UNITED STATES COURT OF MILITARY COMMISSION REVIEW
[Panel not yet assigned]

UNITED STATES OF AMERICA, *Appellee,* *v.* OMAR AHMED KHADR, *Appellant.*	**BRIEF ON BEHALF OF APPELLANT** CMCR Case No. _____ Tried at Guántanamo Bay, Cuba, on 9-12 August 2010, 25-31 October 2010 Before a Military Commission convened by Hon. Susan J. Crawford Presiding Military Judge COL Peter E. Brownback, USA (ret.) COL Patrick J. Parrish, USA DATE: 8 November 2013

TO THE HONORABLE, THE JUDGES OF
THE COURT OF MILITARY COMMISSION REVIEW

Samuel T. Morison
Appellate Defense Counsel
Capt Justin Swick, USAF
Assistant Appellate Defense Counsel
Office of the Chief Defense Counsel
1620 Defense Pentagon
Washington, D.C. 20301
Tel: (703) 696-9490 x181
Email: samuel.morison@osd.mil

Dennis Edney
234 Wolf Ridge Close
Edmonton, Alberta, T5T 5M6, Canada
Tel: (780) 489-0835
Email: dedney@shaw.ca
Law Society of Alberta (ID: 7997)
Civilian Defense Counsel (pro hac vice)

Counsel for Omar Ahmed Khadr

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ISSUES PRESENTED

(1) DID APPELLANT'S COMMISSION HAVE JURISDICTION OVER THE NEWLY ENACTED OFFENSES OF MATERIAL SUPPORT FOR TERRORISM, CONSPIRACY, MURDER, AND SPYING, WHICH WERE NOT CODIFIED BY STATUTE OR RECOGNIZED UNDER THE LAW OF WAR AT THE TIME OF APPELLANT'S CHARGED CONDUCT?

(2) WITH RESPECT TO THE MURDER AND SPYING CHARGES, WAS APPELLANT CHARGED WITH AND CONVICTED OF CRIMES THAT WERE NOT AUTHORIZED BY THE MCA?

(3) DOES THE GOVERNMENT'S SYSTEMATIC MISTREATMENT OF APPELLANT SUFFICIENTLY SHOCK THE CONSCIENCE TO JUSTIFY DISMISSAL OF THE CHARGES?[1]

JURISDICTIONAL STATEMENT

Appellant files this appeal as of right from the Convening Authority's final action approving the judgment and sentence rendered by Appellant's military commission. This Court has jurisdiction to review all final judgments rendered by a military commission as approved by the Convening Authority. 10 U.S.C. §§ 950c(a), 950f(c). This Court's responsibility is to ensure that the judgment as approved by the Convening Authority is correct in law and fact. *Id.* §950f(d). This Court's review is limited only to the extent that the issues raised can be waived by the accused, have, in fact, been knowingly and intelligently waived by the accused, and have been properly waived under the jurisdictional requirements set forth by Congress. *Id.* §950c(b).

The instant grounds of appeal raise only questions of law for which this Court entertains *de novo* review. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008); *United States v. Khadr*, 717 F.Supp.2d 1215, 1220 (C.M.C.R. 2007) ("Regarding all matters of law, we

[1] Appellant also contends that the military commission lacked subject-matter jurisdiction over him because he was a minor at the time of the charged conduct. Pursuant to Rules 15(b) and 20(b) of this Court's Rules of Practice, a Motion to Attach a Statement by Appellant in support of this contention has been filed concurrently herewith.

review the military judge's findings and conclusions *de novo*."). Khadr did not submit a waiver of appellate review pursuant to §950c(b). Moreover, these issues go to the commissions' subject-matter jurisdiction and are therefore not subject to waiver in any event. *Gonzalez v. Thaler*, 132 S.Ct. 641, 648 (2012).

STATEMENT OF THE CASE

In July 2005, Omar Khadr was designated as a person eligible for trial by a military commission established pursuant to the President's Military Order of November 13, 2001. Appendix at 1 (referenced herein as "A__"). In November 2005, the Appointing Authority referred four charges for trial by military commission: conspiracy, murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy. A2-7. These proceedings were halted after the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) ("*Hamdan I*"), which held that the existing military commission scheme violated the Uniform Code of Military Justice ("UCMJ") and Common Article 3 of the Geneva Conventions.

In October 2006, the Military Commissions Act of 2006, Pub. L. No. 109-366 ("MCA") was signed into law. In February 2007, the government resuscitated the case, based on the same underlying facts, by swearing new charges against Khadr under the MCA: murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material for terrorism, and spying in violation of the law of war. A8-14. On April 24, 2007, the Convening Authority referred the restyled charges for trial by military commission. After the passage of the 2009 Act, the government moved to amend the charge sheet to conform it to the new statute. In particular, the government sought to amend the spying charge to add the new element that the

offense was committed "in violation of the law of war." A17. The military judge granted the government's motion. A19.

The trial commenced in August 2010. On October 13, 2010, Khadr entered into a pretrial agreement with the Convening Authority. A20-26. On October 25, 2010, the military commission accepted Khadr's guilty pleas. A351. On October 31, 2010, the panel of officers comprising the military commission sentenced Khadr to 40 years' confinement. A352. The Convening Authority issued his action on May 26, 2011, and pursuant to the pretrial agreement, approved "only so much of the sentence as provides for eight years [sic] confinement." A27. On September 29, 2012, Khadr was repatriated to Canada, where he is serving the remainder of his custodial sentence.

STATEMENT OF THE FACTS

A. The Capture of a Child Soldier (July 2002)

On the morning of July 27, 2002, a group of approximately fifty-five heavily outfitted U.S. and Afghan soldiers departed from a forward operating base near Khost, Afghanistan, in a convoy of pick-up trucks and up-armored Humvees. Their objective was to capture or kill a suspected al-Qaeda bomb maker in the village of Ayub Kheyl. A321-24, 336, 342. An agent from the Central Intelligence Agency, not a member of the armed forces, participated in the operation by "provid[ing] overwatch and rear security to the [soldiers]." A29, 337-40, 346-48. Although they did not find their intended target, villagers directed them to a mud brick compound where a small group of suspected militants were holed up. When villagers informed these men that U.S. forces were headed in their direction, they sent away the women and most of the children and took up a fighting position in the compound. A37-38.

U.S. forces surrounded the compound. Two Afghan soldiers approached and were shot and killed. A37. A volley of grenades was thrown from within the compound which triggered a fierce siege that lasted several hours. The parties exchanged thousands of rounds of ammunition and dozens of grenades. A37, 325-29. The on-scene commander, then-MAJ Steven Watt, called in close air support, which included multiple strikes of cannon and rocket fire by fixed-wing aircraft and attack helicopters. "The pounding to the compound was relentless, with many sections of exterior wall collapsing. A fire started inside the compound in one of the buildings." A44. The air assault included two bombing runs by F-18 Hornets, each of which dropped 500-pound bombs that caused "significant destruction to the compound." A330, 381-85.

The shelling was so intense that U.S. forces "believed … that there was no way that anyone had survived," although "the compound was treated as if hostile forces were still on site." A44, 369. MAJ Watt sent a final assault element, including SFC Christopher Speer, into the compound "to clear the remaining pieces of building and the rubble." A44. As they entered the compound, some of the soldiers threw grenades into the compound to counter any remaining threat. Subsequently, SFC Speer was mortally wounded by an exploding grenade.

While most of the children had been evacuated prior to the battle, Khadr remained inside with the adult fighters. Stunned by the concussive force of the bombing, Khadr had sustained multiple wounds to the head and body, including blinding shrapnel wounds to the eyes, during the initial shelling of the compound. A38, 119. While sitting on the ground next to some brush and debris, with his back to the action, he is alleged to have tossed a grenade over his shoulder, clearing an eight-foot interior wall behind him, which sailed as much as 80 feet in the direction of the advancing soldiers. This grenade is alleged to have killed SFC Speer. A38, 55, 58, 343.

Contrary to initial accounts, Khadr was not the sole survivor of the bombardment. An adult combatant was also alive when the final assault element entered the compound. Sitting in the same alcove where Khadr was found, this man fired his AK-47 at the assault element until the team leader, identified as OC-1, charged toward his direction and killed him. OC-1 also shot Khadr twice in the back, which left two gaping exit wounds in Khadr's chest. A38, 58, 377-78. Khadr was nearly executed as he lay grievously wounded in the rubble of the compound. According to a diary entry made by then-LT John Martinko, a private "had his sights on [Khadr] point blank" while standing guard over him. A62. LT Martinko states that he "was about to tap [the private] on his back and tell him to kill [Khadr]," when an unidentified Special Forces soldier "stopped us and told us not to." *Id*. Khadr was then airlifted to a military field hospital in Bagram.

When the dust settled, one soldier believed that Khadr was responsible for SFC Speer's death and this rumor quickly circulated in Bagram. However, MAJ Watt's after-action memorandum, prepared the same day as the battle, states that the combatant who threw the fatal grenade was himself "killed" during the final assault. He also noted that there were three enemy combatants killed during the operation and one who was wounded in action "with serious injuries," a clear reference to Khadr. A48. After being interviewed by investigating agents in 2004, MAJ Watt "updated" the report, without noting that he was doing so, to implicate Khadr, altering the document to say that the combatant who threw the fatal grenade had been "engaged," rather than "killed," by U.S. forces. A63-64, 333-34.

