MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA	**D-___**
v.	**Defense Motion to Dismiss**
MOHAMMED KAMIN	for Lack of Subject Matter Jurisdiction Over Ex Post Facto Charges
	2 December 2009

1. Timeliness: This Motion is timely filed in accordance with the Order of the Military Judge on 18 November 2009.[1]

2. Relief Sought: Mr. Mohammed Kamin, by and through detailed defense counsel, respectfully requests that, pursuant to R.M.C. 907(b)(1)(A), the Commission dismiss the referred charges for lack of subject matter jurisdiction.

3. Burden and Standard of Proof: The burden of proof is on the government to establish that the Commission has jurisdiction over the charges referred against Mr. Kamin. R.M.C. 905(c)(2)(B).

4. Overview: The charge, with its six specifications of Providing Material Support for Terrorism, referred against Mr. Kamin is an invalid ex post facto law. It violates the proscription against such enactments set forth in Article I, section 9, clause 3 of the U.S.

[1] The defense files this Motion in accordance with the Military Judge's Order. However, in so doing, it does not acquiesce to or acknowledge that the Commission is a "regularly constituted court," and further asserts that the Military Commissions Act of 2009 ("MCA") is unconstitutional on its face. *See, e.g., In re Mohammed Kamin* (09-1294) (D.C. Circuit). Additionally, the defense notes that it has previously stressed the dilemma it faces wherein it must go forward in proceedings without the benefit of the revised Manual that will determine how such proceedings are to be conducted and the legal standards for their outcome. *See*, *e.g.*, Statements of Counsel during hearing on 18 November 2009; Defense Status Report, 6 November 2009, ¶ 3 h ("[T]his case continues in the odd posture of carrying on under rules that may change in the near future."). This issue, in particular, is problematic because it is foreseeable that the revised Manual will amend the charged offense to reassert the view of the Executive Branch that Congress violated the Constitution by including Providing Material Support for Terrorism as an offense because it is NOT a violation of the law of war, and thus cannot be charged as an offense for any conduct that pre-dates the passage of the MCA of 2006. Thus, the defense again notes that Mr. Kamin finds himself impaled with a Morton's Fork, *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 623, fn. 13 (2d Cir. 1982), of the Government's design: either go forward in unconstitutional proceedings, as scheduled, without the benefit of the rules in the Manual *or* seek additional delay while the Secretary revises the Manual, which will likely amount to, at least, several additional months, while remaining in pretrial confinement on a foreign island, surrounded by military guards who do not speak his language, thousands of miles from his family. *See also* Defense Status Report, 6 November 2009, ¶ 3 h ("Thus, the statutory framework essentially provides for a *de facto* continuance of the proceedings while the government continues to fumble through the creation of a legal framework for this trial. The defense does not seek and objects to additional delay.").

Constitution ("Ex Post Facto Clause"). Because the charges are invalid, this Commission lacks subject matter jurisdiction in this action. Mr. Kamin is being prosecuted for offenses defined for the first time in the Military Commissions Act of 2006 ("2006 MCA"), and more recently, the Military Commissions Act of 2009 ("2009 MCA"), statutes signed into law approximately three and six years respectively after Mr. Kamin was taken into custody by coalition forces in Afghanistan. The criminal penalties of the 2006 MCA and 2009 MCA cannot be retroactively applied to Mr. Kamin. The charges do not state pre-existing violations of the law of war, and the alleged offenses have not been traditionally triable by law-of-war commissions such as this one. Moreover, the referred charge further violates the ex post facto principle incorporated into Common Article 3 of the Geneva Conventions.

