MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD;** **WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 625A (GOV)** **Government Response** To Defense Motion to Dismiss Because the Military Commissions Act of 2009 Is a Bill of Attainder 26 April 2019

1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court ("R.C.") 3.7.

2. Relief Sought

The Prosecution respectfully requests that the Commission deny the relief requested in AE 625 (MAH), Defense Motion to Dismiss Because the Military Commissions Act of 2009 Is a Bill of Attainder, without oral argument.

3. Overview

The Military Commissions Act of 2009 ("2009 M.C.A.") is not a bill of attainder. This conclusion is compelled both by controlling precedent and by the standards under which the Supreme Court has evaluated such claims. In *United States v. Al Bahlul*, 820 F. Supp. 2d 1141 (U.S.C.M.C.R. 2011), *rev'd on other grounds Al Bahlul v. United States*, 767 F.3d 1 (2014), the *en banc* U.S. Court of Military Commission Review ("U.S.C.M.C.R.") rejected the appellee's bill-of-attainder claim in interpreting the Military Commissions Act of 2006, which, on this issue, is no different from the 2009 M.C.A. Additionally, the 2009 M.C.A. does not apply with specificity or impose punishment as those terms have been explicated by Supreme Court

precedent. Therefore, the 2009 M.C.A. is not a bill of attainder, and the Motion should be denied.

4. Burden of Proof

The Defense motion is a facial challenge to the constitutionality of the 2009 M.C.A., not a jurisdictional challenge. *See United States v. Al-Nashiri*, 191 F. Supp. 3d 1308, 1314 (U.S.C.M.C.R. 2016) (holding "appellee incorrectly couched his argument in jurisdictional terms" by raising challenge that did not implicate whether appellee's "status and the offenses meet the jurisdictional requirements of 10 U.S.C. § 948d"); *cf. Foretich v. United States*, 351 F.3d 1198, 1209 (D.C. Cir. 2003) ("Before deciding the merits, however, we assured ourselves of our jurisdiction over this appeal under Article III. We will first discuss the jurisdictional issue, then address the merits of the bill of attainder claim."); *United States v. One Parcel of Prop. Located at R.R. 2*, 959 F.2d 101, 103 (8th Cir. 1992) (finding bill of attainder "waived" by "failure to properly raise this claim below"). The Defense therefore bears the burden of establishing that no set of circumstances exist under which the legislative act would be valid. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1329 (11th Cir. 2001) ("This 'heavy burden' makes such an attack 'the most difficult challenge to mount successfully' against an enactment." (quoting *Salerno*, 481 U.S. at 745)).

5. Facts

On September 11, 2001, a group of al Qaeda operatives hijacked four civilian airliners in the United States. After the hijackers killed or incapacitated the airline pilots, a pilot-hijacker deliberately crashed American Airlines Flight #11 into the North Tower of the World Trade Center in New York, New York. A second pilot-hijacker intentionally crashed United Airlines Flight #175 into the South Tower of the World Trade Center. Both towers collapsed soon thereafter. Hijackers also deliberately slammed a third airliner, American Airlines Flight #77,

into the Pentagon in Arlington, Virginia. A fourth hijacked airliner, United Airlines Flight #93, crashed into a field in Pennsylvania after passengers and crew fought to reclaim control of the aircraft. As a result of these attacks, 2,976 people were murdered, and numerous other civilians and military personnel were injured.

On 18 September 2001, Congress passed, and the President signed, the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224. Among other things, the AUMF authorizes the President to "use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided" the September 11, 2001 terrorist attacks, to include al Qaeda. *Id.* Acting pursuant to the AUMF, the President ordered U.S. armed forces to Afghanistan, whose regime he determined harbored al Qaeda. In addition, on 13 November 2001, the President issued a military order that authorized the trial by military commission of non-citizens he had reason to believe were or had been members of al Qaeda; those who had engaged in, aided or abetted, or conspired to commit international acts of terrorism against the United States; and those who had harbored others covered by the military order. *See* Mil. Order, 66 Fed. Reg. 57,833–34 (Nov. 13, 2001).

In 2003, the President determined that six detainees held at Naval Station Guantanamo Bay, Cuba were triable by military commission under his military order. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), however, the Supreme Court held that the adoption by the President and the Secretary of Defense of military commission procedures that deviated from those governing courts-martial was inconsistent with the Uniform Code of Military Justice ("U.C.M.J."). Therefore, as a statutory matter, the Supreme Court determined that the pending military commissions could not proceed as constituted.

In response to that decision, Congress enacted the Military Commissions Act of 2006 ("2006 M.C.A."), which provided detailed statutory authority for military commissions, defined their jurisdictional scope, codified various offenses triable by military commission, and reformed military commission procedures in various ways to enhance the procedural rights of military commission accused. Under the 2006 M.C.A., only an "alien unlawful enemy combatant,"

defined as an alien who "has engaged in hostilities . . . against the United States . . . who is not a lawful enemy combatant," was subject to trial by a military commission. 10 U.S.C. §§ 948a(1), 948c (2006).

Under the 2006 M.C.A., Salim Ahmed Hamdan and Ali Hamza Ahmad Suliman Al Bahlul were tried by military commission. Both individuals were convicted of some, but not all, of the charged offenses. Their convictions and sentences were both approved by the Convening Authority for Military Commissions. On appeal, Mr. Al Bahlul argued that the 2006 M.C.A. was an unconstitutional bill of attainder. The U.S.C.M.C.R. rejected this argument, stating "[t]he M.C.A. is not a bill of attainder, as it lawfully establishes comprehensive procedures for the impartial adjudication of guilt required by the Constitution and the law of armed conflict." *Al Bahlul*, 820 F. Supp. 2d at 1256.