B. Omar's Journey to Afghanistan (1986-2002)

Omar Khadr did not end up in the compound in Ayub Kheyl on the strength of his own convictions. A Canadian citizen, he was born in Toronto on September 19, 1986, and raised in an

austere religious environment of madrassahs and Islamic schools. His late father, Ahmad Sa'id Khadr, is reputed to have been a financier for al-Qaeda and an associate of Usama bin Laden and Ayman al-Zawahiri. A33. In 1996, when Omar was ten years old, his father moved the family to Afghanistan, where he took his son on regular trips throughout the region. As part of these childhood excursions, his father exposed him to senior al-Qaeda officials, training camps and guesthouses, including annual visits to bin Laden's compound in Jalalabad. A33-34. Of those visits Khadr has said that "he did not know what his father talked about with [these] people, as he was outside playing with other kids." A65; *see also* A67 ("While traveling with his father, Khadr met … [bin Laden] and played with his children.").

An Army psychologist who evaluated Khadr at Bagram observed that his adolescent "beliefs, motivations, and actions [were] the result of the strong influence of his father, older brother, and exposure to al-Qa'ida. … [He] was raised to be obligatory to his father's wishes. Through the natural course of his development (especially within a[n] Arab/Islamic family), [he] internalized a belief system that was strongly projected and validated by his father and mother, whom he loved, respected and obeyed." A70. Similarly, his appointed mental health experts noted that Khadr's childhood was marked by his "strict upbringing in [a] Muslim family with intense emotional closeness and high expectations of compliance and obedience. He noted that there was no option for speaking up against his father." A74. The elder Khadr was not a man to be trifled with, once telling Omar's older brother that "[i]f you ever betray[] Islam … I will be the one to kill you." A78. In the words of one of his interrogators, Khadr seemed "very immature" for his age, "like a young man that never really had a chance to grow up." A302.

In June 2002, Khadr's father gave him to a known Islamic militant, the late Abu Laith al-Libi. Abu Laith was the leader of a militia organization fighting in eastern Afghanistan, the

Libyan Islamic Fighting Group (LIFG), which became formally affiliated with al-Qaeda in 2007. A35. Abu Laith then gave Khadr to the LIFG bomb-making cell in Ayub Kheyl, where they were conducting operations against American and coalition forces in Khost Province. They used Khadr as a translator between the cell's members and local al-Qaeda militants. An al-Qaeda member also showed Khadr how to use various weapons. A35.

On one occasion, the LIFG directed Khadr to stand by the side of a road in the vicinity of the Khost airport and look for military traffic. A13-14. Khadr was ordered to record his observations of any U.S. military vehicles, including "the number and types of vehicles[,] … the estimated distance between the vehicles, the approximate speed of the convoy, and the time and direction of the U.S. convoys' movements." A37. He observed "a caravan of 6 United States military vehicles with uniformed soldiers" driving on the road "during daylight hours" in a westerly direction toward Khost. A79. Khadr conveyed this information to his handlers, who considered it when determining where to plant improvised explosive devices ("IEDs") to target U.S. forces. A37.

The LIFG also put Khadr to work helping them in the construction of remote-controlled IEDs, which were planted on a road that was known to have been travelled by U.S. military vehicles but was "away from villages." The IEDs, which were targeted at members of the armed forces, rather than civilians, were placed in the days leading up to the battle at the compound in Ayub Kheyl. After being captured, Khadr disclosed their location and they were safely removed before injuring any U.S. service members. A35-36.

C. Omar's Mistreatment in Custody (2002-2005)

No eyewitness saw Khadr fire a weapon or otherwise engage in hostilities against U.S. forces, either at Ayub Kheyl or anywhere else. The case against him was based largely on his own admissions. But these statements were obtained through a series of coercive, uncounseled, and abusive interrogations that began as soon as he regained consciousness approximately one week after the firefight. A93. Sedated and lying wounded on a stretcher, his interrogators noted that he appeared frightened, weak and disoriented from pain and fatigue. A84, 93, 300. In this condition, because of the rumors that had circulated after the firefight, Khadr was *told* by his captors that he had killed a U.S. soldier with a grenade. A87, 89, 92, 94, 106, 119.

The government then systematically manipulated an injured and vulnerable minor to adopt the preconceived story. Throughout his detention, Khadr was relentlessly questioned by intelligence officers and law enforcement agents at Bagram and Guántanamo on hundreds of occasions. A123-29. During these sessions, he was never advised that he was the target of an ongoing criminal investigation, much less that he had a right against compelled self-incrimination. He was also held incommunicado, without the advice of counsel, access to consular officials, family contacts or a guardian. Defense counsel was not detailed to the case until November 2005 and Khadr did not actually meet with defense counsel until several weeks later. A130-32.

The conditions of his detention were highly abusive, both psychologically and physically. The atmosphere at the Bagram detention facility, a former Soviet aircraft hangar that was retrofitted with wire pens and wooden isolation cells, was calculated to induce compliance by instilling fear in the detainees. According to a comprehensive report published by the non-partisan Constitution Project, "[c]onditions and treatment … at Bagram were, by accounts from detainees

and soldiers alike, brutal."[2] Khadr's principal interrogator was SGT Joshua Claus, who questioned him 20-25 times over a three-month period for up to six hours at a time, often while he was sedated and sleep deprived. A303, 314-16, 318. Prosecutors granted immunity to Claus so that he could testify against Khadr after he was convicted of beating another detainee to death. A133.[3]

For the first several weeks of these interrogations, Khadr could not walk and was taken to the interrogation room while shackled to a stretcher. A94. Despite Khadr's age and the seriousness of his injuries, Claus's preferred method of interrogation was the so-called "fear-up harsh" technique. A148-53, 317. This practice "consisted of yelling and screaming and throwing things around the room … in order to scare the detainee." A155. Claus testified that he "got in [Khadr's] face" and "screamed" and "cussed" at him, because he knew that Khadr "didn't like it." A304. Claus admitted that he used these crude interrogation methods "more often with … Khadr" than with other detainees. A317.

The government used a variety of tactics to deepen Khadr's sense of isolation, vulnerability, and dependence on his captors. For example, in his cell at Bagram, he was able to

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[2] The Report of The Constitution Project's Task Force on Detainee Treatment 63 (Apr. 16, 2013), *available at* http://s3.documentcloud.org/documents/684407/constitution-project-report-on-detainee-treatment.pdf.

[3] Claus was a central figure in the interrogation of an Afghan taxi driver named Dilawar, whose death in U.S. custody in December 2002 was ruled a homicide by military investigators. The Army's investigative file independently corroborates that prisoners at Bagram during this period were regularly subjected to precisely the sort of harsh treatment Khadr has described, such as being hooded, shackled by the wrists to the wire ceiling, threatened with dogs and sexual violence, sleep deprived, and physically assaulted. A136-47. In September 2005, Claus was convicted of assault and maltreatment for his role in beating Dilawar to death during his interrogation. A134-35.

hear the screams of both guards and detainees coming from the interrogation rooms, which was deliberately arranged "to further intimidate detainees." A96, 155, 298-99, 301. He remembers seeing an older man with bandages on his legs resulting from abuse. An interrogator later told him that this man had died from his injuries, which graphically illustrated to Khadr that his death in U.S. custody was a realistic possibility. A96. On several occasions, he was placed in an interrogation room with a hood over his head to disorient him; barking dogs were then brought into the room to terrify him. The fear was exacerbated by the fact that the hood "was wrapped tightly around [his] neck, nearly chocking [him] and making it hard to breathe." A95, 155.[4] He was also subjected to a sleep deprivation technique known as the "frequent flyer program," which was designed "to create a feeling of hopelessness and despair in the detainee" in order to facilitate the extraction of information. A175-77, 360. He attempted to keep track of the passage of time by keeping notes on a calendar, but guards confiscated this material in May 2005. A100.

Worse yet, he was repeatedly threatened with rape. At Bagram, Claus attempted to exploit Khadr's immaturity by telling him a fictitious story about an Afghan boy, "a poor little kid … away from home, kind of isolated," who was transferred to an American prison because "he decided he wanted to lie and didn't want to be straight with us." A307-08. But the prison guards "could [not] be everywhere at once," Claus continued, and the boy found himself alone "in the shower" where he was gang raped by "four big black guys" who hated Muslims. A308. Khadr

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[4] According to the Army's investigation of the Dilawar incident, this appears to have been a standard maneuver for Claus. A146 ("[S]ergeant [Yonushonis] arrived at the interrogation room to find … Claus standing behind the detainee, twisting up the back of the hood that covered the prisoner's head. 'I had the impression that he was actually holding the detainee upright by pulling on the hood,' [Yonushonis] said. 'I was furious at this point because I had seen [Claus] tighten the hood of another detainee the week before.'").

was also threatened with rendition to Egypt, Syria, Israel and similar countries where he was told that he would be raped. A95, 301.

