed by the notion that American criminal courts intended to provide a plethora of rights to Americans accused of crimes inside this country are being afforded to someone who is clearly a terrorist . . . They are not civilians and they are not U.S. citizens and they are not afforded the protections of the criminal courts of the United States.[100]

---

[96] Amendment No. 2669, 155 Cong. Rec. S11155 (2009) (statement of Sen Lieberman).
[97] Trail [sic] of Khalid Shaikh Mohammed, 155 Cong. Rec. S11359 (2009) (statement of Sen. Cornyn).
[98] Giving Terrorists a Trial by Jury in New York City, 155 Cong. Rec. H12993 (2009) (statement of Rep. McCaul).
[99] *Id.* (statement of Rep. Gohmert).
[100] *Id.* (statement of Rep. Shadegg).

The legislative record surrounding the Military Commissions Act could not be any clearer in revealing that the motivation of Congress in passing both the 2006 and 2009 MCAs was to punish the alleged 9/11 perpetrators by depriving them of rights they would have enjoyed as criminal defendants appearing before a federal court or a court-martial. Therefore, this element of the punishment prong is overwhelmingly satisfied.

(ii) **Whether the challenged statute falls within the historical meaning of legislative punishment (Historical Test)**

Under the historical test, courts ask "whether the challenged statute falls within the historical meaning of legislative punishment."[101] To subjects of the British crown, bills of attainder meant parliamentary acts or royal decrees sentencing named persons to death without the benefit of a judicial trial.[102] However, the Bill of Attainder Clause of the U.S. Constitution "sweeps more broadly"[103] and has historically embraced deprivations of life, liberty, or property,[104] or the "deprivation of any rights, civil or political, previously enjoyed,"[105] to include the barring of individuals or groups from participation in specified employments or vocations.[106] A major concern that prompted the framers to include the Bill of Attainder Clause was "fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of judge—or, worse still, lynch mob."[107] This lynch mob mentality can lead to legislative bills of attainder, which pronounce guilt upon an unpopular group by fixing a "degree of punishment in accordance with [Congress's] own notions of the enormity of

[101] *See Kaspersky Lab*, 909 F.3d at 455.
[102] *See Nixon*, 433 U.S. at 473.
[103] *Kaspersky Lab*, 909 F.3d at 454.
[104] *Lovett*, 328 U.S. at 317-18.
[105] *Brown*, 381 U.S. at 448.
[106] *Nixon*, 433 U.S. at 474.
[107] *Nixon*, 433 U.S. at 480.

the offence."[108]

In *United States v. Brown*,[109] the Supreme Court observed that "[a] number of English bills of attainder were enacted for preventive purposes—that is, the legislature made a judgment, undoubtedly based largely on past acts and associations . . . that a given person or group was likely to cause trouble (usually, overthrow the government) and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event."[110] "This question overlaps significantly with the functional test because, historically, 'legislative punishment' existed where the burden imposed so dramatically outweighed the benefit gained that courts could infer only a punitive purpose."[111]

In the MCA, Congress has made a judgment, based on past acts, that the alleged 9/11 perpetrators detained at Guantanamo Bay, Cuba, "should not be granted the same rights and privileges as American criminal defendants."[112] As a result, Congress intentionally stripped the alleged 9/11 perpetrators of fundamental criminal trial rights that they would be entitled to in federal court, or in a "regularly constituted" military commission that follows the Uniform Code of Military Justice (UCMJ).

a. Rights Taken Relative to a Regularly Constituted Military Commission

Under Common Article 3 of the Geneva Conventions of 1949, even a person properly tried by a Law of War military commission cannot be punished or executed except by sentence of "a regularly constituted court affording all the judicial guarantees which are recognized as

[108] *Cummings*, 71 U.S. at 323.
[109] 381 U.S. at 460.
[110] *Id.* at 459-460.
[111] *See Kaspersky*, 909 F.3d at 460.
[112] *See* Trail [sic] of Khalid Shaikh Mohammed, 155 Cong. Rec. S11359 (2009) (statement of Sen. Cornyn), *supra* note 97.

indispensable by civilized peoples."[113] This protection applies to military commissions directly[114] and through longstanding Department of Defense policies.[115] A court or commission is "regularly constituted" if it provides the same procedures and rights as a court-martial under the laws of the trying state, and deviations from court-martial procedures are allowable only if some "practical need" justifies them.[116]

