ALLIED PAPERS

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
GHASSAN ABDULLAH AL SHARBI

ALSO KNOWN AS:

ABDULLAH AL MUSLIM
ABU MUSLIM

NO. 050005

VOLUME _II__ OF _IV__ TOTAL VOLUMES

FEDERAL COURT LITIGATION-FILED BY AL SHARBI'S COUNSEL
CASE NO. 05-CV-02348-EGS
AT U.S. DISTRICT COURT, DISTRICT OF COLUMBIA
(WASHINGTON D.C.)
(NO REDACTIONS OF COURT'S PUBLIC RECORDS)
(AVAILABLE AT: HTTP://WWW.DCD.USCOURTS.GOV/DISTRICT-COURT.HTML)

United States v. Ghassan Abdullah al Sharbi, NO. 050005

INDEX OF VOLUMES

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and *United States v. Castleman*, 10 M.J. 750, 751 (AFCMR 1981) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

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HABEAS, STAYED, TYPE-G

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:05-cv-02348-EGS

AL SHARBI v. BUSH et al
Assigned to: Judge Emmet G. Sullivan
Related Case: 1:04-cv-01519-JR
Cause: 28:2241 Petition for Writ of Habeas Corpus (federa

Date Filed: 12/08/2005
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: U.S. Government Defendant

Petitioner

GHASSAN ABDULLAH AL SHARBI
by his father and next friend, Abdullah Al Sharbi

represented by **Robert D. Rachlin**
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V.

Respondent

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ATTORNEY TO BE NOTICED

Respondent

GORDON R. ENGLAND
Secretary of the United States Navy

represented by **Terry Marcus Henry**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Respondent

JOHN D. ALTENBURG, JR.
Appointing Authority for Military Commissions, Department of Defense

represented by **Terry Marcus Henry**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Respondent

JAY HOOD
Brigadier General, Commander, Joint Task Force, Guantanamo Bay, Cuba

represented by **Terry Marcus Henry**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Respondent

MICHAEL BUMGARNER
Colonel, Commander, Joint Detention Group, Joint Task, Guantanamo Bay, Cuba

represented by **Terry Marcus Henry**
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
12/08/2005	1	PETITION for Writ of Habeas Corpus (with attachments) (Filing fee $ 5.) filed by GHASSAN ABDULLAH AL SHARBI.(lc,) (Entered: 12/12/2005)
12/08/2005	2	NOTICE OF RELATED CASE by GHASSAN ABDULLAH AL SHARBI. Case related to Case No. 04-1519. (lc,) (Entered: 12/12/2005)
12/08/2005		SUMMONS Not Issued as to JAY HOOD, MICHAEL BUMGARNER,

		GEORGE W. BUSH, DONALD RUMSFELD, GORDON R. ENGLAND, JOHN D. ALTENBURG, JR (lc,) (Entered: 12/12/2005)
12/13/2005	3	ENTERED IN ERROR.....ERRATA *Amended to show that petition is filed by next friend* by GHASSAN ABDULLAH AL SHARBI. (Rachlin, Robert) Modified on 12/14/2005 (lc,). (Entered: 12/13/2005)
12/13/2005	4	AMENDED PETITION for Writ of Habeas Corpus filed by GHASSAN ABDULLAH AL SHARBI.(lc,) Modified on 12/14/2005 (lc,). (Entered: 12/14/2005)
12/20/2005		Case reassigned to Judge Emmet G. Sullivan. Judge James Robertson no longer assigned to the case. (td,) (Entered: 12/27/2005)
01/04/2006	5	NOTIFICATION OF SUPPLEMENTAL AUTHORITY by respondents GEORGE WALKER BUSH, and DONALD RUMSFELD, et al. (Attachments: # 1 Exhibit)(jeb,) (Entered: 01/04/2006)
01/05/2006	6	NOTICE of Appearance by Terry Marcus Henry on behalf of JAY HOOD, MICHAEL BUMGARNER, GEORGE W. BUSH, DONALD RUMSFELD, GORDON R. ENGLAND, JOHN D. ALTENBURG, JR (Henry, Terry) (Entered: 01/05/2006)
03/17/2006		MINUTE ORDER. This case is, *sua sponte* , STAYED pending the final resolution of *Al Odah, Khaled A.F. v. USA* , Civil No. 05-5064, in the United States Court of Appeals for the District of Columbia Circuit. The Clerk of the Court is directed to remove the case from the active calendar of the Court. The removal of this case from the Court's active calendar should not discourage the filing of appropriate pleadings. The parties are directed to keep this Court apprised of any developments in *Al Odah, Khaled A.F. v. USA.* Signed by Judge Emmet G. Sullivan on March 17, 2006. (lcegs2) (Entered: 03/17/2006)
05/08/2006	7	Emergency MOTION for Preliminary Injunction *Petitioner Ghassan Abdullah al-Sharbi's Emergency Motion to Enjoin Military Commission Proceedings Against him at Least Until Entry of the Decision in Hamdan v. Rumsfeld (U.S. Supreme Court, Docket No. 05-184)* by GHASSAN ABDULLAH AL SHARBI. (Attachments: # 1 Exhibit A - Opinion in Hicks# 2 Exhibit B - Order in Al Odah# 3 Exhibit C - Order in Al Qosi# 4 Exhibit D - Military Commission Charges against Petitioner# 5 Exhibit E - Military Commission Trial Calendar# 6 Exhibit F - Military Commission Order No. 1# 7 Exhibit G - Military Commission Protective Order No. 1# 8 Exhibit H - Military Commission Protective Order No. 2# 9 Exhibit I - Military Commission Protective Order No. 3)(Rachlin, Robert) (Entered: 05/08/2006)
05/08/2006	8	MINUTE ORDER. Defendants are hereby ordered to respond to petitioner's 7 Emergency Motion to Enjoin Military Commission

		Proceedings by no later than 12:00 PM on May 9, 2006. Petitioner's reply is due no later than 12:00 PM on May 10, 2006. Further, a motions hearing is scheduled for May 11, 2006, at 10:00 AM in Courtroom 24A of the William B. Bryant Annex. Signed by Judge Emmet G. Sullivan on May 8, 2006. (lcegs2) (Entered: 05/08/2006)
05/09/2006		Set Deadlines/Hearings: Responses due by 5/9/2006 Replies due by 5/10/2006. Motion Hearing set for 5/11/2006 10:00 AM in Courtroom 24A before Judge Emmet G. Sullivan. (clv,) (Entered: 05/09/2006)
05/09/2006		Set/Reset Hearings: Motion Hearing set for 5/11/2006 10:00 AM in Courtroom 24A before Judge Emmet G. Sullivan. (clv,) (Entered: 05/09/2006)
05/09/2006	9	Memorandum in opposition to re 7 Emergency MOTION for Preliminary Injunction *Petitioner Ghassan Abdullah al-Sharbi's Emergency Motion to Enjoin Military Commission Proceedings Against him at Least Until Entry of the Decision in Hamdan v. Rumsfeld (U.S. Supreme Court, Docket No. filed by JAY HOOD, MICHAEL BUMGARNER, GEORGE W. BUSH, DONALD RUMSFELD, GORDON R. ENGLAND, JOHN D. ALTENBURG, JR. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5)(Henry, Terry) (Entered: 05/09/2006)*
05/09/2006	10	Unopposed MOTION for Extension of Time to File Response/Reply as to 7 Emergency MOTION for Preliminary Injunction *Petitioner Ghassan Abdullah al-Sharbi's Emergency Motion to Enjoin Military Commission Proceedings Against him at Least Until Entry of the Decision in Hamdan v. Rumsfeld (U.S. Supreme Court, Docket No. by JAY HOOD, MICHAEL BUMGARNER, GEORGE W. BUSH, DONALD RUMSFELD, GORDON R. ENGLAND, JOHN D. ALTENBURG, JR. (Attachments: # 1 Text of Proposed Order)(Henry, Terry) (Entered: 05/09/2006)*
05/10/2006		MINUTE ORDER granting 10 Motion for Extension of Time to File Response. Further, petitioner's reply is now due no later than 5:00 PM on May 10, 2006. Signed by Judge Emmet G. Sullivan on May 10, 2006. (lcegs2) (Entered: 05/10/2006)
05/10/2006	11	NOTICE *of Correction to Respondents' Opposition to Motion to Enjoin Military Commission Proceedings* by JAY HOOD, MICHAEL BUMGARNER, GEORGE W. BUSH, DONALD RUMSFELD, GORDON R. ENGLAND, JOHN D. ALTENBURG, JR re 9 Memorandum in Opposition,, (Henry, Terry) (Entered: 05/10/2006)
05/10/2006	12	REPLY to opposition to motion re 7 Emergency MOTION for Preliminary Injunction *Petitioner Ghassan Abdullah al-Sharbi's Emergency Motion to Enjoin Military Commission Proceedings Against*

		him at Least Until Entry of the Decision in Hamdan v. Rumsfeld (U.S. Supreme Court, Docket No. 05-184) filed by GHASSAN ABDULLAH AL SHARBI. (Rachlin, Robert) (Entered: 05/10/2006)
05/11/2006		Minute Entry for proceedings held before Judge Emmet G. Sullivan : Motion Hearing held on 5/11/2006 re 7 Emergency MOTION for Preliminary Injunction *Petitioner Ghassan Abdullah al-Sharbi's Emergency Motion to Enjoin Military Commission Proceedings Against him at Least Until Entry of the Decision in Hamdan v. Rumsfeld (U.S. Supreme Court, Docket No. filed by GHASSAN ABDULLAH AL SHARBI,. Motion Hearing set for 5/12/2006 11:00 AM in Courtroom 24A before Judge Emmet G. Sullivan. (Court Reporter Elaine Merchant.) (clv,) (Entered: 05/11/2006)*
05/12/2006	13	ORDER granting 7 Motion for Preliminary Injunction pending a final decision by the Supreme Court in Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005). Signed by Judge Emmet G. Sullivan on May 12, 2006. (lcegs1) (Entered: 05/12/2006)
05/12/2006		Minute Entry for proceedings held before Judge Emmet G. Sullivan : Motion Hearing held on 5/12/2006 re 7 Emergency MOTION for Preliminary Injunction Petitioner Ghassan Abdullah al-Sharbi's Emergency Motion to Enjoin Military Commission Proceedings Against him at Least Until Entry of the Decision in Hamdan v. Rumsfeld (U.S. Supreme Court, Docket No. filed by GHASSAN ABDULLAH AL SHARBI. Status Conference set for 6/29/2006 at 11:30 a.m. before Judge Emmet G. Sullivan (Court Reporter Brian Wilson.) (alr,) Modified on 5/15/2006 (alr,). (Entered: 05/15/2006)

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No. 7 Emergency Motion for Preliminary Injunction, May 8, 2006

Select the document you wish to view.

Part	Description	
1	Main Document	10 pages
2	Exhibit A - Opinion in Hicks	15 pages
3	Exhibit B - Order in Al Odah	2 pages
4	Exhibit C - Order in Al Qosi	2 pages
5	Exhibit D - Military Commission Charges against Petitioner	4 pages
6	Exhibit E - Military Commission Trial Calendar	1 page
7	Exhibit F – Military Commission Order No. 1	17 pages
8	Exhibit G – Military Commission Protective Order No. 1	1 page
9	Exhibit H – Military Commission Protective Order No. 2	2 pages
10	Exhibit I – Military Commission Protective Order No. 3	3 pages

Multiple Documents

No. 9 Memorandum in Opposition, May 9, 2006

Part	Description	
1	Main Document	14 pages
2	Exhibit 1	3 pages
3	Exhibit 2	40 pages
4	Exhibit 3	26 pages
5	Exhibit 4	4 pages
6	Exhibit 5	3 pages

No. 10 Unopposed Motion for Extension, May 9, 2006

Part	Description	
1	Main Document	2 pages
2	Text of Proposed Order	1 page

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GHASSAN ABDULLAH AL SHARBI, Petitioner, v. GEORGE W. BUSH, President of the United States; DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy; JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense; Brigadier General JAY HOOD, Commander, Joint Task Force, Guantánamo Bay, Cuba, and Colonel MICHAEL BUMGARNER, Commander, Joint Detention Group, Joint Task, Guantanamo Bay, Cuba *Respondents*, all sued in their official capacities	)	Civ. Act. No.

PETITION FOR WRIT OF *HABEAS CORPUS*
AND COMPLAINT FOR INJUNCTIVE, DECLARATORY AND OTHER RELIEF

Petitioner, Ghassan Abdullah Al Sharbi ("Al Sharbi") through his undersigned attorney, files this petition against Respondents for habeas and other relief. On information and belief, Petitioner alleges that Respondents have held Al Sharbi for more than three years without demonstrating a valid basis for his detention. They have now charged Al Sharbi with "crimes," which they have made up after the fact. Respondents intend to try Al Sharbi for these "crimes" before a military panel that they have appointed and over which they exercise reviewing authority. The prospect of this lawless proceeding provides no basis for the continued detention of Al Sharbi.

In support of his Petition, Al Sharbi alleges as follows:

INTRODUCTION

1. Petitioner Ghassan Abdullah Al Sharbi is currently incarcerated at United States Naval Station, Guantánamo Bay, Cuba (hereinafter "Guantánamo Bay"). Upon information and belief, Al Sharbi was seized in or about March 2002, in Pakistan, and was subsequently transferred to the custody of U.S. military and intelligence personnel.

2. Al Sharbi has been unlawfully detained at the direction of the Respondents for over three years.

3. On information and belief, there is no basis for Al Sharbi's detention. At no time did Al Sharbi engage in any criminal or terrorist conduct. Nor did he kill, injure, fire upon, or direct fire upon, any U.S. or Coalition Forces. Nor did he attempt any such conduct. He did not at any time commit any criminal violations, or any violations of the law of war. Nor did he ever enter into any agreement with anyone to do so. Accordingly, Al Sharbi brings this action seeking a writ of *habeas corpus* to secure his release from Respondents' unlawful detention.

4. Lacking any lawful basis for Al Sharbi's continued detention, Respondents now seek to justify Al Sharbi's detention by subjecting him to "trial" by military commission (the "Commission") on purported war crime charges of Respondents' own creation and definition, never before recognized under international law, and procedures that are unannounced and unpromulgated in advance, procedures essentially subject to the ongoing judgment of the Commission, freely subject to modification by the Commission as its proceedings take place. Because Respondents' war crimes charges are indisputably invalid and the Commission's process and procedures unlawful, Al Sharbi seeks habeas relief with respect to his unlawful detention and trial by the Commission. A true copy of the charges proffered against Al Sharbi for trial by the Commission is attached as EXHIBIT A.

5. As set forth more fully below, Al Sharbi also challenges numerous other unlawful aspects of his continued detention by Respondents, including, without limitation (i) Respondents' failure to afford Al Sharbi the protections of the Geneva Conventions and other applicable law to which he is presumptively and actually entitled, (ii) Respondents' denial of Al Sharbi's rights to due process and equal protection of the laws, and (iii) Al Sharbi's continued detention in derogation of his right to speedy trial under applicable law.

6. Last year, the Supreme Court explained that "[c]onsistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace." *Rasul v. Bush*, 542 U.S. 466 at 557, 124 S. Ct. 2686 at 2692-93 (2004).

7. This is one such application. Al Sharbi invokes the protection of this Court and seeks the Great Writ in order to secure his release and to vindicate the fundamental rights recognized by the Supreme Court. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 124 S. Ct. 2633 (2004); 28 U.S.C. § 2241(c)(3); *Rasul*, 542 U.S. 446 at 487, 124 S. Ct. 2686 at 2700 (Kennedy, J., concurring) ("[a] necessary corollary of [*Johnson v.*] *Eisentrager* [339 U.S. 763 (1950)] is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated"), citing *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281 (1866).

PARTIES

8. Petitioner Ghassan Abdullah Al Sharbi, is a citizen of Saudi Arabia. The United States military (or its agents) assumed custody of Al Sharbi in or about March 2002, and he has remained in the custody of the United States continuously since that date.

9. Respondent George W. Bush is President of the United States, and executed the Military Order that created the military commissions under which Al Sharbi is being detained.

Respondent President Bush also designated Al Sharbi a person eligible for trial by the Commission, which is why Al Sharbi is scheduled for an unlawful trial before the Commission.

10. Respondent Donald H. Rumsfeld is the Secretary of Defense of the United States, and commands all aspects of the United States Military, including the Office of Military Commissions established by the applicable Presidential Military Order. Respondent Secretary Rumsfeld has custodial authority over Al Sharbi and is ultimately in charge of the prosecution of Al Sharbi by the Commission.

11. Respondent Gordon R. England is Secretary of the Navy, and is Respondent Secretary Rumsfeld's designee for the Combatant Status Review Tribunals.

12. Respondent John D. Altenburg, Jr., is the Appointing Authority for Military Commissions, and in that capacity exercises authority over the entire Commission process.

13. Respondent Brigadier General Jay Hood is the Commander of Joint Task Force Guantánamo and, in that capacity, is responsible for Al Sharbi's continued and indefinite detention at Guantánamo Bay.

14. Colonel Michael Bumgarner is the Commander of Joint Detention Group and in that capacity, is responsible for the U.S. facility where Al Sharbi is presently detained. He exercises immediate custody over Al Sharbi pursuant to orders issued by Respondent President Bush, Respondent Secretary Rumsfeld and Respondent General Hood.

JURISDICTION

15. This action arises under the Constitution, laws and treaties of the United States, including Articles I, II, III, and VI and the 5th and 6th Amendments, 28 U.S.C. §§1331, 1350, 1361, 1391, 2241, and 2242, 5 U.S.C. §702, the All Writs Act (28 U.S.C. §1651), 42 U.S.C. §1981, the *Bivens* doctrine [*Bivens v. Six Unknown Named Agents of the Federal Bureau of*

Narcotics, 403 U.S. 388 (1971)], and Geneva Convention (III), as well as international law more generally.

16. This Court possesses subject matter jurisdiction under 28 U.S.C. §§ 1350, 1361 and 1391, 5 U.S.C. § 702, as well as the *habeas corpus* statute, 28 U.S.C. § 2241, and the All Writs Act, 28 U.S.C. § 1651. In addition, the Court may grant the relief requested under Art. 2(a)(12) of the UCMJ, 10 U.S.C. § 802(a)(12), which grants jurisdiction over a petition for judicial review filed by or on behalf of parties incarcerated at Guantánamo. As explained above, the Supreme Court expressly held that this Court has subject matter jurisdiction to consider a *habeas* petition by a Guantanamo detainee in *Rasul*.

17. This Court has personal jurisdiction over the parties. Respondents have substantial contacts in this District.

18. Venue is proper in this Court under 28 U.S.C. §§ 1391(b) and (e) since a substantial part of the events, acts, and omissions giving rise to the claim occurred in this District and a Respondent may be found in the District. *See Rasul*, 542 U.S. 466, 124 S. Ct. 2686 (2004); *see also Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004) (amended opinion) (transferring Guantánamo Bay detainee's action to the District of the District of Columbia in light of *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711 (2004)).

ALLEGATIONS COMMON TO ALL COUNTS

19. Following the September 11, 2001 attack upon targets in the United States, the United States commenced military operations in Afghanistan on or about October 7, 2001 against Taliban and "*al Qa'ida*" targets within Afghanistan. That activity was augmented twelve days later on October 19, 2001, with ground operations by U.S. forces. Through December 2001, the U.S. military action initially involved a small number of Special Forces operating on the ground in Afghanistan, working with forces of the Northern Alliance, a consortium of armed

and organized Afghan foes of the Taliban government. A substantial air campaign supported these units as well as a small number of Special Forces from other nations (hereinafter collectively the "Coalition Forces"). The Northern Alliance and Coalition Forces operated in full cooperation and coordination in their joint campaign against the Taliban and *al Qa'ida*.

20. The above military activities were authorized by Congress in a "use of force" resolution passed on September 18, 2001:

> [t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

See Authorization for Use of Military Force (hereinafter the "AUMF"), Pub.L. 107-40, 115 Stat. 224 (2001). *See also Rasul*, 542 U.S. at 470, 124 S. Ct. at 2690 ("[a]cting pursuant to that authorization, the President sent U.S. Armed Forces into Afghanistan to wage a military campaign against *al Qa'ida* and the Taliban regime that had supported it").

21. Pursuant to the AUMF, the United States, in support of, and in conjunction with, the Northern Alliance, commenced military action against Afghanistan's Taliban government. Within ninety days, the Taliban government was defeated and Coalition Forces and the Northern Alliance had captured and/or apprehended a number of persons allegedly associated with the Taliban and/or *al Qa'ida*. These operations extended to cooperative efforts with the Government of Pakistan to seize individuals suspected of supporting Taliban and/or *al Qa'ida* efforts in Afghanistan. Upon information and belief, Petitioner was seized in Pakistan in or about March 2002.

22. Upon information and belief, on July 6, 2004, Respondent President Bush designated Al Sharbi as a person eligible for trial before the Commission. The Commission was

established by Presidential Military Order, dated November 13, 2001, *see* 66 Fed. Reg. 57,833 (November 13, 2001) (hereinafter "PMO"), and the March 21, 2002, Military Commission Order No. 1 (hereinafter "MCO No. 1"), subsequently revised and re-issued on August 31, 2005 (A copy of the PMO is attached hereto as EXHIBIT B; a copy of revised MCO No. 1 is attached hereto as EXHIBIT C.)

23. On November 9, 2005, over a year after Al Sharbi was designated a person eligible for trial, charges against him were publicly released. They were approved by Respondent Altenburg on November 4, 2005. The charges allege one offense: Conspiracy. *See United States v. Ghassan Abdullah Al Sharbi,* Charge Sheet (attached hereto as EXHIBIT A).

24. Some of the procedures for the military commissions under which Al Sharbi will be tried were set up in the MCO No. 1 (see EXHIBIT C). Many other procedures, fundamental to accepted concepts of due process and procedural fairness will be made up as the proceedings go along, precluding the accused from having any practical understanding of the procedures under which he will be tried.

25. Even those procedures that have been clearly established are deficient and will not result in a full and fair trial. Under these existing procedures, Respondent Secretary Rumsfeld has appointed an "Appointing Authority," Respondent Altenburg, a retired Army officer who is currently employed by the Department of Defense in a civilian capacity. The Appointing Authority will in turn appoint members of the Commission. Thus, Respondent Secretary Rumsfeld and his appointee, who are investigating and prosecuting Al Sharbi, will ultimately be responsible for choosing the panel that will judge him. *Id.* at ¶ 6. This violates the principle established and universally accepted by civilized nations that no one should be a judge in his own cause. *See Federalist Papers #10 (James Madison)*: "No man is allowed to be a judge in

his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."

26. During the military commission proceedings, there is no bar to admission of evidence that courts normally deem unreliable -- such as statements coerced from Al Sharbi at a time when he had no counsel, or statements coerced from other detainees. Indeed, witness statements can be used even if the witnesses are not available to testify and their testimony is presented as unsworn hearsay.

27. There will be no direct appeal from a decision of the Commission. *Id.* The proceedings will be reviewed, but not in federal court. The "review" provided by the PMO and MCO 1 is to take place entirely within the Executive Branch, by officials appointed by the very officials accusing Al Sharbi of criminal misconduct. Thus, not only has Al Sharbi been held without trial for over three years, there is no future prospect of a trial by an impartial tribunal based upon reliable evidence.

28. Just as there has not been and will not be an unbiased determination that Al Sharbi is guilty of any crimes, there also has been no determination by a neutral tribunal that Al Sharbi can justifiably be held as an enemy combatant. On June 28, 2004, the United States Supreme Court decided *Hamdi,* 542 U.S. 507, 124 S. Ct. 2633 (2004), in which it determined that individuals could not be detained as enemy combatants unless such a determination was made by a neutral tribunal that accorded them due process.

29. Subsequently, the United States created a Combatant Status Review Tribunal ("CSRT") to make determinations as to whether those held were enemy combatants. The CSRT was hastily formed in the wake of the Supreme Court's decisions in *Rasul* and *Hamdi*, and does not qualify as the neutral tribunal that satisfies the requirements of due process. For example, the

CSRT fails even to meet the standards for Article 5 hearings as set forth in U.S. Army regulations.[1]

30. The CSRT varies from both the Army regulations and *Hamdi* (and due process generally) materially and dispositively, including with respect to, *inter alia*: (1) the standard of proof required [Regulation 190-8, §1-6(e)(9)'s preponderance of the evidence standard as opposed to the CSRT's "rebuttable presumption" that the detainee is an enemy combatant][2]; (2) the availability of an appeal by the government of a ruling favorable to the detainee; (3) the categories in which a detainee may be placed (*i.e.*, the CSRT fails to allow for prisoner of war (POW) status, but instead purport to determine only whether or not a detainee is an "enemy combatant"); (4) the detainee's right to counsel and/or representation by a personal representative of choice before the Tribunal; (5) whether the hearings are open to the public; (6) the government's reserved power to rescind or change the conditions of the Tribunals at its whim; (7) the composition of the Tribunal(s) (in contrast with *Hamdi's* requirement of "neutral decisionmaker[s,]" 542 U.S. at 533, 124 S. Ct. at 2648); and (8) even the definition of "enemy combatant." These deficiencies are individually and collectively fatal to the CSRT.

CLAIMS FOR RELIEF

COUNT ONE

RESPONDENTS MAY NOT DETAIN AL SHARBI FOR TRIAL BEFORE AN INVALIDLY CONSTITUTED MILITARY COMMISSION

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1 *See* Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, §1-6 (1997).

2 Indeed, the Order implementing the Combatant Status Review Tribunals informs tribunal members that the detainee's status has already been predetermined by their superiors: "[e]ach detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense." *See* Dep't of Defense Order No. 651-04, (July 07, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040707-0992.html (accessed December 6, 2005 and attached hereto as EXHIBIT D).

31. Al Sharbi re-alleges and incorporates by reference paragraphs 1 through 30 above.

32. The Commission in this case is invalid and improperly constituted, and the grant of subject matter jurisdiction to the Commission is overbroad and unlawful for at least the following reasons:

A. <u>The Commission lacks jurisdiction because the President lacked congressional authorization to establish the Commission</u>

33. The Supreme Court has noted that "[w]hen the President acts in absence of . . . a congressional grant . . . of authority, he can only rely upon his own independent powers." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 72 S. Ct. 863, 872 (1952) (Jackson, J. concurring). *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633 (2004). The Constitution expressly grants Congress the sole power to create military commissions and define offenses to be tried by them. The Constitution vests Congress, not the Executive, with "All legislative powers," with the power "[t]o define and punish offences against the Law of Nations" and "[t]o constitute Tribunals inferior to the Supreme Court." U.S. Const., Art. I § 8, cl. 9, cl. 10.

34. Congress has not authorized the establishment of military commissions to try individuals captured during the Afghanistan war. Accordingly, Respondents' detention of Al Sharbi for trial by the Commission is improper, unlawful and invalid as an *ultra vires* exercise of authority. It exceeds the President's powers under Article II and thus violates the constitutional principles of separation of powers.

35. Al Sharbi's status as a Saudi citizen does not confer unlimited power on Respondents to operate outside of the Constitutional framework. The Supreme Court's assertion of jurisdiction for the federal courts in *Rasul* establishes indisputably that aliens held at the base in Guantánamo Bay, no less than American citizens, are entitled to invoke the federal courts' authority under 28 U.S.C. § 2241. *Rasul*, 542 U.S. at 561, 124 S. Ct. at 2696 ("[c]onsidering that

the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship") (footnote omitted). Thus, both Congress and the judiciary possess constitutional authority to check and balance the power of the Executive to act unilaterally. *Rasul*, 542 U.S. at 487, 124 S. Ct. at 2700 (Kennedy, J., concurring).

B. The Appointing Authority lacks power to exercise military authority to appoint a military commission.

36. Because there is no statute expressly stating who can appoint members of a Commission, the power to appoint members of a military commission is based upon the power to convene a general court-martial. Only the Executive, the Secretary of Defense (or Secretaries of the other branches of the armed forces) or a commanding officer to whom the Secretary has delegated authority may convene a general court-martial. *See* 10 U.S.C. § 822.

37. In this case, the Respondent, Secretary Rumsfeld purportedly has delegated authority to Respondent Altenburg to appoint the members of military commissions.

38. Respondent Altenburg is a civilian, not a commissioned officer, and thus lacks the power to exercise military jurisdiction in any form.

39. As a result, the Commission by which the Respondents intend to try Al Sharbi is improperly constituted and invalid, such that Al Sharbi is entitled to a writ of *habeas corpus* preventing his unlawful detention and trial before that improper tribunal.

C. The Commission lacks jurisdiction to try individuals at Guantánamo Bay.

40. Military commissions have no jurisdiction to try individuals far from the "locality of actual war." *See Milligan*, 71 U.S. at 127.

41. The Commission that will try Al Sharbi is situated far outside any zone of conflict or occupation, and Al Sharbi's alleged conduct on which the charges are based did not occur at Guantánamo Bay. As such, the Commission lacks authority to try Al Sharbi, and therefore, the Respondents lack the authority to continue to detain Al Sharbi for any purported trial at Guantánamo Bay.

COUNT TWO

RESPONDENTS MAY NOT DETAIN AL SHARBI FOR OFFENSES THAT HAVE BEEN CREATED BY THE PRESIDENT AFTER THE FACT

42. Al Sharbi alleges and incorporates by reference paragraphs 1 through 41 above.

43. Respondent President Bush is attempting to try Al Sharbi for crimes that he created long after the alleged "offenses" were committed.

44. The offense alleged against Al Sharbi, "conspiracy," did not previously exist as an offense under the law of war. This offense and others were in effect created by the PMO, MCO No. 1, and Military Commission Instruction No. 2 (attached hereto as EXHIBIT E), well after they were allegedly committed by Al Sharbi. In essence, the government alleges that Al Sharbi is *criminally* liable for allegedly participating in combat against the United States and its allies. That has never been a criminal offense. Thus, proceeding against Al Sharbi before the Military Commission violates the principle established and universally accepted among civilized nations: *nulla poena sine lege* (no punishment without a [preëxisting] law).

A. The Executive cannot define crimes.

45. Congress, not the Executive, has the authority to legislate under Article I of the Constitution. This expressly includes the power "[t]o define and punish . . . Offences against the Law of Nations." Absent Congressional authorization, the Executive lacks the power to define

specific offenses. If he attempts to do so, as he has done here, his actions are *ultra vires* and violate the principles of separation of powers. Accordingly, Al Sharbi may not be detained for trial on newly-created offenses established and defined solely by the President.

B. Crimes cannot be defined after the fact.

46. In addition, any charges instituted by the Commission must constitute offenses under the law of war as it existed at the time the alleged conduct was committed. Applying laws created after the conduct (such as the definition of offenses set forth in Military Commission Instruction No. 2 (MCI No. 2) and those which have been included in the Charges against Al Sharbi would violate the *ex post facto* clause of the Constitution (Art. 1, §9, cl. 3), the principle that a person must have reasonable notice of the bounds of an offense, and the principle *nulla poena sine lege* cited above (¶ 44). Offenses defined to criminalize the conduct of a single person or group of people -- such as those in MCI No. 2 also violate the Constitutional prohibition on bills of attainder.

47. Since the Charges do not allege any offenses against Al Sharbi under the law of war as it existed at the time he allegedly committed these acts, Al Sharbi cannot be detained as a result of these Charges. Accordingly, Al Sharbi is entitled to a writ of *habeas corpus*, and Al Sharbi should be released immediately.

COUNT THREE

RESPONDENTS MAY NOT DETAIN AL SHARBI FOR TRIAL ON CHARGES OUTSIDE THE JURISDICTION OF THE MILITARY COMMISSION

48. Al Sharbi re-alleges and incorporates by reference paragraphs 1 through 57 above.

49. Al Sharbi's confinement is unlawful because he is being detained to face charges before a commission that is not empowered to hear and/or adjudicate the charges instituted

against him. Al Sharbi's continued detention purportedly to face trial on the charges leveled against him is unlawful because the charges are outside the parameters established by the Uniform Code of Military Justice (hereinafter "UCMJ"), 10 U.S.C. §801, *et seq.*, the statutory scheme that controls military detentions and that limits the offenses triable by military commissions (even in instances where Congress has provided any jurisdiction to the military commissions, which it has not with respect to the conflict in Afghanistan).

50. Under the UCMJ, military commissions may not hear and adjudicate any offenses other than those that are recognized by the traditional law of war or those that Congress has expressly authorized them to hear. Here, the offenses charged are not within either of these categories.