Similar threats of rape were made after Khadr was transferred to Guántanamo in October 2002, where he was refused age-appropriate treatment and housed with the adult detainee population. This was in disregard of the unanimous advice of the medical staff, who noted that "[e]xposure of pediatric detainees to adult detainees will have a high likelihood of producing physical, emotional, and psychological damage to the pediatric detainee." A157. When he arrived at the base, a military officer told him "Welcome to Israel," which was an unmistakable reference to the previous threats of rendition. A96. In 2003, he was interrogated by a man who claimed to be an Afghani official. He told Khadr that a new detention center was being built in Bagram for non-cooperative detainees. He then said, "In Afghanistan, they like small boys." Before leaving the room, the interrogator pulled out a picture of Khadr and wrote on it: "This detainee must be transferred to Bagram." A99. In another interrogation he was told that the Egyptians would send "Soldier Number 9" to question him, who they said would rape him. A99.

Khadr was also subjected to serious physical mistreatment. As noted above, he was initially unable to walk due to his injuries, but was taken to the interrogation room with his hands and feet shackled to a stretcher. A93-94. Pain medication was administered only at night, apparently to induce cooperation. A94. When Claus did not like the answers he was given, he forced Khadr to sit up on the stretcher, which was agonizing and reduced him to tears. A93-95, 312. His captors shined bright lights directly into his eyes to cause him pain. A95, 155. Before the gunshot wounds to his back, shoulder and chest had healed, his hands were chained above his head to the door frame or ceiling in his cell, where he was forced to stand for hours at a time. A95-96. This practice was commonly used as a "punishment" for detainees deemed to be "non-

compliant" and to facilitate sleep deprivation. A154, 168, 313. A former Army medic testified that he once found Khadr chained to the door frame of a five-foot-square wire cage, with his arms suspended above his shoulders, hooded and weeping. A287-97. Khadr's gunshot wounds were infected, swollen and seeping blood nearly a year after the battle. A179-85. The infection in Khadr's shoulder has still not healed and will require surgery to replace his shoulder joint.

In both Bagram and Guántanamo, Khadr was forced to endure lengthy periods of sensory deprivation and isolation. A96-99. He was also regularly short-shackled in a variety of painful stress positions, sometimes for hours at a time. A98-100. In March 2003, when he was sixteen years old, he was removed from his cell in the middle of the night and brought to an interrogation room. Military guards shackled his wrists and ankles together with handcuffs, tied the cuffs to a bolt in the floor, and then forced Khadr into various stress positions. They then reverse hog-tied him by lying him on his stomach with his hands and feet cuffed together behind his back. Left in this position for hours, he eventually urinated on himself. When this was discovered, the guards poured pine solvent on the floor and used Khadr as a human mop, dragging him on his stomach back and forth through the mixture of urine and pine oil. He was returned to his cell and not allowed a change of clothing for two days. A100.

Khadr quickly learned to "tell [his interrogators] whatever [he] thought they wanted to hear" in an effort "to keep them from causing [him] such pain." A94. After repeated interrogations, he "knew what answers made interrogators happy and would always tailor [his] answers based on what [he] thought would keep [him] from being harmed." A97. Unsurprisingly, this process produced unreliable results. When Khadr was captured, for example, the rumor quickly spread at Bagram that he had killed an Army medic. A167, 286. In September 2002, during an interrogation by Claus and an FBI agent, Khadr purportedly confessed that he "armed

and threw" the grenade that killed SFC Speer. A187. The next day the FBI agent asked Khadr "what the American soldier was doing just before he threw the grenade." In response, Khadr said that Speer "was treating one of [the LIFG fighters] for his injuries, and was not engaging or threatening him in any way." A188.

Khadr's description contradicts the undisputed record. Not only had he suffered a concussion and been blinded by shrapnel, but Khadr could not have seen Speer. As noted above, the fatal grenade was allegedly thrown from an alley inside the compound over an eight-foot interior wall. A386. Moreover, the rumors circulating at Bagram were false. Although Speer had been cross-trained as a medic, he was a Special Forces operative acting in a combatant role when he entered the rubble of the Ayub Kheyl compound. A341, 344-45. There is no evidence that Speer provided first aid to anyone after he entered the compound with the final assault element.

Khadr naïvely clung to the expectation that his home country would work to secure his release. In February 2003, those hopes were dashed when he was interviewed over the course of four days by Canadian intelligence officials. This was his first opportunity to speak to someone he thought would help him. After asking them to "promise to protect him from the Americans," Khadr recanted his prior admissions, stating that he had confessed only because he was afraid of further mistreatment by his captors. A189. But the Canadian officials reinforced that he was subject to the arbitrary control of the United States by telling him that Canada was powerless to do anything for him. A98. When he realized that the Canadian government had no intention of facilitating his release, Khadr became despondent, put his head in his hands, and began sobbing for his mother. A191, 387-88.

D. "Get ready for a miserable life"

While confined in Guántanamo, Khadr was never given a respite from the psychological trauma caused by his exposure to the horrors of war and the abusive conditions of his confinement. The medical literature confirms that the profound uncertainty, unpredictability and lack of control inherent in indefinite detention can itself cause serious psychological and physical harms. These harmful effects may include severe and chronic anxiety and dread, pathological levels of stress that damage the immune and cardiovascular systems, depression and suicidal ideation, and post-traumatic stress disorder. Physicians for Human Rights, *Punishment Before Justice: Indefinite Detention in the U.S.* 9-17 (2011), A223-32. These harms are magnified where, as here, the detainee is already suffering from the psychological sequela of prior trauma and abuse. A235-40.

The risk of harm is especially acute for children, who are developmentally less capable of coping with the harsh and isolating conditions of armed conflict and detention in a maximum security prison. The data "increasingly indicates that significant numbers of children who have been recruited [as combatants] may face mental health issues such as post-traumatic stress disorder, depression, anxiety, and related disorders." Michael Wessells, *Supporting the Mental Health and Psychosocial Well-Being of Former Child Soldiers*, 48 J. Am. Acad. Child Adolesc. Psychiatry 587, 588 (2009), A262. The major risk factors are being the victim or witness of violent acts, exposure to heavy shelling or combat, and forced separation from parents. Emmy Werner, *Children and War: Risk, Resilience, and Recovery*, 24 Dev. & Psychopathology 553, 554-55 (2012), A267-68. Moreover, adolescents in detention and correctional facilities are about ten times more likely to suffer from psychosis than the general adolescent population. Seena Fazel, *et al*., *Mental Disorders among Adolescents in Juvenile Detention and Correctional*

Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys, 48 J. Am. Acad. Child Adolesc. Psychiatry 1010, 1016 (2009), A278.

Accordingly, "threats of indefinite detention," in combination with the other harsh treatment described above, are sufficient to create "torturous" conditions of confinement. *Vance v. Rumsfeld*, 694 F.Supp.2d 957, 967 (N.D. Ill. 2010), *rev'd on other grounds*, 701 F.3d 193 (7th Cir. 2012); *see also* J. Levin, *Intervention in Detention: Psychological, Ethical and Professional Aspects*, 74 S. Afr. Med. J. 460 (1988), A282 (concluding that indefinite detention is a form of "psychological torture without physical violence."). As early as 2003, the ICRC took the unusual step of publicly criticizing the U.S. practice of holding detainees indefinitely without allowing them to know when, or if, they ever would be released because it was causing serious mental health problems. A199-210. Yet, the official policy of the United States is that it has the right to detain any enemy combatant indefinitely for the duration of the "global war on terror," potentially for the rest of his life, even if he is acquitted at a military commission. A353-58.

There is no question that Khadr's mental health suffered as a result of the abusive conditions to which he was subjected. His own interrogators worried about his deteriorating condition, noting that he cried frequently, appeared suicidal and depressed, and was in apparent need of psychological assistance. A184, 189, 192-93. In April 2005, Khadr completed a Proxy Psychiatric Assessment administered by his counsel under the supervision of a forensic psychiatrist. The results showed that Khadr satisfied the "full criteria for a diagnosis of Post-Traumatic Stress Disorder," including intense feelings of fear and hopelessness, intrusive thoughts and memories of the firefight, nightmares, hypervigilance and suicidal ideation. A194-95. This diagnosis was confirmed by a child psychologist, who opined that "the isolation and interrogation practices" to which Khadr was subjected were "likely to have exacerbated his

[medical] condition," made him "particularly susceptible to mental coercion and false confession," and threatened to "impair [his] ability … to assist his attorneys in his defense." A198, 375.

To compound matters, Khadr's interrogators specifically exploited his anxiety about being indefinitely detained in Guántanamo and the possibility that he would never see his family again. A308-11. Claus told him that the only way to avoid that fate was to "tell me the truth now so we can work on maybe getting [you] sent home," otherwise "[you] might end up in prison for a long period of time." A305-06. An interrogator at Guántanamo told Khadr "[y]our life is in my hands" and threatened to "throw [his] case in a safe," suggesting that he would spend the rest of his life imprisoned on the island. A99. In a different interrogation, Khadr was told that his older brother, who had cooperated with authorities, was no longer in Guántanamo, but that he should "get ready for a miserable life." A100, 177.