5. Facts:

a. Mr. Mohammed Kamin is a native of Afghanistan. He was captured in the Khowst Region, Afghanistan on or about [redacted] May 2003. Shortly thereafter, he was transferred to Bagram Air Base, Afghanistan, where he was detained in the custody of the United States. In September 2004, Mr. Kamin was transferred to the U.S. Naval Station, Guantanamo Bay, Cuba (GTMO) where he continues to be confined under the authority of the Commander, Joint Task Force Guantanamo (JTF-GTMO). As of the date of this filing, Mr. Kamin has been confined as a prisoner of the United States for Two Thousand Three Hundred and Ninety-Four (2,394) consecutive days – approximately 6 ½ years.

b. On 17 October 2006, almost three years after Mr. Kamin was captured in Afghanistan, the Military Commissions Act of 2006 was enacted into law. Pub. L. No. 109-366, 120 Stat. 2600 (17 Oct. 2006). The 2006 MCA identified and defined "Providing Material Support for Terrorism" as an offense punishable under that chapter.

c. The Charge was preferred against Mr. Kamin on 11 March 2008 for six Specifications of Providing Material Support for Terrorism ("material support"). *See* 10 U.S.C. § 950v(b)(25). The Charge and Specifications were referred for trial by military commission on 4 April 2008.

d. On 28 October 2009, almost six years after Mr. Kamin was captured in Afghanistan, the Military Commissions Act of 2009 was enacted into law. Pub. L. No. 111-84 (28 Oct. 2009). The MCA identified and defined "Providing Material Support for Terrorism" as an offense punishable under that chapter. 10 U.S.C. §950t(25).

6. Discussion:

THE CHARGE REFERRED AGAINST MR. KAMIN OPERATES AS AN INVALID EX POST FACTO LAW

a. This Commission is a court of limited jurisdiction. The 2009 MCA grants this Commission jurisdiction to try "any offense made punishable by this chapter [10 U.S.C. §§ 948a *et seq*.] . . . or the law of war, whether such offense was committed before, on, or after September 11, 2001 . . . ." 10 U.S.C. § 948d.

b. Thus, the statute recognizes two sources of authority for the Commission's subject matter jurisdiction: (1) the MCA itself, in authorizing prosecution of the offenses defined therein, and (2) the law of war. In this case, neither provides authority to try Mr. Kamin on the referred charge of Providing Material Support for Terrorism. The offenses defined in the 2009 MCA cannot create the legal basis for the charges because the 2009 MCA, signed into law in October 2009, as well as the 2006 MCA, signed into law in October 2006, post-date the alleged offensive conduct, which necessarily occurred prior to Mr. Kamin's capture in May 2003. The Charge Sheet in this case expressly charges Mr. Kamin with violations of the MCA, specifically, violations of 10 U.S.C. § 950v(b)(25) (Providing Material Support for Terrorism). The referral of these charges against Mr. Kamin represents the retroactive application of a criminal statute in a manner that violates the Ex Post Facto Clause of the U.S. Constitution. *Johnson v. United States*, 529 U.S. 694, 699 (2000) (the Ex Post Facto Clause "raises to the constitutional level one of the most basic presumptions of our law: legislation, especially of the criminal sort, is not to be applied retroactively.").

c. It is axiomatic that this Commission, and the United States in its prosecution of Mr. Kamin, is bound by the U.S. Constitution and cannot transgress the limitations on the exercise of power imposed by that instrument. *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."). The Supreme Court, in reviewing the jurisdiction of a military commission, has specifically noted the limitations imposed by the Constitution on the conduct of such tribunals. *Ex parte Quirin*, 317 U.S. 1, 29 (1942) ("We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial.") In this case, the conditions required by *Quirin* for the exercise of jurisdiction are not satisfied, as the acts charged are not offenses under the law of war and the trial of Mr. Kamin on these charges is prohibited by the Ex Post Facto Clause.