51. The purported offense of conspiracy is not a valid offense triable by the Commission under recognized principles of the law of war, the UCMJ or any other statutory authorization. Because civil law countries do not recognize a crime of conspiracy, conspiracy has never been part of the laws of war. No international criminal convention has ever recognized conspiracy to violate the laws of war as a crime. This includes the Geneva Conventions, as well as those establishing the international criminal tribunals for the former Yugoslavia and Rwanda, as well as the International Criminal Court. Indeed, the government is creating charges that have been specifically rejected as violations of the laws of war -- including at Nuremburg, for example.

52. The purported offense of attempted murder by an unprivileged belligerent, which Al Sharbi allegedly "conspired" to commit, also is not a valid offense triable by the Commission under recognized principles of the law of war, the UCMJ or any other statutory authorization. Once again such an offense has not been recognized in any of the conventions setting forth

substantive violations of the laws of war. Nor does it have any other source in the law of war. Such an offense would criminalize participation in war, which is not the intent of the laws of war.

53. The offenses proffered against Al Sharbi before the Military Commission relate to acts allegedly done before any arguable state of war existed between the United States and any national or other entity. Thus, the acts charged are not within the jurisdiction of the Military Commission or otherwise within the law of armed conflict.

54. As a plurality of the Supreme Court held in *Reid v. Covert*:

> [t]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8 [granting Congress the power to "define and punish . . . Offences against the Law of Nations"], and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

354 U.S. 1, 21, 77 S. Ct. 1222, 1233 (1957).

55. Because the charges do not allege any offenses against Al Sharbi under the law of war or express statutory authority, the Commission lacks jurisdiction to try and/or punish Al Sharbi for those offenses. Accordingly, Al Sharbi is entitled to a writ of *habeas corpus*, and should be released immediately.

COUNT FOUR

THE MILITARY COMMISSION PROCEDURES VIOLATE AL SHARBI'S RIGHTS UNDER STATUTORY, CONSTITUTIONAL, AND INTERNATIONAL LAW

56. Al Sharbi re-alleges and incorporates by reference paragraphs 1 through 54 above.

57. Even if the Commission had jurisdiction, Al Sharbi's detention to stand trial before the Commission would remain unlawful because the Commission's procedures violate applicable principles of statutory, constitutional, and international law.

58. In a series of "Military Commission Instructions" (the "MCIs"), Respondent Secretary Rumsfeld prescribed the procedural rules of these special military commissions. If Al Sharbi is tried according to these proposed procedures, he will receive less protection than he is entitled to under United States law, the Constitution, and international law and treaties. The procedures set forth by the MCIs provide Al Sharbi with far less protection than those set forth in the UCMJ. The MCIs violate Al Sharbi's rights to certain basic procedural safeguards. The MCIs fail to provide Al Sharbi an impartial tribunal to adjudicate the charges against him or review those charges. Al Sharbi's accusers effectively appoint the "judge and jury" and then review their decision. And during these proceedings themselves, his accusers can introduce unreliable evidence of the worst sort -- unsworn allegations derived from coerced confessions with no right of confrontation.

59. The absence of procedural protections makes the Commission inadequate as a matter of law.

A. <u>The UCMJ</u>

60. Al Sharbi is entitled to the protections of the basic trial rights set forth by Congress in the UCMJ. By its own terms, the UCMJ applies to all persons, including Al Sharbi, who are detained within the territory or leased properties of the United States. And the UCMJ prohibits biased tribunals and the use of unreliable evidence of the sort the commissions intend to permit.

B. <u>The Geneva Convention</u>

61. The Geneva Convention requires that prisoners of war ("POW"s), as defined by the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, be treated with the same procedural protections as the soldiers of the country detaining them.[3] Under Article 5 of the Geneva Convention (III) ("Article 5"), Al Sharbi is entitled to be treated as a POW until a competent tribunal has determined otherwise.[4] As a result, he is entitled to the procedural protections that would apply in a court martial.

62. Even if Al Sharbi were not a prisoner of war, any proceeding would still have to meet the requirements of Common Article III of the Geneva Convention. These provide that conviction can only be pronounced by an impartial court respecting generally recognized principles of judicial procedure. These requirements are not met by the Commission.

C. <u>The Due Process Clause</u>

63. The Constitution's guarantee of due process also guarantees Al Sharbi the basic trial rights he will be denied before the Commission. A trial without these basic procedural safeguards lacks the fundamental fairness required in any judicial proceedings -- especially in criminal proceedings that can result in life imprisonment.

64. Since the Commission procedures violate statutory, constitutional, and international law, and in so doing, fail to provide Al Sharbi with the basic safeguards necessary to constitute a fundamentally fair criminal proceedings, Al Sharbi is entitled to a writ of *habeas corpus* holding these proceedings to be illegitimate, and should be released immediately.

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[3] Geneva Convention (III) Relative to the Treatment of Prisoners of War: August 12, 1949, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950. The Geneva Convention has also been codified in the UCMJ.

[4] *See id.* at Art. 5.

COUNT FIVE

TRIAL BEFORE THE COMMISSION VIOLATES AL SHARBI'S RIGHT TO EQUAL PROTECTION OF THE LAWS OF THE UNITED STATES

65. Al Sharbi re-alleges and incorporates by reference paragraphs 1 through 63 above.

A. Al Sharbi's detention violates the Equal Protection Clause.

66. Al Sharbi is being detained by Respondents under the claimed authority of the PMO and MCO No. 1. These Orders violate Al Sharbi's right to equal protection of the laws of the United States. Under the PMO and MCO No. 1, Al Sharbi may be held for trial by the Commission only because of his alienage, since the Orders, by their terms, apply *only* to *non*-citizens. [5] Consequently, this detention runs afoul of the very purpose of the Equal Protection Clause of the United States Constitution.

67. The Supreme Court has held that any discrimination against aliens not involving governmental employees is subject to strict scrutiny. Here, the government cannot show a compelling governmental reason, advanced through the least restrictive means, for granting *citizens* access to the fundamental protections of civilian justice (including, *inter alia*, indictment, evidentiary rules ensuring reliability and fairness, a system consistent with previously prescribed rules developed by the legislature and enforced by impartial courts, a jury trial presided over by an independent judge not answerable to the prosecutor, and the right to an appeal before a tribunal independent of the prosecuting authority), but affording *non-citizens* a distinctly less protective and inferior brand of adjudication. While the government may have

[5] Military Order of November 13, 2001 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 4 (November 13, 2001); Presidential Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (EXHIBIT B).

latitude in differentiating between citizens and aliens in areas such as immigration, it has no such latitude with respect to criminal prosecutions.

68. Thus, the blatant and purposeful discriminatory nature and impact of MCO No. 1 violates the Equal Protection clause.

B. Al Sharbi's detention violates 42 U.S.C. § 1981.

69. Al Sharbi's detention for trial by the Commission also violates 42 U.S.C. § 1981.[6] That fundamental statutory provision guarantees equal rights for all persons to give evidence, to receive equal benefit of all laws and proceedings for the security of persons, and to receive like punishment. Al Sharbi is being unlawfully detained for purposes of trial by the Commission solely because he is a non-citizen. A citizen who committed the very same acts as Al Sharbi could not be detained under the PMO and held for trial before the Commission. Accordingly, Al Sharbi's detention for trial by the Commission on that discriminatory basis is unlawful.

70. Respondents have detained Al Sharbi for trial before the Commission in violation of equal protection of the laws of the United States.

71. Accordingly, Al Sharbi is entitled to a writ of habeas corpus, a determination that the Commission proceedings against him are unlawful, and he should be released immediately.

COUNT SIX

RESPONDENTS FAIL TO JUSTIFY HOLDING AL SHARBI AS AN ENEMY COMBATANT

72. Al Sharbi re-alleges and incorporates by reference paragraphs 1 through 70 above.

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6 42 U.S.C. §1981(a) states in its entirety:
[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

73. Just as the government has no authority to detain Al Sharbi for his alleged violations under a nonexistent version of the law of war, the government has no authority to detain Al Sharbi as an enemy combatant. Respondents' actions to date in detaining Al Sharbi constitute a violation of the process accorded persons seized by the military in times of armed conflict as defined by Geneva Conventions III and IV and customary international law, as well as being inconsistent with the provisions set forth below.

A. Under *Hamdi*, the Due Process Clause requires a neutral tribunal with significant procedural protections to determine whether Al Sharbi is an enemy combatant.

74. The CSRT process and procedures that have now been established violate due process at least with respect to: (1) the failure to adhere to an appropriate standard of proof; (2) the granting of an appeal to the government of a determination favorable to the detainee; (3) the failure to make an appropriate status determination by limiting the inquiry to consideration only of "enemy combatant" status; (4) the denial of a detainee's right to counsel or other appropriate representation; (5) the denial of a public hearing; (6) the government's power to arbitrarily rescind or change the CSRT process and procedures; and (7) the failure to constitute the CSRT in a manner to assure a neutral decision maker.

B. The Geneva Convention and army regulations require a determination by a fair tribunal.

75. Under Article 5 of the Geneva Convention, Al Sharbi is entitled to a "competent tribunal" to determine whether he can be held as an enemy combatant.[7] The same procedural deficiencies that render the CSRT proceedings inadequate for purposes of due process also render the CSRT deficient as a competent tribunal. Army Regulations 190-8 and the

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[7] *See id.* at Art. 5.

Administrative Procedures Act also show these procedures are unlawful as, for example, the burden of proof is not consistent with that established in the regulations.

76. Moreover, it is now too late to establish a competent tribunal. Article 5 of Geneva Convention III, provides that "should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in [Article 4 of the Geneva Convention (III), defining the different categories of belligerents,] such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[8]

77. Respondents have unlawfully detained Al Sharbi in violation of their obligation to treat Al Sharbi presumptively as a POW, as required by Article 5, and in violation of the procedural requirements of the Third and Fourth Geneva Conventions and customary international law more generally. Thus, the government's failure to accord Petitioner Al Sharbi the protections of Article 5 violates the provisions of Geneva Convention (III) as well as the U.S. military regulations promulgated to implement them.

C. <u>The government cannot continue to hold Al Sharbi under its own regulations</u>

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[8] *Id* at Art. 5. Geneva Convention (III) revised the Geneva Convention relative to the Treatment of Prisoner of War of July 27, 1929, which followed the 18 October 1907 Hague Conventions [Relative to the Opening of Hostilities (III), Respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land (IV), and Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (V)], and was enacted concurrent with the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces In the Field, Geneva, 12 August 1949 ["Geneva Convention (I)"], the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 ["Geneva Convention (II)"], Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 ["Geneva Convention (IV)"]. Subsequently, two Protocols Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), 8 June 1977, and relating to the Protection of Victims of Non-International. Armed Conflicts ("Protocol II"), 8 June 1977. The United States is not a signatory to Protocol I, but Australia and many other nations are.

78. Indeed, even under the Army's own Regulations 190-8 at 1-6(g), "Persons who have been determined not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed."[9]

79. By arbitrarily and capriciously detaining Petitioner in custody for over three years while claiming he is not entitled to prisoner of war status, Respondents have acted and continue to act *ultra vires* and in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2). Under the Army's own regulations, Petitioner cannot be held unless he has committed specific acts under which he can be punished. But as alleged in the Counts on the Commission, the government has not charged Petitioner with any acts that could form a basis to hold him.

E. Under the Alien Tort Claims Act, Respondents Cannot Continue to Detain Petitioner Al Sharbi.

80. By arbitrarily holding Petitioner without any justification for doing so and subjecting him to cruel, inhuman or degrading treatment, including torture, Respondents have acted in violation of the law of nations under the Alien Tort Claims Act, 28 U.S.C. § 1350 in that the acts violated customary international law as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

F. The government cannot continue to hold Al Sharbi as an enemy combatant once hostilities have ended.

81. Under Article 118 of Geneva Convention (III), "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." *See also Hamdi*,

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[9] *See* Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, § . 1-6(g), (1997).

542 U.S. at 520, 124 S. Ct. at 2641. Respondents and their agents have acknowledged that hostilities in Afghanistan have ceased or will soon cease (even if they were ongoing to some extent until shortly before the Supreme Court's decision in *Hamdi*). Similarly, Respondent Secretary Rumsfeld, in a joint May 1, 2003 press conference with Afghan President Hamid Karzai in Washington, announced that "we're at a point where we clearly have moved from major combat activity to a period of stability and stabilization and reconstruction activities. The bulk of this country today is permissive, it's secure."[10]

82. Al Sharbi is presumptively a POW entitled to all protections afforded by Geneva Convention (III), including, under Article 118, release after hostilities have ceased.

83. Al Sharbi also is entitled to the protection of Common Article 3 of Geneva Convention (III). Article 3(1)(d) prohibits the contracting parties from "passing. . . sentences . . . without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

84. In this case, the prolonged confinement of Al Sharbi without charge, and without process to contest his guilt or challenge his detention, amounts to an arbitrary and illegally imposed sentence that is incompatible with fundamental guarantees of due process recognized by all civilized people, in violation of Article 3 of the Geneva Convention (III), and in violation of the due process clause of the Fifth Amendment. Further, Respondents' confinement of Al Sharbi is a form of punishment in violation of the 8th Amendment to the Constitution. Accordingly, Al Sharbi is entitled to a writ of habeas corpus and should be released immediately.

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[10] *See CNN Rumsfeld: Major combat over in Afghanistan* (May 1, 2003) *at* http://www.cnn.com/2003/WORLD/asiapcf/central/05/01/afghan.combat (accessed December 6, 2005); *See also* Armed Forces Information Service, *News Articles*, (May 1, 2003) *at* http://www.defenselink.mil/news/May2003/n05012003_200305016.html (accessed December 6, 2005).

COUNT SEVEN

RESPONDENTS HAVE DENIED AL SHARBI THE RIGHT TO A SPEEDY TRIAL AND THE RIGHT TO BE FREE FROM UNREASONABLE PRE-TRIAL CONFINEMENT

85. Al Sharbi re-alleges and incorporates by reference paragraphs 1 though 83 above.

A. Al Sharbi was entitled to a speedy trial under the UCMJ.

86. The PMO, pursuant to which Al Sharbi has been detained for trial, purports to be based, in part, on congressional authorization embodied in selected provisions of the UCMJ. In promulgating the PMO, Respondent President Bush relied, in part, on his authority under 10 U.S.C. §836, which allows the Executive to prescribe rules for military commissions so long as they are not inconsistent with the UCMJ.

87. However, the PMO, and its implementation through MCO No. 1, clearly contravene Article 10 of the UCMJ, 10 U.S.C. §810, which provides that any arrest or confinement of an accused must be terminated unless charges are instituted promptly and made known to the accused, and speedy trial afforded for a determination of guilt on such charges:

> [w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him.

10 U.S.C. § 810.

88. Al Sharbi is a person subject to the UCMJ by virtue of Respondent President Bush's PMO and MCO No. 1, as well as by virtue of Article 2 of the UCMJ, 10 U.S.C. § 802(a)(12), which provides that "persons within an area leased by or otherwise reserved or acquired for the use of the United States" and under the control of any of the various branches of the military are subject to the UCMJ. Under the Supreme Court's decision in *Rasul*, 542 U.S. at 480, 124 S. Ct. at 2696, Guantánamo Bay qualifies under both of these authorities.

89. The type of delays to which Al Sharbi has been subjected are intolerable in the absence of extraordinary or compelling circumstances. Here, the Respondents have not provided any reason whatsoever for their inordinate delays in charging Al Sharbi. Since Respondents did not take "immediate steps . . . to inform" Al Sharbi "of the specific wrong of which he is accused," they now have a clear and nondiscretionary duty under the UCMJ to "release him" from his confinement.

B. Al Sharbi was entitled to a speedy trial under the Geneva Convention.

90. Al Sharbi's lengthy pre-trial confinement violates Article 103 of Geneva Convention (III), as well as United States government regulations. Article 103 of Geneva Convention (III) provides that:

> [j]udicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. *In no circumstances shall this confinement exceed three months.*

6 U.S.T. 3316, 3394, 75 U.N.T.S. 135 (emphasis added).

91. In addition, Article 5 of Geneva Convention (III) declares that:

> should any doubt arise as to whether persons . . . belong to any of the categories [entitled to protection as a P.O.W. under the Convention], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

92. Likewise, §1-6(a) U.S Army Regulation 190-8, entitled Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, requires that United States military forces abide by the provisions of Article 5 of Geneva Convention (III). Similarly, the Commander's Handbook on the Law of Naval Operations states that "individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war

status before a judicial tribunal and to have the question adjudicated." Department of the Navy, NWP 1-14M, The Commander's Handbook on the Law of Naval Operations 11.7 (1995).

93. Respondents are under a clear nondiscretionary duty under Geneva Convention (III), and under the U.S. Army's (and Navy's) own regulations to release Al Sharbi because he has been detained in segregation for more than three months.

94. Even if Al Sharbi were not a presumptive POW, the Geneva Convention would not sanction such delay. The Geneva Convention requires that all civilians and protected persons must be "promptly informed" of the charges and brought to trial "as rapidly as possible." Geneva Convention IV, art. 7. Similarly the fundamental guarantees of Protocol I require that Al Sharbi be "informed without delay" of the particulars of charges, and incorporate the International Covenant on Civil and Political Rights.

C. Al Sharbi was entitled to a speedy trial under the Sixth Amendment.

95. Moreover, the Sixth Amendment to the United States Constitution requires that in all criminal prosecutions, "the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. Respondents' unlawful detention violates Al Sharbi's right to a speedy trial.

96. Respondents have denied Al Sharbi his right to a speedy trial as required by American law, the Constitution, and international law and treaty, and Al Sharbi therefore is entitled to a writ of *habeas corpus* and immediate release.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant him the following relief:

1. Issue the writ of mandamus or issue an Order directing Respondents to show cause why a writ of *habeas corpus* should not be granted and why Al Sharbi should not be immediately released;

2. If an Order to Show Cause is issued, to include as part of the Order a prompt

schedule to receive briefing from the parties, including a factual return and a Response from Respondents, and a Reply from Petitioner, on the issues raised in this Petition, followed by a hearing before this Court on any contested factual or legal issues, and production of Petitioner Al Sharbi as appropriate;

3. Issue an Order declaring unconstitutional and invalid and enjoining any and all Commission proceedings and/or findings against Petitioner Al Sharbi;

4. Enter an Order declaring the Combatant Status Review Tribunal unconstitutional and invalid, and enjoin its operation with respect to Petitioner Al Sharbi; and

5. Issue a writ of mandamus and an Order that orders Respondents not to use the PMO and/or the Military Commission Orders and Instructions to detain Al Sharbi, or adjudicate charges against Petitioner Al Sharbi, or conduct any proceedings related to such charges, because those Orders and instructions violate the U.S. Constitution, U.S. law, and U.S. treaty obligations, both facially and as applied to Petitioner Al Sharbi and are therefore *ultra vires* and illegal;

6. After notice and hearing, determine and declare that Petitioner Al Sharbi's detention violates the Constitution, laws, treaties, and regulations of the United States; that the PMO is unconstitutional; that Al Sharbi has been denied a speedy trial; and that Respondents lack any jurisdiction over Petitioner Al Sharbi;

7. After notice and hearing, issue a writ of mandamus that directs Respondents to obey their clear, nondiscretionary duty to follow the Constitution, laws, regulations, and treaties of the United States, and therefore to release Petitioner Al Sharbi immediately;

8. Grant a writ of *habeas corpus* on behalf of Petitioner Al Sharbi ordering his immediate release;

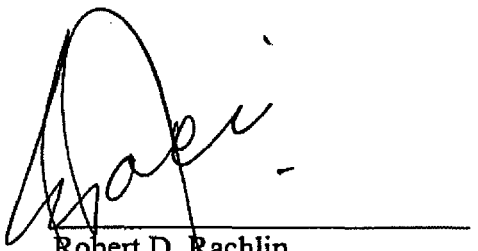
9. Enter an Order that the Court shall retain jurisdiction over this matter to permit

Petitioner Al Sharbi to respond to arguments advanced by Respondents on matters related to his continued detention;

10. Grant such other and further relief on behalf of Petitioner Al Sharbi and against Respondents as this Court deems just and proper.

Burlington, Vermont

December 7, 2005



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CERTIFICATION OF REPRESENTATION WITHOUT COMPENSATION

Robert D. Rachlin, counsel for Petitioner certifies, pursuant to L. Cv. R. 83.2(g), as follows:

1. He is a member in good standing of the bars of the Supreme Court of Vermont, the United States District Court for the District of Vermont, the United States District Court for the Southern District of New York, the United States District Court for the Northern District of California, the United States Court of Appeals for the District of Columbia, the United States Court of Appeals for the First Circuit, the United States Court of Appeals for the Second Circuit, and the United States Supreme Court.

2. He has never been subject to disciplinary complaint or sanction by any court or other disciplinary authority.

3. He believes the petitioner to be indigent within the meaning of Local Rule 83.2(g).

4. He is representing petitioner without compensation or the expectation of compensation.

5. He possesses a copy of the Local Rules of this District and is familiar with the rules generally and as they pertain to this proceeding.

Burlington, Vermont

December 7, 2005

Robert D. Rachlin

EXHIBIT A

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
GHASSAN ABDULLAH AL SHARBI	)	**CHARGE:**
a/k/a Abdullah al Muslim	)	**CONSPIRACY**
a/k/a Abu Muslim	)	

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Ghassan Abdullah al Sharbi (a/k/a/ Abdullah al Muslim a/k/a/ Abu Muslim hereinafter "al Sharbi") is subject to his Military Order of November 13, 2001.

2. The charged conduct alleged against al Sharbi is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.

5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.

6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

8. In 1992 and 1993, al Qaida supported violent opposition of US. property and nationals by, among other things, transporting personnel, weapons, explosives, and ammunition to Yemen, Saudi Arabia, Somalia, and other countries.

9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.

OPTIONAL FORM 99 (7-90)
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To Robert Rachlin	From Bill Kubler
Dept./Agency	Phone # (860) 644-4739
Fax # (802) 863 2573	Fax #

10. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyian Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a/ Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:

    a. In 1998 Barhoumi, an Algerian citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated training camp, where he received training in constructing and dismantling electronically-controlled explosives.

    b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.

c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.

d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.

e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.

f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.

g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bayat* ("oath of allegiance") to Usama bin Laden.

h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.

i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.

j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.

k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.

l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.

m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately $1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.

n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia,* electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.

o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.

p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.

q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.

r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.

15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

EXHIBIT B

Federal Register
Vol. 66, No. 222
Friday, November 16, 2001

Presidential Documents

Title 3—

The President

Military Order of November 13, 2001

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107–40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. *Findings*

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense

purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. *Definition and Policy.*

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. *Detention Authority of the Secretary of Defense.* Any individual subject to this order shall be —

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. *Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.*

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for—

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. *Obligation of Other Agencies to Assist the Secretary of Defense.*

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. *Additional Authorities of the Secretary of Defense.*

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. *Relationship to Other Law and Forums.*

(a) Nothing in this order shall be construed to—

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order—

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or

proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

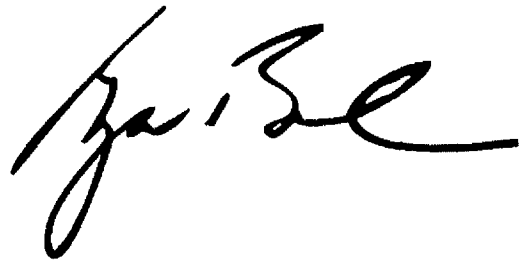
(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. *Publication.*

This order shall be published in the **Federal Register**.



THE WHITE HOUSE,
November 13, 2001.

[FR Doc. 01–28904
Filed 11–15–01; 8:56 am]
Billing code 3195–01–P

EXHIBIT C

Department of Defense

Military Commission Order No. 1

August 31, 2005

SUBJECT: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism

References: (a) United States Constitution, Article II, Section 2

(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001) ("President's Military Order")

(c) DoD 5200.2-R, "Personnel Security Program," current edition

(d) Executive Order 12958, "Classified National Security Information" (April 17, 1995, as amended, or any successor Executive Order)

(e) Section 603 of title 10, United States Code

(f) DoD Directive 5025.1, "DoD Directives System," current edition

(g) Military Commission Order No. 1 (March 21, 2002)

1. PURPOSE

This Order implements policy, assigns responsibilities, and prescribes procedures under references (a) and (b) for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order. Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this Order, the procedures prescribed herein and no others shall govern such trials. This Order supersedes reference (g).

2. ESTABLISHMENT OF MILITARY COMMISSIONS

In accordance with the President's Military Order, the Secretary of Defense or a designee ("Appointing Authority") may issue orders from time to time appointing one or more military

commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.

3. JURISDICTION

A. Over Persons

A military commission appointed under this Order ("Commission") shall have jurisdiction over only an individual or individuals ("the Accused") (1) subject to the President's Military Order and (2) alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.

B. Over Offenses

Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission.

C. Maintaining Integrity of Commission Proceedings

The Commission may exercise jurisdiction over participants in its proceedings as necessary to preserve the integrity and order of the proceedings.

4. COMMISSION PERSONNEL

A. Members

(1) Appointment

The Appointing Authority shall appoint the Presiding Officer, other members, and the alternate member or members of each Commission. The alternate member or members shall attend all sessions of the Commission except sessions with members deliberating and voting on findings and sentence and sessions conducted by the Presiding Officer under Section 4(A)(5)(a), but the absence of an alternate member shall not preclude the Commission from conducting proceedings. Alternate members shall attend deliberations on matters other than findings or sentence, but may not participate in such deliberations or in any voting. In case of incapacity, resignation, or removal of any member, an alternate member, if available, shall take the place of that member, in the sequence designated by the Appointing Authority. Any vacancy among the members or alternate members occurring after a trial has begun may, but need not, be filled by the Appointing Authority, but the substance of all prior proceedings and evidence taken in that case shall be made known to that new member or alternate member before the trial proceeds.

(2) Number of Members

Each Commission shall consist of a Presiding Officer and at least three other members, the number being determined by the Appointing Authority. For each such Commission, the

Appointing Authority shall also appoint at the outset of proceedings one or more alternate members, the number being determined by the Appointing Authority.

(3) Qualifications

Each member and alternate member shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause.

(4) Presiding Officer

The Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.

(5) Duties of the Presiding Officer

(a) The Presiding Officer shall rule upon all questions of law, all challenges for cause, and all interlocutory questions arising during the proceedings. The Presiding Officer may conduct hearings (except hearings on the admissibility of evidence under Section 6(D)(1)) outside the presence of the other members for the purposes of hearing and determining motions, objections, pleas, or such other matters as will promote a fair and expeditious trial. If the Presiding Officer determines that deliberations are necessary to resolve a challenge by another member under Section 6(D)(1) to a ruling by the Presiding Officer on the admissibility of evidence, the Presiding Officer shall deliberate and vote with the other members to determine the admissibility of the evidence in question. The Presiding Officer shall not deliberate or vote with the other members on findings or sentence, nor shall the Presiding Officer be present at such deliberations or votes.

(b) The Presiding Officer shall admit or exclude evidence at trial in accordance with Section 6(D). The Presiding Officer shall have authority to close proceedings or portions of proceedings in accordance with Section 6(B)(3) and for any other reason necessary for the conduct of a full and fair trial.

(c) The Presiding Officer shall ensure that the discipline, dignity, and decorum of the proceedings are maintained, shall exercise control over the proceedings to ensure proper implementation of the President's Military Order and this Order, and shall have authority to act upon any contempt or breach of Commission rules and procedures. Any attorney authorized to appear before a Commission who is thereafter found not to satisfy the requirements for eligibility or who fails to comply with laws, rules, regulations, or other orders applicable to

the Commission proceedings or any other individual who violates such laws, rules, regulations, or orders may be disciplined as the Presiding Officer deems appropriate, including but not limited to revocation of eligibility to appear before that Commission. The Appointing Authority may further revoke that attorney's or any other person's eligibility to appear before any other Commission convened under this Order.

(d) The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably.

(e) The Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(f) As soon as practicable at the conclusion of each Commission session, the Presiding Officer shall transmit an authenticated copy of the proceedings to the Appointing Authority.

(6) Duties of the Other Members

The other members of the Commission shall determine the findings and sentence without the Presiding Officer, and may vote on the admission of evidence, with the Presiding Officer, in accordance with Section 6(D)(1).

B. Prosecution

(1) Office of the Chief Prosecutor

The Chief Prosecutor shall be a judge advocate of any United States armed force, shall supervise the overall prosecution efforts under the President's Military Order, and shall ensure proper management of personnel and resources.

(2) Prosecutors and Assistant Prosecutors

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission ("Prosecution"). Prosecutors and Assistant Prosecutors shall be (a) Military Officers who are judge advocates of any United States armed force, or (b) special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States. The duties of the Prosecution are:

(a) To prepare charges for approval and referral by the Appointing Authority;

(b) To conduct the prosecution before the Commission of all cases referred for trial; and

(c) To represent the interests of the Prosecution in any review process.

C. Defense

(1) Office of the Chief Defense Counsel

The Chief Defense Counsel shall be a judge advocate of any United States armed force, shall supervise the overall defense efforts under the President's Military Order, shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

(2) Detailed Defense Counsel.

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel"). The duties of the Detailed Defense Counsel are:

(a) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and

(b) To represent the interests of the Accused in any review process as provided by this Order.

(3) Choice of Counsel

(a) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Section 7(A). After such selection of a new Detailed Defense Counsel, the original Detailed Defense Counsel will be relieved of all duties with respect to that case. If requested by the Accused, however, the Chief Defense Counsel may allow the original Detailed Defense Counsel to continue to assist in representation of the Accused as another Detailed Defense Counsel.

(b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney: (i) is a

United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be pre-qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5).

(4) Continuity of Representation

The Accused must be represented at all relevant times by Detailed Defense Counsel. Detailed Defense Counsel and Civilian Defense Counsel shall be herein referred to collectively as "Defense Counsel." The Accused and Defense Counsel shall be herein referred to collectively as "the Defense."

D. Other Personnel

Other personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks may be detailed or employed by the Appointing Authority, as necessary.

5. PROCEDURES ACCORDED THE ACCUSED

The following procedures shall apply with respect to the Accused:

A. The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the Accused understands.

B. The Accused shall be presumed innocent until proven guilty.

C. A Commission member, other than the Presiding Officer, shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense.

D. At least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final in accordance with Section 6(H)(2).

E. The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.

F. The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.

G. If the Accused so elects, the Accused may testify at trial on the Accused's own behalf and shall then be subject to cross-examination.

H. The Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer. Such access shall be consistent with the requirements of Section 6(D)(5) and subject to Section 9. The Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.

I. The Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution who appears before the Commission.

J. The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.

K. The Accused shall be present at every stage of the trial before the Commission, to the extent consistent with Section 6(B)(3), unless the Accused engages in disruptive conduct that justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

L. Except by order of the Presiding Officer for good cause shown, the Prosecution shall provide the Defense with access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.

M. The Accused may make a statement during sentencing proceedings.

N. The Accused may have Defense Counsel submit evidence to the Commission during sentencing proceedings.

O. The Accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer), consistent with Section 6(B).

P. The Accused shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final in accordance with Section 6(H)(2).

6. CONDUCT OF THE TRIAL

A. Pretrial Procedures

(1) Preparation of the Charges

The Prosecution shall prepare charges for approval by the Appointing Authority, as provided in Section 4(B)(2)(a)

(2) Referral to the Commission

The Appointing Authority may approve and refer for trial any charge against an individual or individuals within the jurisdiction of a Commission in accordance with Section 3(A) and alleging an offense within the jurisdiction of a Commission in accordance with Section 3(B).

(3) Notification of the Accused

The Prosecution shall provide copies of the charges approved by the Appointing Authority to the Accused and Defense Counsel. The Prosecution also shall submit the charges approved by the Appointing Authority to the Presiding Officer of the Commission to which they were referred.

(4) Plea Agreements

The Accused, through Defense Counsel, and the Prosecution may submit for approval to the Appointing Authority a plea agreement mandating a sentence limitation or any other provision in exchange for an agreement to plead guilty, or any other consideration. Any agreement to plead guilty must include a written stipulation of fact, signed by the Accused, that confirms the guilt of the Accused and the voluntary and informed nature of the plea of guilty. If the Appointing Authority approves the plea agreement, the Presiding Officer will, after determining the voluntary and informed nature of the plea agreement, admit the plea agreement and stipulation into evidence and the Commission will be bound to adjudge findings and a sentence pursuant to that plea agreement.