SUMMARY OF ARGUMENT

The government believed that Khadr was responsible for the death of a U.S. soldier and that he helped plant IEDs in Afghanistan. This presented the government with several options. It could have pursued domestic criminal charges against Khadr in an Article III court, as it has against hundreds of terrorism suspects in the post-9/11 period, assuming it could have convinced a federal judge that Khadr should be tried as an adult. It also could have turned Khadr over to Afghan or Canadian law enforcement authorities for prosecution of any potential violation of their domestic penal codes. Instead, the government elected to keep Khadr in military custody for nearly a decade, to brutalize him, and then to try him as an adult in an untested military commission system.

As with all choices, the government's choice of its preferred forum had consequences. The decision to prosecute Khadr in a war crimes tribunal brought with it jurisdictional limitations that the government subsequently transgressed. The jurisdictional boundaries of such commissions are clear. Where, as here, the alleged conduct occurred before the passage of the 2006 MCA, the only source from which a commission could draw subject-matter jurisdiction was Article 21, UCMJ. With the exception of the statutory offenses of aiding the enemy (Article 104) and spying (Article 106), the only offenses Article 21 makes triable by military commission are violations of the international law of war. No offense codified in the MCA may be prosecuted retroactively unless it passes that test. *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) ("*Hamdan II*").

The government concedes that Khadr pled guilty to crimes that were neither preexisting statutory offenses nor violations of the international law of war. As such, they fell outside the jurisdiction conferred by Article 21, the military judge lacked authority to accept his guilty pleas, and *Hamdan II* compels this Court to vacate Khadr's conviction.

Moreover, retroactivity concerns aside, no reasonable interpretation of the MCA supports the government's contention that Congress intended to criminalize mere participation in hostilities as a war crime. Instead, by requiring that murder and spying offenses under the MCA must be done "in violation of the law of war," Congress expressly incorporated the international legal norms that govern the conduct of hostilities into the definition of these crimes. The government concedes that it has no evidence Khadr violated international law in any way. The commission therefore erred when he found Khadr guilty of offenses that did not satisfy each essential element under the law passed by Congress.

Finally, the Supreme Court has held that the Due Process Clause of the Fifth Amendment places an outer limit on the government's right to invoke the judicial process in a criminal

prosecution. Where the methods employed by government agents are so outrageous that they "shock the conscience" and violate the "decencies of civilized conduct," the government forfeits the moral authority to prosecute the target of its abuse. If the government's choice to detain a gravely injured fifteen-year-old child as an adult in a maximum security prison and to subject him to a systematic regime of physical and psychological abuse does not shock the conscience, then nothing does. This Court should therefore vacate his conviction in the interests of justice.

ERRORS AND ARGUMENT

I. APPELLANT'S CONVICTIONS MUST BE VACATED BECAUSE THE MILITARY COMMISSION LACKED SUBJECT-MATTER JURISDICTION OVER THE CHARGED CONDUCT.

A. Controlling precedent requires that the offenses charged in a military commission be violations of the international law of war.

The validity of Khadr's convictions is controlled by the D.C. Circuit's decision in *Hamdan II*. The question before the court was whether Congress, consistent with the Constitution, conferred subject-matter jurisdiction on a law-of-war military commission over the offense now codified at 10 U.S.C. § 950t(25), the MCA's version of providing material support for terrorism. Answering that question in the negative, the Court made three holdings that clarify the legal principles governing commission proceedings.

First, in order to avoid *ex post facto* concerns with the prosecution of pre-enactment conduct, the Court held that, properly construed, the MCA does "not authorize retroactive prosecution of crimes that were not prohibited as war crimes triable by military commission under U.S. law at the time the conduct occurred." 696 F.3d at 1241.

Second, the Court found that prior to the enactment of the 2006 MCA, the only statute from which military commissions could draw subject-matter jurisdiction was the Uniform Code

of Military Justice. 10 U.S.C. § 801, *et seq*. With the exception of aiding the enemy, *id*. §904, and spying, *id*. §906, the only viable offenses were those that could be incorporated through Article 21's identification of "offenses … that by the law of war may be tried by military commissions." *Id*. §821; *Hamdan II*, 696 F.3d at 1241, 1248.

To ascertain what offenses were, in fact, triable "by the law of war," the Court flatly rejected the government's reliance on "a few isolated precedents from the Civil War era to prop up its assertion that material support for terrorism was a pre-existing war crime" under a putative "U.S. common law of war." *Hamdan II*, 696 F.3d at 1252. To the contrary, the "law of war" incorporated by Article 21 does not include any species of domestic law, but rather "has long been understood to mean the international law of war." *Id*. at 1245 (citing *Hamdan I*, 548 U.S. at 603, 610 (plurality); *id*. at 641 (Kennedy, J. concurring); *Ex parte Quirin*, 317 U.S. 1, 27-30, 35-36 (1942)); *see also id*. at 1248-49 (citing additional sources).

Thus, "the statutory constraint here imposed by [Article 21] is the international law of war." *Hamdan II*, 696 F.3d at 1252. Article 21 incorporates by reference the entire corpus of the *jus in bello* – the evolving body of conventional and customary international law derived from State practice and *opinio juris* that governs the conduct of hostilities – subject to express constitutional or statutory limitations. *Hamdan I*, 548 U.S. at 602 (plurality) ("Congress, through Article 21 of the UCMJ, has 'incorporated by reference' the common law of war, which may render triable by military commission certain offenses not defined by statute."). Any purported law-of-war offense codified in the MCA may not be prosecuted retroactively unless it was already a violation of customary international law at the time of the charged conduct. Otherwise, the offense is a new crime that falls outside the scope of Article 21's jurisdictional grant.

Third, in order to ensure "the fair notice that is a foundation of the rule of law in the United States," the Court insisted that customary law-of-war violations "be based on norms firmly grounded in international law." *Hamdan II*, 696 F.3d at 1250 n. 10 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-38 (2004); *Hamdan I*, 548 U.S. at 602-03 & n.34, 605 (plurality)). The "high standard of clarity" contemplated by the Supreme Court in this context is satisfied only where the alleged violation is "by universal agreement and practice, both in this country and internationally, recognized as an offense against the law of war." *Hamdan I*, 548 U.S. at 603 (plurality); *see also Sosa*, 542 U.S. at 732 ("Actionable violations of international law must be of a norm that is specific, universal and obligatory.").

B. Material support for terrorism is not a war crime triable by military commission.

Under the foregoing standard, the D.C. Circuit found no credible support for the assertion that material support for terrorism has ever been a war crime under international law. The government belatedly conceded this point. *Hamdan II*, 696 F.3d at 1250-51. As a result, the Court could not affirm the accused's conviction without applying the MCA retroactively to punish conduct that was not a crime at the time it occurred. The Court refused to do this, since doing so would have raised "substantial doubts" under the *Ex Post Facto* Clause. *Id*. at 1247 (citing *Collins v. Youngblood*, 497 U.S. 37, 42 (1990); *Calder v. Bull*, 3 Dall. 386, 390-92 (1798)). The Court then reached the inevitable conclusion that the accused's conviction was void for lack of subject-matter jurisdiction. *Id*. at 1253.

It is undisputed that the conduct underlying Charge IV is alleged to have occurred in 2002, more than four years before the passage of the MCA. Because the offense alleged here is indistinguishable from the offense vacated in *Hamdan II*, it was likewise outside the subject-

matter jurisdiction of the commission. Consequently, the military judge lacked authority to accept Khadr's guilty plea on this count and this Court is required to vacate Khadr's conviction on Charge IV.

C. Conspiracy is not a war crime triable by military commission.

The government has equally conceded that conspiracy, like material support for terrorism, has not "attained international recognition at this time as an offense under customary international law." *Al Bahlul v. United States*, Gov't Br., 2012 WL 1743629, at 50, 57 (D.C. Cir. May 16, 2012). In view of that acknowledgment, the government conceded that "the reasoning of *Hamdan II* eliminates military commission jurisdiction over conspiracy or material support charges brought in all of the military commission cases to date that have resulted in convictions." *Al Bahlul v. United States*, Gov't En Banc Petition, at 14 (D.C. Cir. Mar. 5, 2013); *see also United States v. Nashiri*, Gov't Resp. to Defense Renewed Motion to Dismiss the Charge of Conspiracy, AE 048, at 2, 6 (Mil. Comm. Jan. 25, 2013); *United States v. Mohammad*, Gov't Resp. to Defense Motion to Dismiss for Lack of Jurisdiction, AE 107A, at 2, 7 (Mil. Comm. Jan. 16, 2013).

Based on the concession that *Hamdan II* is controlling precedent, the D.C. Circuit summarily vacated the defendant's conspiracy conviction. *Al Bahlul v. United States*, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013) (per curiam), *en banc rev. granted and panel order vacated*, Order, *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Apr. 23, 2013) (en banc) (Dkt. No. 1432126); *see also United States v. Ali*, 718 F.3d 929, 941-42 (D.C. Cir. 2013) (quoting *Hamdan II*, 696 F.3d at 1250 n.10) (reversing defendant's conviction for conspiracy to commit piracy, because conspiracy is not "firmly grounded in international law.").

To be sure, *Bahlul* is currently pending before the D.C. Circuit on *en banc* review. Nevertheless, *Hamdan II* is final, the mandate issued, and the time period to petition the Supreme Court for a writ of *certiorari* has expired. It is the law of the D.C. Circuit and is binding on this Court, unless and until it is overruled by the *en banc* court or the Supreme Court. *Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005); *Ayuda v. Thornburgh*, 919 F.2d 153, 154 (D.C. Cir. 1990) (Henderson, J., concurring).