In 2009, Congress amended the 2006 M.C.A. as part of the National Defense Authorization Act for Fiscal Year 2010. *See* Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2574. Although the legislation, designated the "Military Commissions Act of 2009," *id.* § 1801, 123 Stat. 2574, constituted a wholesale substitution of the 2006 M.C.A., both acts provided for military-commission jurisdiction over aliens.[1]

On 31 May 2011, charges of Conspiracy, Attacking Civilians, Attacking Civilian Objects,[2] Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, Terrorism, and Intentionally Causing Serious Bodily Injury were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi by an Army Warrant Officer subject to the U.C.M.J. alleging the charges were true to the best of his belief.

[1] The 2006 M.C.A. provided for military-commission jurisdiction over "alien unlawful enemy combatants," while the 2009 M.C.A. provided for jurisdiction over an "alien unprivileged enemy belligerent." *See* 10 U.S.C. § 948c.

[2] Attacking Civilian Objects and Destruction of Property in Violation of the Law of War were later dismissed by the Commission in AE 251J. The United States is currently appealing this decision to the U.S.C.M.C.R. *See United States v. Mohammad*, No. 17-003 (U.S.C.M.C.R.).

These charges are all enumerated offenses contained in the 2009 M.C.A. All of the sworn charges allege that the five Accused named in the charge sheet are persons subject to trial by military commission as alien unprivileged enemy belligerents ("AUEBs"). All of the sworn charges allege that the Accused's conduct was committed in the context of, and associated with, hostilities.

On 4 April 2012, sworn charges were all referred jointly to this capital Military Commission. All referred charges allege that the five Accused named in the charge sheet are persons subject to trial by military commission as AUEBs. All of the referred charges allege that the Accused's conduct was committed in the context of, and associated with, hostilities.

On 12 April 2019, over seven years after referral of charges,[3] and despite it raising "a pure question of law,"[4] Defense counsel for Mr. Hawsawi filed the instant motion "seek[ing] dismissal, with prejudice, of the charges against Mr. al Hawsawi because the Military Commissions Act . . . is an unconstitutional bill of attainder." AE 625 (MAH) at 1.

6. Law and Argument

I. Binding Precedent of the U.S. Court of Military Commission Review Requires this Commission To Deny the Defense Motion

The U.S.C.M.C.R. held that the 2006 M.C.A. was "not a bill of attainder, as it lawfully establishe[d] comprehensive procedures for the impartial adjudication of guilt required by the Constitution and the law of armed conflict." *Al Bahlul*, 820 F. Supp. 2d at 1256. While this case concerns the 2009 M.C.A., there is no difference between the 2006 M.C.A. and the 2009 M.C.A. that justifies a different conclusion in this case. *See* AE 052B, Ruling, *United States v. Al Nashiri* (Mil. Comm'n May 7, 2012) (denying Bill-of-Attainder challenge to 2009 M.C.A.

[3] The fact that the instant motion was filed seven years after referral of charges demonstrates the ever-growing and critical need for this Commission to set a trial date with concrete trial milestones, to include the filing of all motions that are based on pure questions of law. *See* AE 478.

[4] AE 052 at 2, Defense Motion To Dismiss All Charges Because the Military Commissions Act is an Unconstitutional Bill of Attainder, *United States v. Al Nashiri* (Mil. Comm'n Mar. 12, 2012).

and citing *Al Bahlul*, 820 F. Supp. 2d. at 1254). Accordingly, *Al Bahlul* requires the Commission to deny the Defense motion.

The Defense attempts to distinguish *Al Bahlul* by arguing that the U.S.C.M.C.R. "overlooked . . . similar Congressional 'status' determinations have been found unconstitutional under a bill of attainder analysis when they single out groups for disparate treatment." AE 625 (MAH) at 13. However, the U.S.C.M.C.R. did not just examine whether Mr. Al Bahlul's status as an AUEC is a punishment, but also whether the procedures established under the 2006 M.C.A. in order to try persons subject to military commission jurisdiction imposed a punishment. After doing so, the U.S.C.M.C.R. concluded that the "M.C.A. is not a bill of attainder, as it lawfully establishes comprehensive procedures for the impartial adjudication of guilt required by the Constitution and the law of armed conflict." *Al Bahlul*, 820 F. Supp. 2d at 1256. Thus, the Defense attempt to limit the *Al Bahlul* decision is incorrect and should be rejected.

The Defense also notes that the U.S.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." AE 625 (MAH) at 13 n.67. Such facts, even if they were true, do not justify departing from the U.S.C.M.C.R.'s binding precedent. As established by the Supreme Court in *United States v. O'Brien*, the Defense must demonstrate that an act or bill contains "specificity in identification, punishment, and lack of a judicial trial," in order for it to be considered a bill of attainder. 391 U.S. 367, 384 n.30 (1968). If a party can only satisfy the specificity in identification element, a statute is not necessarily implicated by the Bill of Attainder clause. *See Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 851 (1984) ("Even if the specificity element were deemed satisfied by [the statute], [it] would not necessarily implicate the Bill of Attainder Clause."). Given the fact that the U.S.C.M.C.R. determined that the 2006 M.C.A. did not punish Mr. Al Bahlul or deprive him of a judicial trial, its holding would be unaffected by the additional facts the Defense offers. *Al Bahlul*, 820 F. Supp. 2d at 1252–56. As such, *Al Bahlul* still represents binding precedent on this Commission and the Defense motion should be denied without oral argument.

II. The Military Commissions Act of 2009 Is Not a Bill of Attainder Because It Does Not Legislatively Determine Guilt and Impose Punishment on Readily Identifiable Individuals Without Judicial Trial

The Bill of Attainder Clause, U.S. Const. art. I § 9, cl. 3, prohibits "legislative acts that inflict punishment without a judicial trial." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867); *see also Selective Serv. Sys.*, 468 U.S. at 846–47; *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468 (1977); *United States v. Lovett*, 328 U.S. 303, 315 (1946). The 2009 M.C.A. does not run afoul of that prohibition. Rather, it provides a robust substantive and procedural framework for military-commission trials designed to adjudicate both an accused's amenability to military-commission jurisdiction and his individual responsibility.