A servicemember at court martial, or a combatant tried by a regularly constituted commission, enjoys (1) a military-specific right to a speedy trial if he is confined before trial;[117] (2) a right to be free from compulsory self-incrimination, with a military-specific strict rights warning requirement;[118] (3) the right to be free from double jeopardy, with jeopardy attaching once presentation of evidence on the merits begins;[119] and (4) "equal opportunity to obtain witnesses and other evidence" relative to the Government.[120]

The Military Commissions Act of 2009 (1) explicitly strips the military-specific speedy

[113] Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, para. 1(d), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
[114] *Hamdan*, 548 U.S. at 628 ("there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3, often referred to as Common Article 3 . . .").
[115] U.S. Department of Defense, Directive No. 2310.01E, *DoD Detainee Program* § 3(a)(1) (19 Aug 2014) (requiring all persons in DoD captivity to be given their rights under Common Article 3); *see also* U.S. Department of Defense, Directive No. 5100.77, *DoD Law of War Program*, § 5.3 (Dec. 9, 1998) (requiring DoD personnel to "comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations"); *Department of Defense Law of War Manual*, p. 71-72 (2015) (noting DoD policy to adhere to certain standards, including Common Article 3, "even in situations that do not constitute 'war' or 'armed conflict,' because these law of war rules reflect standards that must be adhered to in all circumstances").
[116] *Hamdan*, 548 U.S. at 632-33.
[117] 10 U.S.C. § 810.
[118] 10 U.S.C. § 831(b).
[119] R.C.M. 907(b)(2)(C)(i).
[120] 10 U.S.C. § 846; R.C.M. 701(e).

trial right for accused in confinement;[121] (2) explicitly strips the military-specific rights warnings requirement,[122] (3) causes jeopardy to attach only after trial is over and the Convening Authority acts on the sentence;[123] and (4) allows the defense only a "reasonable opportunity" to obtain witnesses and evidence,[124] not an "equal opportunity" with the Government at all. The latter contrast has been quite sharp in this case, as the Government has denied the Defense access to classified networks that it itself enjoys to research and investigate the case,[125] has obtained protective orders that severely restrict the Defense's access to witnesses,[126] and has spent years

[121] *See* 10 U.S.C. § 948b(d)(1)(A) (excluding the right to "speedy trial, including any rule of courts-martial relating to speedy trial"); *compare with* 18 U.S.C. §3161 (Trial is to commence within seventy days of indictment or original appearance before court); UCMJ Art. 10 ("When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him"); U.S. Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial").

[122] *See* 10 U.S.C. § 948b(d)(1)(B) (excluding rights from Art. 31 of the UCMJ relating to compulsory self-incrimination.) and 10 U.S.C. § 948r(c)("A statement of the accused may be admitted … if … the totality of the circumstances renders the statement reliable and possessing sufficient probative value"); *compare with* 18 U.S.C. §3501 (Before a jury is allowed to hear evidence of a defendant's confession, the court must determine that it was voluntarily given); UCMJ Art. 31 ("no person subject to the UCMJ may compel any person to incriminate himself or interrogate an accused without first informing him of his right to remain silent, and that statements obtained in violation of the above or through other unlawful inducement may not be received in evidence against him in a trial by court-martial"); U.S. Const. amend V ("No person ... shall be compelled in any criminal case to be a witness against himself").

[123] *See* 10 U.S.C. § 949h (Jeopardy does not attach is a trial in the sense of this section until the review of the finding of guilty has been fully completed); *compare with* Federal Court (Jeopardy attaches once the jury is sworn); UCMJ Art. 44 (Jeopardy attached once evidence is presented).

[124] *See* 10 U.S.C. § 949j ("Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence"); *compare with* Fed. R. Crim. P. 17 (granting defendants the right to subpoena witnesses); UCMJ Art. 46 (the defendant "shall have equal opportunity to obtain witnesses and other evidence").

[125] *See* AE 356D, Ruling, Defense Motion to Compel Production of Discovery Regarding Revocation of Access to Classified Networks, entered 21 Dec 2016, p. 2-3.

[126] AE 524MM, Protective Order #4, Defense Access to Current and Former CIA Employees and Contractors, entered 17 August 2018, p. 3-4, 6-8; *see also* AE 523L, Protective Order #5, Defense Access to Current and Former Joint Task Force—Guantanamo Medical Providers, entered 2 Apr 2019.

creating "substitutions" for classified evidence that the Government itself can see, but cleared defense counsel cannot.[127]

No "practical need" justifies taking any of these rights.[128] Stripping them from the accused in a death penalty case is far more serious than other acts that have been held to be "punishment," such as deprivations of pay.[129] When the Act takes these rights, it inflicts punishment.

b. Rights Taken Relative to a Civilian Trial

The deprivations above would be "punishment" even if the Government had proven that Mr. al Hawsawi belongs in front of a military tribunal. But Congress has freed the Government from its burden of proving this, by passing an act specifically designed to put the 9/11 accused before these military commissions. In doing so, it directly strips other rights, most especially the right to trial by jury.