A. Prosecution for Conduct that Was Not a Crime When Committed Violates the Ex Post Facto Clause of the U.S. Constitution

d. The United States Constitution prohibits the enactment of Ex Post Facto laws. U.S. Const. Art. I § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed"). Ex Post Facto laws are criminal statutes that retroactively (1) punish previously

innocent conduct; (2) aggravate the criminal nature of an act; (3) increase the punishment for a crime; or (4) change the rules of evidence to lower the government's burden of proof or reduce the quantum of evidence necessary to convict the defendant.

e. Justice Chase long ago elucidated the various categories of ex post facto laws:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commissioner of the offense, *in order to convict the offender.*

Calder v. Bull, 3 Dall. 386, 389 (1798) (emphasis in original). The *Calder* definition remains authoritative. *See Stogner v. California*, 539 U.S. 607, 611 (2003) (*Calder* provides the "authoritative account of the scope of the *Ex Post Facto* Clause"). In this case, the referred charge falls into the first of these categories.

f. The Ex Post Facto Clause is not an individual right that may – or may not – apply outside the United States. Rather, it is a structural limitation on the power of Congress imposed by the Constitution. *Downes v. Bidwell*, 182 U.S. 244, 276-67 (1901) ("There is a clear distinction between . . . prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states. Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' . . . it goes to the competency of Congress to pass a bill *of that description*"). Accordingly, the obligation of this Commission to enforce the Ex Post Facto Clause cannot be avoided by a contention that the Constitution does not confer this right on Mr. Kamin. Compare *Boumediene v. Bush*, 128 S.Ct. 2229, 2259 (2008) ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.") (internal citations omitted).

g. This Commission need only recognize that "Congress and the president, like the courts, possess no power not derived from the Constitution," *Quirin*, 317 U.S. at 25, and that any law repugnant to our Constitution is void and unenforceable in any U.S. court. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Indeed, the Supreme Court's *Hamdan* decision demonstrates that structural limitations on the powers of the Government imposed by the Constitution will be enforced by the courts, even at behest of a non-citizen such as Mr. Kamin. In *Hamdan*, the Court held that the President's establishment of a military commission in a manner unauthorized by Congress violated

Separation of Powers principles. *Hamdan*, 126. S. Ct. at 2774 n.23 ("[T]he President …may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.") (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). In like manner, Congress may not disregard limits on its powers imposed by the Ex Post Facto Clause, and the Prosecution cannot validly contend that such limits can be ignored because Mr. Kamin is not a U.S. citizen.

B. The MCA's "Material Support" Offense Postdates the Conduct that Forms the Basis for the Charge Against Mr. Kamin

h. The 2009 MCA was signed into law by the President on October 28, 2009, and the 2006 MCA on October 17, 2006. By that time, Mr. Kamin had been in U.S. custody for almost six and three years, respectively. The single charge against Mr. Kamin is an alleged violation of the Material Support for Terrorism offense defined at 10 U.S.C. § 950v(b)(25). However, the alleged conduct giving rise to this Charge predates Mr. Kamin's capture, and thus necessarily predates the definition of the offenses in the MCA. On its face, then, the prosecution of the Material Support charge represents the retroactive application of a criminal statute in a manner prohibited by the Ex Post Facto Clause. *Beazell v. Ohio*, 269 U.S. 167, 170 (1925) (laws "which purport to make innocent acts criminal after the event" violate the Ex Post Facto Clause).

i. The drafters of the 2009 MCA and 2006 MCA anticipated this problem, and inserted § 950p into the both statutes in the hope of resolving it. Section 950p in the 2009 MCA provides:

> **''§ 950p. Definitions; construction of certain offenses; common circumstances**
>
> ''(d) EFFECT.—The provisions of this subchapter codify offenses that have traditionally been triable by military commission. This chapter does not establish new crimes that did not exist before the date of the enactment of this subchapter, as amended by the National Defense Authorization Act for Fiscal Year 2010, but rather codifies those crimes for trial by military commission. Because the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment of this subchapter, as so amended.

j. Implicit in this provision is the recognition that Congress cannot, and did not intend to, apply the 2009 MCA in a manner that would offend the Ex Post Facto Clause of the Constitution. The recital in the 2009 MCA that the offenses intended for prosecution are those "that have traditionally been triable by military commission" limits the jurisdiction of this Commission – at least with respect to individuals in custody prior to the enactment of the 2009 MCA, such as Mr. Kamin – to traditional law of war offenses.

k. The issue becomes, then, is Material Support, as defined in the 2009

MCA, truly an "offense[] that ha[s] traditionally been triable by military commission"? The answer is clearly "No." This charge does not allege a violation of the laws of war, and has not traditionally been triable by a law-of-war commission such as this.