First, and most important, the law requires the accused to be presumed innocent. 10 U.S.C. § 949*l*(c). This alone would seem to resolve the issue raised by the Defense motion, but the 2009 M.C.A. goes further. It gives the accused the following rights: to be present at all sessions of the military commission; to present evidence; to cross-examine witnesses; to examine and respond to all evidence; to be assisted by counsel provided at no cost to the accused (without any showing of indigence), including learned counsel in capital cases to the greatest extent practicable; to represent himself *pro se*, if the accused so desires; and to have evidence suppressed if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members. *See id.* § 949a(b)(2) (describing minimum rights of the accused). In addition, the accused is protected against double jeopardy. *Id.* § 949h. The accused also has the right to be served with a copy of the charges in a language he understands (*id.* § 948s)[5]; to have excluded all statements obtained by torture or cruel, inhuman or degrading treatment (*id.* § 948r)[6]; to be judged by an impartial panel of not less than twelve members in a

[5] Where necessary, the Convening Authority is empowered to appoint interpreters for the defense and the accused (*id.* § 948*l*(b)), and the Convening Authority has done so in this case.

[6] To be admissible, statements by the Accused must be voluntary unless they fall within one narrow exception, *viz.* statements made incident to lawful conduct during military operations at the point of capture, or during closely related active combat engagement. Even then, such a statement is admissible only if the military judge determines, based on the totality of the circumstances, that it is reliable, possesses sufficient probative value, and the interests of justice would best be served by admitting it. *id.* § 948r(c).

capital case (*id.* §§ 949f, 949m(c)); to have a reasonable opportunity, comparable to the opportunity to criminal defendants in Article III federal courts, to obtain witnesses and evidence; to the disclosure of exculpatory and mitigating evidence (*id.* § 949j); and to a unanimous verdict on both findings and sentence before a death sentence may be adjudged (*id.* § 949m(b)(2)). Clearly, the 2009 M.C.A. does not legislatively inflict punishment without trial; indeed, its very purpose is to create a system and process that guarantees a fair trial for the Accused.

The Defense attempts to avoid this obvious problem for its position by arguing that it is the military-commission trial itself that constitutes the legislative punishment, insofar as it allegedly denies the Accused various rights they would have enjoyed but for the 2009 M.C.A. *See generally* AE 625 (MAH) at 10–36. Before turning to the particular deprivations alleged, however, it is useful to examine the applicable law.

A. To Determine Whether a Statute Is a Bill of Attainder, the Commission Must Determine Whether the Law Specifically Identifies the Person or People on Whom It Operates, and Whether It Inflicts Punishment Without Judicial Trial

"A bill of attainder is a legislative act which inflicts punishment without trial." *Lovett*, 328 U.S. at 315. "In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements—specificity in identification, punishment, and lack of a judicial trial—are contained in the statute." *O'Brien*, 391 U.S. at 284 n.30 (1968) (citing *Lovett*, 328 U.S. 3303 (1946)).

In discussing the specificity-in-identification element, the Supreme Court has said, "Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder . . . ." *United States v. Brown*, 381 U.S. 437, 448–49 (1965); *see also Lovett*, 328 U.S. at 315; *see also Hettinga v. United States*, 677 F.3d 471, 477 (D.C. Cir. 2012) ("A statute with open-ended applicability, i.e., one that attaches not to specified organizations but to described activities in which an organization may or may not engage, does not single out a particular person or group for punishment.").

Addressing the penalty element, the Court has used three tests to determine whether a particular statute inflicts punishment: historical, functional, and motivational. *Al Bahlul*, 820 F. Supp. 2d at 1252 (citing *Nixon*, 433 U.S. at 472–78). *See also Selective Serv. Sys.*, 468 U.S. at 853–54 ("[W]e must determine whether the challenged statute can be reasonably said to further nonpunitive goals.").

Concerning the historical test, the Supreme Court has instructed that "[t]he infamous history of bills of attainder is a useful starting point in the inquiry whether [an] [a]ct can fairly be characterized as a form of punishment . . . [f]or the substantial experience of both England and the United States with such abuses of parliamentary and legislative power offers a ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription." *Nixon*, 433 U.S. at 473.

At common law, the Supreme Court explained, a bill of attainder imposed the death penalty on named individuals or easily ascertainable members of a group. A bill of pains and penalties, also prohibited by the Clause, imposed lesser punishments, such as imprisonment, banishment and punitive confiscation of property. *Selective Serv. Sys.*, 468 U.S. 852. As well, "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact." *Brown*, 381 U.S. 448. The Court went on to cite, as examples, "disqualification from [public] office . . .[,] [d]isqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian." *Id.*

The Supreme Court's analysis, however, does not end the historical inquiry, as it is possible for Congress to fashion new burdens and deprivations inconsistent with the Bill of Attainder Clause. *Nixon*, 433 U.S. at 475. Consequently, the Commission must "look beyond mere historical experience" and apply a functional test, "analyzing 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." *Id.* at 475–76.

The third test applied by the Supreme Court inquires "whether the legislative record evinces a congressional intent to punish." *Id.* at 478 (citing *Lovett*, 328 U.S. at 308–14). In answering this question, the Court looked principally to the relevant committee reports and secondarily to floor debates. *Id.* at 478–79.

B. The 2009 M.C.A. Cannot Be Characterized as Punishment Under Any of the Three Tests—Historical, Functional or Motivational—Established by Supreme Court Precedent

1. The Historical Test: Examined in Light of the Historical Evils the Clause Was Meant to Address, the 2009 M.C.A. Is Not Punitive

As noted above, the Bill of Attainder Clause historically has been understood to prohibit Congress from singling out an individual or readily ascertainable members of a group for death, imprisonment, banishment, punitive confiscation of property, or disqualification from the pursuit of a lawful avocation or from positions of trust. The 2009 M.C.A. does none of those things. While the Accused are being held, they are not confined pursuant to the 2009 M.C.A.; rather, they are detained as unprivileged enemy belligerents under the law of war. Likewise, while the 2009 M.C.A. provides for a possible sentence of death or imprisonment in this case, such punishments are authorized only after the Prosecution has proven its case beyond a reasonable doubt, and only as the end result of a judicial process "affording all the judicial guarantees recognized as indispensable by civilized peoples." *Al Bahlul*, 820 F. Supp. 2d at 1253 (quoting 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).