> Notwithstanding the recent reforms, military trial does not give an accused the same protection which exists in the civil courts. Looming far above all other deficiencies of the military trial, of

[127] *See, e.g.*, AE 308C, Government Unclassified Notice of *Ex Parte, In Camera,* Under Seal Classified Filing, filed 17 Feb 2016; AE 308XXXX, Government Unclassified Notice of *Ex Parte*, *In Camera*, Under Seal Classified Filing, filed 30 Nov 2017; AE 542 (GOV SUP), Government Unclassified Notice Of Ex Parte, In Camera, Under Seal Classified Filing, filed 12 Jan 2018; AE 542BB, Government Unclassified Notice Of Ex Parte, In Camera, Under Seal Classified Filing, filed 12 Dec 2018. Quite apart from the unequal access to witnesses, these lengthy delays in providing discovery have violated Mr. al Hawsawi's right to a speedy and public trial under the Sixth Amendment—a right the Military Commissions Act does *not* purport to abolish.

[128] *Hamdan v. Rumsfeld*, 548 U.S. 558, 532-33 (2006) (Common Article #3 guarantees the accused at a military commission the same protections as a servicemember at court-martial, unless some "practical need" explains deviations from court-martial practice).

[129] Compare the deprivation of pay at issue in *United States v. Lovett*, 328 U.S. 303, 317-19 (1946), the vocational restrictions at issue in *Con Edison Co. of New York, Inc., v. Pataki*, 292 F.3d 338, 349 (2d Cir. 2002), and the restrictions on holding office in labor unions at issue in *United States v. Brown*, 381 U.S. 437, 458 (1965). All were "punishments" in the Bill of Attainder context; none implicated anything so fundamental as trial rights in a death penalty case.

> course, is the absence of trial by jury before an independent judge after an indictment by a grand jury.[130]

Before 9/11, persons charged with terrorist acts against the United States always enjoyed these rights, no matter where they lived or whether they were aliens or where their alleged crimes were committed; some still enjoyed these rights after 9/11.[131] In the Military Commissions Act however, Congress takes some rights directly, and purportedly empowers the Secretary of Defense to take others.

Thus, in 10 U.S.C. § 949a(3)(B), the Act authorizes the Secretary of Defense to abolish the requirement of rights warnings under *Miranda v. Arizona*:[132]

---

[130] *Reid v. Covert*, 354 U.S. 1, 37 (1957).

[131] *See United States v. Zacarias Moussaoui*, 282 F. Supp. 2d 480, 484 (E.D. Va. 2003), *vacated in part on other grounds*, 382 F.3d 453 (4th Cir. 2004) (in district court trial of alleged 9/11 conspirator, extent of conspiracy is a "matter for the jury to resolve"); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 192-93 (2d Cir. 2008) (noting jury selection in trial of persons accused of al Qaeda attacks on U.S. embassies in Africa); *United States v. Ghailani*, 761 F. Supp. 2d 167, 171 (S.D.N.Y. 2011) (noting jury findings in trial of alleged al Qaeda embassy bombings suspect); *United States v. Yunis*, 924 F.2d 1086, 1089 (D.C. Cir. 1991) (alien defendant accused of overseas hijacking was convicted by jury, and appealed based on alleged defects in jury instructions); *United States v. Abu Ghayth*, Indictment, U.S. District Court, Southern District of New York, No. S13 98-CR-1023 2013 WL 856571 (1 Mar 2013) (superseding indictment of alleged al Qaeda member in federal court); *United States v. Abu Ghayth*, 709 Fed. Appx. 718, 719 (2d Cir. 27 Sep 2017) (noting conviction of alleged al Qaeda conspirator Abu Ghayth after jury trial); *see also* Kevin McCoy, *Al Qaeda Suspect Convicted in U.S. Embassy Bombings*, USA Today (26 Feb 2015), *available at* https://www.usatoday.com/story/news/2015/02/26/khaled-al-fawwaz-guilty/24068683/ (noting that all ten persons charged with the al Qaeda attacks on U.S. embassies in Africa had been convicted by juries or pleaded guilty in federal courts); Spenser S. Hsu, *Libyan Militia Leader Gets 22-Year Sentence in Benghazi Attacks that Killed U.S. Ambassador*, Washington Post (27 Jun 2018) (noting jury conviction of alleged Benghazi attack co-conspirator), https://www.washingtonpost.com/local/public-safety/libyan-militia-leader-to-be-sentenced-in-2012-benghazi-attacks-that-killed-us-ambassador/2018/06/27/55782e5c-789a-11e8-aeee-4d04c8ac6158_story.html?utm_term=.1e8ad35f0959.