C. Material Support is Not a Pre-existing Offense Under the Law of War

l. Material Support for Terrorism is not recognized as a violation of the law of war. "Actionable violations of international law must be of a norm that is specific, universal, and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-733 (2004) (quotation marks and citation omitted). There never has been, and is not now, universal agreement and practice among nations concerning such an offense.

m. Material Support for Terrorism has never been tried by an American law-of-war military commission. *See* David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5 (2005); Michael O. Lacey, *Military Commissions: A Historical Survey*, 41 ARMY LAWYER (2002). It is not identified as a war crime in the U.S. War Crimes Act, 18 U.S.C § 2441, or in *The Law of War Handbook*, the principal statement published by the U.S. military on the law of war. *See The Law of War Handbook* 206 – 215 (2005), International and Operational Law Department, The Judge Advocate General's School, Charlottesville, Va., available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2005.pdf. A Congressional Research Service report prepared for members of Congress concurrent with passage of the 2006 MCA concluded that "defining as a war crime the 'material support for terrorism' does not appear to be supported by historical precedent."[2] Nor does the Obama Administration believe that material support is a traditional law of war offense.[3]

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[2] Jennifer K. Elsea, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice* 12 (CRS, updated September 27, 2007), available at http://www fas.org/sgp/crs/natsec/RL33688.pdf.

[3] At the date of filing, the parties await a ruling from the Commission on D-031 – Defense Motion to Compel legal memorandum from the Department of Justice, Office of Legal Counsel, and Department of Defense, General Counsel Office on this subject. It is the defense position that these memoranda will again confirm the Executive Branch conclusion that material support is not a traditional violation of the law of war and that such findings are binding upon the government. This view was first disclosed on 7 July 2009, during testimony before the Senate Armed Services Committee when the Hon. Jeh Johnson, General Counsel, Department of Defense, stated in his written remarks that he was "speaking on behalf of the administration" and that:

> After careful study, the Administration has concluded that appellate courts may find that "material support for terrorism" – an offense that is also found in Title 18 – is not a traditional violation of the law of war. As you know, the President has made clear that military commissions are for law of war offenses. We thus believe it would be best for material support to be removed from the list of offenses triable by military commission.

This view was echoed by Mr. David Kris, Assistant Attorney General (Head of the National Security Division), U.S. Department of Justice, who stated as follows in his written remarks to the Senate Armed Services Committee:

> There are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a *significant risk* that

n. Moreover, a purported Material Support offense fails the test for a war crime recognized by the Supreme Court plurality in *Hamdan*. Those authorities instruct that only overt acts which themselves constitute war crimes, or acts substantial enough to constitute an attempt to commit a war crime, are triable by military commissions under the law of war. *Hamdan*, 126 S. Ct. at 2785. Until the passage of the MCA, there was no basis in U.S. law for the proposition that Material Support for Terrorism was a war crime.

o. The same is true under international law. Material Support for Terrorism is not mentioned in any of the treaties or statutes that define or address law of war violations. Neither the Hague Convention (IV) Respecting the Laws and Customs of War on Land, nor the Geneva Conventions, take cognizance of it. The Rome Statute of the International Criminal Court ("ICC"), which has over 120 signatory nations and is regarded as "the most comprehensive, definitive and authoritative list of war crimes," does not mention it. Robert Cryer, *International Criminal Law v. State Sovereignty: Another Round?*, 16 EUR. J. INT'L L. 979, 990 (2005); *see generally* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. Nor is the purported offense recognized or prosecuted by the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, or the Iraqi Special Tribunal. In short, there is no basis whatsoever for any contention that Material Support for Terrorism is an offense condemned by universal agreement and practice throughout the international community.[4]

p. Because Material Support for Terrorism is not an offense that has "traditionally been triable by military commissions," 10 U.S.C. § 950p, this Commission lacks jurisdiction over that charge.