Nor does the 2009 M.C.A. deprive the Accused of any pre-existing right. First, the Defense errs by assuming that, in the absence of the 2009 M.C.A., the Accused would have been entitled to trial in an Article III federal court or court-martial. *See* AE 625 (MAH) at 17, 22. Historically, similarly situated persons have been tried by military commissions. *See William Winthrop*, Military Law and Precedents 838 (2d rev. ed. 1920). In fact, as an alien unprivileged

enemy belligerent, the Accused is not *entitled* to a particular forum, such that his trial by military commission itself constitutes punishment.[7]

While the Supreme Court previously held that the military commissions established by presidential order in 2001 were required to follow court-martial procedures unless some practical need explained the deviation, the Supreme Court also found "[t]he uniformity principle is not an inflexible one; it does not preclude departures from the procedures dictated for use by courts-martial." *Hamdan*, 548 U.S. at 620. In doing so, it concluded that the Government had failed to make a "demonstration of practical need for deviations from pre-existing courts-martial rules, noting that the President's practicability determination in his 13 November 2001 Military Order was insufficient for U.C.M.J. Article 36(b) purposes. *Id.* at 617–25. However, heeding Justice Kennedy's injunction in *Hamdan—see id*. at 641 (Kennedy, J. concurring in part) ("Insofar as the '[p]retrial, trial, and post-trial procedures' for military commissions at issue deviate from court-martial practice, the deviations must be explained by some practical need."); *id.* at 651 ("Congress has prescribed these guarantees for courts-martial; and no evidence practical need explains the departures here."—Congress in 2009 specifically enacted 10 U.S.C. §§ 949a(a), 949a(b), which provide:

> (a) PROCEDURES AND RULES OF EVIDENCE.—(a) Pretrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense. Such procedures may not be contrary to or inconsistent with this chapter. Except as otherwise provided in this chapter or chapter 47 of this title, the procedures and rules of evidence applicable in trials by general courts-martial of the United States shall apply in trials by military commission under this chapter.

[7] *See Ameur v. Gates*, 759 F.3d 317, 329 (4th Cir. 2014) ("Ameur posits that precluding persons from appearing in courts amounts to a historic form of punishment, but does not point to any case involving a channeling provision that precludes particular types of claims from being brought. Such jurisdictional limits are usually not viewed as a traditional 'punishment.'"); *Hamad*, 732 F.3d 990, 1004 (9th Cir. 2013) ("Jurisdictional limitations . . . do not fall within the historical meaning of legislative punishment."); *Scheerer v. U.S. Att'y Gen.*, 513 F. 3d 1244, 1253 n.9 (11th Cir. 2008) (declining to find that "jurisdictional rule" amounted to bill of attainder); *Nagac v. Derwinski*, 933 F.2d 990, 990–91 (Fed. Cir. 1991) (same)).

> (b) Exceptions.—(1) in trials by military commission under this chapter, the Secretary of Defense, in consultation with the Attorney General, *may make such exceptions in the applicability of the procedures and rules of evidence otherwise applicable in general courts-martial as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need consistent with this chapter.*

10 U.S.C. §§ 949a(a) and 949a(b) (emphasis added); accord 10 U.S.C. § 949a (2006). Thus, to the extent that procedures for military commissions under the 2009 M.C.A. deviate from courts-martial, Congress itself, joined by a different President who signed this M.C.A. amendment into law, properly determined that such deviations are justified by some practical need. *See Hamdan*, 548 U.S. at 645 (Kennedy, J. concurring) ("Congress has the power and responsibility to determine the necessity for military courts, and to provide the jurisdiction and procedures applicable to them.").

Despite this congressional determination, the Defense argues that the 2009 M.C.A. deprives the Accused of rights to the same procedures used in courts-martial or a regularly constituted military commission. Specifically, the Defense contends the law "(1) explicitly strips the military-specific speedy trial right for accused in confinement; (2) explicitly strips the military-specific rights warnings requirement, (3) causes jeopardy to attach only after trial is over and the Convening Authority acts on the sentence; and (4) allows the defense only a 'reasonable opportunity' to obtain witnesses and evidence, not an 'equal opportunity' with the Government." AE 625 (MAH) at 24–25. Further, the Defense argues the 2009 M.C.A. unconstitutionally deprives the Accused of rights they would enjoy at a civilian trial in that it, (1) abolishes the rights warning requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966); (2) "permits an extremely permissive rule for the authenticating documents"; (3) abolishes pre-existing statutes of limitation for certain offenses; and (4) abridges the right to trial by jury. AE 625 (MAH) at 26–32. As set forth below, these claims fail.

a. Claimed Deprivation of Rights Associated with Courts-Martial or a Regularly Constituted Military Commission

First, while the 2009 M.C.A. specifies that any right "relating to speedy trial, including any rule of courts-martial relating to speedy trial" does not apply to military commissions, 10 U.S.C. § 948b(d)(1)(A), the Secretary of Defense nonetheless promulgated Rule for Military Commissions ("R.M.C.") 707, titled "Timing of Pretrial Matters," which requires, "[w]ithin 120 days of the service of charges, the military judge shall announce the assembly of the military commission, in accordance with R.M.C. 911." R.M.C. 707(a)(2). Applying this rule, which is substantively derived from Rule for Courts-Martial ("R.C.M.") 707,[8] this Commission has consistently granted continuances (R.M.C. 707(b)(4)(E)(i)–(ii)) and excluded other periods of delay (R.M.C. 707(c)) for speedy trial purposes.[9] Second, despite the Defense contention that the 2009 M.C.A. denies the Accused the right against compulsory self-incrimination,[10] the 2009 M.C.A. explicitly provides that "[n]o person shall be required to testify against himself." 10 U.S.C. § 948r; *see also Al Bahlul*, 820 F. Supp. 2d at 1253–54 (recognizing the 2006 M.C.A. affords "extensive procedural guarantees," including "the right against self-incrimination"). In fact that same section goes on to prohibit the use of involuntary statements of the Accused, with