[132] *Miranda v. Arizona*, 384 U.S. 436, 469-72 (1966). Under *Miranda*, "[I]f a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent . . . The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court . . . A once-stated warning, delivered by those who will conduct the interrogation, cannot

> In making exceptions in the applicability in trials by military commission under this chapter from the procedures and rules otherwise applicable in general courts-martial, the Secretary of Defense may provide . . . [that a] statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title.[133]

Section 948r requires no rights warnings, and the Secretary of Defense did in fact enact this provision in M.C.R.E. 104(f), to abolish the rights warning requirements of *Miranda*.

Before that time, persons charged with terrorism, such as Mr. al Hawsawi, actually did receive the full protections of *Miranda* warnings.[134] The United States always gives *Miranda* warnings, as it is required to do by the Constitution.[135] And, in this very commission, testimony from Government witnesses has established that the United States gave *Miranda* warnings to suspected alien al Qaeda terrorists before 9/11, in matters related to the U.S. embassy bombings in Africa.[136] Yet, after passage of the first MCA in 2006, the Government did *not* give *Miranda*

---

itself suffice to that end . . . [A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead." *Id.*

[133] 10 U.S.C. § 949a(3)(B).

[134] Thus, these rights were "previously enjoyed" and their deprivation was "punishment" within the meaning of the Supreme Court's Bill of Attainder jurisprudence. *See Brown*, 381 U.S. at 448 (punishment can include the "deprivation of any rights, civil or political, previously enjoyed").

[135] *Dickerson v. United States*, 530 U.S. 428, 438-41 (2000) (holding that *Miranda* is a constitutional rule arising from the Due Process Clause).

[136] *United States v. Khalid Shaikh Mohammad, et al.*, Tr. 17892-93 (7 Dec 2017) (Special Agent Abigail Perkins testifies that embassy bombings suspects received *Miranda* or "modified *Miranda*" warnings); AE 502BBB, In-Court Submission, Submitted 7 December 2017, p. 1 (Embassy bombings suspect Ahmed al-Owhali received "full Miranda rights" in 1998); AE 502EEE, In-Court Submission, Submitted 7 Dec 2017 p. 1 (Embassy bombings suspect Mohamed Sadiq Odeh received "modified *Miranda* rights," being told he had the right to an attorney, but the attorney would only be provided when he reached the United States). The United States later prosecuted embassy bombings suspects in civilian courts, where their

warnings to Mr. al Hawsawi and the other accused,[137] and the Government continues to pursue its intent to use the un-Mirandized statements it obtained, in seeking convictions and executions in this case.[138] Thus, placing Mr. al Hawsawi before a military commission under the Act deprives him of the important, and previously enjoyed, protection that Miranda affords.

Another punitive aspect of the Military Commissions Act is that it permits an extremely permissive rule for the authenticating documents—a rule that does not apply in civilian court, and would violate the *Ex Post Facto* clause of the Constitution if Congress attempted to apply it there. 10 U.S.C. § 949a(3)(C) provides that

> In making exceptions in the applicability in trials by military commission under this chapter from the procedures and rules otherwise applicable in general courts-martial, the Secretary of Defense may provide the following: . . .
>
> (C) Evidence shall be admitted as authentic so long as—
>
> (i) the military judge of the military commission determines that there is sufficient evidence that the evidence is what it is claimed to be; and
>
> (ii) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.

The Secretary of Defense has enacted just this rule, to the Government's great benefit in trying

---

statements would be admissible only because the warnings were provided. *See In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 198 (2d Cir. 2008) (upholding the admissibility of al-Owhali's and Odeh's confessions only because their *Miranda* warnings were adequate, and admitting that the Fifth Amendment governed admission of their statements).

[137] *United States v. Khalid Shaikh Mohammad, et al.*, Tr. 17837, 17840 (7 Dec 2017) (Special Agent James Fitzgerald, FBI, testifies that Mr. al Hawsawi did not receive *Miranda* warnings or the right to an attorney before his interrogation by the FBI).