(5) Issuance and Service of Process; Obtaining Evidence

The Commission shall have power to:

(a) Summon witnesses to attend trial and testify;

(b) Administer oaths or affirmations to witnesses and other persons and to question witnesses;

(c) Require the production of documents and other evidentiary material; and

(d) Designate special commissioners to take evidence.

The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer's own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial in accordance with the President's Military Order and this Order. The Commission shall issue its process in the name of the Department of Defense over the signature of the Presiding Officer. Such process shall be served as directed by the Presiding Officer in a manner calculated to give reasonable notice to persons required to take action in accordance with that process.

B. Duties of the Commission During Trial

The Commission shall:

(1) Provide a full and fair trial.

(2) Proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay.

(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order. Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an *ex parte, in camera* presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer and subject to Section 9, Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof. Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable.

Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

(4) Hold each session at such time and place as may be directed by the Appointing Authority. Members of the Commission may meet in closed conference at any time authorized by the Presiding Officer.

C. Oaths

(1) All members of a Commission, all Prosecutors, all Defense Counsel, all court reporters, all security personnel, and all interpreters shall take an oath to perform their duties faithfully.

(2) Each witness appearing before a Commission shall be examined under oath, as provided in Section 6(D)(2)(b).

(3) An oath includes an affirmation. Any formulation that appeals to the conscience of the person to whom the oath is administered and that binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

D. Evidence

(1) Admissibility

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission) the evidence would have probative value to a reasonable person.

(2) Witnesses

(a) Production of Witnesses

The Prosecution or the Defense may request that the Commission hear the testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Presiding Officer on his own initiative, or if requested by other members of the Commission, may also summon and hear witnesses. The Presiding Officer may permit the testimony of witnesses by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given to the testimony of the witness.

(b) Testimony

Testimony of witnesses shall be given under oath or affirmation. The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness.

(c) Examination of Witnesses

A witness who testifies before the Commission is subject to both direct examination and cross examination. The Presiding Officer shall maintain order in the proceedings and shall not permit badgering of witnesses or questions that are not material to the issues before the Commission. Members of the Commission may submit written questions to the Presiding Officer for the witnesses at any time.

(d) Protection of Witnesses

The Presiding Officer shall consider the safety of witnesses and others, as well as the safeguarding of Protected Information as defined in Section 6(D)(5)(a), in determining the appropriate methods of receiving testimony and evidence. The Presiding Officer may hear any presentation by the Prosecution or the Defense, including an *ex parte, in camera* presentation, regarding the safety of potential witnesses before determining the ways in which witnesses and evidence will be protected. The Presiding Officer may authorize any methods appropriate for the protection of witnesses and evidence. Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.

(3) Other Evidence

Subject to the requirements of Section 6(D)(1) concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.

(4) Notice

The Presiding Officer may, after affording the Prosecution and the Defense an opportunity to be heard, take conclusive notice of facts that are not subject to reasonable dispute either because they are generally known or are capable of determination by resort to sources that cannot reasonably be contested. The Presiding Officer shall inform the other members of any facts conclusively noticed under this provision.

(5) Protection of Information

(a) Protective Order

The Presiding Officer may issue protective orders as necessary to carry out the President's Military Order and this Order, including to safeguard "Protected Information," which includes: (i) information classified or classifiable pursuant to reference (d); (ii) information protected by law or rule from unauthorized disclosure; (iii) information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses; (iv) information concerning intelligence and law enforcement sources, methods, or activities; or (v) information concerning other national security interests. As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information.

(b) Limited Disclosure

The Presiding Officer, upon motion of the Prosecution or *sua sponte*, shall, as necessary to protect the interests of the United States and consistent with Section 9, direct (i) the deletion of specified items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel; (ii) the substitution of a portion or summary of the information for such Protected Information; or (iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove. The Prosecution's motion and any materials submitted in support thereof or in response thereto shall, upon request of the Prosecution, be considered by the Presiding Officer *ex parte, in camera*, but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel. The Accused and the Civilian Defense Counsel shall be provided access to Protected Information falling under Section 5(E) to the extent consistent with national security, law enforcement interests, and applicable law. If access to such Protected Information is denied and an adequate substitute for that information, such as described above, is unavailable, the Prosecution shall not introduce the Protected Information as evidence without the approval of the Chief Prosecutor; and the Presiding Officer, notwithstanding any determination of probative value under Section 6(D)(1), shall not admit the Protected Information as evidence if the admission of such evidence would result in the denial of a full and fair trial.

(c) Closure of Proceedings

The Presiding Officer may direct the closure of proceedings in accordance with Section 6(B)(3).

(d) Protected Information as Part of the Record of Trial

All exhibits admitted as evidence but containing Protected Information shall be sealed and annexed to the record of trial. Additionally, any Protected Information not admitted as evidence but reviewed *in camera* and subsequently withheld from the Defense over Defense objection shall, with the associated motions and responses and any materials submitted in support thereof, be sealed and annexed to the record of trial as additional exhibits. Such sealed material shall be made available to reviewing authorities in closed proceedings.

E. Proceedings During Trial

The proceedings at each trial will be conducted substantially as follows, unless modified by the Presiding Officer to suit the particular circumstances:

(1) Each charge will be read, or its substance communicated, in the presence of the Accused and the Commission.

(2) The Presiding Officer shall ask each Accused whether the Accused pleads "Guilty" or "Not Guilty." Should the Accused refuse to enter a plea, the Presiding Officer shall enter a plea of "Not Guilty" on the Accused's behalf. If the plea to an offense is "Guilty," the Presiding Officer shall enter a finding of Guilty on that offense after conducting sufficient inquiry to form an opinion that the plea is voluntary and informed. Any plea of Guilty that is not determined to be voluntary and informed shall be changed to a plea of Not Guilty. Plea proceedings shall then continue as to the remaining charges. If a plea of "Guilty" is made on all charges, the Commission shall proceed to sentencing proceedings; if not, the Commission shall proceed to trial as to the charges for which a "Not Guilty" plea has been entered.

(3) The Prosecution shall make its opening statement.

(4) The witnesses and other evidence for the Prosecution shall be heard or received.

(5) The Defense may make an opening statement after the Prosecution's opening statement or prior to presenting its case.

(6) The witnesses and other evidence for the Defense shall be heard or received.

(7) Thereafter, the Prosecution and the Defense may introduce evidence in rebuttal and surrebuttal.

(8) The Prosecution shall present argument to the Commission. Defense Counsel shall be permitted to present argument in response, and then the Prosecution may reply in rebuttal.

(9) After the members of the Commission, other than the Presiding Officer, deliberate and vote on findings in closed conference, the senior-ranking member who voted on findings shall announce the Commission's findings in the presence of the entire Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

(10) In the event a finding of Guilty is entered for an offense, the Prosecution and the Defense may present information to aid the Commission in determining an appropriate sentence. The Accused may testify and shall be subject to cross examination regarding any such testimony.

(11) The Prosecution and, thereafter, the Defense shall present argument to the Commission regarding sentencing.

(12) After the members of the Commission, other than the Presiding Officer, deliberate and vote on a sentence in closed conference, the senior-ranking member who voted on a sentence shall announce the Commission's sentence in the presence of the entire Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

F. Voting

In accordance with instructions from the Presiding Officer, the other members of the Commission shall deliberate and vote in closed conference. Such a Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense. An affirmative vote of two-thirds of the other members is required for a finding of Guilty. When appropriate, the other members of the Commission may adjust a charged offense by exceptions and substitutions of language that do not substantially change the nature of the offense or increase its seriousness, or it may vote to convict of a lesser-included offense. An affirmative vote of two-thirds of the other members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all of the other members. Votes on findings and sentences shall be taken by secret, written ballot. The Presiding Officer shall not participate in, or be present during, the deliberations or votes on findings or sentence by the other members of the Commission.

G. Sentence

Upon conviction of an Accused, in accordance with instructions from the Presiding Officer, the other members of the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the other members of the Commission shall determine to be proper. Only a Commission that includes at least seven other members may sentence an Accused to death. A Commission may (subject to rights of third parties) order confiscation of any property of a convicted Accused, deprive that Accused of any stolen property, or order the delivery of such property to the United States for disposition.

H. Post-Trial Procedures

(1) Record of Trial

Each Commission shall make a verbatim transcript of its proceedings, apart from all Commission deliberations, and preserve all evidence admitted in the trial (including any sentencing proceedings) of each case brought before it, which shall constitute the record of trial. The court reporter shall prepare the official record of trial and submit it to the Presiding Officer for

authentication upon completion. The Presiding Officer shall transmit the authenticated record of trial to the Appointing Authority. If the Secretary of Defense is serving as the Appointing Authority, the record shall be transmitted to the Review Panel constituted under Section 6(H)(4).

(2) Finality of Findings and Sentence

A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to Section 4(c)(8) of the President's Military Order and in accordance with Section 6(H)(6) of this Order. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly. Adjudged confinement shall begin immediately following the trial.

(3) Review by the Appointing Authority

If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4). If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.

(4) Review Panel

The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (e). At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within seventy-five days after receipt of the record of trial, the Review Panel shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

(5) Review by the Secretary of Defense

The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of the President's Military Order, forward it to the President with a recommendation as to disposition.

(6) Final Decision

After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under Section 6(H)(5) shall constitute the final decision.

7. REGULATIONS

A. Supplementary Regulations and Instructions

The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President's Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

B. Construction

In the event of any inconsistency between the President's Military Order and this Order, including any supplementary regulations or instructions issued under Section 7(A), the provisions of the President's Military Order shall govern. In the event of any inconsistency between this Order and any regulations or instructions issued under Section 7(A), the provisions of this Order shall govern.

8. AUTHORITY

Nothing in this Order shall be construed to limit in any way the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons. Nothing in this Order shall affect the authority to constitute military commissions for a purpose not governed by the President's Military Order.

9. PROTECTION OF STATE SECRETS

Nothing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.

10. OTHER

This Order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or

other entities, its officers or employees, or any other person. No provision in this Order shall be construed to be a requirement of the United States Constitution. Section and subsection captions in this document are for convenience only and shall not be used in construing the requirements of this Order. Failure to meet a time period specified in this Order, or supplementary regulations or instructions issued under Section 7(A), shall not create a right to relief for the Accused or any other person. Reference (f) shall not apply to this Order or any supplementary regulations or instructions issued under Section 7(A).

11. AMENDMENT

The Secretary of Defense may amend this Order from time to time.

12. DELEGATION

The authority of the Secretary of Defense to make requests for assistance under Section 5 of the President's Military Order is delegated to the General Counsel of the Department of Defense. The Executive Secretary of the Department of Defense shall provide such assistance to the General Counsel as the General Counsel determines necessary for this purpose.

13. EFFECTIVE DATE

This Order is effective immediately.

Donald H. Rumsfeld
Secretary of Defense

EXHIBIT D

United States Department of Defense

News Release

On the web: http://www.defenselink.mil/cgi-bin/dlprint.cgi?
http://www.defenselink.mil/releases/2004/nr20040707-0992.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

No. 651-04
MMEDIATE RELEASE July 7, 2004

COMBATANT STATUS REVIEW TRIBUNAL ORDER ISSUED

The Department of Defense announced today the formation of the Combatant Status Review Tribunal for detainees held at Guantanamo Bay, Cuba. This tribunal will serve as a forum for detainees to contest their status as enemy combatants.

Detainees held at Guantanamo Bay will be notified within 10 days of their opportunity to contest their enemy combatant status under this process. The tribunal process will start as soon as possible. Detainees will also be notified of their right to seek a writ of habeas corpus in the courts of the United States. Habeas corpus is a writ ordering a person in custody to be brought before a court.

An individual tribunal will be comprised of three neutral officers, none of whom were involved with the detainee. One of the tribunal members will be a judge advocate and the senior ranking officer will serve as the president of the tribunal.

Each detainee will be assigned a military officer as a personal representative. That officer will assist the detainee in preparing for a tribunal hearing. Detainees will have the right to testify before the tribunal, call witnesses and introduce any other evidence. Following the hearing of testimony and other evidence, the tribunal will determine in a closed-door session whether the detainee is properly held as an enemy combatant. Any detainee who is determined not to be an enemy combatant will be transferred to their country of citizenship or other disposition consistent with domestic and international obligations and U.S. foreign policy.

This tribunal does not replace the administrative review procedure announced earlier this year.

The order establishing the tribunals and a DoD Fact Sheet are available at:
ttp://www.defenselink.mil/news/Jul2004/d20040707review.pdf
ttp://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf

ttp://www.defenselink.mil/releases/2004/nr20040707-0992.html

EXHIBIT E

Department of Defense
Military Commission Instruction No. 2

April 30, 2003

SUBJECT: Crimes and Elements for Trials by Military Commission

References: (a) Military Commission Order No. 1 (Mar. 21, 2002)

(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)

(c) Section 113(d) of Title 10 of the United States Code

(d) Section 140(b) of Title 10 of the United States Code

(e) Section 821 of Title 10 of the United States Code

(f) Military Commission Instruction No. 1, current edition

1. PURPOSE

This Instruction provides guidance with respect to crimes that may be tried by military commissions established pursuant to references (a) and (b) and enumerates the elements of those crimes.

2. AUTHORITY

This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (b) through (e). The provisions of reference (f) are applicable to this Instruction.

3. GENERAL

A. *Background.* The following crimes and elements thereof are intended for use by military commissions established pursuant to references (a) and (b), the jurisdiction of which extends to offenses or offenders that by statute or the law of armed conflict may be tried by military commission as limited by reference (b). No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that

body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

B. *Effect of Other Laws.* No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this Instruction as compared to other articulations of law.

C. *Non-Exclusivity.* This Instruction does not contain a comprehensive list of crimes triable by military commission. It is intended to be illustrative of applicable principles of the common law of war but not to provide an exclusive enumeration of the punishable acts recognized as such by that law. The absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense.

4. APPLICABLE PRINCIPLES OF LAW

A. *General Intent.* All actions taken by the Accused that are necessary for completion of a crime must be performed with general intent. This intent is not listed as a separate element. When the mens rea required for culpability to attach involves an intent that a particular consequence occur, or some other specific intent, an intent element is included. The necessary relationship between such intent element and the conduct constituting the actus reus is not articulated for each set of elements, but is presumed; a nexus between the two is necessary.

B. *The Element of Wrongfulness and Defenses.* Conduct must be wrongful to constitute one of the offenses enumerated herein or any other offense triable by military commission. Conduct is wrongful if it is done without justification or excuse cognizable under applicable law. The element of wrongfulness (or the absence of lawful justification or excuse), which may be required under the customary law of armed conflict, is not repeated in the elements of crimes below. Conduct satisfying the elements found herein shall be inferred to be wrongful in the absence of evidence to the contrary. Similarly, this Instruction does not enunciate defenses that may apply for specific offenses, though an Accused is entitled to raise any defense available under the law of armed conflict. Defenses potentially available to an Accused under the law of armed conflict, such as self-defense, mistake of fact, and duress, may be applicable to certain offenses subject to trial by military commission. In the absence of evidence to the contrary, defenses in individual cases shall be presumed not to apply. The burden of going forward with evidence of lawful justification or excuse or any applicable defense shall be upon the Accused. With respect to the issue of combatant immunity raised by the specific enumeration of an element requiring the absence thereof, the prosecution must affirmatively prove that element regardless of whether the issue is raised by the defense. Once an applicable defense or an issue of lawful justification or lawful excuse is fairly raised by the evidence presented, except for the defense of lack of mental responsibility, the burden is on the prosecution to establish beyond a reasonable doubt that the conduct was wrongful or that the defense does not apply. With respect to the defense of lack of mental responsibility, the

Accused has the burden of proving by clear and convincing evidence that, as a result of a severe mental disease or defect, the Accused was unable to appreciate the nature and quality of the wrongfulness of the Accused's acts. As provided in Section 5(C) of reference (a), the prosecution bears the burden of establishing the Accused's guilt beyond a reasonable doubt in all cases tried by a military commission. Each element of an offense enumerated herein must be proven beyond a reasonable doubt.

C. *Statute of Limitations*. Violations of the laws of war listed herein are not subject to any statute of limitations.

5. DEFINITIONS

A. *Combatant immunity*. Under the law of armed conflict, only a lawful combatant enjoys "combatant immunity" or "belligerent privilege" for the lawful conduct of hostilities during armed conflict.

B. *Enemy*. "Enemy" includes any entity with which the United States or allied forces may be engaged in armed conflict, or which is preparing to attack the United States. It is not limited to foreign nations, or foreign military organizations or members thereof. "Enemy" specifically includes any organization of terrorists with international reach.

C. *In the context of and was associated with armed conflict*. Elements containing this language require a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus (*e.g.*, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if temporally and geographically associated with armed conflict, is not "in the context of" the armed conflict). The focus of this element is not the nature or characterization of the conflict, but the nexus to it. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war," or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

D. *Military Objective*. "Military objectives" are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.

E. *Object of the attack*. "Object of the attack" refers to the person, place, or thing intentionally targeted. In this regard, the term includes neither collateral damage nor incidental injury or death.

F. *Protected property.* "Protected property" refers to property specifically protected by the law of armed conflict such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provided they are not being used for military purposes or are not otherwise military objectives. Such property would include objects properly identified by one of the distinctive emblems of the Geneva Conventions but does not include all civilian property.

G. *Protected under the law of war.* The person or object in question is expressly "protected" under one or more of the Geneva Conventions of 1949 or, to the extent applicable, customary international law. The term does not refer to all who enjoy some form of protection as a consequence of compliance with international law, but those who are expressly designated as such by the applicable law of armed conflict. For example, persons who either are *hors de combat* or medical or religious personnel taking no active part in hostilities are expressly protected, but other civilians may not be.

H. *Should have known.* The facts and circumstances were such that a reasonable person in the Accused's position would have had the relevant knowledge or awareness.

6. CRIMES AND ELEMENTS

A. *Substantive Offenses—War Crimes.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

1) Willful Killing Of Protected Persons

a. *Elements.*

(1) The accused killed one or more persons;

(2) The accused intended to kill such person or persons;

(3) Such person or persons were protected under the law of war;

(4) The accused knew or should have known of the factual circumstances that established that protected status; and

(5) The killing took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

2) Attacking Civilians

a. *Elements.*

(1) The accused engaged in an attack;

(2) The object of the attack was a civilian population as such or individual civilians not taking direct or active part in hostilities;

(3) The accused intended the civilian population as such or individual civilians not taking direct or active part in hostilities to be an object of the attack; and

(4) The attack took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

3) Attacking Civilian Objects

a. *Elements.*

(1) The accused engaged in an attack;

(2) The object of the attack was civilian property, that is, property that was not a military objective;

(3) The accused intended such property to be an object of the attack;

(4) The accused knew or should have known that such property was not a military objective; and

(5) The attack took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

4) Attacking Protected Property

a. *Elements.*

(1) The accused engaged in an attack;

(2) The object of the attack was protected property;

(3) The accused intended such property to be an object of the attack;

(4) The accused knew or should have known of the factual circumstances that established that protected status; and

(5) The attack took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

5) Pillaging

a. *Elements.*

(1) The accused appropriated or seized certain property;

(2) The accused intended to appropriate or seize such property for private or personal use;

(3) The appropriation or seizure was without the consent of the owner of the property or other person with authority to permit such appropriation or seizure; and

(4) The appropriation or seizure took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) As indicated by the use of the term "private or personal use," legitimate captures or appropriations, or seizures justified by military necessity, cannot constitute the crime of pillaging.

6) Denying Quarter

a. *Elements.*

(1) The accused declared, ordered, or otherwise indicated that there shall be no survivors or surrender accepted;

(2) The accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;

(3) It was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;

(4) The accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and

(5) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (3) precludes this offense from being interpreted as limiting the application of lawful means or methods of warfare against enemy

combatants. For example, a remotely delivered attack cannot give rise to this offense.

7) **Taking Hostages**

a. *Elements.*

(1) The accused seized, detained, or otherwise held hostage one or more persons;

(2) The accused threatened to kill, injure, or continue to detain such person or persons;

(3) The accused intended to compel a State, an international organization, a natural or legal person, or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Consistent with Section 4(B) of this Instruction, this offense cannot be committed by lawfully detaining enemy combatants or other individuals as authorized by the law of armed conflict.

8) **Employing Poison or Analogous Weapons**

a. *Elements.*

(1) The accused employed a substance or a weapon that releases a substance as a result of its employment;

(2) The substance was such that exposure thereto causes death or serious damage to health in the ordinary course of events, through its asphyxiating, poisonous, or bacteriological properties;

(3) The accused employed the substance or weapon with the intent of utilizing such asphyxiating, poisonous, or bacteriological properties as a method of warfare;

(4) The accused knew or should have known of the nature of the substance or weapon; and

(5) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The "death or serious damage to health" required by Element (2) of this offense must be a direct result of the substance's effect or effects on the human body (e.g., asphyxiation caused by the depletion of atmospheric

oxygen secondary to a chemical or other reaction would not give rise to this offense).

(2) The clause "serious damage to health" does not include temporary incapacitation or sensory irritation.

(3) The use of the "substance or weapon" at issue must be proscribed under the law of armed conflict. It may include chemical or biological agents.

(4) The specific intent element for this offense precludes liability for mere knowledge of potential collateral consequences (e.g., mere knowledge of a secondary asphyxiating or toxic effect would be insufficient to complete the offense).

9) Using Protected Persons as Shields

a. *Elements.*

(1) The accused positioned, or took advantage of the location of, one or more civilians or persons protected under the law of war;

(2) The accused intended to use the civilian or protected nature of the person or persons to shield a military objective from attack or to shield, favor, or impede military operations; and

(3) The conduct took place in the context of and was associated with armed conflict.

10) Using Protected Property as Shields

a. *Elements.*

(1) The accused positioned, or took advantage of the location of, civilian property or property protected under the law of war;

(2) The accused intended to shield a military objective from attack or to shield, favor, or impede military operations; and

(3) The conduct took place in the context of and was associated with armed conflict.

11) Torture

a. *Elements.*

(1) The accused inflicted severe physical or mental pain or suffering upon one or more persons;

(2) The accused intended to inflict such severe physical or mental pain or suffering;

(3) Such person or persons were in the custody or under the control of the accused; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Consistent with Section 4(B) of this Instruction, this offense does not include pain or suffering arising only from, inherent in, or incidental to, lawfully imposed punishments. This offense does not include the incidental infliction of pain or suffering associated with the legitimate conduct of hostilities.

(2) Severe "mental pain or suffering" is the prolonged mental harm caused by or resulting from:

(a) the intentional infliction or threatened infliction of severe physical pain or suffering;

(b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(c) the threat of imminent death; or

(d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(3) "Prolonged mental harm" is a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder.

(4) Element (3) of this offense does not require a particular formal relationship between the accused and the victim. Rather, it precludes prosecution for pain or suffering consequent to a lawful military attack.

12) Causing Serious Injury

a. *Elements.*

(1) The accused caused serious injury to the body or health of one or more persons;

(2) The accused intended to inflict such serious injury;

(3) Such person or persons were in the custody or under the control of the accused; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) "Serious injury" includes fractured or dislocated bones, deep cuts, torn members of the body, and serious damage to internal organs.

13) Mutilation or Maiming

a. *Elements.*

(1) The accused subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage;

(2) The accused intended to subject such person or persons to such mutilation;

(3) The conduct caused death or seriously damaged or endangered the physical or mental health or appearance of such person or persons.

(4) The conduct was neither justified by the medical treatment of the person or persons concerned nor carried out in the interest of such person or persons;

(5) Such person or persons were in the custody or control of the accused; and

(6) The conduct took place in the context of and was associated with armed conflict.

14) Use of Treachery or Perfidy

a. *Elements.*

(1) The accused invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under the law of war;

(2) The accused intended to betray that confidence or belief;

(3) The accused killed, injured, or captured one or more persons;

(4) The accused made use of that confidence or belief in killing, injuring, or capturing such person or persons; and

(5) The conduct took place in the context of and was associated with armed conflict.

15) Improper Use of Flag of Truce

a. *Elements.*

(1) The accused used a flag of truce;

(2) The accused made such use in order to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there was no such intention on the part of the accused; and

(3) The conduct took place in the context of and was associated with armed conflict.

16) Improper Use of Protective Emblems

a. *Elements.*

(1) The accused used a protective emblem recognized by the law of armed conflict;

(2) The accused undertook such use for combatant purposes in a manner prohibited by the law of armed conflict;

(3) The accused knew or should have known of the prohibited nature of such use; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) "Combatant purposes," as used in Element (2) of this offense, means purposes directly related to hostilities and does not include medical, religious, or similar activities.

17) Degrading Treatment of a Dead Body

a. *Elements.*

(1) The accused degraded or otherwise violated the dignity of the body of a dead person;

(2) The accused intended to degrade or otherwise violate the dignity of such body;

(3) The severity of the degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (2) of this offense precludes prosecution for actions justified by military necessity.

18) Rape

a. *Elements.*

(1) The accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

(2) The invasion was committed by force, threat of force or coercion, or was committed against a person incapable of giving consent; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (2) of this offense recognizes that consensual conduct does not give rise to this offense.

(2) It is understood that a person may be incapable of giving consent if affected by natural, induced, or age-related incapacity.

(3) The concept of "invasion" is linked to the inherent wrongfulness requirement for all offenses. In this case, for example, a legitimate body cavity search could not give rise to this offense.

(4) The concept of "invasion" is gender neutral.

B. *Substantive Offenses—Other Offenses Triable by Military Commission.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

1) Hijacking or Hazarding a Vessel or Aircraft

a. *Elements.*

(1) The accused seized, exercised control over, or endangered the safe navigation of a vessel or aircraft;

(2) The accused intended to so seize, exercise control over, or endanger such vessel or aircraft; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) A seizure, exercise of control, or endangerment required by military necessity, or against a lawful military objective undertaken by military forces of a State in the exercise of their official duties, would not satisfy the wrongfulness requirement for this crime.

2) Terrorism

a. *Elements.*

(1) The accused killed or inflicted bodily harm on one or more persons or destroyed property;

(2) The accused:

(a) intended to kill or inflict bodily harm on one or more persons;

or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) The killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion; and

(4) The killing, harm or destruction took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (1) of this offense includes the concept of causing death or bodily harm, even if indirectly.

(2) The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

3) Murder by an Unprivileged Belligerent

a. *Elements.*

(1) The accused killed one or more persons;

(2) The accused:

(a) intended to kill or inflict great bodily harm on such person or persons

or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) The accused did not enjoy combatant immunity; and

(4) The killing took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The term "kill" includes intentionally causing death, whether directly or indirectly.

(2) Unlike the crimes of willful killing or attacking civilians, in which the victim's status is a prerequisite to criminality, for this offense the victim's status is immaterial. Even an attack on a soldier would be a crime if the attacker did not enjoy "belligerent privilege" or "combatant immunity."

4) Destruction of Property by an Unprivileged Belligerent

a. *Elements.*

(1) The accused destroyed property;

(2) The property belonged to another person, and the destruction was without that person's consent;

(3) The accused intended to destroy such property;

(4) The accused did not enjoy combatant immunity; and

(5) The destruction took place in the context of and was associated with armed conflict.

5) Aiding the Enemy

a. *Elements.*

(1) The accused aided the enemy;

(2) The accused intended to aid the enemy; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Means of accomplishing Element (1) of this offense include, but are not limited to: providing arms, ammunition, supplies, money, other items or services to the enemy; harboring or protecting the enemy; or giving intelligence or other information to the enemy.

(2) The requirement that conduct be wrongful for this crime necessitates that the accused act without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence or quarters in accordance with applicable orders or policy is not aiding the enemy.

(3) The requirement that conduct be wrongful for this crime may necessitate that, in the case of a lawful belligerent, the accused owe allegiance or some duty to the United States of America or to an ally or coalition partner. For example, citizenship, resident alien status, or a contractual relationship in or with the United States or an ally or coalition partner is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

6) Spying

a. *Elements.*

(1) The accused collected or attempted to collect certain information;

(2) The accused intended to convey such information to the enemy;

(3) The accused, in collecting or attempting to collect the information, was lurking or acting clandestinely, while acting under false pretenses; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Members of a military organization not wearing a disguise and others who carry out their missions openly are not spies, if, though they may have resorted to concealment, they have not acted under false pretenses.

(2) Related to the requirement that conduct be wrongful or without justification or excuse in this case is the fact that, consistent with the law of war, a lawful combatant who, after rejoining the armed force to which that combatant belongs, is subsequently captured, can not be punished for previous acts of espionage. His successful rejoining of his armed force constitutes a defense.

7) Perjury or False Testimony

a. *Elements.*

(1) The accused testified at a military commission, in proceedings ancillary to a military commission, or provided information in a writing executed under an oath to tell the truth or a declaration acknowledging the applicability of penalties of perjury in connection with such proceedings;

(2) Such testimony or information was material;

(3) Such testimony or information was false; and

(4) The accused knew such testimony or information to be false.

8) Obstruction of Justice Related to Military Commissions

a. *Elements.*

(1) The accused did an act;

(2) The accused intended to influence, impede, or otherwise obstruct the due administration of justice; and

(3) The accused did such act in the case of a certain person against whom the accused had reason to believe:

(a) there were or would be proceedings before a military commission

or

(b) there was an ongoing investigation of offenses triable by military commission.

C. *Other Forms of Liability and Related Offenses.* A person is criminally liable as a principal for a completed substantive offense if that person commits the offense (perpetrator), aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility. Such a person would be charged as a principal even if another individual more directly perpetrated the offense. In proving culpability, however, the below listed definitions and elements are applicable. Additionally, if a substantive offense was completed, a person may be criminally liable for the separate offense of accessory after the fact. If the substantive offense was not completed, a person may be criminally liable of the lesser-included offense of attempt or the separate offense of solicitation. Finally, regardless of whether the substantive offense was completed, a person may be criminally liable of the separate offense of conspiracy in addition to the substantive offense. Each element need not be specifically charged.

1) Aiding or Abetting

a. *Elements.*

(1) The accused committed an act that aided or abetted another person or entity in the commission of a substantive offense triable by military commission;

(2) Such other person or entity committed or attempted to commit the substantive offense; and

(3) The accused intended to or knew that the act would aid or abet such other person or entity in the commission of the substantive offense or an associated criminal purpose or enterprise.

b. *Comments.*

(1) The term "aided or abetted" in Element (1) includes: assisting, encouraging, advising, instigating, counseling, ordering, or procuring

another to commit a substantive offense; assisting, encouraging, advising, counseling, or ordering another in the commission of a substantive offense; and in any other way facilitating the commission of a substantive offense.

(2) In some circumstances, inaction may render one liable as an aider or abettor. If a person has a legal duty to prevent or thwart the commission of a substantive offense, but does not do so, that person may be considered to have aided or abetted the commission of the offense if such noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(3) An accused charged with aiding or abetting should be charged with the related substantive offense as a principal.

2) Solicitation

a. *Elements.*

(1) The accused solicited, ordered, induced, or advised a certain person or persons to commit one or more substantive offenses triable by military commission; and

(2) The accused intended that the offense actually be committed.

b. *Comments.*

(1) The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to induce a person or persons to commit any offense triable by military commission. It is not necessary that the person or persons solicited, ordered, induced, advised, or assisted agree to or act upon the solicitation or advice. If the offense solicited is actually committed, however, the accused is liable under the law of armed conflict for the substantive offense. An accused should not be convicted of both solicitation and the substantive offense solicited if criminal liability for the substantive offense is based upon the solicitation.

(2) Solicitation may be by means other than speech or writing. Any act or conduct that reasonably may be construed as a serious request, order, inducement, advice, or offer of assistance to commit any offense triable by military commission may constitute solicitation. It is not necessary that the accused act alone in the solicitation, order, inducement, advising, or assistance. The accused may act through other persons in committing this offense

(3) An accused charged with solicitation of a completed substantive offense should be charged for the substantive offense as a principal. An accused charged with solicitation of an uncompleted offense should be charged for the separate offense of solicitation. Solicitation is not a lesser-included offense of the related substantive offense.

3) Command/Superior Responsibility – Perpetrating

a. *Elements.*

(1) The accused had command and control, or effective authority and control, over one or more subordinates;

(2) One or more of the accused's subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(3) The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding or abetting such offense or offenses; and

(4) The accused failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the offense or offenses.

b. *Comments.*

(1) The phrase "effective authority and control" in Element (1) of this offense includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who should not be held responsible for the behavior of subordinates involved in activities that have no relationship to such superior's sphere of authority. Subject matter authority need not be demonstrated for command responsibility as it applies to a military commander.