It is undisputed that the conduct underlying Charge III ended with Khadr's capture by U.S. forces in July 2002. Like material support for terrorism, the government has conceded that reasoning of *Hamdan II* compels the conclusion that this offense was also outside the subject-matter jurisdiction of the commission at the time of the charged conduct. The military judge therefore lacked authority to accept Khadr's guilty plea on this count and this Court is required to vacate Khadr's conviction on Charge III.

D. As charged by the government and construed by the commission, murder in violation of the law of war is not a war crime triable by military commission.

As with material support and conspiracy, the government makes no pretense that Khadr committed an internationally recognized war crime merely by participating in a conventional battle during which he threw a hand grenade at a soldier or by utilizing command-controlled land mines against a lawful military target. Nor could it. U.S. service members routinely use these types of weapons in combat, including in the very battle that is the subject of this appeal.

The government conceded at trial that "the evidence will *not* establish the accused used either a means or method of warfare prohibited by international humanitarian law." *United States v. Khadr*, Gov't Supp. Br., AE 295-C, at 4 (Mil. Comm. July 23, 2010) (original emphasis); *see also United States v. Khadr*, Gov't Request for Findings Instruction, AE 295, at 4 (Mil. Comm.

Nov. 14, 2008) ("The Government will not advance any facts that support a conviction that the murder, attempted murder and conspiracy to commit murder in violation of the law of war was committed by killing any 'protected persons' or employed 'unlawful means.'"). The government stipulated that if the commission required proof of an actual war crime to satisfy "the element of 'in violation of the law of war,'" then it would be unable to secure a conviction and that the commission should dismiss the charges in order to give the government the opportunity to file an interlocutory appeal. *Id*. at 1-2.

Instead of international law, the government staked its case on the now discredited theory that a military commission has jurisdiction over any hostile act by an unprivileged belligerent under the so-called "U.S. common law of war." *Id*. at 4; AE 295 at 1. Citing primarily martial law commission precedents from the Civil War, the government insisted that "it is legally sufficient to satisfy the element of 'in violation of the law of war' that the accused engaged in a hostile act while an unprivileged belligerent," which it characterized as a violation of "U.S. domestic law." AE 295-C at 4; AE 295 at 5-8.

The military judge accepted the government's arguments with respect to the necessary elements of §950t(15), murder in violation of the law of war. A319-20. During the plea colloquy, the military judge defined the phrase "in violation of the law of war" to mean "a person was acting as a combatant but did not meet the requirements for being a lawful combatant. … A person who is an unlawful combatant and engages in combat activities is in violation of the law of war." A349-50. The stipulation of fact merely affirms that erroneous legal conclusion. A39. The only facts that even arguably support this assertion are that Khadr was "not a member of the armed forces" and "did not wear a uniform." A31-32, 36.

In the best light for the government, the evidence shows that Khadr participated in hostilities against the United States in Afghanistan in 2002 without meeting the criteria for the combatants' privilege. But even assuming he lacked combatant immunity and therefore could have been charged with a domestic crime in an appropriate forum, the premise of the government's theory of liability was squarely rejected by the D.C. Circuit.

Under *Hamdan II*, it is necessary that each offense be a war crime under international humanitarian law at the time it was committed. The government admits that the murder charges here do not allege such a violation. Charges I, II and III fail to state an offense cognizable by military commission, because they could not have been charged under the common law jurisdiction conferred by Article 21. *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) (if something is not a crime, a charge of attempting or conspiring to do the same thing "would be equally untenable."). Accordingly, Khadr's murder-related convictions must be vacated.

E. As charged by the government and construed by the commission, the MCA's new version of spying is not a war crime triable by military commission.

In the 2009 MCA, Congress gave military commissions jurisdiction over two distinct spying offenses – what can be called "Traditional Spying" and "Spying in Violation of the Law of War." Traditional Spying is codified at Article 106, UCMJ, 10 U.S.C. § 906, and is expressly made triable under the MCA. *Id.* §948d. It is the modern codification of a long line of Congressional enactments which have proscribed spying, in one form or another, since 1776 and has been expressly triable by military commission since 1863. *See* David A. Anderson, *Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of its Mandatory Death Penalty*, 127 Mil. L. Rev. 1, 4-10 (1990) (tracing the statutory evolution of spying in the federal code). Among other things, Traditional Spying requires the accused to be apprehended in the act

of spying in a particular place within the control or jurisdiction of the United States that is closely associated with military operations.

By contrast, Spying in Violation of the Law of War is an entirely new offense created by the MCA. The elements of Spying in Violation of the Law of War differ in significant ways from Traditional Spying. It requires a different specific intent than Traditional Spying, such that the accused must have the intent to harm the United States or its allies. It is far broader in its scope than Traditional Spying, insofar as it does not require the accused to be captured in the act, as Khadr was not. Nor does it require an individual to collect information from an area within the territory or control of the United States, as Khadr was not until after being sent to Guántanamo Bay.

Perhaps most importantly, Spying in Violation of the Law of War attaches an additional element, namely that the accused acted "in violation of the law of war." While this element would seem to suggest that this offense falls within the broad customary international law jurisdiction conferred by Article 21, as with the murder charges, the government insisted this element merely means that the accused failed to qualify as a privileged belligerent. The commission agreed with this interpretation and instructed Khadr that the "in violation of the law of war" element required only his admission that he was not a privileged combatant. As a result, Khadr pled guilty to nothing more than being an unprivileged civilian who passed publicly-available information to an adversary.

Regardless of the label attached to this offense, it did not exist before 2009. The reasoning of *Hamdan II* compels the conclusion that Spying in Violation of the Law of War was also outside the subject-matter jurisdiction of the military commission at the time of the charged

conduct. The military judge therefore lacked authority to accept Khadr's guilty plea on this count, and this Court is required to vacate his conviction on Charge V.

II. THE MILITARY COMMISSION FUNDAMENTALLY MISCONSTRUED THE "IN VIOLATION OF THE LAW OF WAR" ELEMENT COMMON TO THE MURDER AND SPYING CHARGES IN THIS CASE.

A. The commission's erroneous interpretation of "in violation of the law of war" ignores the settled meaning of the phrase.

Even assuming *arguendo* that Congress has the authority to promulgate domestic "war crimes" and divert them to trial by military commission, nothing in the text of the MCA supports the government's contention that Congress intended to proscribe mere participation in hostilities by an unprivileged belligerent. It is axiomatic that when interpreting a statute, this Court must "give the words contained in the text their ordinary meaning and interpret the statute in a manner that does not render words or phrases superfluous, unless no other reasonable interpretation can be made." *Khadr*, 717 F.Supp.2d at 1226 (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (if a statute's language is plain and clear, "the sole function of the courts is to enforce it according to its terms.")).

As reiterated most recently by the D.C. Circuit, there is no doubt about what the phrase "law of war" means. *Hamdan II*, 696 F.3d at 1248-49. The Supreme Court has long since defined the law of war as a "branch of international law," *Quirin*, 317 U.S. at 29, a phrase that comes directly from the Lieber Code's reference to that "branch of the law of nature and nations which is called the law and usages of war on land." Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 § 40 (Apr. 24, 1863). The Department of Defense continues to define the law of war as, "That part of international law that regulates the

conduct of armed hostilities." DoD Directive 2311.01E, DoD Law of War Program ¶ 3.1 (May 9, 2006) (certified current as of Feb. 22, 2011). As historically used in the context of adjudication, up through and including the government's own briefing in the Guántanamo *habeas* litigation, the "laws of war include a series of prohibitions and obligations, which have developed over time and have periodically been codified in treaties such as the Geneva Conventions or become customary international law." *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442, *et seq*., Respondents Memorandum Regarding Detention Authority Relative to Detainees held at Guantanamo Bay, at 1 (D.D.C. March 13, 2010).

Unsurprisingly, in construing the "in violation of the law of war" element under the 2006 MCA, three different military judges unanimously rejected the status-based definition that the commission accepted here. Instead, to satisfy the "in violation of the law of war" element, these judges required the government to prove that the accused either killed a protected person or used a means, weapon or technique considered illegal under the laws of war. *United States v. Hamdan*, Panel Member Instructions, AE 321, at 4 (Mil. Comm. Aug. 4, 2008); *United States v. Jawad*, Ruling on Defense Motion to Dismiss, Lack of Subject Matter Jurisdiction, D-007 (Mil. Comm. Sept. 24, 2008); *United States v. Bahlul*, Panel Member Instructions, AE 71, at 9-10 (Mil. Comm. Oct. 31, 2008). These decisions were brought to Congress's attention during its consideration of the 2009 Act. Proposals for Reform of the Military Commission System: Hearing before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the House Comm. on the Judiciary, 111th Cong. 96, 104-05 (July 30, 2009) (statement of David J. R. Frakt). And Congress incorporated this interpretation into the 2009 Act by re-enacting the identical language. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or

judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

The requirement that an offense be committed "in violation of the law of war" was an element of the murder and spying charges in this case. For the reasons set forth below, the commission misinformed Khadr about the true nature of these offenses and Khadr consequently pled guilty to acts that were not crimes under the law Congress passed. *Bousley v. United States,* 523 U.S. 614, 618-19 (1998). Indeed, the Supreme Court has long held that "the first and most universally recognized requirement of due process" is that an accused be provided "real notice of the true nature of the charge against him." *Smith v. O'Grady*, 312 U.S. 329, 334 (1941); *see also Bousley*, 523 U.S. at 618 ("[A] plea does not qualify as intelligent unless a criminal defendant first receives real notice of the true nature of the charges against him.") (internal quotation omitted). Where there is "an incomplete understanding of the charge [the] plea cannot stand as an intelligent admission of guilt." *Henderson v. Morgan*, 426 U.S. 637, 644 n.13 (1976).