[138] *See* AE 524NN, Government Motion to Reconsider and Clarify AE 524LL, dated 22 Aug 2018, p. 50 (setting forth the Government's intention to use the unwarned statements of all five accused, and describing them as "vital evidence" in its case).

this case.[139] This abolishes the stricter authentication requirements of F.R.E. 901-02 and M.R.E. 901-02, and so gives the Government yet another tactical edge at trial.

The Military Commissions Act also purported to abolish preexisting statutes of limitation for certain offenses,[140] limitations that would have protected Mr. al Hawsawi in civilian court.[141]

Importantly also, the Military Commissions Act, as a military tribunal, abridges the right to trial by jury. Deprivation of that right is a central consideration in Law of War military commission cases, as the Supreme Court itself recognized in *Ex Parte Quirin*:

> Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the *constitutional* guaranty of trial by jury, ***not because they were aliens*** *but* ***only*** *because they had violated the law of war by committing offenses* ***constitutionally triable*** *by military tribunal.*[142]

Deprivation of the right to trial by jury is a recognized defect of military tribunals. "Looming far above all other deficiencies of the military trial, of course, is the *absence of trial by jury* before an independent judge after an indictment by a grand jury."[143] Deprivation of this right is structural and is not subject to harmless error analysis—if the right is *wrongly* taken, any conviction obtained must be reversed.[144]

---

[139] M.C.R.E. 901 (tracking the statutory language exactly).
[140] 10 U.S.C. § 950t ("The following offenses shall be triable by military commission under this chapter at any time without limitation . . . ")
[141] The Commission has mitigated this deprivation by dismissing charges III and V on the grounds that Congress lacked the authority to do this under the *Ex Post Facto* clause of the United States Constitution. AE 251J, Ruling: Defense Motion to Dismiss Charges III and V as Barred by the Statute of Limitations, entered 7 Apr 2017, p. 21-22. The Government's appeal of this ruling has not yet been finally decided. AE 251V, Ruling: Mr. al Baluchi's Motion to Stay Further Proceedings Pending the Outcome of the Government's Second Interlocutory Appeal, or, in the Alternative, Cancel December 2017 Hearing, entered 29 November 2017, p. 1-2 (noting the progress of the Government's appeal).
[142] *Ex Parte Quirin*, 317 U.S. 1, 44 (1942) (emphasis added).
[143] *Reid v. Covert*, 354 U.S. 1, 37 (1957).
[144] *Miller v. Dormire*, 310 F.3d 600, 604 (8th Cir. 2002), *citing Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993).

Even as a non-U.S. citizen, that is, as an alien, Mr. al Hawsawi would have the right to trial by jury if he were prosecuted in federal court. In the past, aliens accused of participating in al Qaeda operations have received grand jury indictments and the right to trial by jury when so prosecuted.[145] The MCA, by *directly* subjecting the 9/11 accused to a military tribunal, strips them of this important right. Particularly in a capital case, a tribunal drawn solely from military members cannot serve the function of a jury. "[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."[146] Under the Sixth Amendment, the "community" is the population "of the State and district where the crime shall have been committed"[147]—not the Armed Forces. A military panel is neither legally nor

---

[145] *See United States v. Zacarias Moussaoui*, 282 F. Supp. 2d 480, 484 (E.D. Va. 2003), *vacated in part on other grounds*, 382 F.3d 453 (4th Cir. 2004) (in district court trial of alleged 9/11 conspirator, extent of conspiracy is a "matter for the jury to resolve"); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 177, 192-93 (2d Cir. 2008) (noting jury selection in trial of persons accused of al Qaeda attacks on U.S. embassies in Africa); *United States v. Ghailani*, 761 F. Supp. 2d 167, 171 (S.D.N.Y. 2011) (noting jury findings in trial of alleged al Qaeda embassy bombings suspect); *United States v. Yunis*, 924 F.2d 1086, 1089 (D.C. Cir. 1991) (alien defendant accused of overseas hijacking was convicted by jury, and appealed based on alleged defects in jury instructions); *United States v. Abu Ghayth*, Indictment, U.S. District Court, Southern District of New York, No. S13 98-CR-1023 2013 WL 856571 (1 Mar 2013) (superseding indictment of alleged al Qaeda member in federal court); *United States v. Abu Ghayth*, 709 Fed. Appx. 718, 719 (2d Cir. 27 Sep 2017) (noting conviction of alleged al Qaeda conspirator Abu Ghayth after jury trial); *see also* Kevin McCoy, *Al Qaeda Suspect Convicted in U.S. Embassy Bombings*, USA Today (26 Feb 2015), *available at* https://www.usatoday.com/story/news/2015/02/26/khaled-al-fawwaz-guilty/24068683/ (noting that all ten persons charged with the al Qaeda attacks on U.S. embassies in Africa had been convicted by juries or pleaded guilty in federal courts); Spenser S. Hsu, *Libyan Militia Leader Gets 22-Year Sentence in Benghazi Attacks that Killed U.S. Ambassador*, Washington Post (Jun. 27, 2018) (noting jury conviction of alleged Benghazi attack co-conspirator), https://www.washingtonpost.com/local/public-safety/libyan-militia-leader-to-be-sentenced-in-2012-benghazi-attacks-that-killed-us-ambassador/2018/06/27/55782e5c-789a-11e8-aeee-4d04c8ac6158_story.html?utm_term=.1e8ad35f0959