[8] Notably, unlike U.S. military personnel detained under the U.C.M.J., the Accused are detained as unprivileged enemy belligerents under the law of war and not pursuant to the 2009 M.C.A. As such, any analogous speedy trial right enjoyed by U.S. military personnel who are detained before trial, is clearly inapplicable because of the status of the Accused. *See* R.C.M. 707(a)(2).

[9] *See* AE 446G, AE 443, AE 423, AE 416, AE 402, AE 387, AE 374, AE 370, AE 358, AE 353, AE 334, AE 328B, AE 324, AE 313A, AE 302, AE 281, AE 265, AE 250, AE 230, AE 216, AE 187, AE 159, and AE 148.

[10] Based on the text and citation set forth within the instant Motion, the Defense allegation that the 2009 M.C.A. "explicitly strips the military-specific warnings requirement" appears to be in reference to the Article 31, U.C.M.J., right against compulsory self-incrimination. *See* AE 625 (MAH) at 23 (stating that U.S. military personnel have "a right to be free from compulsory self-incrimination, with a military-specific strict rights warning requirement"); *id.* at 24 n.122 (citing various legal authorities relating to compulsory self-incrimination). To the extent it has misconstrued the Defense position, the Prosecution requests the opportunity to respond to any Defense clarification.

just one exception, which is not at issue in this case, and which is intended to address the practical needs of battlefield capture situations.[11]

The Defense next argues that the 2009 M.C.A. punishes the Accused because it causes jeopardy to attach only after trial is over and the Convening Authority acts on the sentence. AE 625 (MAH) at 24. However, this statement is misleading and fails to note that the 2009 M.C.A. and 10 U.S.C. § 844 (Article 44, U.C.M.J.) are substantively similar with the exception of the additional provisions contained within § 844 that define when jeopardy attaches. *Compare* 10 U.S.C. § 949h, *with id.* § 844. To the extent the 2009 M.C.A. fails to explicitly do so,[12] the Secretary of Defense promulgated R.M.C. 907, which establishes that jeopardy attaches upon the "presentation of evidence on the general issue of guilt." R.M.C. 907(b)(2)(B). By comparison, jeopardy attaches in courts-martial after the members have been impaneled and before announcement of findings. 10 U.S.C. 844(c)(2). Thus, there is little difference between the rights enjoyed by U.S. military personnel in courts-martial and those enjoyed by the Accused before this Military Commission. In any event, the U.S.C.M.C.R. previously determined that the "M.C.A. provides the very procedural safeguards identified by the Supreme Court as required for citizens of this country to have a fair trial," to include the right not to be subjected to double jeopardy. *Al Bahlul*, 820 F. Supp. 2d at 1253 (citing 2006 and 2009 M.C.A. §§ 948–950).

The Defense finally argues that the 2009 M.C.A. "allows the defense only a 'reasonable opportunity' to obtain witnesses and evidence, not an 'equal opportunity' with the Government,"

[11] The M.C.A. makes Article 31, U.C.M.J., inapplicable to trials by military commission. Of course, Article 31 confers on U.S. military personnel a statutory right above and beyond the constitutional right against self-incrimination enjoyed by ordinary Americans, and it does so to guard against the influence of the command structure that permeates military life. The 2009 M.C.A.'s exclusion of that statutory protection from the very different context of military commissions involving alien unprivileged enemy belligerents hardly can be said to constitute a punishment.

[12] *But see* 10 U.S.C. § 950b(d) ("The convening authority may not revise findings or order a rehearing in any case to reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty, or reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation. The convening authority may not increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.").

as found under Article 46, U.C.M.J. AE 625 (MAH) at 24.[13] However, in making this argument, the Defense neglects to mention that the 2009 M.C.A. states that "[t]he opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the constitution." 10 U.S.C. § 949j(a)(1). Further, the Defense neglects to mention that this Commission has already determined that such provision "establishes compatibility with federal practice, gives the provision of defense witnesses' parity with military practice, and *statutorily affords a defendant the same right to obtain a witness as provided our service members by both the Constitution and statute*." AE 036C, Ruling, at 4 (citing *U.S. v. Davison*, 4 M.J. 702 (A. Ct. Mil. Rev. 1977)) (emphasis added). As such, given that the Accused possess a substantively identical right to access witnesses and other evidence when compared to U.S. service members who are tried under the U.C.M.J., the Defense has no credible complaint that the Accused is being punished under the 2009 M.C.A.

b. Claimed Deprivation of Rights Associated with a Civilian Trial

The Defense next attempts to argue that the 2009 M.C.A. strips away rights that the Accused would otherwise enjoy in a civilian trial. Specifically, the Defense argues first that the 2009 M.C.A. abolishes the requirement of rights warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966). AE 625 (MAH) at 26–28. While the Defense may be technically correct that the 2009 M.C.A. does not require an advisement of rights pursuant to *Miranda per se*—having been modeled substantively after the U.C.M.J.—such does not constitute punishment. To be clear, the 2009 M.C.A. requires the Prosecution to demonstrate by a preponderance of the evidence that a