It follows that "a guilty plea is not knowingly and voluntarily made when the defendant has been misinformed as to a crucial aspect of his case." *United States v. Fisher*, 711 F.3d 460, 462 (4th Cir. 2013); *see also* 10 U.S.C. § 949i(a) (rendering a plea invalid "if it appears that the accused has entered the plea of guilty through lack of understanding of its meaning and effect."). The military judge therefore erred when he found Khadr guilty of an offense that did not satisfy the essential elements set forth in the MCA. *United States v. Spinner*, 152 F.3d 950, 956 (D.C. Cir. 1998) (conviction is invalid where "the government failed to present any evidence on an essential element of a crime for which [the defendant] was convicted."); *United States v. Castro*, 704 F.3d 125, 140 (3d Cir. 2013) ("[O]ur legal system does not convict people of being bad. If they are to be convicted, it is for specific crimes, and the government here undertook the burden

of proving that [the defendant] had committed each element of the specific crime set forth in [the statute]. It failed to do that.").

B. Appellant did not violate the law of war which renders his murder-related convictions invalid.

Interpreting "in violation of the law of war" to proscribe unprivileged belligerency renders numerous provisions of the MCA either superfluous or nonsensical. Section 950t(15) provides that "Any person subject to this chapter who intentionally kills one or more persons, including privileged belligerents, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct." To sustain a conviction under this statute, the government must prove, *inter alia*, that (1) Khadr's belligerent acts were unlawful because he did not enjoy combatant immunity or any other relevant privilege, such as self-defense, and (2) he acted in violation of the law of war, either by killing a protected person or using a method or means considered illegal under international humanitarian law.

The first element is satisfied by the fact that Khadr, as an unprivileged belligerent, is subject to this chapter. 10 U.S.C. § 948c. The personal jurisdiction of the MCA extends to non-U.S. citizens, like Khadr, who have "engaged in hostilities against the United States" without satisfying the conditions for prisoner of war status under the Geneva Conventions. By definition, this makes him an "unprivileged enemy belligerent." *Id*. §948a(7)(A). For purposes of this appeal, Khadr does not dispute this characterization of his combatant status.

The fatal flaw in this case is the complete absence of *any* evidence to sustain the second element, to wit: that he acted in violation of the law of war. As explained above, Khadr was charged with and pled guilty to nothing more than being an unprivileged belligerent whose use of a lawful weapon in the course of a conventional battle resulted in the death of a soldier. This

has never been a statutory offense, much less an internationally recognized war crime. Instead, it originated with Military Commission Instruction No. 2 (MCI No. 2), which enumerated twenty-eight offenses that were purportedly triable by military commission. 32 C.F.R. § 11.6 (2003). The regulation divided the universe of applicable offenses into three distinct classes. Subsection A listed eighteen traditional law-of-war violations under the heading of "war crimes." *Id*. §11.6(a). Subsection B listed eight additional crimes under the heading "other offenses triable by military commission." *Id*. §11.6(b). Subsection C listed six additional "forms of liability," such as conspiracy, solicitation, and attempt. *Id*. §11.6(c).

Tellingly, Murder by an Unprivileged Belligerent was included in Subsection B. *Id*. §11.6(b)(3)(i). The government did not pretend that this was a war crime; its elements contained no requirement that the accused's conduct violate the law of war. To the contrary, a comment clarified that "[u]nlike the crimes of willful killing or attacking civilians," which were listed as war crimes in Subsection A, "[e]ven an attack on a soldier would be a crime if the attacker did not enjoy 'belligerent privilege' or 'combatant immunity.'" *Id*. §11.6(b)(3)(ii)(B).

After this system was invalidated by the Supreme Court, Congress did not simply codify MCI No. 2, but rather made a considered decision to revise the constituent elements of a number of offenses. In particular, Congress rejected the Bush Administration's proposal to codify Murder by an Unprivileged Belligerent and, in its place, proscribed Murder in Violation of the Law of War. This modification significantly narrowed the scope of the offense by requiring the government to prove an additional essential element. Whereas MCI No. 2 merely required proof that an accused's conduct was wrongful, in the sense of being without privilege or excuse, the MCA also requires an accused's conduct to "be gauged against the current state of international law." *Sosa*, 542 U.S. at 733; *see also Hamdan II*, 696 F.3d at 1249 n.8 (international norms are

judicially enforceable when they are "explicitly incorporated" by Congress into a statute "by means of [an] express cross-reference to the 'law of war.'").

The obvious interpretive error in the government's status-based theory is that it would read the element of "in violation of the law of war" out of the statute altogether. If the government were correct, the crime would be complete once "[a]ny person subject to this chapter," who by definition is an unprivileged belligerent, "intentionally kills one or more persons." It would follow that any accused who participates in hostilities against U.S. forces would be automatically guilty, at the very least, of attempted murder. That result might be appropriate in a domestic law enforcement context, where criminal suspects are not permitted to use lethal force except in self-defense. But it cannot be a correct interpretation of the MCA, because the additional element that limits war criminality to homicides that also violate "the law of war" would be sheer surplusage. As Judge Henley concluded in *Jawad*, "Congress must have intended each [of these] provision[s] to have independent meaning. To accept otherwise would render that part of the statute requiring the murder be in violation of the law of war meaningless." *Jawad*, D-007, at ¶ 3.

Conflating the elements of an offense is especially unjustified where, as here, it would have the effect of expanding the scope of liability to reach *every* member of a hostile force and render them war criminals. While "[a]n interpretation that needlessly renders some words superfluous is suspect" to begin with, it is a "particularly bad construction to ignore [language that narrows the scope of] a criminal statute, where the rule of lenity applies." *Crandon v. United States*, 494 U.S. 152, 171 (1990) (Scalia, J., concurring).

The government's status-based theory is also inconsistent with the rest of the statute. The MCA provides that soldiers are a lawful object of attack because it defines "military objective" to include "combatants." 10 U.S.C. § 950p(a)(1). There is no exception for U.S. or coalition forces.

Instead, the statute categorically prohibits intentional attacks against individuals *other than* active combatant adversaries, who are deemed "protected persons" as defined in the Geneva Conventions. *Id*. §950p(a)(2) ("protected person" means "civilians not taking an active part in hostilities, military personnel placed out of combat by sickness, wounds, or detention, and military medical or religious personnel."); *see also United States v. Calley*, 48 C.M.R. 19, 27 (C.M.A. 1973) ("The killing of resisting or fleeing enemy forces is generally recognized as a justifiable act of war. … The law attempts to protect those persons not actually engaged in warfare, however; and limits the circumstances under which their lives may be taken."). The intentional killing of a protected person is the war crime of murder. 10 U.S.C. § 950t(1).[5]

Moreover, under the MCA culpability for murdering a protected person, attacking civilian persons or objects, or inflicting cruel or inhuman treatment – all *prima facie* violations of the law of war – does not attach so long as the alleged "death, damage or injury" was the result of "collateral damage" or "incident to a lawful attack." 10 U.S.C. § 950p(b). Attacking or otherwise endangering the safe navigation of a vessel or aircraft is also permissible if the object of the attack is "a legitimate military objective." *Id*. §950t(23). And an accused can be convicted of seizing private property for personal use only if the property is appropriated "in the absence of military necessity." *Id*. §950t(5). These provisions would make no sense if the statute was intended to

[5] The War Crimes Act, which codifies U.S. obligations under the Geneva Conventions, also limits the war crime of murder to intentionally killing protected persons, namely civilian non-combatants and persons *hors de combat*. 18 U.S.C. § 2441(d)(1)(D). Murder of protected persons was specified as a war crime in the Charter of the International Military Tribunal at Nuremberg, and is included in the statutes of the International Criminal Court, the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Special Court for Sierra Leone. 1 Int'l Comm. of Red Cross, *Customary International Humanitarian Law* at 311 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005) ("ICRC Study"). None of these instruments proscribes civilian participation in hostilities.

categorically prohibit an accused from directly participating in hostilities under any circumstances, as the government argued at trial. In that case, an accused would be incapable of inflicting "collateral damage," much less engaging in a "lawful attack" against "a legitimate military objective," because the *only* persons "subject to this chapter" are unprivileged belligerents. *Id*. §948c.

While Congress did not prohibit attacks against military objectives per se, it subjected them to various qualifications that restrict the method or means that may be used. For example, the MCA prohibits the use of certain types of weapons (e.g., poison gas), even when directed at a combatant adversary, because there is a consensus in the international community that such weapons are "of a nature to cause superfluous injury or unnecessary suffering." ICRC Study at 237; 10 U.S.C. § 950t(8) (prohibiting the use of poison or other similar weapons "as a method of warfare"). Additionally, the MCA prohibits resort to certain kinds of tactics (e.g., perfidy), because they involve taking advantage of an adversary's good faith reliance on the law of war by feigning protected status, which undermines the integrity of the principle of distinction. ICRC Study at 203-26; 10 U.S.C. § 950t(17) (prohibiting the use of treacherous or perfidious means to kill, injure or capture another person).