[146] *Witherspoon v. Illinois*, 391 U.S. 510, 519-20 (1968); *see also McCleskey v. Kemp*, 481 U.S. 279, 310 (1987).

[147] U.S. Constitution, Amend. VI.

practically the same as a jury.

The importance of trial by jury cannot be overstressed. Historically, the Supreme Court has always recognized deprivation of trial by jury as an extremely grave transgression of rights. In the context of military tribunals, the Court has made this especially clear:

> We do not write on a clean slate. The attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for nonmilitary offenses—has a long history.
>
> We reviewed both British and American history, touching on this point, in *Reid v. Covert*, 354 U.S. 1, 23-30 [1957] . . .We pointed out the great alarms sounded when James II authorized the trial of soldiers for nonmilitary crimes and the American protests that mounted when British courts-martial impinged on the domain of civil courts in this country. The views of Blackstone on military jurisdiction became deeply imbedded in our thinking: 'The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land.' 1 Blackstone's Commentaries 413. And see Hale, *History and Analysis of the Common Law of England* (1st ed. 1713), 40-41. We spoke in that tradition in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 [1955] . . . "Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." . . .
>
> Civil courts were, indeed, thought to be better qualified than military tribunals to try nonmilitary offenses. They have a more deeply engrained judicial attitude, a more thorough indoctrination in the procedural safeguards necessary for a fair trial. Moreover, important constitutional guarantees come into play once the citizen—whether solder or civilian—is charged with a capital crime such as murder or rape. *The most significant of these is the right to trial by jury, one of the most important safeguards against tyranny which our law has designed . . .*[148]

The British Crown's deprivation of this safeguard was a major factor in the Declaration of

[148] *Lee v. Madigan*, 358 U.S. 228, 232-34 (1959) (emphasis added)

Independence, the American Revolution, and the absolute requirement of trial by jury in Article III of the Constitution itself.[149] This right is more precious than life or property, which is why the signers of the Declaration pledged their lives and fortunes to secure it,[150] and the deprivation of it is far more severe than any loss of pay or restrictions on trade.[151] By *directly* robbing the 9/11 accused of this vital safeguard, Congress took away yet another settled right recognized in civilian trials.

The U.S. Supreme Court has always been unwilling to "empower Congress to deprive people of trials under Bill of Rights safeguards" even in a military setting.[152] The Military Commissions Act, as compared to civilian trials, unquestionably strips highly substantial procedural and substantive rights. By doing so, the Act falls within the historic definition of punishment.

(iii) **Whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes (Function Test)**[153]

---

[149] *See The Declaration of Independence* para. 20 (U.S. 1776) (charging the King, in conjunction with Parliament, with "depriving us, in many Cases, of the benefits of Trial by Jury"); *United States v. One 1976 Mercedes Benz*, 618 F.2d 453, 464 & n.49 (7th Cir. 1980) (noting that Parliament had deprived citizens of Massachusetts of trial by jury simply by extending the jurisdiction of admiralty courts to smuggling cases).

[150] "And for the support of this Declaration, with a firm Reliance on the Protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor." *The Declaration of Independence* para. 32 (U.S. 1776).

[151] Compare the deprivation of pay at issue in *United States v. Lovett*, 328 U.S. 303, 317-19 (1946), the vocational restrictions at issue in *Con Edison Co. of New York, Inc., v. Pataki*, 292 F.3d 338, 349 (2d Cir. 2002), and the restrictions on holding office in labor unions at issue in *Brown*, 381 U.S. at 458. All were "punishments" in the Bill of Attainder context; none implicated anything so fundamental as trial by jury in a death penalty case.

[152] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-22 (1955).

[153] *See Kaspersky Lab., Inc. v. United States Department of Homeland Security*, 909 F.3d 446, 455 (D.C. Cir. 2018) ("The second factor—the so-called 'functional test'—invariably appears to be the most important of the three. . . . Where there exists a significant imbalance between the magnitude of the burden imposed and a purported nonpunitive purpose, the statute cannot reasonably be said to further nonpunitive purposes. In short: identify the purpose, ascertain the burden, and assess the balance between the two.").