(2) A commander or other military or civilian superior, not in command, charged with failing adequately to prevent or repress a substantive offense triable by military commission should be charged for the related substantive offense as a principal.

4) Command/Superior Responsibility – Misprision

a. *Elements.*

(1) The accused had command and control, or effective authority and control, over one or more subordinates;

(2) One or more of the accused's subordinates had committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(3) The accused knew or should have known that the subordinate or subordinates had committed, attempted to commit, conspired to commit, solicited, or aided or abetted such offense or offenses; and

(4) The accused failed to submit the matter to competent authorities for investigation or prosecution as appropriate.

b. *Comments.*

(1) The phrase, "effective authority and control" in Element (1) of this offense includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who cannot be held responsible under this offense for the behavior of subordinates involved in activities that have nothing to do with such superior's sphere of authority.

(2) A commander or superior charged with failing to take appropriate punitive or investigative action subsequent to the perpetration of a substantive offense triable by military commission should not be charged for the substantive offense as a principal. Such commander or superior should be charged for the separate offense of failing to submit the matter for investigation and/or prosecution as detailed in these elements. This offense is not a lesser-included offense of the related substantive offense.

5) Accessory After the Fact

a. *Elements.*

(1) The accused received, comforted, or assisted a certain person;

(2) Such person had committed an offense triable by military commission;

(3) The accused knew that such person had committed such offense or believed such person had committed a similar or closely related offense; and

(4) The accused intended to hinder or prevent the apprehension, trial, or punishment of such person.

b. *Comments.*

(1) Accessory after the fact should be charged separately from the related substantive offense. It is not a lesser-included offense of the related substantive offense.

6) Conspiracy

a. *Elements.*

(1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined in it willfully, that is, with the intent to further the unlawful purpose; and

(3) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

b. *Comments.*

(1) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(2) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact "triable by military commission."

(3) The overt act must be done by one or more of the conspirators, but not necessarily the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(4) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. It is not essential that any substantive offense be committed.

(5) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(6) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains

guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(8) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

7) Attempt

a. *Elements.*

(1) The accused committed an act;

(2) The accused intended to commit one or more substantive offenses triable by military commission;

(3) The act amounted to more than mere preparation; and

(4) The act apparently tended to effect the commission of the intended offense.

b. *Comments.*

(1) To constitute an attempt there must be a specific intent to commit the offense accompanied by an act that tends to accomplish the unlawful purpose. This intent need not involve knowledge that the offense is in fact "triable by military commission."

(2) Preparation consists of devising or arranging means or measures apparently necessary for the commission of the offense. The act need not be the last act essential to the consummation of the offense. The combination of specific intent to commit an offense, plus the commission of an act apparently tending to further its accomplishment, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(3) A person who purposely engages in conduct that would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt.

(4) It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended offense, solely because of the person's own sense that it was wrong, prior to the completion of the substantive offense. The voluntary abandonment defense is not allowed if the

abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance.

(5) Attempt is a lesser-included offense of any substantive offense triable by military commission and need not be charged separately. An accused may be charged with attempt without being charged with the substantive offense.

7. EFFECTIVE DATE

This Instruction is effective immediately.

William J. Haynes II
General Counsel of the Department of Defense

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GHASSAN ABDULLAH AL SHARBI, Petitioner, v. GEORGE W. BUSH, President of the United States; DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy; JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense; Brigadier General JAY HOOD, Commander, Joint Task Force, Guantánamo Bay, Cuba, and Colonel MICHAEL BUMGARNER, Commander, Joint Detention Group, Joint Task, Guantanamo Bay, Cuba *Respondents*, all sued in their official capacities	)	Civ. Act. No.

CERTIFICATE OF SERVICE

I certify that on December 7, 2005, a true and correct copy of Ghassan Abdullah Al Sharbi's Petition for Writ of *Habeas Corpus* and Complaint for Injunctive, Declaratory and Other Relief was served by hand delivery, via Federal Express, upon:

Kenneth L. Wainstein, Esquire
U.S. Attorney
District of Columbia District
Judiciary Center
555 4th Street, NW
Washington, DC 20530

and that true and correct copies of the Petition were served by certified mail, return receipt requested, upon:

Alberto R. Gonzales, Esquire
Attorney General of the United States
U.S. Department of Justice
Robert F. Kennedy Building
Tenth Street & Constitution Ave., NW
Room 5111
Washington, DC 20530

Mr. George W. Bush
President of the United States
United States of America
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20301-1000

Mr. Donald Rumsfeld
Secretary, United States Department of Defense
1000 Defense Pentagon
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Mr. Gordon R. England
Secretary of the United States Navy
1000 Navy Pentagon
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Mr. John D. Altenburg, Jr.
Appointing Authority for Military Commissions
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Office of Military Commissions
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Army Brig. Gen. Jay Hood
Commander, Joint Task Force-GTMO
JTF-GTMO
APO AE 09360

Army Col. Michael Bumgarner
Commander, JDOG
JTF-GTMO
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Dated: December 7, 2005

Respectfully submitted,

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CLERK=S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CO-932
Rev. 4/96

NOTICE OF DESIGNATION OF RELATED CIVIL CASES PENDING
IN THIS OR ANY OTHER UNITED STATES COURT

Civil Action No. _____
(To be supplied by the Clerk)

NOTICE TO PARTIES:

Pursuant to Rule 405(b)(2), you are required to prepare and submit this form at the time of filing any civil action which is related to any pending cases or which involves the same parties and relates to the same subject matter of any dismissed related cases. This form must be prepared in sufficient quantity to provide one copy for the Clerk=s records, one copy for the Judge to whom the cases is assigned and one copy for each defendant, so that you must prepare 3 copies for a one defendant case, 4 copies for a two defendant case, etc.

NOTICE TO DEFENDANT:

Rule 405(b)(2) of this Court requires that you serve upon the plaintiff and file with your first responsive pleading or motion any objection you have to the related case designation.

NOTICE TO ALL COUNSEL

Rule 405(b)(3) of this Court requires that as soon as an attorney for a party becomes aware of the existence of a related case or cases, such attorney shall immediately notify, in writing, the Judges on whose calendars the cases appear and shall serve such notice on counsel for all other parties.

The plaintiff, defendant or counsel must complete the following:

1. RELATIONSHIP OF NEW CASE TO PENDING RELATED CASE(S).

A new case is deemed related to a case pending in this or another U.S. Court if the new case: [Check appropriate box(es) below.]

- [ ] (a) relates to common property
- [x] (b) involves common issues of fact
- [x] (c) grows out of the same event or transaction
- [ ] (d) involves the validity or infringement of the same patent
- [ ] (e) is filed by the same pro se litigant

2. RELATIONSHIP OF NEW CASE TO DISMISSED RELATED CASE(ES)

A new case is deemed related to a case dismissed, with or without prejudice, in this or any other U.S. Court, if the new case involves the same parties and same subject matter.

Check box if new case is related to a dismissed case: [ ]

3. NAME THE UNITED STATES COURT IN WHICH THE RELATED CASE IS FILED (IF OTHER THAN THIS COURT):

_____

4. CAPTION AND CASE NUMBER OF RELATED CASE(E=S). IF MORE ROOM IS NEED PLEASE USE OTHER SIDE.

Hamdan v. Rumsfeld C.A.No. 04-1519-JR

12/07/2004
DATE

Signature of Plaintiff/Defendant (or counsel)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GHASSAN ABDULLAH AL SHARBI, by his father and next friend, Abdullah Al Sharbi Petitioner, v. GEORGE W. BUSH, President of the United States; DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy; JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense; Brigadier General JAY HOOD, Commander, Joint Task Force, Guantánamo Bay, Cuba, and Colonel MICHAEL BUMGARNER, Commander, Joint Detention Group, Joint Task, Guantanamo Bay, Cuba *Respondents*, all sued in their official capacities	Civ. Act. No. 1:05-cv-2348

FIRST AMENDED PETITION FOR WRIT OF *HABEAS CORPUS*
AND COMPLAINT FOR INJUNCTIVE, DECLARATORY AND OTHER RELIEF

Petitioner, Ghassan Abdullah Al Sharbi ("Al Sharbi") through his undersigned attorney, files this petition against Respondents for habeas and other relief. On information and belief, Petitioner alleges that Respondents have held Al Sharbi for more than three years without demonstrating a valid basis for his detention. They have now charged Al Sharbi with "crimes," which they have made up after the fact. Respondents intend to try Al Sharbi for these "crimes" before a military panel that they have appointed and over which they exercise reviewing authority. The prospect of this lawless proceeding provides no basis for the continued detention of Al Sharbi.

In support of his Petition, Al Sharbi alleges as follows:

INTRODUCTION

1. Petitioner Ghassan Abdullah Al Sharbi is currently incarcerated at United States Naval Station, Guantánamo Bay, Cuba (hereinafter "Guantánamo Bay"). Upon information and belief, Al Sharbi was seized in or about March 2002, in Pakistan, and was subsequently transferred to the custody of U.S. military and intelligence personnel. **This petition is filed by the authority and the request of petitioner's father and next friend, Abdullah Al Sharbi, P.O. Box 128247, Jeddah 2136, Saudi Arabia.** A copy of such authority and request is attached hereto as EXHIBIT F.

2. Al Sharbi has been unlawfully detained at the direction of the Respondents for over three years.

3. On information and belief, there is no basis for Al Sharbi's detention. At no time did Al Sharbi engage in any criminal or terrorist conduct. Nor did he kill, injure, fire upon, or direct fire upon, any U.S. or Coalition Forces. Nor did he attempt any such conduct. He did not at any time commit any criminal violations, or any violations of the law of war. Nor did he ever enter into any agreement with anyone to do so. Accordingly, Al Sharbi brings this action seeking a writ of *habeas corpus* to secure his release from Respondents' unlawful detention.

4. Lacking any lawful basis for Al Sharbi's continued detention, Respondents now seek to justify Al Sharbi's detention by subjecting him to "trial" by military commission (the "Commission") on purported war crime charges of Respondents' own creation and definition, never before recognized under international law, and procedures that are unannounced and unpromulgated in advance, procedures essentially subject to the ongoing judgment of the Commission, freely subject to modification by the Commission as its proceedings take place.

Because Respondents' war crimes charges are indisputably invalid and the Commission's process and procedures unlawful, Al Sharbi seeks habeas relief with respect to his unlawful detention and trial by the Commission. A true copy of the charges proffered against Al Sharbi for trial by the Commission is attached as EXHIBIT A.

5. As set forth more fully below, Al Sharbi also challenges numerous other unlawful aspects of his continued detention by Respondents, including, without limitation (i) Respondents' failure to afford Al Sharbi the protections of the Geneva Conventions and other applicable law to which he is presumptively and actually entitled, (ii) Respondents' denial of Al Sharbi's rights to due process and equal protection of the laws, and (iii) Al Sharbi's continued detention in derogation of his right to speedy trial under applicable law.

6. Last year, the Supreme Court explained that "[c]onsistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace." *Rasul v. Bush*, 542 U.S. 466 at 557, 124 S. Ct. 2686 at 2692-93 (2004).

7. This is one such application. Al Sharbi invokes the protection of this Court and seeks the Great Writ in order to secure his release and to vindicate the fundamental rights recognized by the Supreme Court. *See Hamdi v. Rumsfeld,* 542 U.S. 507, 124 S. Ct. 2633 (2004); 28 U.S.C. § 2241(c)(3); *Rasul*, 542 U.S. 446 at 487, 124 S. Ct. 2686 at 2700 (Kennedy, J., concurring) ("[a] necessary corollary of [*Johnson v.*] *Eisentrager* [339 U.S. 763 (1950)] is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated"), citing *Ex parte Milligan*, 4 Wall. 2, 18 L.Ed. 281 (1866).

PARTIES

8. Petitioner Ghassan Abdullah Al Sharbi, is a citizen of Saudi Arabia. The United States military (or its agents) assumed custody of Al Sharbi in or about March 2002, and he has remained in the custody of the United States continuously since that date.

9. Respondent George W. Bush is President of the United States, and executed the Military Order that created the military commissions under which Al Sharbi is being detained. Respondent President Bush also designated Al Sharbi a person eligible for trial by the Commission, which is why Al Sharbi is scheduled for an unlawful trial before the Commission.

10. Respondent Donald H. Rumsfeld is the Secretary of Defense of the United States, and commands all aspects of the United States Military, including the Office of Military Commissions established by the applicable Presidential Military Order. Respondent Secretary Rumsfeld has custodial authority over Al Sharbi and is ultimately in charge of the prosecution of Al Sharbi by the Commission.

11. Respondent Gordon R. England is Secretary of the Navy, and is Respondent Secretary Rumsfeld's designee for the Combatant Status Review Tribunals.

12. Respondent John D. Altenburg, Jr., is the Appointing Authority for Military Commissions, and in that capacity exercises authority over the entire Commission process.

13. Respondent Brigadier General Jay Hood is the Commander of Joint Task Force Guantánamo and, in that capacity, is responsible for Al Sharbi's continued and indefinite detention at Guantánamo Bay.

14. Colonel Michael Bumgarner is the Commander of Joint Detention Group and in that capacity, is responsible for the U.S. facility where Al Sharbi is presently detained. He exercises immediate custody over Al Sharbi pursuant to orders issued by Respondent President Bush, Respondent Secretary Rumsfeld and Respondent General Hood.

JURISDICTION

15. This action arises under the Constitution, laws and treaties of the United States, including Articles I, II, III, and VI and the 5th and 6th Amendments, 28 U.S.C. §§1331, 1350, 1361, 1391, 2241, and 2242, 5 U.S.C. §702, the All Writs Act (28 U.S.C. §1651), 42 U.S.C. §1981, the *Bivens* doctrine [*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)], and Geneva Convention (III), as well as international law more generally.

16. This Court possesses subject matter jurisdiction under 28 U.S.C. §§ 1350, 1361 and 1391, 5 U.S.C. § 702, as well as the *habeas corpus* statute, 28 U.S.C. § 2241, and the All Writs Act, 28 U.S.C. § 1651. In addition, the Court may grant the relief requested under Art. 2(a)(12) of the UCMJ, 10 U.S.C. § 802(a)(12), which grants jurisdiction over a petition for judicial review filed by or on behalf of parties incarcerated at Guantánamo. As explained above, the Supreme Court expressly held that this Court has subject matter jurisdiction to consider a *habeas* petition by a Guantanamo detainee in *Rasul*.

17. This Court has personal jurisdiction over the parties. Respondents have substantial contacts in this District.

18. Venue is proper in this Court under 28 U.S.C. §§ 1391(b) and (e) since a substantial part of the events, acts, and omissions giving rise to the claim occurred in this District and a Respondent may be found in the District. *See Rasul*, 542 U.S. 466, 124 S. Ct. 2686 (2004); *see also Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004) (amended opinion) (transferring Guantánamo Bay detainee's action to the District of the District of Columbia in light of *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711 (2004)).

ALLEGATIONS COMMON TO ALL COUNTS

19. Following the September 11, 2001 attack upon targets in the United States, the United States commenced military operations in Afghanistan on or about October 7, 2001 against Taliban and "*al Qa'ida*" targets within Afghanistan. That activity was augmented twelve days later on October 19, 2001, with ground operations by U.S. forces. Through December 2001, the U.S. military action initially involved a small number of Special Forces operating on the ground in Afghanistan, working with forces of the Northern Alliance, a consortium of armed and organized Afghan foes of the Taliban government. A substantial air campaign supported these units as well as a small number of Special Forces from other nations (hereinafter collectively the "Coalition Forces"). The Northern Alliance and Coalition Forces operated in full cooperation and coordination in their joint campaign against the Taliban and *al Qa'ida*.

20. The above military activities were authorized by Congress in a "use of force" resolution passed on September 18, 2001:

> [t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

See Authorization for Use of Military Force (hereinafter the "AUMF"), Pub.L. 107-40, 115 Stat. 224 (2001). *See also Rasul*, 542 U.S. at 470, 124 S. Ct. at 2690 ("[a]cting pursuant to that authorization, the President sent U.S. Armed Forces into Afghanistan to wage a military campaign against *al Qa'ida* and the Taliban regime that had supported it").

21. Pursuant to the AUMF, the United States, in support of, and in conjunction with, the Northern Alliance, commenced military action against Afghanistan's Taliban government. Within ninety days, the Taliban government was defeated and Coalition Forces and the Northern Alliance had captured and/or apprehended a number of persons allegedly associated with the

Taliban and/or *al Qa'ida*. These operations extended to cooperative efforts with the Government of Pakistan to seize individuals suspected of supporting Taliban and/or *al Qa'ida* efforts in Afghanistan. Upon information and belief, Petitioner was seized in Pakistan in or about March 2002.

22. Upon information and belief, on July 6, 2004, Respondent President Bush designated Al Sharbi as a person eligible for trial before the Commission. The Commission was established by Presidential Military Order, dated November 13, 2001, *see* 66 Fed. Reg. 57,833 (November 13, 2001) (hereinafter "PMO"), and the March 21, 2002, Military Commission Order No. 1 (hereinafter "MCO No. 1"), subsequently revised and re-issued on August 31, 2005 (A copy of the PMO is attached hereto as EXHIBIT B; a copy of revised MCO No. 1 is attached hereto as EXHIBIT C.)

23. On November 9, 2005, over a year after Al Sharbi was designated a person eligible for trial, charges against him were publicly released. They were approved by Respondent Altenburg on November 4, 2005. The charges allege one offense: Conspiracy. *See United States v. Ghassan Abdullah Al Sharbi,* Charge Sheet (attached hereto as EXHIBIT A).

24. Some of the procedures for the military commissions under which Al Sharbi will be tried were set up in the MCO No. 1 (see EXHIBIT C). Many other procedures, fundamental to accepted concepts of due process and procedural fairness will be made up as the proceedings go along, precluding the accused from having any practical understanding of the procedures under which he will be tried.

25. Even those procedures that have been clearly established are deficient and will not result in a full and fair trial. Under these existing procedures, Respondent Secretary Rumsfeld has appointed an "Appointing Authority," Respondent Altenburg, a retired Army officer who is

currently employed by the Department of Defense in a civilian capacity. The Appointing Authority will in turn appoint members of the Commission. Thus, Respondent Secretary Rumsfeld and his appointee, who are investigating and prosecuting Al Sharbi, will ultimately be responsible for choosing the panel that will judge him. *Id.* at ¶ 6. This violates the principle established and universally accepted by civilized nations that no one should be a judge in his own cause. *See Federalist Papers #10 (James Madison)*: "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."

26. During the military commission proceedings, there is no bar to admission of evidence that courts normally deem unreliable -- such as statements coerced from Al Sharbi at a time when he had no counsel, or statements coerced from other detainees. Indeed, witness statements can be used even if the witnesses are not available to testify and their testimony is presented as unsworn hearsay.

27. There will be no direct appeal from a decision of the Commission. *Id.* The proceedings will be reviewed, but not in federal court. The "review" provided by the PMO and MCO 1 is to take place entirely within the Executive Branch, by officials appointed by the very officials accusing Al Sharbi of criminal misconduct. Thus, not only has Al Sharbi been held without trial for over three years, there is no future prospect of a trial by an impartial tribunal based upon reliable evidence.

28. Just as there has not been and will not be an unbiased determination that Al Sharbi is guilty of any crimes, there also has been no determination by a neutral tribunal that Al Sharbi can justifiably be held as an enemy combatant. On June 28, 2004, the United States Supreme Court decided *Hamdi*, 542 U.S. 507, 124 S. Ct. 2633 (2004), in which it determined

that individuals could not be detained as enemy combatants unless such a determination was made by a neutral tribunal that accorded them due process.

29. Subsequently, the United States created a Combatant Status Review Tribunal ("CSRT") to make determinations as to whether those held were enemy combatants. The CSRT was hastily formed in the wake of the Supreme Court's decisions in *Rasul* and *Hamdi*, and does not qualify as the neutral tribunal that satisfies the requirements of due process. For example, the CSRT fails even to meet the standards for Article 5 hearings as set forth in U.S. Army regulations.[1]

30. The CSRT varies from both the Army regulations and *Hamdi* (and due process generally) materially and dispositively, including with respect to, *inter alia*: (1) the standard of proof required [Regulation 190-8, §1-6(e)(9)'s preponderance of the evidence standard as opposed to the CSRT's "rebuttable presumption" that the detainee is an enemy combatant][2]; (2) the availability of an appeal by the government of a ruling favorable to the detainee; (3) the categories in which a detainee may be placed (*i.e.*, the CSRT fails to allow for prisoner of war (POW) status, but instead purport to determine only whether or not a detainee is an "enemy combatant"); (4) the detainee's right to counsel and/or representation by a personal representative of choice before the Tribunal; (5) whether the hearings are open to the public; (6) the government's reserved power to rescind or change the conditions of the Tribunals at its whim;

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1 *See* Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, §1-6 (1997).

2 Indeed, the Order implementing the Combatant Status Review Tribunals informs tribunal members that the detainee's status has already been predetermined by their superiors: "[e]ach detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense." *See* Dep't of Defense Order No. 651-04, (July 07, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040707-0992 html (accessed December 6, 2005 and attached hereto as EXHIBIT D).

(7) the composition of the Tribunal(s) (in contrast with *Hamdi's* requirement of "neutral decisionmaker[s,]" 542 U.S. at 533, 124 S. Ct. at 2648); and (8) even the definition of "enemy combatant." These deficiencies are individually and collectively fatal to the CSRT.

CLAIMS FOR RELIEF

COUNT ONE

RESPONDENTS MAY NOT DETAIN AL SHARBI FOR TRIAL BEFORE AN INVALIDLY CONSTITUTED MILITARY COMMISSION

31. Al Sharbi re-alleges and incorporates by reference paragraphs 1 through 30 above.

32. The Commission in this case is invalid and improperly constituted, and the grant of subject matter jurisdiction to the Commission is overbroad and unlawful for at least the following reasons:

A. The Commission lacks jurisdiction because the President lacked congressional authorization to establish the Commission

33. The Supreme Court has noted that "[w]hen the President acts in absence of . . . a congressional grant . . . of authority, he can only rely upon his own independent powers." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 72 S. Ct. 863, 872 (1952) (Jackson, J. concurring). *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633 (2004). The Constitution expressly grants Congress the sole power to create military commissions and define offenses to be tried by them. The Constitution vests Congress, not the Executive, with "All legislative powers," with the power "[t]o define and punish offences against the Law of Nations" and "[t]o constitute Tribunals inferior to the Supreme Court." U.S. Const., Art. I § 8, cl. 9, cl. 10.

34. Congress has not authorized the establishment of military commissions to try individuals captured during the Afghanistan war. Accordingly, Respondents' detention of Al Sharbi for trial by the Commission is improper, unlawful and invalid as an *ultra vires* exercise of

authority. It exceeds the President's powers under Article II and thus violates the constitutional principles of separation of powers.

35. Al Sharbi's status as a Saudi citizen does not confer unlimited power on Respondents to operate outside of the Constitutional framework. The Supreme Court's assertion of jurisdiction for the federal courts in *Rasul* establishes indisputably that aliens held at the base in Guantánamo Bay, no less than American citizens, are entitled to invoke the federal courts' authority under 28 U.S.C. § 2241. *Rasul,* 542 U.S. at 561, 124 S. Ct. at 2696 ("[c]onsidering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship") (footnote omitted). Thus, both Congress and the judiciary possess constitutional authority to check and balance the power of the Executive to act unilaterally. *Rasul*, 542 U.S. at 487, 124 S. Ct. at 2700 (Kennedy, J., concurring).

B. <u>The Appointing Authority lacks power to exercise military authority to appoint a military commission</u>.

36. Because there is no statute expressly stating who can appoint members of a Commission, the power to appoint members of a military commission is based upon the power to convene a general court-martial. Only the Executive, the Secretary of Defense (or Secretaries of the other branches of the armed forces) or a commanding officer to whom the Secretary has delegated authority may convene a general court-martial. *See* 10 U.S.C. § 822.

37. In this case, the Respondent, Secretary Rumsfeld purportedly has delegated authority to Respondent Altenburg to appoint the members of military commissions.

38. Respondent Altenburg is a civilian, not a commissioned officer, and thus lacks the power to exercise military jurisdiction in any form.

39. As a result, the Commission by which the Respondents intend to try Al Sharbi is improperly constituted and invalid, such that Al Sharbi is entitled to a writ of *habeas corpus* preventing his unlawful detention and trial before that improper tribunal.

C. The Commission lacks jurisdiction to try individuals at Guantánamo Bay.

40. Military commissions have no jurisdiction to try individuals far from the "locality of actual war." *See Milligan*, 71 U.S. at 127.

41. The Commission that will try Al Sharbi is situated far outside any zone of conflict or occupation, and Al Sharbi's alleged conduct on which the charges are based did not occur at Guantánamo Bay. As such, the Commission lacks authority to try Al Sharbi, and therefore, the Respondents lack the authority to continue to detain Al Sharbi for any purported trial at Guantánamo Bay.

COUNT TWO

RESPONDENTS MAY NOT DETAIN AL SHARBI FOR OFFENSES THAT HAVE BEEN CREATED BY THE PRESIDENT AFTER THE FACT

42. Al Sharbi alleges and incorporates by reference paragraphs 1 through 41 above.

43. Respondent President Bush is attempting to try Al Sharbi for crimes that he created long after the alleged "offenses" were committed.

44. The offense alleged against Al Sharbi, "conspiracy," did not previously exist as an offense under the law of war. This offense and others were in effect created by the PMO, MCO No. 1, and Military Commission Instruction No. 2 (attached hereto as EXHIBIT E), well after they were allegedly committed by Al Sharbi. In essence, the government alleges that Al Sharbi is *criminally* liable for allegedly participating in combat against the United States and its allies. That has never been a criminal offense. Thus, proceeding against Al Sharbi before the Military

Commission violates the principle established and universally accepted among civilized nations: *nulla poena sine lege* (no punishment without a [preëxisting] law).

A. <u>The Executive cannot define crimes.</u>

45. Congress, not the Executive, has the authority to legislate under Article I of the Constitution. This expressly includes the power "[t]o define and punish . . . Offences against the Law of Nations." Absent Congressional authorization, the Executive lacks the power to define specific offenses. If he attempts to do so, as he has done here, his actions are *ultra vires* and violate the principles of separation of powers. Accordingly, Al Sharbi may not be detained for trial on newly-created offenses established and defined solely by the President.

B. <u>Crimes cannot be defined after the fact.</u>

46. In addition, any charges instituted by the Commission must constitute offenses under the law of war as it existed at the time the alleged conduct was committed. Applying laws created after the conduct (such as the definition of offenses set forth in Military Commission Instruction No. 2 (MCI No. 2) and those which have been included in the Charges against Al Sharbi would violate the *ex post facto* clause of the Constitution (Art. 1, §9, cl. 3), the principle that a person must have reasonable notice of the bounds of an offense, and the principle *nulla poena sine lege* cited above (¶ 44). Offenses defined to criminalize the conduct of a single person or group of people -- such as those in MCI No. 2 also violate the Constitutional prohibition on bills of attainder.

47. Since the Charges do not allege any offenses against Al Sharbi under the law of war as it existed at the time he allegedly committed these acts, Al Sharbi cannot be detained as a result of these Charges. Accordingly, Al Sharbi is entitled to a writ of *habeas corpus*, and Al Sharbi should be released immediately.

COUNT THREE

RESPONDENTS MAY NOT DETAIN AL SHARBI FOR TRIAL ON CHARGES OUTSIDE THE JURISDICTION OF THE MILITARY COMMISSION

48. Al Sharbi re-alleges and incorporates by reference paragraphs 1 through 57 above.

49. Al Sharbi's confinement is unlawful because he is being detained to face charges before a commission that is not empowered to hear and/or adjudicate the charges instituted against him. Al Sharbi's continued detention purportedly to face trial on the charges leveled against him is unlawful because the charges are outside the parameters established by the Uniform Code of Military Justice (hereinafter "UCMJ"), 10 U.S.C. §801, *et seq.*, the statutory scheme that controls military detentions and that limits the offenses triable by military commissions (even in instances where Congress has provided any jurisdiction to the military commissions, which it has not with respect to the conflict in Afghanistan).

50. Under the UCMJ, military commissions may not hear and adjudicate any offenses other than those that are recognized by the traditional law of war or those that Congress has expressly authorized them to hear. Here, the offenses charged are not within either of these categories.

51. The purported offense of conspiracy is not a valid offense triable by the Commission under recognized principles of the law of war, the UCMJ or any other statutory authorization. Because civil law countries do not recognize a crime of conspiracy, conspiracy has never been part of the laws of war. No international criminal convention has ever recognized conspiracy to violate the laws of war as a crime. This includes the Geneva Conventions, as well as those establishing the international criminal tribunals for the former Yugoslavia and Rwanda, as well as the International Criminal Court. Indeed, the government is creating charges that have

been specifically rejected as violations of the laws of war -- including at Nuremburg, for example.

52. The purported offense of attempted murder by an unprivileged belligerent, which Al Sharbi allegedly "conspired" to commit, also is not a valid offense triable by the Commission under recognized principles of the law of war, the UCMJ or any other statutory authorization. Once again such an offense has not been recognized in any of the conventions setting forth substantive violations of the laws of war. Nor does it have any other source in the law of war. Such an offense would criminalize participation in war, which is not the intent of the laws of war.

53. The offenses proffered against Al Sharbi before the Military Commission relate to acts allegedly done before any arguable state of war existed between the United States and any national or other entity. Thus, the acts charged are not within the jurisdiction of the Military Commission or otherwise within the law of armed conflict.

54. As a plurality of the Supreme Court held in *Reid v. Covert*:

> [t]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8 [granting Congress the power to "define and punish . . . Offences against the Law of Nations"], and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

354 U.S. 1, 21, 77 S. Ct. 1222, 1233 (1957).

55. Because the charges do not allege any offenses against Al Sharbi under the law of war or express statutory authority, the Commission lacks jurisdiction to try and/or punish Al Sharbi for those offenses. Accordingly, Al Sharbi is entitled to a writ of *habeas corpus*, and should be released immediately.

COUNT FOUR

THE MILITARY COMMISSION PROCEDURES VIOLATE AL SHARBI'S RIGHTS UNDER STATUTORY, CONSTITUTIONAL, AND INTERNATIONAL LAW

56. Al Sharbi re-alleges and incorporates by reference paragraphs 1 through 54 above.

57. Even if the Commission had jurisdiction, Al Sharbi's detention to stand trial before the Commission would remain unlawful because the Commission's procedures violate applicable principles of statutory, constitutional, and international law.

58. In a series of "Military Commission Instructions" (the "MCIs"), Respondent Secretary Rumsfeld prescribed the procedural rules of these special military commissions. If Al Sharbi is tried according to these proposed procedures, he will receive less protection than he is entitled to under United States law, the Constitution, and international law and treaties. The procedures set forth by the MCIs provide Al Sharbi with far less protection than those set forth in the UCMJ. The MCIs violate Al Sharbi's rights to certain basic procedural safeguards. The MCIs fail to provide Al Sharbi an impartial tribunal to adjudicate the charges against him or review those charges. Al Sharbi's accusers effectively appoint the "judge and jury" and then review their decision. And during these proceedings themselves, his accusers can introduce unreliable evidence of the worst sort -- unsworn allegations derived from coerced confessions with no right of confrontation.

59. The absence of procedural protections makes the Commission inadequate as a matter of law.

A. The UCMJ

60. Al Sharbi is entitled to the protections of the basic trial rights set forth by Congress in the UCMJ. By its own terms, the UCMJ applies to all persons, including Al Sharbi,

who are detained within the territory or leased properties of the United States. And the UCMJ prohibits biased tribunals and the use of unreliable evidence of the sort the commissions intend to permit.

B. The Geneva Convention

61. The Geneva Convention requires that prisoners of war ("POW"s), as defined by the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, be treated with the same procedural protections as the soldiers of the country detaining them.[3] Under Article 5 of the Geneva Convention (III) ("Article 5"), Al Sharbi is entitled to be treated as a POW until a competent tribunal has determined otherwise.[4] As a result, he is entitled to the procedural protections that would apply in a court martial.