This reading of the MCA is entirely consistent with international law, because the law of war neither authorizes nor prohibits civilians from taking direct part in hostilities. As this Court has recognized, the regulation of such conduct is reserved for the domestic criminal justice system of the aggrieved State. *Khadr*, 717 F.Supp.2d at 1222 ("Unlawful combatants remain civilians and may properly be … treated as criminals under the domestic law of the capturing nation for any and all unlawful combatant actions."). The punitive consequence of unlawful combatancy is thus exposure to domestic criminal prosecution, but it is not a war crime unless the accused's conduct

also violates the law of war. *HPCR Manual on International Law Applicable to Air and Missile Warfare*, commentary accompanying Rule 111(b), at 246 (2009) ("*AMW Manual*") ("'Unprivileged belligerents' do not enjoy combatant privilege … [but] 'unprivileged belligerency' is not in itself a war crime."); *Tallinn Manual on the International Law Applicable to Cyber Warfare*, commentary accompanying Rule 26, at 88 (Michael N. Schmitt, ed., 2013) ("The International Group of Experts agreed that unprivileged belligerency as such is not a war crime.").

No reasonable interpretation of §950t(15) would permit its application to conduct that Congress expressly excluded from the reach of the statute and described as lawful in the very same section of the Act. If Congress had intended to extend jurisdiction to any murder committed by an unprivileged belligerent, it could easily have done so. Instead, Congress created a specialized war crimes tribunal with subject-matter jurisdiction over a limited class of offenses grounded in international law. To hold otherwise would inexplicably transform the military commission into something akin to the Superior Court for Guantánamo Bay, an alternative domestic forum with general jurisdiction over simple homicide. "The short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979).

In sum, the government concedes that there is no evidence that the murder-related charges establish an actual violation of the law of war. Instead, at the government's insistence, the military judge erroneously advised Khadr that the "in violation of the law of war" element was satisfied by his failure to qualify for the combatant's privilege. At the plea colloquy, Khadr did not admit to any facts that supported any other theory of liability and both counsel and the commission incorrectly assumed that his status sufficiently proved the element. Consequently,

Khadr's guilty plea was premised on a fundamental misunderstanding of the nature of the offense; indeed, it constituted a plea to a non-existent crime. His conviction, therefore, must be vacated.

C. Appellant did not violate the law of war which renders his spying conviction invalid.

Similarly, Khadr was erroneously instructed that he could be found guilty of Spying in Violation of the Law of War merely by being an unprivileged combatant who passed publicly-available information to a belligerent adversary. He admitted to nothing more. Yet as discussed above, "in violation of the law of war" does not and cannot be synonymous with unprivileged belligerency.

Indeed, such an interpretation would be even more anomalous in the case of spying because it would ascribe a significance to status that is absent in the law of war. International law allows for the punishment of *any* person who is apprehended in the act of spying, regardless of status.[6] Jurisdiction over spies in U.S. military law has similarly extended to "[a]ny person," regardless of status. 10 U.S.C. § 906. This necessarily includes unprivileged belligerents because Congress made Article 106 triable under the MCA. The law of war, therefore, both as a matter of domestic and international law recognizes that all persons, belligerents and civilians, privileged and unprivileged, can be spies.

It would be incongruous for Congress to have added a status element to an offense that has never had it, and even more so to have used the phrase "in violation of the law of war" to stand for that element. Instead, as with Murder in Violation of the Law of War, incorporation of the

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[6] *See* Hague Convention No. IV Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, arts. 29-31, Oct. 18, 1907, 36 Stat. 2277, 2303-04, T.S. No. 539.

common law with respect to spying was Congress's way of requiring that the accused's conduct actually be "in violation of the law of war," *i.e.*, violative of the established legal definition of the offense. With respect to that offense, Khadr's conviction cannot be upheld.

It is axiomatic that the military offense of spying must occur within a particular geographic area within the control of the adverse party. The gravamen of spying involves a furtive attempt to obtain information of military value by entering into a physical space over which the targeted State exercises a legitimate right of exclusion. *See* ICRC Study, Rule 107, at 390 ("[T]his rule applies only to a spy captured in the act whilst in enemy-controlled territory."); Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 209 (2004) ("A spy must be physically located in an area controlled by the enemy."). This conception of spying is consistent with historic American practice. *Trial of Spies by Military Tribunals*, 31 Op. Att'y Gen. 356, 363 (1918) (quoting 2 William Winthrop, *Military Law and Precedents* 766-67 (2d ed. 1920)) ("A spy is a person who … contrives to enter within the lines of an army for the purpose of obtaining material information and communicating it to the enemy."); Henry Halleck, *International Law* 406 (1861) ("Spies are persons who … insinuate themselves among the enemy, in order to discover his state of affairs").

By contrast, the enemy alien who collects information without violating the territorial integrity of the adverse party has never been understood to be a spy. For example, a party's use of military and civilian aircraft to gather intelligence does not constitute spying, unless the aircraft penetrates the airspace of, or the airspace controlled by, the adverse party. *AMW Manual* 262.

However broadly one construes this territorial requirement, there is no evidence that Khadr conducted surveillance of U.S. troop movements "in or about" any location that could reasonably be described as "within the control or jurisdiction of the armed forces." In the first

place, Afghanistan is obviously not sovereign U.S. territory. Nor did the United States' armed forces purport to occupy Afghanistan, as they did in Iraq in 2003, and therefore had no occasion to establish a provisional military government. The United States may have been an invading force when Operation Enduring Freedom was launched in October 2001, but that phase of the conflict ended no later than December 2001, when an interim Afghan government was officially established pursuant to the Bonn Agreement.[7] Thereafter, the U.S. military was present in the country with the permission of the Afghan government as part of a U.N.-sponsored coalition force. The United States exercised no legal authority over the civilian population generally.

Moreover, there is no evidence that Khadr attempted to gain unauthorized access to any military facility, such as a forward operating base, over which the United States exercised *de facto* control. Rather, in June 2002, Khadr had been lawfully present in Afghanistan for five years. A34. In that capacity, he is charged with recording his observations of a single U.S. military convoy driving on a public road near Khost. He then conveyed his observations to his co-belligerents, "who considered the information in determining where to target U.S. forces." A37.

This Court may take judicial notice of the fact that Khost is a city in eastern Afghanistan with approximately 160,000 residents, whereas the surrounding province has a population of about 640,000.[8] Nothing in the record suggests that the U.S. attempted to control access to the particular stretch of road at issue or take any other precautions to conceal the movement of the

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[7] Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, S/2001/1154 (5 Dec. 2001).

[8] *See, e.g.*, USAID Afghanistan Clean Energy Project, *Khost Province*: *Renewable Energy Resource Initial Assessment & Recommendations* (Jan. 2010), *available at* pdf.usaid.gov/pdf_docs/PNADY028.pdf.

convoy from public view. To the contrary, the convoy drove through a heavily-populated urban area on a public highway in broad daylight. Indeed, according to MAJ Watt's after action report, the mission that day was to seek out those who had been using IEDs to attack U.S. "presence patrols that have been occurring in and around … Khowst Airfield." A40. By design, a "presence patrol" is intended to be seen by the local populace "as a tangible representation of the U.S. military force, projecting an image that furthers the accomplishment of the commander's intent." Dep't of the Army, *The Infantry Rifle Platoon and Squad*, FM 3-21.8, para. 9-136 (2007).

It is well-established that even in occupied territory, a "resident who observes military movements while walking along the street or who takes photographs from his residence would not be engaged in espionage; whereas the resident who uses a forged pass to enter a military base or who, if lawfully on the base, illegally brings a camera with him, would be engaging in espionage." 1 Int'l Comm. of Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 569 (Yzes Sandoz, *et al*., eds., 1987). In other words, absent evidence that the information was obtained in a prohibited manner, a person who "merely reports what is seen or heard through agents to the enemy… may not be charged under [Article 106] with being a spy." *Manual for Courts-Martial, United States*, Part IV, para. 30(c)(6)(b) (2002 ed.); *see also* Winthrop at 768 ("It need scarcely be added that the mere observing of the enemy, with a view to gain intelligence of his movements, does not constitute [spying].").

The application of these principles to this case makes it readily apparent that Khadr could only be considered a spy to the extent that the definitional elements of Spying in Violation of the Law of War – *i.e.*, using subterfuge to obtain information that is closely-held by the government – are cast aside. Khadr did not use deceptive means to gain unauthorized access to a restricted area

in order to obtain non-public information about future troop movements. Instead, he did nothing more than record his observations of a patrol that drove past him on a public road, while standing in a place he was lawfully entitled to be. The mere fact that he did not announce his affiliation with the enemy does not make him a spy, because the United States took no precautions to shield the movement of the patrol from public scrutiny, even though it knew Khost was a hotbed of insurgent activity. To the contrary, the government intended the local population to see the patrol. The government therefore cannot complain that the information Khadr conveyed to his co-belligerents harmed any cognizable interest of the United States.