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appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby reversing hard-won convictions, and leading to questions about the system's legitimacy. (emphasis added).

See AE's 35, 36.

[4] Recognition of Material Support for Terrorism as a war crime would require, in the first instance, universal agreement concerning the definition of "terrorism." There is a bewildering array of inconsistent definitions of terrorism under U.S. law alone, *see* Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of too Many Grails*, 30 J. LEGIS. 249, 255 (2004), and absolutely no consensus internationally on the meaning of the term. *See United States v. Yousef*, 327 F.3d 56, 97 (2d Cir. 2003) (noting "the failure of States to achieve anything like consensus on the definition of terrorism" and, moreover, that "United States legislation has adopted several approaches to defining terrorism, demonstrating that, even within nations, no single definition of 'terrorism' or 'terrorist act' prevails."); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 806-07 (D.C. Cir. 1984) ("the claim that a defendant violated customary principles of international law against terrorism [ ] concerns an area of international law in which there is little or no consensus.… [N]o consensus has developed on how properly to define 'terrorism' generally.") (Bork, J., concurring).

D. Trying Mr. Kamin on a Material Support Charge Violates Common Article 3

q. Common Article 3 of the Geneva Conventions also prohibits the trial of Mr. Kamin on the referred charge because it incorporates the ex post facto principle as one of the indispensable judicial guarantees that must be afforded to all defendants. The United States Supreme Court has already ruled that Common Article 3 applies and protects Mr. Kamin in any proceeding before a military commission. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2796 (2006) ("Common Article 3, then, is applicable here and . . . requires that Mr. Kamin be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.") (quoting 6 U.S.T. 3316, 3320, Art. 3, ¶ 1(d)). The MCA itself contemplates that Common Article 3 must be respected (*see* 10 U.S.C. § 948b(f), stating that a military commission established under the MCA affords all the judicial guarantees required by Common Article 3).

r. In *Hamdan*, a plurality of the Supreme Court pointed out that Common Article 3 "must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977." *Id.* at 2797.[5] Article 75(4)(c) of Protocol I states:

> [N]o one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed.

Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I), 8 June 1977, Art. 75(4)(c), available at http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument.

s. *The Law of War Handbook* also recognizes that international law, like U.S. law, prohibits ex post facto prosecutions. In defining a war crime, the following principles must be respected:

> 5. Application of the principle of *nullum crimen sine lege* requires that the law to be applied in the trial be binding on the defendant at the time the offense was committed. Application

[5] *See also* International Committee of the Red Cross, COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36 (Jean de Preux, ed., 1960) (stating that Common Article 3 "merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed."). Customary international law has been defined as "a general practice accepted as law," and it is binding on all states. *See* Statute of the International Court of Justice, Art. 38, June 26, 1945, 59 Stat. 1031, T.S. 993.

of either customary international law or applicable treaty provisions is required.

6. *Nulla poena sine lege* requires that acts that may be punished as war crimes be clearly defined such that the defendant is on notice.