[13] In support of this assertion, the Defense attempts to argue that "[t]he . . . 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, has obtained protective orders that severely restrict the Defense's access to witnesses, and has spent years creating 'substitutions' for classified evidence that the Government itself can see, but cleared defense counsel cannot." AE 625 (MAH) at 24–25 (citing, AE 356D, Ruling, AE 524MM, Protective Order #4, AE 523L, Protective Order #5, AE 308C, AE 308XXXX). However, in doing so, the Defense fails to demonstrate how the protection of classified information in this case (all subject to approval by the Military Judge) is any different than that in an Article III court or a military court-martial.

statement of the Accused was voluntarily given before it can be admitted into evidence. *See* 10 U.S.C. § 948r(c)(2)(B). In an effort to comply with this requirement, the FBI agents who questioned the Accused for law enforcement purposes in 2007–2008 were instructed to do the following:

> (1) Assure the detainee that the FBI agents do not work for and are independent of any organization that previously held the detainee.
>
> (2) Ascertain the detainee's belief or knowledge regarding his changed circumstances and/or remind the detainee that he is in the "custody" of the Department of Defense and tell the detainee that he will not be returning to the custody of any of his previous custodians.
>
> (3) Tell the detainee that the agent is aware that the detainee may have made statements in the past and that the agent is not interested in any of the previous questioning or any of the answers the detainee may have given. For those detainees who may have been questioned by FBI agents in the past, the interviewing agent will reiterate that even though the detainee may have already spoken with the FBI, this interviewing agent is not interested in that questioning or any answers the detainee may have been given.
>
> (4) Determine whether the detainee is willing to answer questions.
>
> (5) (Mandatory for Documents/Photographs) Tell the detainee that the detainee may or may not have seen this document before, that the agent does not care what the detainee may have said in the past about the document, and that the agent is interested in the detainee's current answers (or words to that effect).

AE 524NN (GOV), Attach. B. Thus, while the strict language of *Miranda* was not utilized during interviews with the Accused, as is customary in other non-military law enforcement interrogations, the voluntariness of the Accused to provide a statement was assessed and reassessed throughout the entire interview process. Other than being advised of their right to an attorney, which the Accused did not possess at the time of the 2007–2008 FBI interviews because of their status as law of war detainees, the warnings and admonitions that they were provided establish voluntariness, and would have otherwise complied with the Supreme Court's concerns in *Miranda* regarding the inherent coercive nature of custodial statements. In either event, just as a defendant in a civilian court may seek the suppression of statement, so can the

Acccused seek suppression of their statements on the basis of the underlying principles espoused in *Miranda*. As such, the 2009 M.C.A. does not in fact impose any perceived punishment on the Accused as it still requires statements to be found voluntary before they are admitted into evidence much like in an Article III court.

Second, the Defense argues that another punitive aspect of the 2009 M.C.A. "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." AE 625 (MAH) at 28 (citing 10 U.S.C. §949a(3)(C)).[14] However, the Defense complaint is clearly misplaced as evidenced by a plain reading of M.C.R.E. 901–902 (implementing 10 U.S.C. §949a(3)(C)), M.R.E. 901–902, and Federal Rule of Evidence ("F.R.E.") 901–902. As stated in M.C.R.E. 901:

> Evidence shall be admitted as authentic if:—
>
> (a) the military judge determines that there is sufficient basis to find that the evidence is what it is claimed to be; and
>
> (b) 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.

In comparison, F.R.E. 901 states:

> (a) **In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

The only difference between M.C.R.E. 901 and F.R.E. 901 is that the former states what a judge must find, and the latter specifies what the proponent of the evidence must demonstrate in order

[14] Within the instant Motion, the Defense also allege, without more, that the same provision "abolishes the stricter authentication requirements of" F.R.E. 902 and M.R.E. 902." AE 625 (MAH) at 29. In the absence of any substantive argument, the Prosecution notes that while there is no analogous rule to F.R.E. 902 within the Military Commission Rules of Evidence, the Prosecution has generally applied M.R.E. 902, which is analogous to F.R.E. 902, for the purpose of admitting self-authenticating documents. *See, e.g.*, AE 491 (GOV).

for the judge to make the same finding.[15] In no way, is the burden of proof altered or does it give the Prosecution or Defense—as it is applicable to both parties—any tactical edge at trial. As such, the Defense argument about this perceived punishment under the 2009 M.C.A. is perplexing at best, as the rule is substantively the same in civilian courts.

Next, the Defense asserts that the 2009 M.C.A. "purport[s] to abolish preexisting statutes of limitation for certain offenses, limitations that would have protected Mr. Hawsawi in civilian court." AE 625 (MAH) at 29 (internal citations omitted). However, in making this complaint, Defense counsel for Mr. Hawsawi fail to cite any specific statute of limitation to which they are referring. To the extent the Defense are referring to the litigation and appeal of the issues raised in the AE 251 motion series, the Prosecution maintains its position that the Accused are charged as alien unlawful enemy belligerents under the law of war. Because neither the law of war nor customary international law provide for limitation periods for war crimes, the 2009 M.C.A. does not in and of itself "abolish preexisting statutes of limitation for certain offenses." Given this, and where the Accused are charged with war crimes, not civilian offenses, the 2009 M.C.A. does not, in fact, punish the Accused.[16]

Last, and of great emphasis, Defense counsel for Mr. Hawsawi complain "the Military Commissions Act, as a military tribunal, abridges the right to trial by jury." AE 625 (MAH) at 29; *but see Ex parte Quirin* 317 U.S. 1, 29 (1942) ("But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury."). Specifically, the Defense assert that "[e]ven as a non-U.S. citizen, that is, as an

[15] The Prosecution notes that F.R.E. 901(b) also outlines ways in which a proponent of a piece of evidence may satisfy the authentication requirement contained within paragraph (a). While a similar paragraph is not contained within M.C.R.E. 901, the Prosecution asserts that such a paragraph is unnecessary as it merely provides a "treatment of authentication and identification [that] draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a)." F.R.E. 901(b), Discussion. Therefore, such non-binding illustrative examples may still be utilized in military commissions to satisfy the requirements of M.C.R.E. 901.