62. Even if Al Sharbi were not a prisoner of war, any proceeding would still have to meet the requirements of Common Article III of the Geneva Convention. These provide that conviction can only be pronounced by an impartial court respecting generally recognized principles of judicial procedure. These requirements are not met by the Commission.

C. The Due Process Clause

63. The Constitution's guarantee of due process also guarantees Al Sharbi the basic trial rights he will be denied before the Commission. A trial without these basic procedural safeguards lacks the fundamental fairness required in any judicial proceedings -- especially in criminal proceedings that can result in life imprisonment.

64. Since the Commission procedures violate statutory, constitutional, and international law, and in so doing, fail to provide Al Sharbi with the basic safeguards necessary

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[3] Geneva Convention (III) Relative to the Treatment of Prisoners of War: August 12, 1949, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950. The Geneva Convention has also been codified in the UCMJ.

[4] *See id.* at Art. 5.

to constitute a fundamentally fair criminal proceedings, Al Sharbi is entitled to a writ of *habeas corpus* holding these proceedings to be illegitimate, and should be released immediately.

COUNT FIVE

TRIAL BEFORE THE COMMISSION VIOLATES AL SHARBI'S RIGHT TO EQUAL PROTECTION OF THE LAWS OF THE UNITED STATES

65. Al Sharbi re-alleges and incorporates by reference paragraphs 1 through 63 above.

A. Al Sharbi's detention violates the Equal Protection Clause.

66. Al Sharbi is being detained by Respondents under the claimed authority of the PMO and MCO No. 1. These Orders violate Al Sharbi's right to equal protection of the laws of the United States. Under the PMO and MCO No. 1, Al Sharbi may be held for trial by the Commission only because of his alienage, since the Orders, by their terms, apply *only* to *non*-citizens. [5] Consequently, this detention runs afoul of the very purpose of the Equal Protection Clause of the United States Constitution.

67. The Supreme Court has held that any discrimination against aliens not involving governmental employees is subject to strict scrutiny. Here, the government cannot show a compelling governmental reason, advanced through the least restrictive means, for granting *citizens* access to the fundamental protections of civilian justice (including, *inter alia*, indictment, evidentiary rules ensuring reliability and fairness, a system consistent with previously prescribed rules developed by the legislature and enforced by impartial courts, a jury trial presided over by an independent judge not answerable to the prosecutor, and the right to an appeal before a tribunal independent of the prosecuting authority), but affording *non-citizens* a

[5] Military Order of November 13, 2001 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 4 (November 13, 2001); Presidential Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (EXHIBIT B).

distinctly less protective and inferior brand of adjudication. While the government may have latitude in differentiating between citizens and aliens in areas such as immigration, it has no such latitude with respect to criminal prosecutions.

68. Thus, the blatant and purposeful discriminatory nature and impact of MCO No. 1 violates the Equal Protection clause.

B. Al Sharbi's detention violates 42 U.S.C. § 1981.

69. Al Sharbi's detention for trial by the Commission also violates 42 U.S.C. § 1981.[6] That fundamental statutory provision guarantees equal rights for all persons to give evidence, to receive equal benefit of all laws and proceedings for the security of persons, and to receive like punishment. Al Sharbi is being unlawfully detained for purposes of trial by the Commission solely because he is a non-citizen. A citizen who committed the very same acts as Al Sharbi could not be detained under the PMO and held for trial before the Commission. Accordingly, Al Sharbi's detention for trial by the Commission on that discriminatory basis is unlawful.

70. Respondents have detained Al Sharbi for trial before the Commission in violation of equal protection of the laws of the United States.

71. Accordingly, Al Sharbi is entitled to a writ of habeas corpus, a determination that the Commission proceedings against him are unlawful, and he should be released immediately.

COUNT SIX

RESPONDENTS FAIL TO
JUSTIFY HOLDING AL SHARBI AS AN ENEMY COMBATANT

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6 42 U.S.C. §1981(a) states in its entirety:
[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

72. Al Sharbi re-alleges and incorporates by reference paragraphs 1 through 70 above.

73. Just as the government has no authority to detain Al Sharbi for his alleged violations under a nonexistent version of the law of war, the government has no authority to detain Al Sharbi as an enemy combatant. Respondents' actions to date in detaining Al Sharbi constitute a violation of the process accorded persons seized by the military in times of armed conflict as defined by Geneva Conventions III and IV and customary international law, as well as being inconsistent with the provisions set forth below.

A. Under *Hamdi*, the Due Process Clause requires a neutral tribunal with significant procedural protections to determine whether Al Sharbi is an enemy combatant.

74. The CSRT process and procedures that have now been established violate due process at least with respect to: (1) the failure to adhere to an appropriate standard of proof; (2) the granting of an appeal to the government of a determination favorable to the detainee; (3) the failure to make an appropriate status determination by limiting the inquiry to consideration only of "enemy combatant" status; (4) the denial of a detainee's right to counsel or other appropriate representation; (5) the denial of a public hearing; (6) the government's power to arbitrarily rescind or change the CSRT process and procedures; and (7) the failure to constitute the CSRT in a manner to assure a neutral decision maker.

B. The Geneva Convention and army regulations require a determination by a fair tribunal.

75. Under Article 5 of the Geneva Convention, Al Sharbi is entitled to a "competent tribunal" to determine whether he can be held as an enemy combatant.[7] The same procedural deficiencies that render the CSRT proceedings inadequate for purposes of due process also

[7] *See id.* at Art. 5.

render the CSRT deficient as a competent tribunal. Army Regulations 190-8 and the Administrative Procedures Act also show these procedures are unlawful as, for example, the burden of proof is not consistent with that established in the regulations.

76. Moreover, it is now too late to establish a competent tribunal. Article 5 of Geneva Convention III, provides that "should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in [Article 4 of the Geneva Convention (III), defining the different categories of belligerents,] such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[8]

77. Respondents have unlawfully detained Al Sharbi in violation of their obligation to treat Al Sharbi presumptively as a POW, as required by Article 5, and in violation of the procedural requirements of the Third and Fourth Geneva Conventions and customary international law more generally. Thus, the government's failure to accord Petitioner Al Sharbi the protections of Article 5 violates the provisions of Geneva Convention (III) as well as the U.S. military regulations promulgated to implement them.

C. <u>The government cannot continue to hold Al Sharbi under its own regulations</u>

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[8] *Id* at Art. 5. Geneva Convention (III) revised the Geneva Convention relative to the Treatment of Prisoner of War of July 27, 1929, which followed the 18 October 1907 Hague Conventions [Relative to the Opening of Hostilities (III), Respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land (IV), and Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (V)], and was enacted concurrent with the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces In the Field, Geneva, 12 August 1949 ["Geneva Convention (I)"], the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 ["Geneva Convention (II)"], Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 ["Geneva Convention (IV)"]. Subsequently, two Protocols Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), 8 June 1977, and relating to the Protection of Victims of Non-International. Armed Conflicts ("Protocol II"), 8 June 1977. The United States is not a signatory to Protocol I, but Australia and many other nations are.

78. Indeed, even under the Army's own Regulations 190-8 at 1-6(g), "Persons who have been determined not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed."[9]

79. By arbitrarily and capriciously detaining Petitioner in custody for over three years while claiming he is not entitled to prisoner of war status, Respondents have acted and continue to act *ultra vires* and in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2). Under the Army's own regulations, Petitioner cannot be held unless he has committed specific acts under which he can be punished. But as alleged in the Counts on the Commission, the government has not charged Petitioner with any acts that could form a basis to hold him.

E. Under the Alien Tort Claims Act, Respondents Cannot Continue to Detain Petitioner Al Sharbi.

80. By arbitrarily holding Petitioner without any justification for doing so and subjecting him to cruel, inhuman or degrading treatment, including torture, Respondents have acted in violation of the law of nations under the Alien Tort Claims Act, 28 U.S.C. § 1350 in that the acts violated customary international law as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

F. The government cannot continue to hold Al Sharbi as an enemy combatant once hostilities have ended.

81. Under Article 118 of Geneva Convention (III), "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." *See also Hamdi*,

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[9] *See* Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, § . 1-6(g), (1997)

542 U.S. at 520, 124 S. Ct. at 2641. Respondents and their agents have acknowledged that hostilities in Afghanistan have ceased or will soon cease (even if they were ongoing to some extent until shortly before the Supreme Court's decision in *Hamdi*). Similarly, Respondent Secretary Rumsfeld, in a joint May 1, 2003 press conference with Afghan President Hamid Karzai in Washington, announced that "we're at a point where we clearly have moved from major combat activity to a period of stability and stabilization and reconstruction activities. The bulk of this country today is permissive, it's secure."[10]

82. Al Sharbi is presumptively a POW entitled to all protections afforded by Geneva Convention (III), including, under Article 118, release after hostilities have ceased.

83. Al Sharbi also is entitled to the protection of Common Article 3 of Geneva Convention (III). Article 3(1)(d) prohibits the contracting parties from "passing. . . sentences . . . without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

84. In this case, the prolonged confinement of Al Sharbi without charge, and without process to contest his guilt or challenge his detention, amounts to an arbitrary and illegally imposed sentence that is incompatible with fundamental guarantees of due process recognized by all civilized people, in violation of Article 3 of the Geneva Convention (III), and in violation of the due process clause of the Fifth Amendment. Further, Respondents' confinement of Al Sharbi is a form of punishment in violation of the 8th Amendment to the Constitution. Accordingly, Al Sharbi is entitled to a writ of habeas corpus and should be released immediately.

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[10] *See CNN Rumsfeld Major combat over in Afghanistan* (May 1, 2003) *at* http://www.cnn.com/2003/WORLD/asiapcf/central/05/01/afghan.combat (accessed December 6, 2005); *See also* Armed Forces Information Service, *News Articles*, (May 1, 2003) *at* http://www.defenselink.mil/news/May2003/n05012003_200305016.html (accessed December 6, 2005).

COUNT SEVEN

RESPONDENTS HAVE DENIED AL SHARBI THE RIGHT TO A SPEEDY TRIAL AND THE RIGHT TO BE FREE FROM UNREASONABLE PRE-TRIAL CONFINEMENT

85. Al Sharbi re-alleges and incorporates by reference paragraphs 1 though 83 above.

A. Al Sharbi was entitled to a speedy trial under the UCMJ.

86. The PMO, pursuant to which Al Sharbi has been detained for trial, purports to be based, in part, on congressional authorization embodied in selected provisions of the UCMJ. In promulgating the PMO, Respondent President Bush relied, in part, on his authority under 10 U.S.C. §836, which allows the Executive to prescribe rules for military commissions so long as they are not inconsistent with the UCMJ.

87. However, the PMO, and its implementation through MCO No. 1, clearly contravene Article 10 of the UCMJ, 10 U.S.C. §810, which provides that any arrest or confinement of an accused must be terminated unless charges are instituted promptly and made known to the accused, and speedy trial afforded for a determination of guilt on such charges:

> [w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him.

10 U.S.C. § 810.

88. Al Sharbi is a person subject to the UCMJ by virtue of Respondent President Bush's PMO and MCO No. 1, as well as by virtue of Article 2 of the UCMJ, 10 U.S.C. § 802(a)(12), which provides that "persons within an area leased by or otherwise reserved or acquired for the use of the United States" and under the control of any of the various branches of the military are subject to the UCMJ. Under the Supreme Court's decision in *Rasul*, 542 U.S. at 480, 124 S. Ct. at 2696, Guantánamo Bay qualifies under both of these authorities.

89. The type of delays to which Al Sharbi has been subjected are intolerable in the absence of extraordinary or compelling circumstances. Here, the Respondents have not provided any reason whatsoever for their inordinate delays in charging Al Sharbi. Since Respondents did not take "immediate steps . . . to inform" Al Sharbi "of the specific wrong of which he is accused," they now have a clear and nondiscretionary duty under the UCMJ to "release him" from his confinement.

B. Al Sharbi was entitled to a speedy trial under the Geneva Convention.

90. Al Sharbi's lengthy pre-trial confinement violates Article 103 of Geneva Convention (III), as well as United States government regulations. Article 103 of Geneva Convention (III) provides that:

> [j]udicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. *In no circumstances shall this confinement exceed three months.*

6 U.S.T. 3316, 3394, 75 U.N.T.S. 135 (emphasis added).

91. In addition, Article 5 of Geneva Convention (III) declares that:

> should any doubt arise as to whether persons . . . belong to any of the categories [entitled to protection as a P.O.W. under the Convention], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

92. Likewise, §1-6(a) U.S Army Regulation 190-8, entitled Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, requires that United States military forces abide by the provisions of Article 5 of Geneva Convention (III). Similarly, the Commander's Handbook on the Law of Naval Operations states that "individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war

status before a judicial tribunal and to have the question adjudicated." Department of the Navy, NWP 1-14M, The Commander's Handbook on the Law of Naval Operations 11.7 (1995).

93. Respondents are under a clear nondiscretionary duty under Geneva Convention (III), and under the U.S. Army's (and Navy's) own regulations to release Al Sharbi because he has been detained in segregation for more than three months.

94. Even if Al Sharbi were not a presumptive POW, the Geneva Convention would not sanction such delay. The Geneva Convention requires that all civilians and protected persons must be "promptly informed" of the charges and brought to trial "as rapidly as possible." Geneva Convention IV, art. 7. Similarly the fundamental guarantees of Protocol I require that Al Sharbi be "informed without delay" of the particulars of charges, and incorporate the International Covenant on Civil and Political Rights.

C. Al Sharbi was entitled to a speedy trial under the Sixth Amendment.

95. Moreover, the Sixth Amendment to the United States Constitution requires that in all criminal prosecutions, "the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. Respondents' unlawful detention violates Al Sharbi's right to a speedy trial.

96. Respondents have denied Al Sharbi his right to a speedy trial as required by American law, the Constitution, and international law and treaty, and Al Sharbi therefore is entitled to a writ of *habeas corpus* and immediate release.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that this Court grant him the following relief:

1. Issue the writ of mandamus or issue an Order directing Respondents to show cause why a writ of *habeas corpus* should not be granted and why Al Sharbi should not be immediately released;

2. If an Order to Show Cause is issued, to include as part of the Order a prompt

schedule to receive briefing from the parties, including a factual return and a Response from Respondents, and a Reply from Petitioner, on the issues raised in this Petition, followed by a hearing before this Court on any contested factual or legal issues, and production of Petitioner Al Sharbi as appropriate;

3. Issue an Order declaring unconstitutional and invalid and enjoining any and all Commission proceedings and/or findings against Petitioner Al Sharbi;

4. Enter an Order declaring the Combatant Status Review Tribunal unconstitutional and invalid, and enjoin its operation with respect to Petitioner Al Sharbi; and

5. Issue a writ of mandamus and an Order that orders Respondents not to use the PMO and/or the Military Commission Orders and Instructions to detain Al Sharbi, or adjudicate charges against Petitioner Al Sharbi, or conduct any proceedings related to such charges, because those Orders and instructions violate the U.S. Constitution, U.S. law, and U.S. treaty obligations, both facially and as applied to Petitioner Al Sharbi and are therefore *ultra vires* and illegal;

6. After notice and hearing, determine and declare that Petitioner Al Sharbi's detention violates the Constitution, laws, treaties, and regulations of the United States; that the PMO is unconstitutional; that Al Sharbi has been denied a speedy trial; and that Respondents lack any jurisdiction over Petitioner Al Sharbi;

7. After notice and hearing, issue a writ of mandamus that directs Respondents to obey their clear, nondiscretionary duty to follow the Constitution, laws, regulations, and treaties of the United States, and therefore to release Petitioner Al Sharbi immediately;

8. Grant a writ of *habeas corpus* on behalf of Petitioner Al Sharbi ordering his immediate release;

9. Enter an Order that the Court shall retain jurisdiction over this matter to permit

Petitioner Al Sharbi to respond to arguments advanced by Respondents on matters related to his continued detention;

10. Grant such other and further relief on behalf of Petitioner Al Sharbi and against Respondents as this Court deems just and proper.

Burlington, Vermont

December 13, 2005

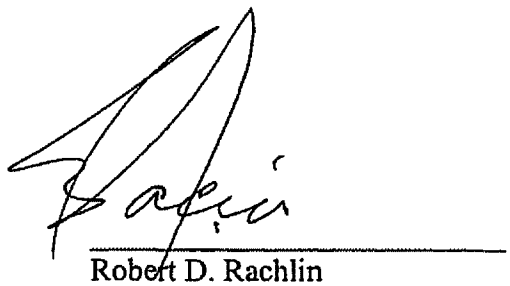

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EXHIBIT A

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
GHASSAN ABDULLAH AL SHARBI	)	**CHARGE:**
a/k/a Abdullah al Muslim	)	**CONSPIRACY**
a/k/a Abu Muslim	)	

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Ghassan Abdullah al Sharbi (a/k/a/ Abdullah al Muslim a/k/a/ Abu Muslim hereinafter "al Sharbi") is subject to his Military Order of November 13, 2001.

2. The charged conduct alleged against al Sharbi is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.

5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.

6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

8. In 1992 and 1993, al Qaida supported violent opposition of US. property and nationals by, among other things, transporting personnel, weapons, explosives, and ammunition to Yemen, Saudi Arabia, Somalia, and other countries.

9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.

10. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyian Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a/ Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:

    a. In 1998 Barhoumi, an Algerian citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated training camp, where he received training in constructing and dismantling electronically-controlled explosives.

    b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.

c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.

d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.

e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.

f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.

g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bayat* ("oath of allegiance") to Usama bin Laden.

h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.

i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.

j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.

k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.

l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.

m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately $1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.

n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.

o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.

p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.

q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.

r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.

15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

EXHIBIT B

Federal Register
Vol. 66, No. 222
Friday, November 16, 2001

Presidential Documents

Title 3—

The President

Military Order of November 13, 2001

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107–40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. *Findings.*

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense

purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency

Sec. 2. *Definition and Policy.*

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. *Detention Authority of the Secretary of Defense.* Any individual subject to this order shall be —

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe

Sec. 4. *Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.*

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for—

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. *Obligation of Other Agencies to Assist the Secretary of Defense.*

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. *Additional Authorities of the Secretary of Defense.*

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. *Relationship to Other Law and Forums.*

(a) Nothing in this order shall be construed to—

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order—

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or

proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

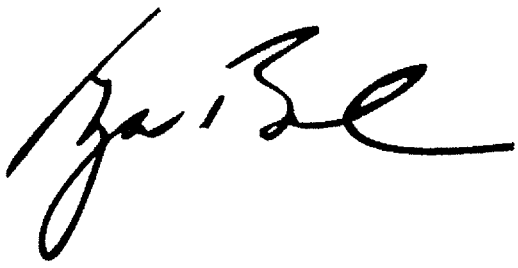
(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. *Publication*

This order shall be published in the **Federal Register**.



THE WHITE HOUSE,
November 13, 2001.

[FR Doc. 01–28904
Filed 11–15–01; 8:56 am]
Billing code 3195–01–P

EXHIBIT C

Department of Defense

Military Commission Order No. 1

August 31, 2005

SUBJECT: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism

References: (a) United States Constitution, Article II, Section 2

(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001) ("President's Military Order")

(c) DoD 5200.2-R, "Personnel Security Program," current edition

(d) Executive Order 12958, "Classified National Security Information" (April 17, 1995, as amended, or any successor Executive Order)

(e) Section 603 of title 10, United States Code

(f) DoD Directive 5025.1, "DoD Directives System," current edition

(g) Military Commission Order No. 1 (March 21, 2002)

1. PURPOSE

This Order implements policy, assigns responsibilities, and prescribes procedures under references (a) and (b) for trials before military commissions of individuals subject to the President's Military Order. These procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission, as required by the President's Military Order. Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President's Military Order or this Order, the procedures prescribed herein and no others shall govern such trials. This Order supersedes reference (g).

2. ESTABLISHMENT OF MILITARY COMMISSIONS

In accordance with the President's Military Order, the Secretary of Defense or a designee ("Appointing Authority") may issue orders from time to time appointing one or more military

commissions to try individuals subject to the President's Military Order and appointing any other personnel necessary to facilitate such trials.

3. JURISDICTION

A. Over Persons

A military commission appointed under this Order ("Commission") shall have jurisdiction over only an individual or individuals ("the Accused") (1) subject to the President's Military Order and (2) alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority.

B. Over Offenses

Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission.

C. Maintaining Integrity of Commission Proceedings

The Commission may exercise jurisdiction over participants in its proceedings as necessary to preserve the integrity and order of the proceedings.

4. COMMISSION PERSONNEL

A. Members

(1) Appointment

The Appointing Authority shall appoint the Presiding Officer, other members, and the alternate member or members of each Commission. The alternate member or members shall attend all sessions of the Commission except sessions with members deliberating and voting on findings and sentence and sessions conducted by the Presiding Officer under Section 4(A)(5)(a), but the absence of an alternate member shall not preclude the Commission from conducting proceedings. Alternate members shall attend deliberations on matters other than findings or sentence, but may not participate in such deliberations or in any voting. In case of incapacity, resignation, or removal of any member, an alternate member, if available, shall take the place of that member, in the sequence designated by the Appointing Authority. Any vacancy among the members or alternate members occurring after a trial has begun may, but need not, be filled by the Appointing Authority, but the substance of all prior proceedings and evidence taken in that case shall be made known to that new member or alternate member before the trial proceeds.

(2) Number of Members

Each Commission shall consist of a Presiding Officer and at least three other members, the number being determined by the Appointing Authority. For each such Commission, the

Appointing Authority shall also appoint at the outset of proceedings one or more alternate members, the number being determined by the Appointing Authority.

(3) Qualifications

Each member and alternate member shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, and retired personnel recalled to active duty. The Appointing Authority shall appoint members and alternate members determined to be competent to perform the duties involved. The Appointing Authority may remove members and alternate members for good cause.

(4) Presiding Officer

The Appointing Authority shall designate a Presiding Officer to preside over the proceedings of that Commission. The Presiding Officer shall be a Military Officer who is a judge advocate of any United States armed force.

(5) Duties of the Presiding Officer

(a) The Presiding Officer shall rule upon all questions of law, all challenges for cause, and all interlocutory questions arising during the proceedings. The Presiding Officer may conduct hearings (except hearings on the admissibility of evidence under Section 6(D)(1)) outside the presence of the other members for the purposes of hearing and determining motions, objections, pleas, or such other matters as will promote a fair and expeditious trial. If the Presiding Officer determines that deliberations are necessary to resolve a challenge by another member under Section 6(D)(1) to a ruling by the Presiding Officer on the admissibility of evidence, the Presiding Officer shall deliberate and vote with the other members to determine the admissibility of the evidence in question. The Presiding Officer shall not deliberate or vote with the other members on findings or sentence, nor shall the Presiding Officer be present at such deliberations or votes.

(b) The Presiding Officer shall admit or exclude evidence at trial in accordance with Section 6(D). The Presiding Officer shall have authority to close proceedings or portions of proceedings in accordance with Section 6(B)(3) and for any other reason necessary for the conduct of a full and fair trial.

(c) The Presiding Officer shall ensure that the discipline, dignity, and decorum of the proceedings are maintained, shall exercise control over the proceedings to ensure proper implementation of the President's Military Order and this Order, and shall have authority to act upon any contempt or breach of Commission rules and procedures. Any attorney authorized to appear before a Commission who is thereafter found not to satisfy the requirements for eligibility or who fails to comply with laws, rules, regulations, or other orders applicable to

the Commission proceedings or any other individual who violates such laws, rules, regulations, or orders may be disciplined as the Presiding Officer deems appropriate, including but not limited to revocation of eligibility to appear before that Commission. The Appointing Authority may further revoke that attorney's or any other person's eligibility to appear before any other Commission convened under this Order.

(d) The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably.

(e) The Presiding Officer shall certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, for decision by the Appointing Authority. The Presiding Officer may certify other interlocutory questions to the Appointing Authority as the Presiding Officer deems appropriate.

(f) As soon as practicable at the conclusion of each Commission session, the Presiding Officer shall transmit an authenticated copy of the proceedings to the Appointing Authority.

(6) Duties of the Other Members

The other members of the Commission shall determine the findings and sentence without the Presiding Officer, and may vote on the admission of evidence, with the Presiding Officer, in accordance with Section 6(D)(1).

B. Prosecution

(1) Office of the Chief Prosecutor

The Chief Prosecutor shall be a judge advocate of any United States armed force, shall supervise the overall prosecution efforts under the President's Military Order, and shall ensure proper management of personnel and resources.

(2) Prosecutors and Assistant Prosecutors

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Prosecutor shall detail a Prosecutor and, as appropriate, one or more Assistant Prosecutors to prepare charges and conduct the prosecution for each case before a Commission ("Prosecution"). Prosecutors and Assistant Prosecutors shall be (a) Military Officers who are judge advocates of any United States armed force, or (b) special trial counsel of the Department of Justice who may be made available by the Attorney General of the United States. The duties of the Prosecution are:

(a) To prepare charges for approval and referral by the Appointing Authority;

(b) To conduct the prosecution before the Commission of all cases referred for trial; and

(c) To represent the interests of the Prosecution in any review process.

C. Defense

(1) Office of the Chief Defense Counsel

The Chief Defense Counsel shall be a judge advocate of any United States armed force, shall supervise the overall defense efforts under the President's Military Order, shall ensure proper management of personnel and resources, shall preclude conflicts of interest, and shall facilitate proper representation of all Accused.

(2) Detailed Defense Counsel.

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel"). The duties of the Detailed Defense Counsel are:

(a) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and

(b) To represent the interests of the Accused in any review process as provided by this Order.

(3) Choice of Counsel

(a) The Accused may select a Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Section 7(A). After such selection of a new Detailed Defense Counsel, the original Detailed Defense Counsel will be relieved of all duties with respect to that case. If requested by the Accused, however, the Chief Defense Counsel may allow the original Detailed Defense Counsel to continue to assist in representation of the Accused as another Detailed Defense Counsel.

(b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney: (i) is a

United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings. Civilian attorneys may be pre-qualified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5).

(4) Continuity of Representation

The Accused must be represented at all relevant times by Detailed Defense Counsel. Detailed Defense Counsel and Civilian Defense Counsel shall be herein referred to collectively as "Defense Counsel." The Accused and Defense Counsel shall be herein referred to collectively as "the Defense."

D. Other Personnel

Other personnel, such as court reporters, interpreters, security personnel, bailiffs, and clerks may be detailed or employed by the Appointing Authority, as necessary.

5. PROCEDURES ACCORDED THE ACCUSED

The following procedures shall apply with respect to the Accused:

A. The Prosecution shall furnish to the Accused, sufficiently in advance of trial to prepare a defense, a copy of the charges in English and, if appropriate, in another language that the Accused understands.

B. The Accused shall be presumed innocent until proven guilty.

C. A Commission member, other than the Presiding Officer, shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense.

D. At least one Detailed Defense Counsel shall be made available to the Accused sufficiently in advance of trial to prepare a defense and until any findings and sentence become final in accordance with Section 6(H)(2).

E. The Prosecution shall provide the Defense with access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.

F. The Accused shall not be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused.

G. If the Accused so elects, the Accused may testify at trial on the Accused's own behalf and shall then be subject to cross-examination.

H. The Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer. Such access shall be consistent with the requirements of Section 6(D)(5) and subject to Section 9. The Appointing Authority shall order that such investigative or other resources be made available to the Defense as the Appointing Authority deems necessary for a full and fair trial.

I. The Accused may have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness presented by the Prosecution who appears before the Commission.

J. The Prosecution shall ensure that the substance of the charges, the proceedings, and any documentary evidence are provided in English and, if appropriate, in another language that the Accused understands. The Appointing Authority may appoint one or more interpreters to assist the Defense, as necessary.

K. The Accused shall be present at every stage of the trial before the Commission, to the extent consistent with Section 6(B)(3), unless the Accused engages in disruptive conduct that justifies exclusion by the Presiding Officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

L. Except by order of the Presiding Officer for good cause shown, the Prosecution shall provide the Defense with access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings. Such access shall be consistent with Section 6(D)(5) and subject to Section 9.

M. The Accused may make a statement during sentencing proceedings.

N. The Accused may have Defense Counsel submit evidence to the Commission during sentencing proceedings.

O. The Accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer), consistent with Section 6(B).

P. The Accused shall not again be tried by any Commission for a charge once a Commission's finding on that charge becomes final in accordance with Section 6(H)(2).

6. CONDUCT OF THE TRIAL

A. Pretrial Procedures

(1) Preparation of the Charges

The Prosecution shall prepare charges for approval by the Appointing Authority, as provided in Section 4(B)(2)(a).

(2) Referral to the Commission

The Appointing Authority may approve and refer for trial any charge against an individual or individuals within the jurisdiction of a Commission in accordance with Section 3(A) and alleging an offense within the jurisdiction of a Commission in accordance with Section 3(B).

(3) Notification of the Accused

The Prosecution shall provide copies of the charges approved by the Appointing Authority to the Accused and Defense Counsel. The Prosecution also shall submit the charges approved by the Appointing Authority to the Presiding Officer of the Commission to which they were referred.

(4) Plea Agreements

The Accused, through Defense Counsel, and the Prosecution may submit for approval to the Appointing Authority a plea agreement mandating a sentence limitation or any other provision in exchange for an agreement to plead guilty, or any other consideration. Any agreement to plead guilty must include a written stipulation of fact, signed by the Accused, that confirms the guilt of the Accused and the voluntary and informed nature of the plea of guilty. If the Appointing Authority approves the plea agreement, the Presiding Officer will, after determining the voluntary and informed nature of the plea agreement, admit the plea agreement and stipulation into evidence and the Commission will be bound to adjudge findings and a sentence pursuant to that plea agreement.

(5) Issuance and Service of Process; Obtaining Evidence

The Commission shall have power to:

(a) Summon witnesses to attend trial and testify;

(b) Administer oaths or affirmations to witnesses and other persons and to question witnesses;

(c) Require the production of documents and other evidentiary material; and

(d) Designate special commissioners to take evidence.

The Presiding Officer shall exercise these powers on behalf of the Commission at the Presiding Officer's own initiative, or at the request of the Prosecution or the Defense, as necessary to ensure a full and fair trial in accordance with the President's Military Order and this Order. The Commission shall issue its process in the name of the Department of Defense over the signature of the Presiding Officer. Such process shall be served as directed by the Presiding Officer in a manner calculated to give reasonable notice to persons required to take action in accordance with that process.

B. Duties of the Commission During Trial

The Commission shall:

(1) Provide a full and fair trial.

(2) Proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay.

(3) Hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Order. Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an *ex parte, in camera* presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof. Except with the prior authorization of the Presiding Officer and subject to Section 9, Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof. Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable.

Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

(4) Hold each session at such time and place as may be directed by the Appointing Authority. Members of the Commission may meet in closed conference at any time authorized by the Presiding Officer.

C. Oaths

(1) All members of a Commission, all Prosecutors, all Defense Counsel, all court reporters, all security personnel, and all interpreters shall take an oath to perform their duties faithfully.

(2) Each witness appearing before a Commission shall be examined under oath, as provided in Section 6(D)(2)(b).

(3) An oath includes an affirmation. Any formulation that appeals to the conscience of the person to whom the oath is administered and that binds that person to speak the truth, or, in the case of one other than a witness, properly to perform certain duties, is sufficient.

D. Evidence

(1) Admissibility

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission) the evidence would have probative value to a reasonable person.

(2) Witnesses

(a) Production of Witnesses

The Prosecution or the Defense may request that the Commission hear the testimony of any person, and such testimony shall be received if found to be admissible and not cumulative. The Presiding Officer on his own initiative, or if requested by other members of the Commission, may also summon and hear witnesses. The Presiding Officer may permit the testimony of witnesses by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given to the testimony of the witness.

(b) Testimony

Testimony of witnesses shall be given under oath or affirmation. The Commission may still hear a witness who refuses to swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness.

(c) Examination of Witnesses

A witness who testifies before the Commission is subject to both direct examination and cross examination. The Presiding Officer shall maintain order in the proceedings and shall not permit badgering of witnesses or questions that are not material to the issues before the Commission. Members of the Commission may submit written questions to the Presiding Officer for the witnesses at any time.

(d) Protection of Witnesses

The Presiding Officer shall consider the safety of witnesses and others, as well as the safeguarding of Protected Information as defined in Section 6(D)(5)(a), in determining the appropriate methods of receiving testimony and evidence. The Presiding Officer may hear any presentation by the Prosecution or the Defense, including an *ex parte, in camera* presentation, regarding the safety of potential witnesses before determining the ways in which witnesses and evidence will be protected. The Presiding Officer may authorize any methods appropriate for the protection of witnesses and evidence. Such methods may include, but are not limited to: testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; introduction of prepared declassified summaries of evidence; and the use of pseudonyms.