III. APPELLANT'S CONVICTION SHOULD BE DISMISSED FOR OUTRAGEOUS GOVERNMENT CONDUCT.

The Supreme Court has recognized that situations may arise in which "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell*, 411 U.S. 423, 431-32 (1973). The constitutional imperative underlying this doctrine is to prevent public officials entrusted with upholding the laws of the United States, however well-intentioned, "from abusing [their] power, or employing it as an instrument of oppression." *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992) (quotation omitted).

This occurs where the government's conduct "violat[es] that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." *Russell*, 411 U.S. at 432 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (government action offends due process where it is so egregious that it "shocks the conscience"

and violates the "decencies of civilized conduct"); *Rochin v. California*, 342 U.S. 165, 172 (1952) (reversing conviction where government agents employed investigative "methods too close to the rack and the screw to permit of constitutional differentiation.").

The D.C. Circuit has held that "the broad due process check" applies in the narrow class of cases in which the methods used "have been brutal, employing against the defendant physical or psychological coercion that 'shocks the conscience.'" *United States v. Kelley*, 707 F.2d 1460, 1476 n.13 (D.C. Cir. 1983) (rejecting defendant's due process claim because government agents did not inflict "pain or physical or psychological coercion"); *United States v. Jenrette*, 744 F.2d 817, 824 (D.C. Cir. 1984) (quoting *Irvine v. California*, 347 U.S. 128, 133 (1954)) ("[D]ue process guarantees are violated only where the challenged conduct includes 'coercion, violence, or brutality to the person.'"); *Harbury v. Deutch*, 233 F.3d 596, 602 (D.C. Cir. 2000), *rev'd on other grounds sub nom*, *Christopher v. Harbury*, 536 U.S. 403 (2002) ("No one doubts that under Supreme Court precedent, interrogation by torture like that alleged by [the appellant] shocks the conscience."). When the government subjects a defendant to "torture, brutality, and similar outrageous conduct" prior to bringing him before a court, that court loses jurisdiction to try him. *United States v. Rezaq*, 134 F.3d 1121, 1130 (D.C. Cir. 1998).

Although this is necessarily a case-specific inquiry, whether the government's conduct sufficiently "shocks the conscience" to justify dismissal of the charges is a question of law this Court reviews *de novo*. *United States v. Berkhimer*, 72 M.J. 676, 680 (A.F. Ct. Crim. App. 2013) (citing *United States v. Lewis*, 69 M.J. 379, 383 (C.A.A.F. 2011)).

There is no doubt that the harshly punitive conditions of Khadr's treatment at Bagram and Guántanamo Bay were calculated to inflict "pain or physical or psychological coercion." *See, e.g.*, *Vance*, 694 F.Supp.2d at 967 (threats of violence and actual violence, sleep deprivation, extremes

of temperature and sound, light manipulation, threats of indefinite detention, yelling, prolonged solitary confinement, and incommunicado detention created "tortuous" conditions of confinement); *Mohammed v. Obama,* 704 F.Supp.2d 1, 26-27 (D.D.C. 2009) (petitioner, who was regularly beaten, held in stress positions for days at a time, kept in darkness, subjected to loud music, and forced to inculpate himself during interrogations, was physically and psychologically tortured).

Perhaps most importantly, this Court is confronted with a case in which pain and coercion were exacted upon a 15-year-old child suffering from life-threatening injuries received on the battlefield. At an age when his biggest challenge should have been keeping his high school grades up, Khadr was relinquished by his father to the custody of a dangerous Islamic militant, who ruthlessly exploited him in the service of a conflict over which Khadr exercised no control whatsoever.

Despite the fact that he was the victim of a heinous form of human trafficking that is itself a war crime, the government never – at any time – afforded Khadr the protections that both U.S. and international law deem to be necessary for a civilized criminal justice system. Given his age, his medical condition, and his physical and psychological immaturity, the government's decision to treat Khadr as an adult war criminal, rather than a trafficked child soldier, resulted in unjust and unreasonably punitive conditions of confinement. Even considering the seriousness of his charges, the punishment inflicted on Khadr since his capture would be atypical for adults in the American justice system, let alone juveniles.

Khadr was held incommunicado for more than two years, with no meaningful contact with anyone concerned with his best interests. For more than three years, he was relentlessly interrogated on hundreds of occasions by intelligence and law enforcement agents. Determined to

extract a confession that could be used in evidence against him, Khadr's interrogators never warned him that he was the target of a criminal investigation. When he was not kept in isolation, Khadr was housed with adult terrorism suspects in direct contravention of DoD's own policy with respect to juvenile detainees.

Khadr was also physically and psychologically abused by his captors. His pain medication was manipulated to coincide with interrogation sessions. During the initial weeks of his detention, he was taken to the interrogation room shackled to a stretcher because he was too weak to walk. While his gunshot wounds were still fresh, he was forced to stand with his hands chained above his shoulders and a hood over his head. He was short-shackled into various stress positions to a bolt in the floor; sometimes left for hours without being allowed to use the bathroom, he was forced to urinate on himself. He was terrorized by barking dogs while he sat helplessly; his head covered by a bag tied tightly around his neck, making it hard for him to breathe. He was repeatedly told he was going to be raped. He was subjected to "light pushing," bright lights shoved into his eyes until he could not see. He endured long periods of solitary confinement, sometimes in very cold temperatures. He was sleep deprived in order to make him more compliant during interrogation sessions. He was threatened with indefinite detention and told that might never see his family again. His injuries never properly healed, leaving him with permanent physical disabilities.

These are the type of sordid tactics that have been condemned by the United States as human rights abuses when practiced by other countries. *See* U.S. Dept. of State, Bureau of Democracy, Human Rights and Labor, Country Reports on Human Rights, *available at* http://www.state.gov/j/drl/rls/hrrpt/.

Khadr's mistreatment is all the more egregious because the Supreme Court has held that "children are constitutionally different from adults" for criminal justice purposes. *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012). The Court reasoned that "juveniles have diminished culpability and greater prospects for reform," and "'are more vulnerable ... to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings." *Id*. (quoting *Roper v. Simmons*, 543 U.S., 551, 569 (2005)). This is especially true with respect to children caught in the vortex of armed conflict, who are "uniquely vulnerable to military recruitment because of their emotional and physical immaturity, are easily manipulated, and can be drawn into violence that they are too young to resist or understand." Department of Defense Appropriations Act of 1999, Pub. Law 105-262 § 8128(a)(3) (1998).

For these reasons, the penological justification of the juvenile justice system in this country is rehabilitation, rather than retribution, deterrence or incapacitation. *Graham v. Florida*, 130 S.Ct. 2011, 2028-30 (2010). Juvenile cases therefore impose on the government a special obligation to address the inadequacies of the child's upbringing and provide an opportunity for the child to be reintegrated as a productive member of society. *See* The Child Soldiers Prevention Act of 2008, Pub. L. 110-457, Title IV, Sec. 403(3) (2008) ("[T]he United States Government should expand ongoing services to rehabilitate recovered child soldiers and to reintegrate such children back into their respective communities.").

In the face of this record, the government's systematic and calculated mistreatment of Khadr over the course of a decade should and does shock even the most calloused conscience. If this does not constitute outrageous government conduct, then the words have lost their meaning. The government may well have been justified in viewing Khadr as a potential intelligence asset,

but in its misguided zeal to punish him for the death of a soldier, it has forfeited the right to prosecute him. This is the rare case that falls squarely within the principle recognized in *Russell*. This Court should therefore dismiss the charges against Khadr in the interests of justice.

CONCLUSION

For the reasons stated above, the judgment should be reversed and Appellant's convictions and sentence vacated.

Dated: November 8, 2013

Respectfully submitted,

/s/ Samuel T. Morison
Samuel T. Morison
Appellate Defense Counsel
Capt Justin Swick, USAF
Assistant Appellate Defense Counsel
Office of the Chief Defense Counsel
1620 Defense Pentagon
Washington, D.C. 20301
Tel: (703) 696-9490 x181
Email: samuel.morison@osd.mil

Dennis Edney
234 Wolf Ridge Close
Edmonton, Alberta, T5T 5M6, Canada
Tel: (780) 489-0835
Email: dedney@shaw.ca
Law Society of Alberta (ID: 7997)
Civilian Defense Counsel (pro hac vice)

Counsel for Omar Ahmed Khadr

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1. This brief complies with the type-volume limitation of Rule 14(i) because it contains 13,849 words.

2. This brief complies with the typeface and type style requirements of Rule 14(e) because it has been prepared in a monospaced typeface using Microsoft Word Version 2010 with 12 characters per inch and Time New Roman font.

Dated: November 8, 2013

/s/ Justin Swick
Capt Justin Swick, USAF
Assistant Appellate Defense Counsel
Office of the Chief Defense Counsel
1620 Defense Pentagon
Washington, D.C. 20301
Tel: (703) 696-9490 x125
justin.swick@osd.mil

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to this Court, BG Mark S. Martins, USA, and CAPT Edward S. White, JAGC, USN, on this 8th day of November, 2013.

/s/ Justin Swick
Capt Justin Swick, USAF
Assistant Appellate Defense Counsel