[16] The Prosecution hereby incorporates by reference its law and argument as set forth within AE 251A (GOV) and AE 251G (GOV).

alien, Mr. Hawsawi would have the right to trial by jury if he were prosecuted in federal court." *Id.* at 29. To be clear, U.S. service members are tried in courts-martial consisting of military panels every day across the globe. While the offenses they are charged and tried for are often military-specific crimes, such crimes have also included murder, rape, and child sexual abuse. Some of these crimes are committed off-base where local authorities have personal jurisdiction. Nonetheless, from time-to-time these same local authorities transfer jurisdiction to the military resulting in the accused being tried by courts-martial. The Prosecution is aware of no case, and the Defense fails to cite any applicable authority,[17] that specifies or even implies that a military panel under the U.C.M.J. cannot "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519–20 (1968). This is especially true, where the Accused is charged as an AUEB with violations of the law of war, a subject of which a soldier has a unique knowledge. *See Ex parte Quirin*, 317 U.S. at 45 ("We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury."). That said, the U.S.C.M.C.R. has already determined that the Accused possess a right to be tried by a jury under the 2009 M.C.A. and thus the Accused are not punished in this regard when tried by military commission.

In sum, none of the purported burdens that the Defense claims the 2009 M.C.A. impose on the Accused constitute "deprivations or disabilities so disproportionately sever and so inappropriate to nonpunitive ends" that they run afoul of the Bill of Attainder Clause. *See Nixon*, 433 U.S. at 473.

[17] The lone case the Defense cites is inapplicable here because it pertains to a courts-martial that pre-dates the enactment of the U.C.M.J. and the procedural safeguards set forth within it. AE 625 (MAH) at 31 (quoting *Lee v. Madigan*, 358 U.S. 228, 232–34 (1959)).

2. The Functional Test: The 2009 M.C.A. Reasonably Furthers Non-Punitive Legislative Purposes

Under the functional test, the court must "analyz[e] 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." *Nixon,* 433 U.S. at 475–76. As is obvious from the above discussion, the actual "burdens" imposed on the Accused by the 2009 M.C.A.—as distinct from the Defense claims—reasonably can be said to further non-punitive legislative purposes.

The asymmetrical armed conflict with al Qaeda and associated forces, presents practical challenges for both the war effort and the effort to hold accountable those who violate the law of war. Before 2006, Congress had made only the barest mention of military commissions in the U.C.M.J., choosing instead to leave their employment largely to the Executive under the common law of war. In 2006, however, after *Hamdan,* Congress determined that the question of military commissions required a more robust approach. Two different Presidents and two Congresses wrestled with the best way to accommodate the demands of waging war with the demands of doing justice. The result is the 2009 M.C.A. The differences between trial in a military commission under the 2009 M.C.A., on the one hand, and trial in either an Article III court or court-martial, on the other, are minimal, and in each instance carefully tailored to account for the challenges of conducting trials in the midst of an ongoing armed conflict, as well as to recognize the distinction between violations of the law of war and ordinary crimes. Consequently, under the functional test, the 2009 M.C.A. is not a bill of attainder.

3. The Motivational Test: A Full Examination of the Legislative Record Reveals that Congress Was Appropriately Motivated in Enacting the 2009 M.C.A. To Reconcile Fair Accountability for Accused War Criminals With the Exigencies of Combat and the Nature of the Armed Conflict in Which the Country Is Engaged

Under the motivational test, the court must ask "whether the legislative record evinces a congressional intent to punish." *Nixon,* 433 U.S. at 478 (citing *Lovett,* 328 U.S. at 308–14). "The Supreme Court has emphasized that a statute must show 'unmistakable evidence of punitive intent' before it may be struck down as a bill of attainder.'" *Hamad v. Gates*, 732 F.3d

990, 1004 (9th Cir. 2013) (quoting *Flemming v. Nestor*, 363 U.S. 603, 619 (1960)). On this score, the Defense cites some statements made by a few members of Congress and the President before the enactment of the 2006 M.C.A. and the 2009 M.C.A, as well as some statements made well after the enactment of the 2009 M.C.A.[18] The full record, however, makes clear that Congress's intent was to balance the need to effectively wage war with the need to provide fair trials to accused war criminals.

Even the references to the September 11, 2001 attacks and the Accused cited by the Defense indicate no punitive intent. *See Selective Serv. Sys.*, 468 U.S. at 855 n.15 (explaining that "isolated" statements from legislators "do not constitute the unmistakable evidence of punitive intent" required (quotation mark omitted)). Those statements simply express concern that acts like the September 11, 2001 attacks, as well as other attacks such as that on the U.S.S. COLE, be categorized as violations of the law of war and thus necessitating military tribunals, rather than ordinary civilian crimes. None of the cited statements, including those concerning the September 11, 2001 attacks, indicate Congress has predetermined the Accused's guilt or was attempting, by enacting the 2009 M.C.A., to inflict a legislative punishment.[19]

In *Nixon*, the Supreme Court began its inquiry into legislative intent with the committee reports, and this Commission should likewise begin there. The 2009 M.C.A. began as Senate Bill S. 1390. The report accompanying the bill, after describing the holding in *Hamdan*, described the military-commission framework recommended by the committee as:

> designed to meet this test [*i.e.* that any departure from the procedures dictated for use by courts-martial must be tailored to the exigency that necessitates it] by bringing procedures for military commissions in line with procedures governing trial by courts-martial, except in cases where deviations are justified by practical needs. . . . The committee acknowledges that the United States and its coalition

[18] *See* AE 625 (MAH) at 19–20 (quoting statements of Sen. Lieberman, Sen. Cornyn, Rep. McCaul, Rep. Gohmert, and Rep. Shadegg). Statements made by legislators after enactment of a law, as opposed to during the debate on its passage, are irrelevant to divining the legislature's intent in passing the law.

[19] As demonstrated in Section 6.II.B.1., the 2009 M.C.A. does not, in fact, impose any legislative punishment on the Accused.