(3) Other Evidence

Subject to the requirements of Section 6(D)(1) concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.

(4) Notice

The Presiding Officer may, after affording the Prosecution and the Defense an opportunity to be heard, take conclusive notice of facts that are not subject to reasonable dispute either because they are generally known or are capable of determination by resort to sources that cannot reasonably be contested. The Presiding Officer shall inform the other members of any facts conclusively noticed under this provision.

(5) Protection of Information

(a) Protective Order

The Presiding Officer may issue protective orders as necessary to carry out the President's Military Order and this Order, including to safeguard "Protected Information," which includes: (i) information classified or classifiable pursuant to reference (d); (ii) information protected by law or rule from unauthorized disclosure; (iii) information the disclosure of which may endanger the physical safety of participants in Commission proceedings, including prospective witnesses; (iv) information concerning intelligence and law enforcement sources, methods, or activities; or (v) information concerning other national security interests. As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information.

(b) Limited Disclosure

The Presiding Officer, upon motion of the Prosecution or *sua sponte*, shall, as necessary to protect the interests of the United States and consistent with Section 9, direct (i) the deletion of specified items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel; (ii) the substitution of a portion or summary of the information for such Protected Information; or (iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove. The Prosecution's motion and any materials submitted in support thereof or in response thereto shall, upon request of the Prosecution, be considered by the Presiding Officer *ex parte, in camera*, but no Protected Information shall be admitted into evidence for consideration by the Commission if not presented to Detailed Defense Counsel. The Accused and the Civilian Defense Counsel shall be provided access to Protected Information falling under Section 5(E) to the extent consistent with national security, law enforcement interests, and applicable law. If access to such Protected Information is denied and an adequate substitute for that information, such as described above, is unavailable, the Prosecution shall not introduce the Protected Information as evidence without the approval of the Chief Prosecutor; and the Presiding Officer, notwithstanding any determination of probative value under Section 6(D)(1), shall not admit the Protected Information as evidence if the admission of such evidence would result in the denial of a full and fair trial.

(c) Closure of Proceedings

The Presiding Officer may direct the closure of proceedings in accordance with Section 6(B)(3).

(d) Protected Information as Part of the Record of Trial

All exhibits admitted as evidence but containing Protected Information shall be sealed and annexed to the record of trial. Additionally, any Protected Information not admitted as evidence but reviewed *in camera* and subsequently withheld from the Defense over Defense objection shall, with the associated motions and responses and any materials submitted in support thereof, be sealed and annexed to the record of trial as additional exhibits. Such sealed material shall be made available to reviewing authorities in closed proceedings.

E. Proceedings During Trial

The proceedings at each trial will be conducted substantially as follows, unless modified by the Presiding Officer to suit the particular circumstances:

(1) Each charge will be read, or its substance communicated, in the presence of the Accused and the Commission.

(2) The Presiding Officer shall ask each Accused whether the Accused pleads "Guilty" or "Not Guilty." Should the Accused refuse to enter a plea, the Presiding Officer shall enter a plea of "Not Guilty" on the Accused's behalf. If the plea to an offense is "Guilty," the Presiding Officer shall enter a finding of Guilty on that offense after conducting sufficient inquiry to form an opinion that the plea is voluntary and informed. Any plea of Guilty that is not determined to be voluntary and informed shall be changed to a plea of Not Guilty. Plea proceedings shall then continue as to the remaining charges. If a plea of "Guilty" is made on all charges, the Commission shall proceed to sentencing proceedings; if not, the Commission shall proceed to trial as to the charges for which a "Not Guilty" plea has been entered.

(3) The Prosecution shall make its opening statement.

(4) The witnesses and other evidence for the Prosecution shall be heard or received.

(5) The Defense may make an opening statement after the Prosecution's opening statement or prior to presenting its case.

(6) The witnesses and other evidence for the Defense shall be heard or received.

(7) Thereafter, the Prosecution and the Defense may introduce evidence in rebuttal and surrebuttal.

(8) The Prosecution shall present argument to the Commission. Defense Counsel shall be permitted to present argument in response, and then the Prosecution may reply in rebuttal.

(9) After the members of the Commission, other than the Presiding Officer, deliberate and vote on findings in closed conference, the senior-ranking member who voted on findings shall announce the Commission's findings in the presence of the entire Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

(10) In the event a finding of Guilty is entered for an offense, the Prosecution and the Defense may present information to aid the Commission in determining an appropriate sentence. The Accused may testify and shall be subject to cross examination regarding any such testimony.

(11) The Prosecution and, thereafter, the Defense shall present argument to the Commission regarding sentencing.

(12) After the members of the Commission, other than the Presiding Officer, deliberate and vote on a sentence in closed conference, the senior-ranking member who voted on a sentence shall announce the Commission's sentence in the presence of the entire Commission, the Prosecution, the Accused, and Defense Counsel. The individual votes of the members of the Commission shall not be disclosed.

F. Voting

In accordance with instructions from the Presiding Officer, the other members of the Commission shall deliberate and vote in closed conference. Such a Commission member shall vote for a finding of Guilty as to an offense if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense. An affirmative vote of two-thirds of the other members is required for a finding of Guilty. When appropriate, the other members of the Commission may adjust a charged offense by exceptions and substitutions of language that do not substantially change the nature of the offense or increase its seriousness, or it may vote to convict of a lesser-included offense. An affirmative vote of two-thirds of the other members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all of the other members. Votes on findings and sentences shall be taken by secret, written ballot. The Presiding Officer shall not participate in, or be present during, the deliberations or votes on findings or sentence by the other members of the Commission.

G. Sentence

Upon conviction of an Accused, in accordance with instructions from the Presiding Officer, the other members of the Commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the other members of the Commission shall determine to be proper. Only a Commission that includes at least seven other members may sentence an Accused to death. A Commission may (subject to rights of third parties) order confiscation of any property of a convicted Accused, deprive that Accused of any stolen property, or order the delivery of such property to the United States for disposition.

H. Post-Trial Procedures

(1) Record of Trial

Each Commission shall make a verbatim transcript of its proceedings, apart from all Commission deliberations, and preserve all evidence admitted in the trial (including any sentencing proceedings) of each case brought before it, which shall constitute the record of trial. The court reporter shall prepare the official record of trial and submit it to the Presiding Officer for

authentication upon completion. The Presiding Officer shall transmit the authenticated record of trial to the Appointing Authority. If the Secretary of Defense is serving as the Appointing Authority, the record shall be transmitted to the Review Panel constituted under Section 6(H)(4).

(2) Finality of Findings and Sentence

A Commission finding as to a charge and any sentence of a Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon pursuant to Section 4(c)(8) of the President's Military Order and in accordance with Section 6(H)(6) of this Order. An authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly. Adjudged confinement shall begin immediately following the trial.

(3) Review by the Appointing Authority

If the Secretary of Defense is not the Appointing Authority, the Appointing Authority shall promptly perform an administrative review of the record of trial. If satisfied that the proceedings of the Commission were administratively complete, the Appointing Authority shall transmit the record of trial to the Review Panel constituted under Section 6(H)(4). If not so satisfied, the Appointing Authority shall return the case for any necessary supplementary proceedings.

(4) Review Panel

The Secretary of Defense shall designate a Review Panel consisting of three Military Officers, which may include civilians commissioned pursuant to reference (e). At least one member of each Review Panel shall have experience as a judge. The Review Panel shall review the record of trial and, in its discretion, any written submissions from the Prosecution and the Defense and shall deliberate in closed conference. The Review Panel shall disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission. Within seventy-five days after receipt of the record of trial, the Review Panel shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred.

(5) Review by the Secretary of Defense

The Secretary of Defense shall review the record of trial and the recommendation of the Review Panel and either return the case for further proceedings or, unless making the final decision pursuant to a Presidential designation under Section 4(c)(8) of the President's Military Order, forward it to the President with a recommendation as to disposition.

(6) Final Decision

After review by the Secretary of Defense, the record of trial and all recommendations will be forwarded to the President for review and final decision (unless the President has designated the Secretary of Defense to perform this function). If the President has so designated the Secretary of Defense, the Secretary may approve or disapprove findings or change a finding of Guilty to a finding of Guilty to a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed or any portion thereof. If the Secretary of Defense is authorized to render the final decision, the review of the Secretary of Defense under Section 6(H)(5) shall constitute the final decision.

7. REGULATIONS

A. Supplementary Regulations and Instructions

The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President's Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President's Military Order. The General Counsel shall issue such instructions consistent with the President's Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships.

B. Construction

In the event of any inconsistency between the President's Military Order and this Order, including any supplementary regulations or instructions issued under Section 7(A), the provisions of the President's Military Order shall govern. In the event of any inconsistency between this Order and any regulations or instructions issued under Section 7(A), the provisions of this Order shall govern.

8. AUTHORITY

Nothing in this Order shall be construed to limit in any way the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons. Nothing in this Order shall affect the authority to constitute military commissions for a purpose not governed by the President's Military Order.

9. PROTECTION OF STATE SECRETS

Nothing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them.

10. OTHER

This Order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or

other entities, its officers or employees, or any other person. No provision in this Order shall be construed to be a requirement of the United States Constitution. Section and subsection captions in this document are for convenience only and shall not be used in construing the requirements of this Order. Failure to meet a time period specified in this Order, or supplementary regulations or instructions issued under Section 7(A), shall not create a right to relief for the Accused or any other person. Reference (f) shall not apply to this Order or any supplementary regulations or instructions issued under Section 7(A).

11. AMENDMENT

The Secretary of Defense may amend this Order from time to time.

12. DELEGATION

The authority of the Secretary of Defense to make requests for assistance under Section 5 of the President's Military Order is delegated to the General Counsel of the Department of Defense. The Executive Secretary of the Department of Defense shall provide such assistance to the General Counsel as the General Counsel determines necessary for this purpose.

13. EFFECTIVE DATE

This Order is effective immediately.

Donald H. Rumsfeld
Secretary of Defense

EXHIBIT D

United States Department of Defense

News Release

On the web: http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/releases/2004/nr20040707-0992.html
Media contact: +1 (703) 697-5131
Public contact: http://www.dod.mil/faq/comment.html or +1 (703) 428-0711

No. 651-04
IMMEDIATE RELEASE July 7, 2004

COMBATANT STATUS REVIEW TRIBUNAL ORDER ISSUED

The Department of Defense announced today the formation of the Combatant Status Review Tribunal for detainees held at Guantanamo Bay, Cuba. This tribunal will serve as a forum for detainees to contest their status as enemy combatants.

Detainees held at Guantanamo Bay will be notified within 10 days of their opportunity to contest their enemy combatant status under this process. The tribunal process will start as soon as possible. Detainees will also be notified of their right to seek a writ of habeas corpus in the courts of the United States. Habeas corpus is a writ ordering a person in custody to be brought before a court.

An individual tribunal will be comprised of three neutral officers, none of whom were involved with the detainee. One of the tribunal members will be a judge advocate and the senior ranking officer will serve as the president of the tribunal.

Each detainee will be assigned a military officer as a personal representative. That officer will assist the detainee in preparing for a tribunal hearing. Detainees will have the right to testify before the tribunal, call witnesses and introduce any other evidence. Following the hearing of testimony and other evidence, the tribunal will determine in a closed-door session whether the detainee is properly held as an enemy combatant. Any detainee who is determined not to be an enemy combatant will be transferred to their country of citizenship or other disposition consistent with domestic and international obligations and U.S. foreign policy.

This tribunal does not replace the administrative review procedure announced earlier this year.

The order establishing the tribunals and a DoD Fact Sheet are available at:
http://www.defenselink.mil/news/Jul2004/d20040707review.pdf
http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf

http://www.defenselink.mil/releases/2004/nr20040707-0992.html

EXHIBIT E

Department of Defense
Military Commission Instruction No. 2

April 30, 2003

SUBJECT: Crimes and Elements for Trials by Military Commission

References: (a) Military Commission Order No. 1 (Mar. 21, 2002)

(b) Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001)

(c) Section 113(d) of Title 10 of the United States Code

(d) Section 140(b) of Title 10 of the United States Code

(e) Section 821 of Title 10 of the United States Code

(f) Military Commission Instruction No. 1, current edition

1. PURPOSE

This Instruction provides guidance with respect to crimes that may be tried by military commissions established pursuant to references (a) and (b) and enumerates the elements of those crimes.

2. AUTHORITY

This Instruction is issued pursuant to Section 7(A) of reference (a) and in accordance with references (b) through (e). The provisions of reference (f) are applicable to this Instruction.

3. GENERAL

A. *Background.* The following crimes and elements thereof are intended for use by military commissions established pursuant to references (a) and (b), the jurisdiction of which extends to offenses or offenders that by statute or the law of armed conflict may be tried by military commission as limited by reference (b). No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict or offenses that, consistent with that

body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.

B. *Effect of Other Laws.* No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this Instruction as compared to other articulations of law.

C. *Non-Exclusivity.* This Instruction does not contain a comprehensive list of crimes triable by military commission. It is intended to be illustrative of applicable principles of the common law of war but not to provide an exclusive enumeration of the punishable acts recognized as such by that law. The absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense.

4. APPLICABLE PRINCIPLES OF LAW

A. *General Intent.* All actions taken by the Accused that are necessary for completion of a crime must be performed with general intent. This intent is not listed as a separate element. When the mens rea required for culpability to attach involves an intent that a particular consequence occur, or some other specific intent, an intent element is included. The necessary relationship between such intent element and the conduct constituting the actus reus is not articulated for each set of elements, but is presumed; a nexus between the two is necessary.

B. *The Element of Wrongfulness and Defenses.* Conduct must be wrongful to constitute one of the offenses enumerated herein or any other offense triable by military commission. Conduct is wrongful if it is done without justification or excuse cognizable under applicable law. The element of wrongfulness (or the absence of lawful justification or excuse), which may be required under the customary law of armed conflict, is not repeated in the elements of crimes below. Conduct satisfying the elements found herein shall be inferred to be wrongful in the absence of evidence to the contrary. Similarly, this Instruction does not enunciate defenses that may apply for specific offenses, though an Accused is entitled to raise any defense available under the law of armed conflict. Defenses potentially available to an Accused under the law of armed conflict, such as self-defense, mistake of fact, and duress, may be applicable to certain offenses subject to trial by military commission. In the absence of evidence to the contrary, defenses in individual cases shall be presumed not to apply. The burden of going forward with evidence of lawful justification or excuse or any applicable defense shall be upon the Accused. With respect to the issue of combatant immunity raised by the specific enumeration of an element requiring the absence thereof, the prosecution must affirmatively prove that element regardless of whether the issue is raised by the defense. Once an applicable defense or an issue of lawful justification or lawful excuse is fairly raised by the evidence presented, except for the defense of lack of mental responsibility, the burden is on the prosecution to establish beyond a reasonable doubt that the conduct was wrongful or that the defense does not apply. With respect to the defense of lack of mental responsibility, the

Accused has the burden of proving by clear and convincing evidence that, as a result of a severe mental disease or defect, the Accused was unable to appreciate the nature and quality of the wrongfulness of the Accused's acts. As provided in Section 5(C) of reference (a), the prosecution bears the burden of establishing the Accused's guilt beyond a reasonable doubt in all cases tried by a military commission. Each element of an offense enumerated herein must be proven beyond a reasonable doubt.

C. *Statute of Limitations.* Violations of the laws of war listed herein are not subject to any statute of limitations.

5. DEFINITIONS

A. *Combatant immunity.* Under the law of armed conflict, only a lawful combatant enjoys "combatant immunity" or "belligerent privilege" for the lawful conduct of hostilities during armed conflict.

B. *Enemy.* "Enemy" includes any entity with which the United States or allied forces may be engaged in armed conflict, or which is preparing to attack the United States. It is not limited to foreign nations, or foreign military organizations or members thereof. "Enemy" specifically includes any organization of terrorists with international reach.

C. *In the context of and was associated with armed conflict.* Elements containing this language require a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus (*e.g.*, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if temporally and geographically associated with armed conflict, is not "in the context of" the armed conflict). The focus of this element is not the nature or characterization of the conflict, but the nexus to it. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war," or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

D. *Military Objective.* "Military objectives" are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.

E. *Object of the attack.* "Object of the attack" refers to the person, place, or thing intentionally targeted. In this regard, the term includes neither collateral damage nor incidental injury or death.

F. *Protected property.* "Protected property" refers to property specifically protected by the law of armed conflict such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provided they are not being used for military purposes or are not otherwise military objectives. Such property would include objects properly identified by one of the distinctive emblems of the Geneva Conventions but does not include all civilian property.

G. *Protected under the law of war.* The person or object in question is expressly "protected" under one or more of the Geneva Conventions of 1949 or, to the extent applicable, customary international law. The term does not refer to all who enjoy some form of protection as a consequence of compliance with international law, but those who are expressly designated as such by the applicable law of armed conflict. For example, persons who either are *hors de combat* or medical or religious personnel taking no active part in hostilities are expressly protected, but other civilians may not be.

H. *Should have known.* The facts and circumstances were such that a reasonable person in the Accused's position would have had the relevant knowledge or awareness.

6. CRIMES AND ELEMENTS

A. *Substantive Offenses—War Crimes.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

1) Willful Killing Of Protected Persons

a. *Elements.*

(1) The accused killed one or more persons;

(2) The accused intended to kill such person or persons;

(3) Such person or persons were protected under the law of war;

(4) The accused knew or should have known of the factual circumstances that established that protected status; and

(5) The killing took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

2) Attacking Civilians

a. *Elements.*

(1) The accused engaged in an attack;

(2) The object of the attack was a civilian population as such or individual civilians not taking direct or active part in hostilities;

(3) The accused intended the civilian population as such or individual civilians not taking direct or active part in hostilities to be an object of the attack; and

(4) The attack took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

3) Attacking Civilian Objects

a. *Elements.*

(1) The accused engaged in an attack;

(2) The object of the attack was civilian property, that is, property that was not a military objective;

(3) The accused intended such property to be an object of the attack;

(4) The accused knew or should have known that such property was not a military objective; and

(5) The attack took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

4) Attacking Protected Property

a. *Elements.*

(1) The accused engaged in an attack;

(2) The object of the attack was protected property;

(3) The accused intended such property to be an object of the attack;

(4) The accused knew or should have known of the factual circumstances that established that protected status; and

(5) The attack took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The intent required for this offense precludes its applicability with regard to collateral damage or injury incident to a lawful attack.

5) Pillaging

a. *Elements.*

(1) The accused appropriated or seized certain property;

(2) The accused intended to appropriate or seize such property for private or personal use;

(3) The appropriation or seizure was without the consent of the owner of the property or other person with authority to permit such appropriation or seizure; and

(4) The appropriation or seizure took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) As indicated by the use of the term "private or personal use," legitimate captures or appropriations, or seizures justified by military necessity, cannot constitute the crime of pillaging.

6) Denying Quarter

a. *Elements.*

(1) The accused declared, ordered, or otherwise indicated that there shall be no survivors or surrender accepted;

(2) The accused thereby intended to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted;

(3) It was foreseeable that circumstances would be such that a practicable and reasonable ability to accept surrender would exist;

(4) The accused was in a position of effective command or control over the subordinate forces to which the declaration or order was directed; and

(5) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (3) precludes this offense from being interpreted as limiting the application of lawful means or methods of warfare against enemy

combatants. For example, a remotely delivered attack cannot give rise to this offense.

7) Taking Hostages

a. *Elements.*

(1) The accused seized, detained, or otherwise held hostage one or more persons;

(2) The accused threatened to kill, injure, or continue to detain such person or persons;

(3) The accused intended to compel a State, an international organization, a natural or legal person, or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Consistent with Section 4(B) of this Instruction, this offense cannot be committed by lawfully detaining enemy combatants or other individuals as authorized by the law of armed conflict.

8) Employing Poison or Analogous Weapons

a. *Elements.*

(1) The accused employed a substance or a weapon that releases a substance as a result of its employment;

(2) The substance was such that exposure thereto causes death or serious damage to health in the ordinary course of events, through its asphyxiating, poisonous, or bacteriological properties;

(3) The accused employed the substance or weapon with the intent of utilizing such asphyxiating, poisonous, or bacteriological properties as a method of warfare;

(4) The accused knew or should have known of the nature of the substance or weapon; and

(5) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The "death or serious damage to health" required by Element (2) of this offense must be a direct result of the substance's effect or effects on the human body (e.g., asphyxiation caused by the depletion of atmospheric

oxygen secondary to a chemical or other reaction would not give rise to this offense).

(2) The clause "serious damage to health" does not include temporary incapacitation or sensory irritation.

(3) The use of the "substance or weapon" at issue must be proscribed under the law of armed conflict. It may include chemical or biological agents.

(4) The specific intent element for this offense precludes liability for mere knowledge of potential collateral consequences (e.g., mere knowledge of a secondary asphyxiating or toxic effect would be insufficient to complete the offense).

9) Using Protected Persons as Shields

a. *Elements.*

(1) The accused positioned, or took advantage of the location of, one or more civilians or persons protected under the law of war;

(2) The accused intended to use the civilian or protected nature of the person or persons to shield a military objective from attack or to shield, favor, or impede military operations; and

(3) The conduct took place in the context of and was associated with armed conflict.

10) Using Protected Property as Shields

a. *Elements.*

(1) The accused positioned, or took advantage of the location of, civilian property or property protected under the law of war;

(2) The accused intended to shield a military objective from attack or to shield, favor, or impede military operations; and

(3) The conduct took place in the context of and was associated with armed conflict.

11) Torture

a. *Elements.*

(1) The accused inflicted severe physical or mental pain or suffering upon one or more persons;

(2) The accused intended to inflict such severe physical or mental pain or suffering;

(3) Such person or persons were in the custody or under the control of the accused; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Consistent with Section 4(B) of this Instruction, this offense does not include pain or suffering arising only from, inherent in, or incidental to, lawfully imposed punishments. This offense does not include the incidental infliction of pain or suffering associated with the legitimate conduct of hostilities.

(2) Severe "mental pain or suffering" is the prolonged mental harm caused by or resulting from:

(a) the intentional infliction or threatened infliction of severe physical pain or suffering;

(b) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(c) the threat of imminent death; or

(d) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(3) "Prolonged mental harm" is a harm of some sustained duration, though not necessarily permanent in nature, such as a clinically identifiable mental disorder.

(4) Element (3) of this offense does not require a particular formal relationship between the accused and the victim. Rather, it precludes prosecution for pain or suffering consequent to a lawful military attack.

12) Causing Serious Injury

a. *Elements.*

(1) The accused caused serious injury to the body or health of one or more persons;

(2) The accused intended to inflict such serious injury;

(3) Such person or persons were in the custody or under the control of the accused; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) "Serious injury" includes fractured or dislocated bones, deep cuts, torn members of the body, and serious damage to internal organs.

13) Mutilation or Maiming

a. *Elements.*

(1) The accused subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage;

(2) The accused intended to subject such person or persons to such mutilation;

(3) The conduct caused death or seriously damaged or endangered the physical or mental health or appearance of such person or persons.

(4) The conduct was neither justified by the medical treatment of the person or persons concerned nor carried out in the interest of such person or persons;

(5) Such person or persons were in the custody or control of the accused; and

(6) The conduct took place in the context of and was associated with armed conflict.

14) Use of Treachery or Perfidy

a. *Elements.*

(1) The accused invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under the law of war;

(2) The accused intended to betray that confidence or belief;

(3) The accused killed, injured, or captured one or more persons;

(4) The accused made use of that confidence or belief in killing, injuring, or capturing such person or persons; and

(5) The conduct took place in the context of and was associated with armed conflict.

15) Improper Use of Flag of Truce

a. *Elements.*

(1) The accused used a flag of truce;

(2) The accused made such use in order to feign an intention to negotiate, surrender, or otherwise to suspend hostilities when there was no such intention on the part of the accused; and

(3) The conduct took place in the context of and was associated with armed conflict.

16) Improper Use of Protective Emblems

a. *Elements.*

(1) The accused used a protective emblem recognized by the law of armed conflict;

(2) The accused undertook such use for combatant purposes in a manner prohibited by the law of armed conflict;

(3) The accused knew or should have known of the prohibited nature of such use; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) "Combatant purposes," as used in Element (2) of this offense, means purposes directly related to hostilities and does not include medical, religious, or similar activities.

17) Degrading Treatment of a Dead Body

a. *Elements.*

(1) The accused degraded or otherwise violated the dignity of the body of a dead person;

(2) The accused intended to degrade or otherwise violate the dignity of such body;

(3) The severity of the degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (2) of this offense precludes prosecution for actions justified by military necessity.

18) Rape

a. *Elements.*

(1) The accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;

(2) The invasion was committed by force, threat of force or coercion, or was committed against a person incapable of giving consent; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (2) of this offense recognizes that consensual conduct does not give rise to this offense.

(2) It is understood that a person may be incapable of giving consent if affected by natural, induced, or age-related incapacity.

(3) The concept of "invasion" is linked to the inherent wrongfulness requirement for all offenses. In this case, for example, a legitimate body cavity search could not give rise to this offense.

(4) The concept of "invasion" is gender neutral.

B. *Substantive Offenses—Other Offenses Triable by Military Commission.* The following enumerated offenses, if applicable, should be charged in separate counts. Elements are drafted to reflect conduct of the perpetrator. Each element need not be specifically charged.

1) Hijacking or Hazarding a Vessel or Aircraft

a. *Elements.*

(1) The accused seized, exercised control over, or endangered the safe navigation of a vessel or aircraft;

(2) The accused intended to so seize, exercise control over, or endanger such vessel or aircraft; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) A seizure, exercise of control, or endangerment required by military necessity, or against a lawful military objective undertaken by military forces of a State in the exercise of their official duties, would not satisfy the wrongfulness requirement for this crime.

2) Terrorism

a. *Elements.*

(1) The accused killed or inflicted bodily harm on one or more persons or destroyed property;

(2) The accused:

(a) intended to kill or inflict bodily harm on one or more persons;

or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) The killing, harm or destruction was intended to intimidate or coerce a civilian population, or to influence the policy of a government by intimidation or coercion; and

(4) The killing, harm or destruction took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Element (1) of this offense includes the concept of causing death or bodily harm, even if indirectly.

(2) The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

3) Murder by an Unprivileged Belligerent

a. *Elements.*

(1) The accused killed one or more persons;

(2) The accused:

(a) intended to kill or inflict great bodily harm on such person or persons

or

(b) intentionally engaged in an act that is inherently dangerous to another and evinces a wanton disregard of human life;

(3) The accused did not enjoy combatant immunity; and

(4) The killing took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) The term "kill" includes intentionally causing death, whether directly or indirectly.

(2) Unlike the crimes of willful killing or attacking civilians, in which the victim's status is a prerequisite to criminality, for this offense the victim's status is immaterial. Even an attack on a soldier would be a crime if the attacker did not enjoy "belligerent privilege" or "combatant immunity."

4) Destruction of Property by an Unprivileged Belligerent

a. *Elements.*

(1) The accused destroyed property;

(2) The property belonged to another person, and the destruction was without that person's consent;

(3) The accused intended to destroy such property;

(4) The accused did not enjoy combatant immunity; and

(5) The destruction took place in the context of and was associated with armed conflict.

5) Aiding the Enemy

a. *Elements.*

(1) The accused aided the enemy;

(2) The accused intended to aid the enemy; and

(3) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Means of accomplishing Element (1) of this offense include, but are not limited to: providing arms, ammunition, supplies, money, other items or services to the enemy; harboring or protecting the enemy; or giving intelligence or other information to the enemy.

(2) The requirement that conduct be wrongful for this crime necessitates that the accused act without proper authority. For example, furnishing enemy combatants detained during hostilities with subsistence or quarters in accordance with applicable orders or policy is not aiding the enemy.

(3) The requirement that conduct be wrongful for this crime may necessitate that, in the case of a lawful belligerent, the accused owe allegiance or some duty to the United States of America or to an ally or coalition partner. For example, citizenship, resident alien status, or a contractual relationship in or with the United States or an ally or coalition partner is sufficient to satisfy this requirement so long as the relationship existed at a time relevant to the offense alleged.

6) Spying

a. *Elements.*

(1) The accused collected or attempted to collect certain information;

(2) The accused intended to convey such information to the enemy;

(3) The accused, in collecting or attempting to collect the information, was lurking or acting clandestinely, while acting under false pretenses; and

(4) The conduct took place in the context of and was associated with armed conflict.

b. *Comments.*

(1) Members of a military organization not wearing a disguise and others who carry out their missions openly are not spies, if, though they may have resorted to concealment, they have not acted under false pretenses.

(2) Related to the requirement that conduct be wrongful or without justification or excuse in this case is the fact that, consistent with the law of war, a lawful combatant who, after rejoining the armed force to which that combatant belongs, is subsequently captured, can not be punished for previous acts of espionage. His successful rejoining of his armed force constitutes a defense.

7) Perjury or False Testimony

a. *Elements.*

(1) The accused testified at a military commission, in proceedings ancillary to a military commission, or provided information in a writing executed under an oath to tell the truth or a declaration acknowledging the applicability of penalties of perjury in connection with such proceedings;

(2) Such testimony or information was material;

(3) Such testimony or information was false; and

(4) The accused knew such testimony or information to be false.

8) Obstruction of Justice Related to Military Commissions

a. *Elements.*

(1) The accused did an act;

(2) The accused intended to influence, impede, or otherwise obstruct the due administration of justice; and

(3) The accused did such act in the case of a certain person against whom the accused had reason to believe:

(a) there were or would be proceedings before a military commission

or

(b) there was an ongoing investigation of offenses triable by military commission.

C. *Other Forms of Liability and Related Offenses.* A person is criminally liable as a principal for a completed substantive offense if that person commits the offense (perpetrator), aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility. Such a person would be charged as a principal even if another individual more directly perpetrated the offense. In proving culpability, however, the below listed definitions and elements are applicable. Additionally, if a substantive offense was completed, a person may be criminally liable for the separate offense of accessory after the fact. If the substantive offense was not completed, a person may be criminally liable of the lesser-included offense of attempt or the separate offense of solicitation. Finally, regardless of whether the substantive offense was completed, a person may be criminally liable of the separate offense of conspiracy in addition to the substantive offense. Each element need not be specifically charged.

1) Aiding or Abetting

a. *Elements.*

(1) The accused committed an act that aided or abetted another person or entity in the commission of a substantive offense triable by military commission;

(2) Such other person or entity committed or attempted to commit the substantive offense; and

(3) The accused intended to or knew that the act would aid or abet such other person or entity in the commission of the substantive offense or an associated criminal purpose or enterprise.

b. *Comments.*

(1) The term "aided or abetted" in Element (1) includes: assisting, encouraging, advising, instigating, counseling, ordering, or procuring

another to commit a substantive offense; assisting, encouraging, advising, counseling, or ordering another in the commission of a substantive offense; and in any other way facilitating the commission of a substantive offense.

(2) In some circumstances, inaction may render one liable as an aider or abettor. If a person has a legal duty to prevent or thwart the commission of a substantive offense, but does not do so, that person may be considered to have aided or abetted the commission of the offense if such noninterference is intended to and does operate as an aid or encouragement to the actual perpetrator.

(3) An accused charged with aiding or abetting should be charged with the related substantive offense as a principal.

2) Solicitation

a. *Elements.*

(1) The accused solicited, ordered, induced, or advised a certain person or persons to commit one or more substantive offenses triable by military commission; and

(2) The accused intended that the offense actually be committed.

b. *Comments.*

(1) The offense is complete when a solicitation is made or advice is given with the specific wrongful intent to induce a person or persons to commit any offense triable by military commission. It is not necessary that the person or persons solicited, ordered, induced, advised, or assisted agree to or act upon the solicitation or advice. If the offense solicited is actually committed, however, the accused is liable under the law of armed conflict for the substantive offense. An accused should not be convicted of both solicitation and the substantive offense solicited if criminal liability for the substantive offense is based upon the solicitation.

(2) Solicitation may be by means other than speech or writing. Any act or conduct that reasonably may be construed as a serious request, order, inducement, advice, or offer of assistance to commit any offense triable by military commission may constitute solicitation. It is not necessary that the accused act alone in the solicitation, order, inducement, advising, or assistance. The accused may act through other persons in committing this offense

(3) An accused charged with solicitation of a completed substantive offense should be charged for the substantive offense as a principal. An accused charged with solicitation of an uncompleted offense should be charged for the separate offense of solicitation. Solicitation is not a lesser-included offense of the related substantive offense.