A legislative enactment falling outside the historical definition of punishment may still be a bill of attainder "if no legitimate nonpunitive purpose appears."[154] Requiring this showing "ensures that Congress cannot circumvent the clause by cooking up newfangled ways to punish disfavored individuals or groups."[155] "For this reason, the category of 'bills of attainder' has continued to evolve and expand."[156] The functional test analyzes "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes."[157] When "there exists a significant imbalance between the magnitude of the burden imposed and a purported nonpunitive purpose, the statute cannot reasonably be said to further nonpunitive purposes."[158] "[T]he nonpunitive aims must be 'sufficiently clear and convincing' before a court will uphold a disputed statute against a bill of attainder challenge."[159] Additionally, "a statute that burdens a particular person or class of persons must serve purposes that are not only nonpunitive, but also rational and fair . . . there must be a nexus between the legislative means and legitimate nonpunitive ends."[160] Finally, "if there exists an extraordinary imbalance between the burden imposed and the alleged nonpunitive purpose, and if the legislative means do not appear rationally to further that alleged purpose, then the statute in question does not escape unconstitutionality merely because the Government can assert purposes that superficially appear to be nonpunitive."[161]

---

[154] *Kaspersky Lab*, 311 F. Supp. 3d at 210.
[155] *Foretich*, 351 F. 3d. at 1218 (internal quotations and citations omitted).
[156] *Foretich*, 351 F.3d at 1220.
[157] *Id. citing Nixon*, 433 U.S. at 473.
[158] *Foretich*, 351 F.3d at 1220; *see also, Foretich*, 351 F.3d at 122 ("Because such an imbalance belies any purported nonpunitive goals, the availability of 'less burdensome alternatives' becomes relevant to the bill of attainder analysis." *Quoting Nixon*, 433 U.S. at 482.)
[159] *Foretich*, 351 F.3d at 1221.
[160] *Foretich*, 351 F.3d at 1223.
[161] *Foretich*, 351 F.3d.at 1223.

Given the very overt legislative history of the MCA, showing that this Act was designed to create a legal system with lesser rights for a certain group of people, there can be no non-punitive purpose to the Act. The rights deprivations listed above, by their very nature, are all punitive. To take the rights to speedy trial, self-incrimination, equal access to evidence, due process, trial by jury, or any other fundamental trial rights, plainly constitutes punishment. Quite simply, the Act deprives defendants in a death penalty case of rights and protections they would have enjoyed in civilian court or even a regularly constituted commission, and that is punishment.

Furthermore, no matter what Congress's purpose was, a less burdensome alternative[162] is and always has been readily available: to try the accused in federal court or in a regularly constituted commission operating under the UCMJ.[163]

(3) **The MCA Imposes Punishment Without Judicial Trial**

In *Lovett*, the Supreme Court found that a bill of attainder violation arises where a law is passed affecting "easily ascertainable members of a group in such a way as to inflict punishment on them *without a judicial trial*."[164] As to the "judicial trial" component, the *Lovett* decision

---

[162] The availability of less burdensome alternatives can defeat a claim of a legitimate "administrative purpose." *See Foretich*, 351 F. 3d at 1222, *quoting Nixon*, 433 U.S. at 482.

[163] Indeed the availability of other alternatives is proven by the Government's own actions in this case when, in December 2009, the Government indicted all of these accused in a civilian court, though it withdrew the indictment due to political infighting. *United States v. Khalid Shaikh Mohammad, et al.*, No. 93CR00180, Indictment (S.D.N.Y. 2011), 2011 WL 1227685, *available at* https://www.justice.gov/archive/opa/documents/ksm-indictment.pdf . .

[164] *U.S. v. Lovett*, 328 U.S. at, 315 (emphasis added); *see also Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866) ("A bill of attainder is a legislative act which inflicts punishment without a judicial trial.") In a footnote of an unrelated ruling, in AE 502BBBB, the judge imagined that the trials provided in Guantanamo military commissions saved the Military Commissions Act, by falling outside the "judicial trial" prong of the Bill of Attainder standard. As shown here, the availability of a trial *after* the loss of a right, does not rescue a law from the "judicial trial" prong, and such a law still constitutes a prohibited bill of attainder. The Commission's footnote is therefore plainly in error.

reminds us that an accused *may* lose important rights—such as the right to seek Government employment—if he is *first convicted* of serious crimes, but not by a legislative act before such conviction takes place.[165]