The Law of War Handbook at 206. In this case, as shown above, the referred charge violates both of these principles.

t. In addition, the International Committee of the Red Cross ("ICRC") identifies the ex post facto principle as a fundamental tenet of customary international law. *See* 1 ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 371-72 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005) (mirroring the text of the provision in Article 75 of Additional Protocol I). The prohibition on ex post facto prosecution has also been codified in the statute governing the International Criminal Court ("ICC"). Rome Statute of the International Criminal Court, Arts. 22, 24, July 17, 1998, 2187 U.N.T.S. 90. Likewise, the International Covenant on Civil and Political Rights ("ICCPR") states that observation of the ex post facto principle (listed as a guarantee to all persons standing trial in Article 15) is non-derogable. International Covenant on Civil and Political Rights, Art. 4(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171. Both the American Convention on Human Rights and the European Convention on Human Rights echo the provisions of the ICCPR regarding ex post facto prosecutions. *See* American Convention on Human Rights, Arts. 9, 27, *opened for signature* Nov. 21, 1969, 1144 U.N.T.S. 123; European Convention on Human Rights, Arts. 7, 15, Nov. 4, 1950, 213 U.N.T.S. 221. These documents demonstrate the broad extent to which nations observe the ex post facto principle in their criminal justice systems.

u. Further, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") has stated that although its Statute gives it the power to try persons for certain crimes, it will only permit prosecution for conduct proscribed by customary international law at the time of commission. "The jurisdiction *ratione materiae* of the International Tribunal is circumscribed by customary international law, and the International Tribunal cannot impose criminal responsibility for acts which, prior to their being committed, did not entail such responsibility under customary international law." *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment, ¶ 78 (July 29, 2004).

v. Accordingly, the ex post facto prohibition is clearly a matter of customary international law and one of the judicial guarantees protected by Common Article 3. As such, it must be given effect here regardless of the scope of the protections afforded by the U.S. Constitution, as the Supreme Court has held that Common Article 3 must be respected in this case.[6] Because the charge against Mr. Kamin did not exist as a criminal

[6] Any contention that Common Article 3 provides no protection to Mr. Kamin because of § 948b(e) of the 2009 MCA ("No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action.") must be rejected, as Congress cannot validly strip Mr. Kamin of pre-existing rights recognized by the Supreme Court. Further,

offense under customary international law at the time of the alleged commission, it should be dismissed for lack of subject matter jurisdiction.

7. Request for Oral Argument: As it is entitled, the defense respectfully requests oral argument. *See* R.M.C. 905(h). Specifically, the defense respectfully requests it be provided the opportunity to present evidence and argument on this matter at the hearing scheduled for the week of 15-16 December 2009.

8. Witness Request: None.

9. Conference with Opposing Counsel: Pursuant to Military Commissions Rules of Court, Rule 3.3, the defense conferred with the prosecution on 1 December 2009. The prosecution opposes the requested relief.

10. Additional Information: "The Military Judge has the sole authority to determine whether or not any given matter shall be released." *See* RC 3.9.c; *see also* R.M.C. 801; Reg. ¶¶ 19-5, 19-6. The Commission should seek to strike a balance of protecting Mr. Kamin's right to a fair trial, the improper or unwarranted publicity pertaining to the case, and the public understanding of the Military Commissions. *See* Reg. ¶ 19-1. The release of pleadings and rulings is essential for the public, writ large, to be able to assess and evaluate the legitimacy of United States judicial proceedings being held on a military base overseas and in a fortified courtroom. At a minimum, providing the public the opportunity to read and evaluate the pleadings and rulings would contribute to Mr. Kamin being able to have a "public trial." *See* U.S. Constitution, Sixth Amendment. The defense hereby respectfully requests that the Military Judge authorize the Assistant Secretary of Defense for Public Affairs (or designee) to release this pleading and any and all responses, replies, and/or rulings under the same designation to the public at the earliest possible date.

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such an application of the 2009 MCA § 948b(e) (compare § 948b(g) in the 2006 MCA) would operate as an invalid Bill of Attainder and Ex Post Facto law. *See Cummings v. Missouri*, 71 U.S. 277, 320 (1866) ("deprivation of any rights, civil or political, previously enjoyed may be punishment" and constitute a bill of attainder); *Collins v. Youngblood*, 497 U.S. 37, 49 (1990) ("A law that abolishes an affirmative defense" violates the Ex Post Facto Clause); *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925) ("[Any] statute...which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*").

11. Attachments: None.

Respectf ully submitted,

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