3) Command/Superior Responsibility – Perpetrating

a. *Elements.*

(1) The accused had command and control, or effective authority and control, over one or more subordinates;

(2) One or more of the accused's subordinates committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(3) The accused either knew or should have known that the subordinate or subordinates were committing, attempting to commit, conspiring to commit, soliciting, or aiding or abetting such offense or offenses; and

(4) The accused failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the offense or offenses.

b. *Comments.*

(1) The phrase "effective authority and control" in Element (1) of this offense includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who should not be held responsible for the behavior of subordinates involved in activities that have no relationship to such superior's sphere of authority. Subject matter authority need not be demonstrated for command responsibility as it applies to a military commander.

(2) A commander or other military or civilian superior, not in command, charged with failing adequately to prevent or repress a substantive offense triable by military commission should be charged for the related substantive offense as a principal.

4) Command/Superior Responsibility – Misprision

a. *Elements.*

(1) The accused had command and control, or effective authority and control, over one or more subordinates;

(2) One or more of the accused's subordinates had committed, attempted to commit, conspired to commit, solicited to commit, or aided or abetted the commission of one or more substantive offenses triable by military commission;

(3) The accused knew or should have known that the subordinate or subordinates had committed, attempted to commit, conspired to commit, solicited, or aided or abetted such offense or offenses; and

(4) The accused failed to submit the matter to competent authorities for investigation or prosecution as appropriate.

b. *Comments.*

(1) The phrase, "effective authority and control" in Element (1) of this offense includes the concept of relative authority over the subject matter or activities associated with the perpetrator's conduct. This may be relevant to a civilian superior who cannot be held responsible under this offense for the behavior of subordinates involved in activities that have nothing to do with such superior's sphere of authority.

(2) A commander or superior charged with failing to take appropriate punitive or investigative action subsequent to the perpetration of a substantive offense triable by military commission should not be charged for the substantive offense as a principal. Such commander or superior should be charged for the separate offense of failing to submit the matter for investigation and/or prosecution as detailed in these elements. This offense is not a lesser-included offense of the related substantive offense.

5) **Accessory After the Fact**

a. *Elements.*

(1) The accused received, comforted, or assisted a certain person;

(2) Such person had committed an offense triable by military commission;

(3) The accused knew that such person had committed such offense or believed such person had committed a similar or closely related offense; and

(4) The accused intended to hinder or prevent the apprehension, trial, or punishment of such person.

b. *Comments.*

(1) Accessory after the fact should be charged separately from the related substantive offense. It is not a lesser-included offense of the related substantive offense.

6) **Conspiracy**

a. *Elements.*

(1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

(2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined in it willfully, that is, with the intent to further the unlawful purpose; and

(3) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

b. *Comments.*

(1) Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the agreement or enterprise need not be established. A person may be guilty of conspiracy although incapable of committing the intended offense. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.

(2) The agreement or enterprise must, at least in part, involve the commission or intended commission of one or more substantive offenses triable by military commission. A single conspiracy may embrace multiple criminal objectives. The agreement need not include knowledge that any relevant offense is in fact "triable by military commission."

(3) The overt act must be done by one or more of the conspirators, but not necessarily the accused, and it must be done to effectuate the object of the conspiracy or in furtherance of the common criminal purpose. The accused need not have entered the agreement or criminal enterprise at the time of the overt act.

(4) The overt act need not be in itself criminal, but it must advance the purpose of the conspiracy. It is not essential that any substantive offense be committed.

(5) Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.

(6) A party to the conspiracy who withdraws from or abandons the agreement or enterprise before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must consist of affirmative conduct that is wholly inconsistent with adherence to the unlawful agreement or common criminal purpose and that shows that the party has severed all connection with the conspiracy. A conspirator who effectively withdraws from or abandons the conspiracy after the performance of an overt act by one of the conspirators remains

guilty of conspiracy and of any offenses committed pursuant to the conspiracy up to the time of the withdrawal or abandonment. The withdrawal of a conspirator from the conspiracy does not affect the status of the remaining members.

(7) That the object of the conspiracy was impossible to effect is not a defense to this offense.

(8) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.

7) **Attempt**

a. *Elements.*

(1) The accused committed an act;

(2) The accused intended to commit one or more substantive offenses triable by military commission;

(3) The act amounted to more than mere preparation; and

(4) The act apparently tended to effect the commission of the intended offense.

b. *Comments.*

(1) To constitute an attempt there must be a specific intent to commit the offense accompanied by an act that tends to accomplish the unlawful purpose. This intent need not involve knowledge that the offense is in fact "triable by military commission."

(2) Preparation consists of devising or arranging means or measures apparently necessary for the commission of the offense. The act need not be the last act essential to the consummation of the offense. The combination of specific intent to commit an offense, plus the commission of an act apparently tending to further its accomplishment, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(3) A person who purposely engages in conduct that would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt.

(4) It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended offense, solely because of the person's own sense that it was wrong, prior to the completion of the substantive offense. The voluntary abandonment defense is not allowed if the

abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance.

(5) Attempt is a lesser-included offense of any substantive offense triable by military commission and need not be charged separately. An accused may be charged with attempt without being charged with the substantive offense.

7. EFFECTIVE DATE

This Instruction is effective immediately.

William J. Haynes II
General Counsel of the Department of Defense

EXHIBIT F

FAX 001 802863 2513

To Robert D. Rachlin

Dear Robert

Please try to pass my letter to my son Ghassan Al-Sharbi in which I urged him to fully cooperate with you and with lieutenant W. C. Kubler while you are advocating his case

Also you will find another letter from Ghassan's mother (in Arabic) urging him to do so

our Thanks and best regards to you and to lieutenant Kubler.

Sincerely Yours

A. Sharbi

Abdullah Al Sharbi
P.O.Box 128247 Jeddah 2136
Saudi Arabia

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GHASSAN ABDULLAH AL SHARBI, Petitioner, v. GEORGE W. BUSH, President of the United States; DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy; JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense; Brigadier General JAY HOOD, Commander, Joint Task Force, Guantánamo Bay, Cuba, and Colonel MICHAEL BUMGARNER, Commander, Joint Detention Group, Joint Task, Guantanamo Bay, Cuba *Respondents*, all sued in their official capacities	Civ. Act. No. 1:05-CV-2348

CERTIFICATE OF SERVICE

I certify that on December 13, 2005, true and correct copies of Ghassan Abdullah Al Sharbi's Amended Petition for Writ of *Habeas Corpus* and Complaint for Injunctive, Declaratory and Other Relief were served by first class mail, postage prepaid, upon:

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Mr. John D. Altenburg, Jr.
Appointing Authority for Military Commissions
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Army Brig. Gen. Jay Hood
Commander, Joint Task Force-GTMO
JTF-GTMO
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Army Col. Michael Bumgarner
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Dated: December 13, 2005

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Hicks (Rasul) v. Bush	)	Case No. 02-CV-0299 (CKK)
Al Odah v. United States	)	Case No. 02-CV-0828 (CKK)
Habib v. Bush	)	Case No. 02-CV-1130 (CKK)
Kurnaz v. Bush	)	Case No. 04-CV-1135 (ESH)
Khadr v. Bush	)	Case No. 04-CV-1136 (JDB)
Begg v. Bush	)	Case No. 04-CV-1137 (RMC)
El-Banna v. Bush	)	Case No. 04-CV-1144 (RWR)
Gherebi v. Bush	)	Case No. 04-CV-1164 (RBW)
Anam v. Bush	)	Case No. 04-CV-1194 (HHK)
Almurbati v. Bush	)	Case No. 04-CV-1227 (RBW)
Abdah v. Bush	)	Case No. 04-CV-1254 (HHK)
Hamdan v. Bush	)	Case No. 04-CV-1519 (JR)
Al-Qosi v. Bush	)	Case No. 04-CV-1937 (PLF)
Paracha v. Bush	)	Case No. 04-CV-2022 (PLF)
Al-Marri v. Bush	)	Case No. 04-CV-2035 (GK)
Zemiri v. Bush	)	Case No. 04-CV-2046 (CKK)
Deghayes v. Bush	)	Case No. 04-CV-2215 (RMC)
Mustapha v. Bush	)	Case No. 05-CV-0022 (JR)
Abdullah v. Bush	)	Case No. 05-CV-0023 (RWR)
Al-Mohammed v. Bush	)	Case No. 05-CV-0247 (HHK)

El-Mashad v. Bush	)	Case No. 05-CV-0270 (JR) (consolidated with 05-CV-833)
Al-Adahi v. Bush	)	Case No. 05-CV-0280 (GK)
Al-Joudi v. Bush	)	Case No. 05-CV-0301 (GK)
Doe 1-570 v. Bush	)	Case No. 05-CV-0313 (CKK)
Al-Wazan v. Bush	)	Case No. 05-CV-0329 (PLF)
Al-Anazi v. Bush	)	Case No. 05-CV-0345 (JDB)
Alhami v. Bush	)	Case No. 05-CV-0359 (GK)
Ameziane v. Bush	)	Case No. 05-CV-0392 (ESH)
Batarfi v. Bush	)	Case No. 05-CV-0409 (EGS)
Sliti v. Bush	)	Case No. 05-CV-0429 (RGL)
Kabir v. Bush	)	Case No. 05-CV-0431 (RGL)
Qayed v. Bush	)	Case No. 05-CV-0454 (RMU)
Al-Shihry v. Bush	)	Case No. 05-CV-0490 (PLF)
Aziz v. Bush	)	Case No. 05-CV-0492 (JR)
Al-Oshan v. Bush	)	Case No. 05-CV-0520 (RMU)
Tumani v. Bush	)	Case No. 05-CV-0526 (RMU)
Al-Oshan v. Bush	)	Case No. 05-CV-0533 (RJL)
Salahi v. Bush	)	Case No. 05-CV-0569 (JR) (Consolidated with 05-CV-0881) (Consolidated with 05-CV-0995)
Mammar v. Bush	)	Case No. 05-CV-0573 (RJL)
Al-Sharekh v. Bush	)	Case No. 05-CV-0583 (RJL)

Magram v. Bush	)	Case No. 05-CV-0584 (CKK)
Al Rashaidan v. Bush	)	Case No. 05-CV-0586 (RWR)
Mokit v. Bush	)	Case No. 05-CV-0621 (PLF)
Al Daini v. Bush	)	Case No. 05-CV-0634 (RWR)
Errachidi v. Bush	)	Case No. 05-CV-0640 (EGS)
Ahmed v. Bush	)	Case No. 05-CV-0665 (RWR)
Battayav v. Bush	)	Case No. 05-CV-0714 (RBW)
Adem v. Bush	)	Case No. 05-CV-0723 (RWR)
Aboassy v. Bush	)	Case No. 05-CV-0748 (RMC)
Hamlily v. Bush	)	Case No. 05-CV-0763 (JDB)
Imran v. Bush	)	Case No. 05-CV-0764 (CKK)
Al Habashi v. Bush	)	Case No. 05-CV-0765 (EGS)
Al Hamamy v. Bush	)	Case No. 05-CV-0766 (RJL)
Hamoodah v. Bush	)	Case No. 05-CV-0795 (RJL)
Khiali-Gul v. Bush	)	Case No. 05-CV-0877 (JR)
Rahmattullah v. Bush	)	Case No. 05-CV-0878 (CKK)
Mohammad v. Bush	)	Case No. 05-CV-0879 (RBW)
Nasrat v. Bush	)	Case No. 05-CV-0880 (ESH)
Rahman v. Bush	)	Case No. 05-CV-0882 (GK)
Bostan v. Bush	)	Case No. 05-CV-0883 (RBW)
Muhibullah v. Bush	)	Case No. 05-CV-0884 (RMC)
Mohammad v. Bush	)	Case No. 05-CV-0885 (GK)

Wahab v. Bush	)	Case No. 05-CV-0886 (EGS)
Chaman v. Bush	)	Case No. 05-CV-0887 (RWR)
Gul v. Bush	)	Case No. 05-CV-0888 (CKK)
Basardh v. Bush	)	Case No. 05-CV-0889 (ESH)
Khan v. Bush	)	Case No. 05-CV-0890 (RMC)
Nasrullah v. Bush	)	Case No. 05-CV-0891 (RBW)
Shaaban v. Bush	)	Case No. 05-CV-0892 (CKK)
Sohail v. Bush	)	Case No. 05-CV-0993 (RMU)
Tohirjanovich v. Bush	)	Case No. 05-CV-0994 (JDB)
Khudaidad v. Bush	)	Case No. 05-CV-0997 (PLF)
Al Karim v. Bush	)	Case No. 05-CV-0998 (RMU)
Al-Khalaqi v. Bush	)	Case No. 05-CV-0999 (RBW)
Sarajuddin v. Bush	)	Case No. 05-CV-1000 (PLF)
Kahn v. Bush	)	Case No. 05-CV-1001 (ESH)
Mohammed v. Bush	)	Case No. 05-CV-1002 (EGS)
Mangut v. Bush	)	Case No. 05-CV-1008 (JDB)
Hamad v. Bush	)	Case No. 05-CV-1009 (JDB)
Khan v. Bush	)	Case No. 05-CV-1010 (RJL)
Zuhoor v. Bush	)	Case No. 05-CV-1011 (JR)
Ali Shah v. Bush	)	Case No. 05-CV-1012 (ESH)
Salaam v. Bush	)	Case No. 05-CV-1013 (JDB)
Al-Hela v. Bush	)	Case No. 05-CV-1048 (RMU)

Mousovi v. Bush	)	Case No. 05-CV-1124 (RMC)
Khalifh v. Bush	)	Case No. 05-CV-1189 (JR)
Zalita v. Bush	)	Case No. 05-CV-1220 (RMU)
Ahmed v. Bush	)	Case No. 05-CV-1234 (EGS)
Baqi v. Bush	)	Case No. 05-CV-1235 (PLF)
Aminullah v. Bush	)	Case No. 05-CV-1237 (ESH)
Ghalib v. Bush	)	Case No. 05-CV-1238 (CKK)
Al Khaiy v. Bush	)	Case No. 05-CV-1239 (RJL)
Bukhari v. Bush	)	Case No. 05-CV-1241 (RMC)
Pirzai v. Bush	)	Case No. 05-CV-1242 (RCL)
Peerzai v. Bush	)	Case No. 05-CV-1243 (RCL)
Alsawam v. Bush	)	Case No. 05-CV-1244 (CKK)
Mohammadi v. Bush	)	Case No. 05-CV-1246 (RWR)
Al Ginco v. Bush	)	Case No. 05-CV-1310 (RJL)
Ullah v. Bush	)	Case No. 05-CV-1311 (RCL)
Al Bihani v. Bush	)	Case No. 05-CV-1312 (RJL)
Mohammed v. Bush	)	Case No. 05-CV-1347 (GK)
Saib v. Bush	)	Case No. 05-CV-1353 (RMC)
Hatim v. Bush	)	Case No. 05-CV-1429 (RMU)
Al-Subaiy v. Bush	)	Case No. 05-CV-1453 (RMU)
Dhiab v. Bush	)	Case No. 05-CV-1457 (GK)
Ahmed Doe v. Bush	)	Case No. 05-CV-1458 (ESH)

Sadkhan v. Bush	)	Case No. 05-CV-1487 (RMC)
Faizullah v. Bush	)	Case No. 05-CV-1489 (RMU)
Faraj v. Bush	)	Case No. 05-CV-1490 (PLF)
Khan v. Bush	)	Case No. 05-CV-1491 (JR)
Ahmad v. Bush	)	Case No. 05-CV-1492 (RCL)
Amon v. Bush	)	Case No. 05-CV-1493 (RBW)
Al Wirghi v. Bush	)	Case No. 05-CV-1497 (RCL)
Nabil v. Bush	)	Case No. 05-CV-1504 (RMC)
Al Hawary v. Bush	)	Case No. 05-CV-1505 (RMC)
Shafiiq v. Bush	)	Case No. 05-CV-1506 (RMC)
Kiyemba v. Bush	)	Case No. 05-CV-1509 (RMU)
Idris v. Bush	)	Case No. 05-CV-1555 (JR) (Consolidated with 05-CV-1725)
Attash v. Bush	)	Case No. 05-CV-1592 (RCL)
Al Razak v. Bush	)	Case No. 05-CV-1601 (GK)
Mamet v. Bush	)	Case No. 05-CV-1602 (ESH)
Rabbani v. Bush	)	Case No. 05-CV-1607 (RMU)
Zahir v. Bush	)	Case No. 05-CV-1623 (RWR) (Consolidated with 05-CV-01236)
Akhtiar v. Bush	)	Case No. 05-CV-1635 (PLF)
Ghanem v. Bush	)	Case No. 05-CV-1638 (CKK)
Albkri v. Bush	)	Case No. 05-CV-1639 (RBW)
Al-Badah v. Bush	)	Case No. 05-CV-1641 (CKK)

Almerfedi v. Bush	)	Case No. 05-CV-1645 (PLF)
Zaid v. Bush	)	Case No. 05-CV-1646 (JDB)
Al-Bahooth v. Bush	)	Case No. 05-CV-1666 (ESH)
Al-Siba'i v. Bush	)	Case No. 05-CV-1667 (RBW)
Al-Uwaidah v. Bush	)	Case No. 05-CV-1668 (GK)
Al-Jutaili v. Bush	)	Case No. 05-CV-1669 (TFH)
Ali Ahmed v. Bush	)	Case No. 05-CV-1678 (GK)
Khandan v. Bush	)	Case No. 05-CV-1697 (RBW)
Kabir (Sadar Doe) v. Bush	)	Case No. 05-CV-1704 (JR)
Al-Rubaish v. Bush	)	Case No. 05-CV-1714 (RWR)
Qasim v. Bush	)	Case No. 05-CV-1779 (JDB)
Sameur v. Bush	)	Case No. 05-CV-1806 (CKK)
Al-Harbi v. Bush	)	Case No. 05-CV-1857 (CKK)
Aziz v. Bush	)	Case No. 05-CV-1864 (HHK)
Mamet v. Bush	)	Case No. 05-CV-1886 (EGS)
Hamoud v. Bush	)	Case No. 05-CV-1894 (RWR)
Al-Qahtani v. Bush	)	Case No. 05-CV-1971 (RMC)
Alkhemisi v. Bush	)	Case No. 05-CV-1983 (RMU)
Gamil v. Bush	)	Case No. 05-CV-2010 (JR)
Al-Shabany v. Bush	)	Case No. 05-CV-2029 (JDB)
Zakirjan v. Bush	)	Case No. 05-CV-2053 (HHK)
Muhammed v. Bush	)	Case No. 05-CV-2087 (RMC)

Othman v. Bush	)	Case No. 05-CV-2088 (RWR)
Ali Al Jayfi v. Bush	)	Case No. 05-CV-2104 (RBW)
Jamolivich v. Bush	)	Case No. 05-CV-2112 (RBW)
Al-Mudafari v. Bush	)	Case No. 05-CV-2185 (JR)
Al-Mithali v. Bush	)	Case No. 05-CV-2186 (ESH)
Al-Asadi v. Bush	)	Case No. 05-CV-2197 (HHK)
Alhag v. Bush	)	Case No. 05-CV-2199 (HHK)
Nakheelan v. Bush	)	Case No. 05-CV-2201 (ESH)
Al Subaie v. Bush	)	Case No. 05-CV-2216 (RCL)
Ghazy v. Bush	)	Case No. 05-CV-2223 (RJL)
Al Khatemi v. Bush	)	Case No. 05-CV-2248 (ESH)
Al-Shimrani v. Bush	)	Case No. 05-CV-2249 (RMC)
Amin v. Bush	)	Case No. 05-CV-2336 (PLF)
Al Sharbi v. Bush	)	Case No. 05-CV-2348 (EGS)
Ben Bacha v. Bush	)	Case No. 05-CV-2349 (RMC)
Zadran v. Bush	)	Case No. 05-CV-2367 (RWR)
Alsaaei v. Bush	)	Case No. 05-CV-2369 (RWR)
Razakah v. Bush	)	Case No. 05-CV-2370 (EGS)
Al Darby v. Bush	)	Case No. 05-CV-2371 (RCL)
Haleem v. Bush	)	Case No. 05-CV-2376 (RBW)
Al-Ghizzawi v. Bush	)	Case No. 05-CV-2378 (JDB)
Awad v. Bush	)	Case No. 05-CV-2379 (JR)

Al-Baidany v. Bush	)	Case No. 05-CV-2380 (CKK)
Al Rammi v. Bush	)	Case No. 05-CV-2381 (JDB)
Said v. Bush	)	Case No. 05-CV-2384 (RWR)
Mohammon v. Bush	)	Case No. 05-CV-2386 (RBW)
Al-Quhtani v. Bush	)	Case No. 05-CV-2387 (RMC)
Thabid v. Bush	)	Case No. 05-CV-2398 (ESH)
Al Yafie v. Bush	)	Case No. 05-CV-2399 (RJL)
Rimi v. Bush	)	Case No. 05-CV-2427 (RJL)
Almjrd v. Bush	)	Case No. 05-CV-2444 (RMC)
Al Salami v. Bush	)	Case No. 05-CV-2452 (PLF)
Al Shareef v. Bush	)	Case No. 05-CV-2458 (RWR)
Khan v. Bush	)	Case No. 05-CV-2466 (RCL)
Hussein v. Bush	)	Case No. 05-CV-2467 (PLF)
Al-Delebany v. Bush	)	Case No. 05-CV-2477 (RMU)
Al-Harbi v. Bush	)	Case No. 05-CV-2479 (HHK)

NOTICE OF SUPPLEMENTAL AUTHORITY

Respondents hereby give notice of the recent enactment of legislation that, among other things, amends 28 U.S.C. § 2241 to remove court jurisdiction to hear or consider applications for writs of habeas corpus and other actions brought in this Court by or on behalf of aliens detained at Guantanamo Bay, Cuba. See Department of Defense Appropriations Act, 2006, Pub. L. No. ___, § 1005 (2005) (signed by President Bush on Dec. 30, 2005) (copy of relevant excerpts attached).[1] No sooner than the week of January 9, 2006, respondents anticipate filing in each of the above-captioned cases a motion to dismiss or for other appropriate relief based on the new legislation. Prior to or shortly after filing of such motion, respondents will consult with petitioners' counsel in an effort to agree upon a briefing schedule that can be proposed to the Court.

Dated: January 3, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

DOUGLAS N. LETTER
Terrorism Litigation Counsel

[*signature block continued on following page*]

[1] Section 1005 is part of Title X of the Department of Defense Appropriations Act, 2006. Title X is also know as the Detainee Treatment Act of 2005. See Department of Defense Appropriations Act, 2006, Pub. L. No. ___, § 1001 (2005).

/s/ *Joseph H. Hunt*
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H. R. 2863

One Hundred Ninth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the fourth day of January, two thousand and five

An Act

Making appropriations for the Department of Defense for the fiscal year ending September 30, 2006, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2006

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 2006, for military functions administered by the Department of Defense and for other purposes, namely:

TITLE I

MILITARY PERSONNEL

MILITARY PERSONNEL, ARMY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Army on active duty, (except members of reserve components provided for elsewhere), cadets, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $28,191,287,000.

MILITARY PERSONNEL, NAVY

For pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations, for members of the Navy on active duty (except members of the Reserve provided for elsewhere), midshipmen, and aviation cadets; for members of the Reserve Officers' Training Corps; and for payments pursuant to section 156 of Public Law 97–377, as amended (42 U.S.C. 402 note), and to the Department of Defense Military Retirement Fund, $22,788,101,000.

(J) An assessment, in a classified annex if necessary, of United States military requirements, including planned force rotations, through the end of calendar year 2006.

SEC. 9011. Supervision and administration costs associated with a construction project funded with appropriations available for operation and maintenance, and executed in direct support of the Global War on Terrorism only in Iraq and Afghanistan, may be obligated at the time a construction contract is awarded: *Provided,* That for the purpose of this section, supervision and administration costs include all in-house Government costs.

SEC. 9012. Amounts appropriated or otherwise made available in this title are designated as making appropriations for contingency operations related to the global war on terrorism pursuant to section 402 of H. Con. Res. 95 (109th Congress), the concurrent resolution on the budget for fiscal year 2006.

TITLE X—MATTERS RELATING TO DETAINEES

SEC. 1001. SHORT TITLE.

This title may be cited as the "Detainee Treatment Act of 2005".

SEC. 1002. UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.

(a) IN GENERAL.—No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

(b) APPLICABILITY.—Subsection (a) shall not apply with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.

(c) CONSTRUCTION.—Nothing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States.

SEC. 1003. PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT OF PERSONS UNDER CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT.

(a) IN GENERAL.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) CONSTRUCTION.—Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) LIMITATION ON SUPERSEDURE.—The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

(d) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

SEC. 1004. PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL ENGAGED IN AUTHORIZED INTERROGATIONS.

(a) PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL.—In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

(b) COUNSEL.—The United States Government may provide or employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation of an officer, employee, member of the Armed Forces, or other agent described in subsection (a), with respect to any civil action or criminal prosecution arising out of practices described in that subsection, under the same conditions, and to the same extent, to which such services and payments are authorized under section 1037 of title 10, United States Code.

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA, AND IN AFGHANISTAN AND IRAQ.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth—

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are

in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.

(2) DESIGNATED CIVILIAN OFFICIAL.—The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the "Designated Civilian Official") shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) CONSIDERATION OF NEW EVIDENCE.—The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.—

(1) ASSESSMENT.—The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY.—Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) REPORT ON MODIFICATION OF PROCEDURES.—The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection (a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) ANNUAL REPORT.—

(1) REPORT REQUIRED.—The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary. The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT.—Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.—

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the

release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW.—Review under this paragraph—

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien—

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT.—The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) CONSTRUCTION.—Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) UNITED STATES DEFINED.—For purposes of this section, the term "United States", when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) EFFECTIVE DATE.—

(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection

(e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

SEC. 1006. TRAINING OF IRAQI FORCES REGARDING TREATMENT OF DETAINEES.

(a) REQUIRED POLICIES.—

(1) IN GENERAL.—The Secretary of Defense shall ensure that policies are prescribed regarding procedures for military and civilian personnel of the Department of Defense and contractor personnel of the Department of Defense in Iraq that are intended to ensure that members of the Armed Forces, and all persons acting on behalf of the Armed Forces or within facilities of the Armed Forces, ensure that all personnel of Iraqi military forces who are trained by Department of Defense personnel and contractor personnel of the Department of Defense receive training regarding the international obligations and laws applicable to the humane detention of detainees, including protections afforded under the Geneva Conventions and the Convention Against Torture.

(2) ACKNOWLEDGMENT OF TRAINING.—The Secretary shall ensure that, for all personnel of the Iraqi Security Forces who are provided training referred to in paragraph (1), there is documented acknowledgment of such training having been provided.

(3) DEADLINE FOR POLICIES TO BE PRESCRIBED.—The policies required by paragraph (1) shall be prescribed not later than 180 days after the date of the enactment of this Act.

(b) ARMY FIELD MANUAL.—

(1) TRANSLATION.—The Secretary of Defense shall provide for the United States Army Field Manual on Intelligence Interrogation to be translated into arabic and any other language the Secretary determines appropriate for use by members of the Iraqi military forces.

(2) DISTRIBUTION.—The Secretary of Defense shall provide for such manual, as translated, to be provided to each unit of the Iraqi military forces trained by Department of Defense personnel or contractor personnel of the Department of Defense.

(c) TRANSMITTAL OF REGULATIONS.—Not less than 30 days after the date on which regulations, policies, and orders are first prescribed under subsection (a), the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives copies of such regulations, policies, or orders, together with a report on steps taken to the date of the report to implement this section.

(d) ANNUAL REPORT.—Not less than one year after the date of the enactment of this Act, and annually thereafter, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report on the implementation of this section.

This division may be cited as the "Department of Defense Appropriations Act, 2006".

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAVIL MINGASA GAMIL, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2010 (JR)
JABBAROW OYBEK JAMOLIVICH, Petitioner, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2112 (RBW)
NAIF ABDULLA AL NAKHEELAN, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2201 (ESH)

MOHAMMED AL AMIN, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2336 (PLF)
GHASSAN ABDULLAH AL SHARBI, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2348 (EGS)
AHMED BEN BACHA, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2349 (RMC)

ABDULLAH WAZIR ZADRAN, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2367 (RWR)
ABDULLAH ALI SALEH GERAB ALSAAEI, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2369 (RWR)
ABDUR RAZAKAH, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2370 (EGS)

AHMED AL DARBY, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2371 (RCL)
ABDUL HALEEM, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2376 (RBW)
ABDUL HAMID ABDUL SALAM AL-GHIZZAWI, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2378 (JDB)

ADHAM MOHAMMED ALI AWAD, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2379 (JR)
ZAKARIA AL-BAIDANY, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2380 (CKK)
ISMAIL ALI AL RAMMI, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2381 (JDB)

SALIM SAID, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2384 (RWR)
AMER MOHAMMON, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2386 (RBW)
JOBRAN SAAD AL-QUHTANI, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2387 (RMC)

THABID, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2398 (ESH)
ALKHADR ABDULLAH AL YAFIE, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2399 (RJL)
MOHAMMAD RIMI, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2427 (RJL)

TALAH AHMED MOHAMMED ALI ALMJRD, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2444 (RMC)
SALEH ALI ABDULLAH AL SALAMI, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2452 (PLF)
FAHD UMAR ABDULMAJID AL SHAREEF, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2458 (RWR)

ANWAR KHAN, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2466 (RCL)
MUBARK HUSSEIN, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2467 (PLF)
AHMED AL-DELEBANY, *et al.*, Petitioners, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2477 (RMU)

GHANIM-ABDULRAHMAN AL-HARBI, *et al.*,	)	
Petitioners,	)	
v.	)	Civil Action No. 05-CV-2479 (HHK)
GEORGE W. BUSH, President of the United States, *et al.*,	)	
Respondents.	)	

ATTORNEY APPEARANCE

Undersigned counsel, Terry M. Henry, hereby enters his appearance as one of the counsel for respondents in the above-captioned cases.

Dated: January 5, 2006

Respectfully submitted,

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Assistant Attorney General

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United States Attorney

DOUGLAS N. LETTER
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/s/ Terry M. Henry
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Attorneys for Respondents

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GHASSAN ABDULLAH AL SHARBI, by his father and next friend, Abdullah Al Sharbi, Petitioner,	)	
v.	)	
GEORGE W. BUSH, President of the United States; DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy; JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense; Brigadier General JAY HOOD, Commander, Joint Task Force, Guantánamo Bay, Cuba, and Colonel BRICE A. GYURISKO, Commander, Joint Detention Operations Group, Joint Task, Guantánamo Bay, Cuba, Respondents.	)	1:05-cv-2348 EGS

PETITIONER GHASSAN ABDULLAH AL-SHARBI'S EMERGENCY MOTION TO ENJOIN MILITARY COMMISSION PROCEEDINGS AGAINST HIM AT LEAST UNTIL ENTRY OF THE DECISION IN HAMDAN V. RUMSFELD (U.S. SUPREME COURT, DOCKET NO. 05-184)

Petitioner Ghassan Abdullah Al-Sharbi, by his attorneys, respectfully moves this Court for an order enjoining further proceedings against him in a Military Commission, currently in progress at the U.S. Naval Base, Guantánamo Bay, Cuba, at least until the United States Supreme Court renders a decision in *Hamdan v. Rumsfeld,* docket number 05-184, or until such later time as may be necessary in light of such procedural or other guidelines that may be reflected by the opinion(s) of the United States Supreme Court in that case.

Present Status of Case

This case is subject to a STAY ordered *sua sponte* on March 17, 2006, pending the outcome of the appeal in *Al Odah, Khaled A.F. v. USA* , Civil No. 05-5064, in the United States Court of Appeals for the District of Columbia Circuit (hereinafter *Al Odah*). In its minute ORDER, this Court stated: "The removal of this case from the Court's active calendar should not discourage the filing of appropriate pleadings." This motion is brought pursuant to the leave so accorded counsel.