In *Cummings v. Missouri*, the defendant who raised a Bill of Attainder claim had received a judicial trial in "one of the circuit courts of the state" (to determine whether the defendant had practiced his vocation, as a Catholic priest and teacher, without taking the requisite oath).[166] Notwithstanding that the defendant in Cummings got a trial, the Supreme Court found the law at issue to be a bill of attainder. The Court reasoned that, by stripping Cummings of his right to practice his vocation, it imposed punishment without judicial trial.[167] The Court referred to the trial he received *after* his rights had been stripped as a "formality."[168] Similarly, the defendant in *United States v. Brown* received a jury trial in a U.S. district court.[169] The Supreme Court ruled that the act under which he was convicted constituted a bill of attainder.[170] It found that, when Congress passed an act depriving Brown of his right to hold union office, it punished him *then*—and no subsequent trial could change that fact or validate the act.

Likewise, with the Military Comissions Act, when Congress passed that legislation directly and purposefully taking rights from the 9/11 accused, it imposed a bill of attainder on

---

[165] *See Lovett*, 328 U.S. at 316 (noting that the punishment in that case was "normally inflicted for conviction of "odious and dangerous crimes, such as treason; acceptance of bribes by members of Congress; or by other government officials; and interference with elections by Army and Navy officers.").
[166] *Cummings*, 71 U.S. at 316.
[167] *Cummings*, 71 U.S. at 322. On the same day it decided *Cummings*, the Court decided *Ex parte Garland*, invalidating an Act of Congress which required attorneys to take a similar oath in order to practice in federal court. *Ex Parte Garland*, 71 U.S. 333, 377 (1866).
[168] *See Cummings*, 71 U.S. at 329 (contrasting other ways in which the same deprivation might have been accomplished without this "formality").
[169] *United States v. Brown*, 381 U.S. 437, 440 (1965).
[170] *Brown*, 381 U.S. at 440, 449.

Mr. al Hawsawi. It stripped him of important trial rights. The fact that he can exercise his impaired rights at a "trial" does not change the fact that the rights were *taken* without trial.

C. **Conclusion**

> The framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument [the U.S. Constitution] have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. . .[171]

> Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment . . . When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder.[172]

The Military Commissions Act is a bill of attainder. (1) It was created to apply to easily ascertainable members of a group, namely, aliens who are alleged members of al Qaeda and those allegedly responsible for the 9/11 attacks; (2) the MCA was designed to legislatively punish this group by stripping them of the rights they would have been entitled to as criminal defendants in United States federal court or in a "regularly constituted" Law of War military commission; and (3) it stripped them of these rights without judicial trial.

As a bill of attainder, the MCA is unconstitutional. This Commission's exercise of jurisdiction is based on this bill of attainder, and its trial regime violates rights to which any civilian or even war criminal must be entitled. The charges against Mr. al Hawsawi must be dismissed.

---

[171] *Cummings v. Missouri*, 71 U.S. 277, 322 (1866), *quoting Fletcher v. Peck*, 10 U.S. 87, 137-38 (1810).
[172] *United States v. Lovett*, 328 U.S. 303, 317-18 (1946).

7. **Request for Oral Argument:** The Defense requests oral argument on this motion.

8. **Witnesses:** None

9. **Conference with Opposing Counsel:** The Prosecution opposes this motion.

10. **Attachments:**

A. Certificate of Service.

//s//
WALTER B. RUIZ
Learned Counsel for
Mr. al Hawsawi

//s//
JENNIFER N. WILLIAMS
LTC, JA, USAR
Detailed Defense Counsel for
Mr. al Hawsawi

//s//
SEAN M. GLEASON
Detailed Defense Counsel for
Mr. al Hawsawi

//s//
SUZANNE M. LACHELIER
Detailed Defense Counsel for
Mr. al Hawsawi

//s//
JOSEPH D. WILKINSON II
MAJ, JA, USAR
Detailed Defense Counsel for
Mr. al Hawsawi

//s//
DAVID D. FURRY
LCDR, JAGC, USN
Detailed Defense Counsel for
Mr. al Hawsawi

A

CERTIFICATE OF SERVICE

I certify that on the 12th day of April 2019, I caused **AE 625 (MAH) - Defense Motion to Dismiss Because the Military Commissions Act of 2009 Is a Bill of Attainder,** to be electronically filed with the Clerk of the Court and all the counsel of record by e-mail.

//s//
WALTER B. RUIZ
Learned Counsel for Mr. Hawsawi