> partners are and have been engaged in hostilities pursuant to the Authorization for Use of Military Force, Public Law 107-40. The definition [of "unprivileged enemy belligerent"] used by the committee encompasses these hostilities, as well as future hostilities, *while providing for jurisdictional determinations to be made case-by-case, on the basis of the actions of each individual*.

S. Rep. No. 111-35, at 175–76 (July 2, 2009) (emphasis added).

Similarly, the joint conference report on the bill that contained the 2009 M.C.A. also expressed solicitousness for the rights of an accused tried in military commissions.[20] The report expressed the conferees' intent that those accused of a war crime and tried by military commission have adequate representation, "particularly in capital cases," with appropriate consideration given to the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003) and other comparable guidelines. The report called the House's and Senate's attention to the fact that the bill required representation by "learned counsel" in all capital cases. The report stated the conferees' expectation that the narrow exception for admissibility of "point of capture" statements be "interpreted in the context of testimony before [Congress] addressing the unique circumstances applicable to statements that are made during a force-protection, tactical, or intelligence-related interrogation which occurs within a reasonable proximity in time and location to the point of capture given the unique circumstances of active combat operations." Finally, noting the Supreme Court decision in *Roper v. Simmons*, 543 U.S. 551 (2005), concerning the constitutionality of the death penalty for murder defendants who were under 18 years old at the time of the crime, the conferees "encourage[d] the Secretary of Defense to give appropriate consideration to [the *Roper*] decision in light of Commons Article 3 of the Geneva Conventions, which requires that military commissions afford 'all of the judicial guarantees which are

[20] The 2009 M.C.A. was enacted as part of the National Defense Authorization Act for Fiscal Year 2010. The NDAA, as initially passed in the House (H.R. 2647), did not contain any provisions related to military commissions. The Senate amended H.R. 2647 to insert what had formerly been S. 1390. That change, *inter alia*, necessitated a conference on H.R. 2647. The bill finally enacted into law, containing the 2009 M.C.A., was the product of that conference. *See generally* H.R. Rep. No. 111-288 (Oct. 7, 2009) (Conf. Rep.).

recognized as indispensable by civilized peoples.'" H.R. Rep. No. 111-288 (Oct. 7, 2009) (Conf. Rep.).

The same concern for fairness is apparent in the comments by the House floor manager of the bill that became the 2006 M.C.A., Rep. Duncan Hunter, Chairman of the Armed Services Committee. Explaining the bill to his colleagues, Rep. Hunter stated:

> Our primary purpose is to keep them off the battlefield. In doing so, we treat them humanely, and, if we choose to try them as war criminals, *we will give them due process rights that the world will respect*. . . . In time of war, it is not practical to apply to rules of evidence the same rules of evidence that we do in civilian trials or court-martials for our troops. Commanders and witnesses can't be called from the front line to testify in a military commission. We need to accommodate rules of evidence, chain of custody and authentication to fit what we call the exigencies of the battlefield. It is clear, Mr. Speaker, that we don't have crime scenes that can be reproduced, that can be taped off, that can be attended to by dozens of people looking for forensic evidence. We have in this war against terror a battlefield situation. . . . *We won't lower our standards: we will always treat detainees humanely*, but we can't be naïve either.

152 Cong. Rec. H7533–34 (daily ed., Sept. 27, 2006) (statement of Rep. Duncan Hunter) (emphases added). Later, he said, "So what do we do with these new military commissions? We *uphold basic human rights* and state what our compliance with this standard means for the treatment of detainees. *We do this in a way that is fair and the world will acknowledge as fair*." 152 Cong. Rec. at H7937 (emphases added).

Similarly, during the floor debate in the Senate on the 2006 M.C.A., Senator Cornyn—cited by the Defense—posed these rhetorical questions: "How do we preserve this important intelligence-gathering tool which has allowed us to detect and disrupt terrorist attacks? How do we preserve that *and at the same time meet our other legal obligations, constitutional and statutory?*" 152 Cong. Rec. S10273 (daily ed., Sept. 27, 2006) (Statement of Sen. John Cornyn) (emphasis added).

In sum, a fuller examination of the legislative record indicates Congress was legitimately concerned about the need to achieve accountability for accused war criminals in a way that provided "all the judicial guarantees which are recognized as indispensable by civilized

peoples," while at the same time accounting for the exigencies of combat and the nature of the armed conflict in which the country was engaged. The record does *not* reflect a Congress seeking to carry out a punitive animus against the Accused. Indeed, the 2009 M.C.A. is a legitimate "act of nonpunitive legislative policy making." *Al Bahlul*, 820 F. Supp. 2d at 1254.

7. Conclusion

The 2009 M.C.A. does not legislatively inflict punishment on named individuals or easily ascertainable members of a group without a judicial trial. It does not single out the Accused either by name or as an easily ascertainable member of a group. Its provisions do not constitute punishment under any of the three tests used by the Supreme Court, nor does it deny the Accused any pre-existing right. Rather, the 2009 M.C.A. lawfully establishes fair and robust procedures for the impartial adjudication of both an accused's status and guilt. Accordingly, the 2009 M.C.A. is not a bill of attainder. The Commission should therefore deny the Defense motion.

8. Oral Argument

The Prosecution does not request oral argument, and posits that this issue should be resolved by the Commission on the parties' submissions alone, and that no oral argument need be granted. If the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

9. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this motion.

10. Additional Information

The Prosecution has no additional information.

11. <u>Attachments</u>

A. Certificate of Service, dated 26 April 2019

Respectfully submitted,

_____//s//_____
Clay Trivett
Managing Trial Counsel

Christopher Dykstra
Major, USAF
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 26th day of April 2019, I filed AE 625A (GOV), Government Response To Defense Motion to Dismiss Because the Military Commissions Act of 2009 Is a Bill of Attainder, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
Christopher Dykstra
Major, USAF
Assistant Trial Counsel