Statement of Points and Authorities

1. The validity, jurisdiction, and procedures of military commissions established by Presidential Military Order No. 1 (November 13, 2001) have been briefed and argued in the United States Supreme Court in *Hamdan v. Rumsfeld*, docket number 05-184 (hereinafter *Hamdan*), pursuant to grant of a writ of certiorari. Oral argument was held on March 28, 2006, and the case is presently *sub judice*.
2. Trial of an accused before a tribunal lacking jurisdiction, vested with constitutionally defective procedures, or otherwise invalid constitutes "irreparable harm" to the accused. *Hicks v. Bush*, No. 02-299-CKK (D.D.C. Nov. 14, 2005, mem. op.) (hereinafter *Hicks*) at 8. A copy of Judge Kollar-Kotelly's, Memorandum Opinion is attached hereto as Exhibit A.
3. The harm, if any, to the United States from a delay of the military commission proceedings now in progress against Petitioner, is a matter of minor logistical inconvenience only and, in any case, significantly less than the harm to Petitioner by

virtue of his continued subjection to a proceeding that is claimed to be invalid. *Hicks*, at 9.

4. The grant of certiorari in *Hamdan* by the United States Supreme Court attests, *eo ipso*, that Petitioner in the instant case has a substantial likelihood of success on the merits. *See Hicks*, at 13.

5. Whether the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148 (2005), Pub. L. No. 109-463 (2006), constitutionally succeeds in stripping courts of the United States of jurisdiction to hear and determine petitions for writs of habeas corpus presented by detainees at the United States Navy Base, Guantánamo Bay, Cuba and whether, if it does, its effect is retroactive to cases, such as the instant case, which were pending when the DTA was enacted are issues raised by the United States Supreme Court during oral argument in *Hamdan* and have been raised *sua sponte* by the United States Court of Appeals for the District of Columbia in the pending case of *Al Odah v. U.S.*, No. 05-5064 (D.C.Cir.) (*sua* sponte Order of January 4, 2006). A copy of the Per Curiam Order in *Al Odah* is attached hereto as Exhibit B. Thus, this Court need not address the effect, if any, or the retroactive versus prospective application of the DTA.

6. It is in the public interest that adjudicative proceedings of doubtful validity be suspended until their validity decided by the highest court of the United States in a case now before it for decision. *Hicks*, at 11.

7. This Court, per Kollar-Kotelly, D.J., has previously enjoined a similar Guantánamo military commission case in *Hicks*. That case is, in all pertinent respects, parallel to the instant case. The Appointing Authority, which convenes military commissions

ordered that Military Commission proceedings against Ibrahim al Qosi be stayed pending the outcome in *Hamdan*, as reflected in the December 17, 2004 ORDER of Friedman, J. in *Al Qosi v. Bush*, No. 04-1937 (hereinafter *Al Qosi*). A copy of Judge Friedman's ORDER is attached hereto as Exhibit C.

Pertinent Facts

Petitioner, Ghassan Abdullah al Sharbi was designated for trial by Military Commission by Presidential determination on July 6, 2004, more than two years after he was captured by United States forces. *See* Charge Sheet, Exhibit D. On information and belief, Petitioner was not served with charged until late November or early December 2005 and appeared for the first time before the Military Commission on April 27, 2006[1] – more than four years after he was first captured by the United States. Petitioner's case before the Military Commission is ordered to reconvene at Guantánamo the week of May 15. A copy of the latest Commission designation of trial terms, dated May 4, 2006, is attached hereto as Exhibit E. *See* designation of Petitioner's case for the week of May 15.

Ground for Emergency Relief

Because further hearings in this case are imminent, Petitioner respectfully asks the Court to exercise its authority under LCvR 7(b) and require Respondents to reply in fewer than the eleven days provided in the Rule. This should occasion no hardship for Respondents, as they have already confronted this issue in *Hicks*, in which cases this Court granted a stay of Military Commission proceedings pending the outcome of *Hamdan*.

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[1] The undersigned (Rachlin) was present at the April 27, 2006 session.

Legal Standard

The purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits can be held. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). There are four factors considered by the Court in its analysis of a motion for preliminary injunctive relief. To prevail, the moving party must demonstrate (1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable harm without injunctive relief, (3) that an injunction would not substantially harm other interested parties, and (4) that issuance of the injunction is in the public interest. *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004); *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). In this Circuit, injury is irreparable only if it is "both certain and great." *Wisconsin Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). This requires that the alleged harm "be actual and not theoretical" and "of such *imminence* that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Id.* (quoting *Ashland Oil, Inc. v. FTC*, 409 F. Supp 297, 307 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976) (internal citation omitted)). The four factors are taken in totality. For example, the Court has held that an injunction may be issued by the court "with either a high probability of success and some injury, or *vice versa*." *Hicks*, at 13 (quoting *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985)). A preliminary injunction is an "extraordinary measure," and should be granted only where the movant has met his burden of persuasion. *Cobell*, 391 F.3d at 258.

Argument

1. The Grant of Certiorori in *Hamdan* by the United States Supreme Court attests, *eo ipso*, that Petitioner Has a Substantial Likelihood of Success on the Merits.

Petitioner has a substantial likelihood of success on the merits because the granting by the United States Supreme Court of *certiorari* in *Hamdan* indicates there are substantial arguments that the military commission has no jurisdiction. *See Hamdan*, 415 F.3d 33, 36-37 (D.C. Cir. 2005), *cert. granted* (No. 05-184). This court has held that a challenge to military commissions should be adjudicated pre-commission where the petitioner has raised any substantial arguments that the military commission has no jurisdiction. *Id.* at 36. Here, the Supreme Court's grant of *certiorari* in *Hamdan*, a case factually similar to this case, indicates a significant likelihood of Al Sharbi's success on the merits. *See id.*

Furthermore, this court has made clear the gravity of the outcome of *Hamdan*. *Hicks*, at 13 ("...the court emphasizes that *Hamdan* is a unique, highly contentious case involving unprecedented and high-profile claims regarding the propriety of military commission jurisdiction"). In *Hicks*, this gravity and the imminent resolution of *Hamdan* combined with a strong showing of the other factors necessary for injunctive relief to persuade the court to allow an injunction to "rightfully 'preserve the relative positions of the parties' until the full and complete contours of military commission jurisdiction are elucidated by the nation's highest appellate court." *Id.* Because the facts of that case are on all fours with this case, the court should similarly resolve that there is sufficient likelihood of success on the merits for injunctive relief.

2. <u>Without Injunctive Relief, Petitioner Will Suffer Irreparable Harm Due to Prejudice.</u>

Petitioner will suffer irreparable harm without an injunction, because of the prejudice he will suffer at any future tribunal, and the corresponding damage to his reputation. The Court has found irreparable harm where there exists a "clear and imminent risk of being subjected to a military commission which had not been ultimately determined by the Supreme Court to have

jurisdiction over [a] Petitioner." *Hicks*, at 8. Here, if Petitioner is tried by a tribunal consequently deemed not to have jurisdiction over him, then he would have been tried by a tribunal without any authority to adjudicate the charges against him in the first place, potentially subjecting him to a second trial before a different tribunal. *Id.* at 9. Significantly, proceedings which ultimately may be determined to be unlawful cannot be "undone," and because jurisdictional authority is requisite for legal proceedings before any tribunal, Petitioner faces irreparable injury absent an injunction. *See id.* at 9; *Cobell v. Norton*, 334 F.3d 1128, 1139 ("The remedy by appeal is inadequate. It comes after trial, and if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious") (quoting *Berger v. United States*, 255 U.S. 22, 36 (1921)). In addition, the D.C. Circuit has previously held that the injury suffered by a party required to participate in proceedings overseen by an impartial judicial authority whom the party has objected to, is by its nature irreparable. *See Cobell*, 334 F.3d. at 1139.

Moreover, a trial would give the prosecution a dry run and a free look at Al Sharbi's defense. Also, even if the military commissions are later invalidated, a trial will do irreparable damage to Petitioner's reputation at an international level Finally, an invalid trial would waste the government's money and pro bono counsel's time and resources.

3. <u>An Injunction Would Cause Insubstantial Harm to the United States, Because Any Harm Caused Would Be Merely Logistical.</u>

The only harm suffered by the United States is not evidentiary or prejudicial in nature, but rather merely logistical. *See Hicks*, at 9-10. For example, this court has found that concerns regarding loss of time and resources, a need for rescheduling, and speculative arguments regarding disruption of other military commissions proceedings are insufficient reasons to deny

injunctive relief. *Id.* The facts of this case are no different than *Hicks*; the United States fails to show it will suffer irreparable injury if Petitioner is granted injunctive relief.

4. The Issuance of the Injunction is in the Public Interest, Because Questions of Separation of Powers Affect the Fabric of Democracy.

"Since questions regarding the separation of powers are fundamental to the fabric of our democracy, it is in the public interest that any question regarding the separation of powers as applied to the military commission proceedings at issue be ultimately clarified before such proceedings further ensue." *Id.* at 19. Here, as in *Hicks*, "it would not be in the public interest to subject [Petitioner] to a process which the highest court in the land may determine to be invalid." *See id.* at 11.

Additionally, given the intense scrutiny of the Guantánamo Bay detainees, both nationally and abroad, the public is best served by ensuring the process meets constitutional muster. Here, the validity of the military commissions is uncertain. Permitting Petitioner's case to go forward in the midst of this uncertainty would be a disservice to the public.

Conclusion

One cannot predict with confidence when the United States Supreme Court will decide *Hamdan*, let alone how it will decide the case. Where the case was argued at the end of March, it is reasonable to suppose that a decision will be forthcoming in a matter of a few months. Moreover, there seems a reasonable probability that if the Military Commission process, as it is now being conducted at Guantánamo, is upheld, the Court will likely offer guidance with respect to the procedures necessary to assure that the proceedings go forth with rules and procedures consonant with the United States Constitution.

At present there are no rules of evidence, other than what the Presiding Officer, from moment to moment deems relevant. Miliary Commission Order No. 1, August 31, 2005 (hereinafter *MCO 1*), attached hereto as Exhibit F, ¶ 6(d)(1).[2] Petitioner is to be excluded from the courtroom when certain sensitive evidence against him is presented. *MCO 1*, ¶ 6(B)(3). Counsel is forbidden to share with Petitioner the contents of any evidence that is designated classified or law enforcement sensitive. *Protective Order No. 1*, January 23, 2006, attached hereto as Exhibit G, ¶3(a)-(b); *Protective Order No. 2*, January 23, 2006, attached hereto as Exhibit H; *Protective Order No. 3*, January 23, 2006, attached hereto as Exhibit I, ¶ 5(a). The charges against Petitioner, sounding mainly in conspiracy, raise substantial questions about the viability of such charges in the context of war crimes triable by Military Commission.

A "trial" in which rules are made up *ad hoc*, in which a defendant is denied the right to confront witnesses, hear inculpatory evidence against him, or even be informed by his counsel what that evidence is so that he has an opportunity to refute it is closer to Kafka's *Der Prozeß* than to what civilized nations, most especially the United States, are accustomed to view as a fair trial.

Until the Supreme Court has pronounced on the validity of these Commissions and offered what guidance for the future that it chooses – and until Commission procedure is reformed to comply with such guidance – the Commission proceeding against Petitioner serves no purpose other than to give the United States Government an advance peek at his defenses, to the irreparable prejudice of Petitioner.

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[2] The only rule of evidence is the Presiding Officer or the Commission as a whole believes that "the evidence would have probative value to a reasonable person." Thus, there is no advance notice to the accused of what rules will be applied.

WHEREFORE, Petitioner Ghassan Abdullah Al Sharbi requests this Court enter an order enjoining military proceedings against him at least until entry in the decision of *Hamdan*.

Burlington, Vermont
May 4, 2006

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID M. HICKS, Petitioner, v. GEORGE W. BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 02–299 (CKK)

MEMORANDUM OPINION
(November 14, 2005)

Presently pending before the Court is [194] Petitioner David M. Hicks's Motion to Stay Military Commission Proceedings ("Motion to Stay"). Petitioner effectively asks the Court to enjoin military commission proceedings against Petitioner in Guantanamo Bay until both the Supreme Court has issued a final and ultimate decision in the appeal of *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), and until this Court has issued an order with respect to Petitioner's pending [182] Revised Brief in Support of Petitioner David M. Hicks's Cross-Motion for Partial Summary Judgment ("Motion for Partial Summary Judgment") in this case. Respondents, in their [196] Respondents' Opposition to Petitioner's Motion to "Stay" Military Commission Proceedings ("Opposition"), oppose Petitioner's Motion to Stay. Petitioner then filed [197] Petitioner, David M. Hicks's Reply in Further Support of his Motion to Stay Military Commission Proceedings. After careful consideration of the aforementioned pleadings and Petitioner's [77] Second Amended Petition for Writ of Habeas Corpus and Complaint for Injunctive, Declaratory and Other Relief, the Court shall enjoin Respondents from going forward with any and all legal proceedings associated with the military commission process with respect to Petitioner and shall stay the case presently

before the Court until the Supreme Court has issued a final and ultimate decision in *Hamdan*.

I. BACKGROUND

In response to the September 11, 2001, terrorist attacks upon various targets in the United States, the U.S. military commenced operations in Afghanistan with the assistance of the Northern Alliance and Coalition forces against the Taliban and Al Qaeda in October of 2001. Petitioner David M. Hicks, an Australian citizen, was captured by the Northern Alliance and subsequently transferred to U.S. custody. 2d Am. Pet. ¶ 21. Petitioner was transported to Guantanamo Bay in January of 2002, where he has been detained in various facilities until the present time. *Id.* ¶¶ 8, 22.

On July 3, 2003, Respondent President George W. Bush "designated [Petitioner] as a person eligible for trial before the commission." *Id.* ¶ 26. On June 10, 2004, Petitioner was publicly charged with three offenses to be tried by military commission: Conspiracy, Attempted Murder by an Unprivileged Belligerent, and Aiding the Enemy. 2d Am. Pet. ¶ 29, Exh. 2 (Charge Sheet ¶¶ 19-22). The conspiracy charge more specifically alleged that Petitioner conspired and agreed with members of Al Qaeda to commit the following offenses: attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent, and terrorism. 2d Am. Pet. at Exh. 2 (Charge Sheet ¶ 19). These charges were referred to the military commission on June 25, 2004. 2d Am. Pet. at Exh. 7. At an appearance before the military commission on August 25, 2004, Hicks pleaded not guilty to all charges. Pet'r's Mot. Summ. Judg. at 8.

Petitioner originally filed a petition for writ of habeas corpus with the Court on February 19, 2002. Petitioner filed an amended petition on March 18, 2002. After the Supreme Court issued its ruling in *Rasul v. Bush*, 542 U.S. 466 (2004), the Court granted Petitioner leave to file a second amended petition, which was submitted to the Court on September 28, 2004 and is the presently

operative petition in this case. In Petitioner's Second Amended Petition, Petitioner's claims for relief are premised on the lack of jurisdiction of the military commission designated to try Petitioner; the illegality of the manner in which the commission is constituted; the invalidity of the charges brought against Petitioner; the illegality of the procedures employed by the military commission; the violation of equal protection caused as a result of Petitioner's trial before a military commission as a result of his non-citizen status; and various charges related to Petitioner's classification, interrogation, and detention as an enemy combatant (including speedy trial-related allegations). 2d Am. Pet. ¶¶ 41-112.

The Appointing Authority for Military Commissions stayed the military commission proceedings in Petitioner's case via a December 10, 2004 directive in response to Judge James Robertson's ruling in *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), which invalidated the military commission proceedings at issue. A stay in Petitioner's military commission proceedings was issued pending an appellate decision in *Hamdan* by the D.C. Circuit. As a result, motions before this Court related to the military commission hearings were stayed by the Court on April 21, 2005, "pending a ruling from the Circuit Court in *Hamdan*." The D.C. Circuit then reversed Judge Robertson's decision in *Hamdan*, holding in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), that the military commission process did not violate the separation of powers doctrine because it was backed by sufficient congressional authorization and that the Geneva Convention did not confer upon Hamdan a federal right to enforce its provisions. At the request of the parties in this case, this Court lifted the stay on August 5, 2005 with respect to Petitioner's challenges before this Court to military commission proceedings.

Once the stay in the proceedings before this Court was lifted, Petitioner initially filed a Motion for Partial Summary Judgment on August 17, 2005, requesting that the Court grant

summary judgment in favor of Petitioner on the military commission-related claims of its Second Amended Petition, including constitutional claims, by "determin[ing] now that the commission proceedings against Mr. Hicks are illegal." Pet'r's Mot. Summ. J. at 77. More specifically, Petitioner requested that "the Court find illegal the operation of a military commission seeking to try him for newly-invented military crimes . . . ." *Id.* at 1. In asking the Court to declare that military commission proceedings against Petitioner are invalid, Petitioner's Motion for Partial Summary Judgment essentially asked the Court to make five separate determinations. Petitioner asked the Court to hold that the military commission lacks the authority to try Petitioner because allegedly 1) the military commission does not have jurisdiction over Petitioner for the particular offenses with which he is charged; 2) military commission procedures violate the Due Process Clause; 3) trial of Petitioner before a military commission violates the Equal Protection Clause because U.S. citizens accused of similar offenses are not subject to trial before a military commission; 4) the military commission itself is invalidly constituted under statutory, regulatory, and constitutional law; and 5) trial before a military commission this far removed in time from Petitioner's capture would violate Petitioner's right to a speedy trial. *Id.* Respondents filed a Motion to Dismiss on August 17, 2005, requesting that "the Court [] dismiss and enter judgment for respondents on petitioner's military commission claims and otherwise deny petitioner's requests for injunctive and other relief related to military commission proceedings." Resp'ts' Mot. Dismiss at 1. Respondents alleged that the D.C. Circuit's opinion in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), resolved the jurisdictional and many of the procedural claims raised by Petitioner both by establishing that the President had authority to establish military commissions and that the courts should abstain initially on procedural issues such as how such commission hearings are conducted. *Id.*

On September 20, 2005, the Appointing Authority in Petitioner's military commission case

reinitiated proceedings against Petitioner. Pet'r's Mot. Stay at 4. An initial hearing in Petitioner's military commission proceedings was thereafter scheduled for November 18, 2005 in Guantanamo Bay for the purpose of deciding pre-trial motions with a trial date to follow. *Id.* at 5.

While this Court was considering Petitioner's Motion for Partial Summary Judgment and Respondents' Motion to Dismiss, the Supreme Court granted *certiorari* in *Hamdan* on November 7, 2005. Consequently, Petitioner filed the present motion before this Court, Petitioner's [194] Motion to Stay Military Commission Proceedings, on November 8, 2005, asking the Court to "stay" military commission proceedings related to Petitioner until after the Supreme Court has made a final decision in *Hamdan* and until after this Court has ruled on Petitioner's Motion for Partial Summary Judgment. Petitioner asserts that he has a right to have his claim that the military commission has no jurisdiction to try him reviewed prior to any proceedings occurring before said military commission. Mot. Stay at 2. Furthermore, Petitioner claims that if he were subjected to proceedings via military commission prior to a Supreme Court ruling, which he argues will find the commission process illegitimate, he would forever lose his right to never appear before the commission. *Id.* Respondents filed their Opposition on November 10, 2005, arguing that Petitioner had not met the standard for injunctive relief and that further delay in going forward with military commission proceedings would harm Respondents and run counter to the public interest. Resp'ts' Opp'n at 2-5. Petitioner's Reply was filed on November 14, 2005.

II. LEGAL STANDARD

A party seeking preliminary injunctive relief must demonstrate at least some irreparable injury because " '[t]he basis of injunctive relief in the federal courts has always been irreparable harm.' " *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). Thus, if the movant makes no

showing of irreparable injury, "that alone is sufficient" for a district court to refuse to grant preliminary injunctive relief. *Id.*; *see also Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("We believe that analysis of [irreparable harm] disposes of these motions and, therefore, address only whether the petitioners have demonstrated that in the absence of a stay, they will suffer irreparable harm."). In this Circuit, injury is irreparable only if it is "both certain and great." *Wisconsin Gas*, 758 F.2d at 674. This requires that the alleged harm "be actual and not theoretical" and " 'of such *imminence* that there is a "clear and present" need for equitable relief to prevent irreparable harm.' " *Id.* (quoting *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297, 307 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976) (internal citation omitted)).

In addition to determining whether irreparable injury would occur if an injunction were not granted, a court must look at three other factors in assessing whether to grant injunctive relief: (1) whether an injunction would substantially injure other interested parties; (2) whether the public interest would be furthered by the injunction; and (3) whether the movant is substantially likely to succeed on the merits. *See Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998) (quoting *CityFed Fin.*, 58 F.3d at 746 (D.C. Cir. 1995)). In applying this four-factored standard, no single factor is dispositive; rather the Court "must balance the strengths of the requesting party's arguments in each of the four required areas." *CityFed*, 58 F.3d at 747. This calculus reflects a sliding-scale approach in which an injunction may issue if the arguments for one factor are particularly strong "even if the arguments in other areas are rather weak." *Id.*

Furthermore, "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981).

III. DISCUSSION

A. Military Commission Proceedings

Petitioner and Respondents having submitted themselves to the jurisdiction of this Court, and the Court having asserted *in personam* jurisdiction, *see Rasul v. Bush*, 542 U.S. 466 (2004), the Court has the authority to enjoin Respondents with respect to all proceedings applicable to petitioners, including without limitation their adjudication in related matters and their release. The Respondents in fact do not argue that the Court does not have the authority to enjoin Respondents from subjecting Petitioner to military commission proceedings; Respondents limit their argument to the premise that in this particular case, the Court should not issue an injunction. The Court will only engage in a limited discussion of the applicability of the All Writs Act, 28 U.S.C. § 1651(a), since this is not an issue in contention between the parties.

The All Writs Act states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). *See also S.E.C. v. Vision Commc'ns, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996) ("[T]he All Writs Act, 28 U.S.C. § 1651(a), empowers a district court to issue injunctions to protect its jurisdiction."). Under the law as articulated by the D.C. Circuit in *Hamdan*, it is within the province of a district court to determine whether a military commission has jurisdiction over a particular individual *prior* to that individual's adjudication by a military commission. *Hamdan*, 415 F.3d at 36-37. Thus, the Court has the authority to enjoin Respondents from going forward with military commission proceedings against Petitioner. An injunction in this case is necessary in order for this Court to maintain its jurisdiction over Petitioner's claim that a military commission lacks jurisdiction to try him, a claim which Petitioner is entitled to have adjudicated by this Court prior to trial before a military commission. While

granting an injunction under the All Writs Act is normally considered an extraordinary remedy, the posture of this case and the importance of the issues involved call for this extraordinary measure to be imposed. It is important to note in this case that *certiorari* has actually been granted in *Hamdan* by the Supreme Court, which may have an effect on Petitioner's established right to pre-commission review of jurisdictional issues. This is not a case where the grant of *certiorari* has not been determined.

The Court clearly has the authority to enjoin Respondents from subjecting Petitioner to proceedings before a military commission before the Supreme Court makes a determination regarding the proper jurisdiction of a military commission created under the Presidential Military Order[1] ("PMO") authorizing the detention of non-citizens for violations of the laws of war and other applicable laws via military tribunals. The Court will next analyze whether the four-pronged standard for injunctive relief articulated in *Mova Pharmaceutical Corp.* and *CityFed Financial* has been met such that an injunction can be properly issued.

1. Petitioner would suffer irreparable injury if Respondents go forward with military commission proceedings against Petitioner under present circumstances

The Court agrees that subjecting Petitioner to proceedings before a tribunal presently under jurisdictional scrutiny by the highest court in the land, the Supreme Court, before it makes an ultimate ruling on whether or not said tribunal is jurisdictionally sound would cause irreparable injury to Petitioner. Petitioner faces the clear and imminent risk of being subjected to a military commission which has not been ultimately determined by the Supreme Court to have jurisdiction over Petitioner. Furthermore, if Petitioner's scheduled military commission motions hearing and

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[1] Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (Nov. 16, 2001).

consequent trial goes forward and the Supreme Court later determines that said military commission lacks jurisdictional authority, "setting aside the judgment after trial and conviction insufficiently redresses [Petitioner's] right not to be tried by a tribunal that has no jurisdiction." *Hamdan*, 415 F.3d at 36 (citing *Abney v. United States*, 431 U.S. 651, 662 (1977)).

Respondents claim that "petitioner is unable to prove either that harm has occurred in the past or is certain to occur in the near future," alleging that Petitioner "only offers speculative allegations of harm that might occur in the future." Resp'ts' Opp'n at 6. Respondents miss the crux of the irreparable injury that Petitioner faces if tried by a tribunal consequently deemed not to have jurisdiction over him–the fact that he would have been tried by a tribunal without any authority to adjudicate the charges against him in the first place, potentially subjecting him to a second trial before a different tribunal.

Because a military commission motions hearing is scheduled for November 18, 2005, the threat is imminent that Petitioner will be subjected to proceedings before a tribunal for which jurisdictional questions have been certified for review by the Supreme Court. Because proceedings which ultimately may be determined to be unlawful cannot be "undone," and because jurisdictional authority is requisite for legal proceedings before any tribunal, the Court finds that Petitioner in this case faces irreparable injury absent an injunction against Respondents' continuation of military commission proceedings against him before the Supreme Court makes its ruling in *Hamdan*.

2. *Respondents would suffer minimal harm of a largely logistical nature if an injunction is granted*

Respondents claim that issuance of an injunction would "result in substantial harms" to the government because of the "further and lengthy delays in carrying out an important aspect of the war effort" that would result. Resp'ts' Opp'n at 2, 3. Considering that Petitioner in this case has

been held by the U.S. government since November of 2002 and in the event of an injunction that he will simply continue to be detained by the government, the Court fails to see how further delay will harm the government. In fact, the "harms" the government claims will be caused by such a delay are not evidentiary or prejudicial in nature but are instead largely logistical concerns. For example, Respondents claim that the "enormous amount of time and resources" spent by the government in preparation for Petitioner's hearing and trial will be largely lost if an injunction is granted. The Court notes that Petitioner has presumably also been preparing for trial. However, Respondents do not explain how a delay in Petitioner's proceedings, should the Supreme Court affirm that a military commission has jurisdiction over Petitioner, would somehow nullify the time and resources that the Court presumes would have to be expended regardless of when Petitioner's trial before a military commission occurred. Furthermore, Respondents claim that while a few individuals have already departed for Guantanamo Bay in preparation for Petitioner's scheduled November 18, 2005 motions session, a larger number of individuals and press members are scheduled to fly out on or after November 15, 2005. Resp'ts' Opp'n at 4. Since the Court has taken this into consideration in expeditiously ruling on Petitioner's Motion and Respondent's Opposition by November 14, 2005, the government's argument on this point is largely moot. Finally, Respondents express their concern that an injunction in Petitioner's case could also disrupt other military commission proceedings. However, since the Court can only consider the case and parties before it and Respondents raise a speculative argument, the Court cannot assess that an injunction respecting Petitioner will harm Respondents by taking unrelated proceedings into account. Thus the Court does not consider the minor logistical reshuffling caused by an injunction to constitute injury to Respondents in any material fashion.

3. *It is in the public interest that* Hamdan *be decided by the Supreme Court before Petitioner is subjected to proceedings before a military commission*

One of the questions that the Supreme Court will address in its review of *Hamdan* is whether the military commission in question violates the separation of powers based on a lack of sufficient congressional authorization for the executive proceedings at issue. Since questions regarding the separation of powers are fundamental to the fabric of our democracy, it is in the public interest that any question regarding the separation of powers as applied to the military commission proceedings at issue be ultimately clarified before such proceedings further ensue.

Respondents claim that an injunction would harm the public interest because "[a] decision by the Court to enjoin the military commission from proceeding with petitioner's case would be an intrusion by the Judiciary into the realm of the Executive and would hurt the public interest in the separation of powers." Resp'ts' Opp'n at 3-4. However, Respondents base this argument on the longstanding support of both Congress *and* the Judiciary for the Executive's use of military commissions during wartime as well as the D.C. Circuit's confirmation in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), of the use of such commissions specifically in the conflicts against the Taliban and Al Qaeda. Resp'ts' Opp'n at 3. Thus, Respondents essentially make an argument for the authority of the Judiciary to act as a confirmation and check on the Executive's use of military commissions in particular contexts. In this instance, the Supreme Court's review of *Hamdan*, the very decision cited by Respondents, will serve as the ultimate confirmation of and check on the Executive's authority to subject Petitioner to the jurisdiction of a military commission. To await review by the Supreme Court is in compliance with rather than counter to the separation of powers principle that the Court agrees is in the public interest. It would not be in the public interest to subject Petitioner to a process which the highest court in the land may determine to be invalid. It is in the public interest to have a final decision, leaving no doubts as to this key jurisdictional issue, before Petitioner's military commission proceedings begin.

4. Considerations relating to a substantial likelihood of success on the merits to warrant injunctive relief

Finally, in order to meet the standards necessary for injunctive relief, Petitioner must establish "a likelihood of success on the merits." *See Sea Containers, Ltd v. Stena AB*, 890 F.2d 1205, 1208 (D.C. Cir. 1989). Unlike the typical situation in which a court is confronted with a request for an injunction, i.e., before a final adjudication on the merits of a party's claim has occurred, the D.C. Circuit has directly spoken on the issue central to Plaintiff's Second Amended Petition and his Motion for Partial Summary Judgment in *Hamdan*, which rejected Petitioner's jurisdictional arguments. *Hamdan*, 415 F.3d at 37–38. Accordingly, bound by a decision of the Court of Appeals within this Circuit, this Court recognizes that an automatic application of the holding in *Hamdan* to this case virtually eliminates Petitioner's "likelihood of success on the merits" and could be viewed as undermining Petitioner's case for injunctive relief.

However, two considerations compel the Court to look beyond this unreflective analysis. First, a petitioner is not required to prevail on each of the four factors relevant when confronted with a request for injunctive relief. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Rather, under *Holiday Tours*, the factors must be viewed as a continuum, with more of one factor compensating for less of another. As such, a court may issue an injunction if the arguments for one factor are particularly strong, "even if the arguments in other areas are rather weak." *CityFed*, 58 F.3d at 747. An injunction may be justified "where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury." *Id.* Conversely, when the other three factors strongly favor interim relief, a court may grant injunctive relief when the moving party has merely made out a "substantial" case on the merits. *Holiday Tours*, 559 F.2d at 843-45. The necessary level or degree of likelihood of

success that must be shown will vary according to the Court's assessment of the other three factors. *Id.* In sum, an injunction may be issued by a court "with either a high probability of success and some injury, or *vice versa*." *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985). Here, as discussed *supra*, Petitioner faces clear irreparable injury, while there is virtually no harm to Respondents through a short delay in the adjudication of Petitioner's charges and the public interest strongly favors a final resolution of the jurisdictional question by the Supreme Court before Petitioner's military commission proceedings begin.

Second, while the Court in this memorandum expresses no opinion as to the viability of the D.C. Circuit's decision in *Hamdan*, the Court emphasizes that *Hamdan* is a unique, highly contentious case involving unprecedented and high-profile claims regarding the propriety of military commission jurisdiction. Recognizing the importance of the D.C. Circuit's ruling in *Hamdan* and the "substantial" issues raised by those challenging the military commission's jurisdiction, the Supreme Court has already granted *certiorari* in the case for immediate briefing and oral argument this term. As such, a full and complete resolution by the highest court in the land of the claims underlying Plaintiff's Second Amended Petition and his Motion for Partial Summary Judgment is on the immediate horizon. Given the immediate, definitive resolution of the issues relevant to this case by the Supreme Court and the strong showing by Petitioner as to the other three factors of the injunction analysis, the Court finds that granting an injunction in this unique context would rightfully "preserve the relative positions of the parties" until the full and complete contours of military commission jurisdiction are elucidated by the nation's highest appellate court.

B. Stay in Present Case before the Court

The issues raised in Petitioner's Second Amended Petition related to military commission proceedings, Petitioner's Motion for Partial Summary Judgment, and [174, 175] Respondents'

Renewed Response and Motion to Dismiss or for Judgment as a Matter of Law with Respect to Petitioner's Challenges to the Military Commission Process ("Motion to Dismiss") were considered by the D.C. Circuit in *Hamdan*. A court considers a request for a stay on a sliding scale; if irreparable harm is shown, it will grant a stay so long as there is some reasonable likelihood that the movant will prevail on the merits. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977). In this case, jurisdiction of the military commission preparing to try Petitioner is a predicate issue. As demonstrated above, Petitioner has shown that irreparable injury will flow from his adjudication before a commission that could be held by the Supreme Court to lack jurisdiction over him entirely. If *Hamdan* is upheld by the Supreme Court, then this Court's consideration of the other issues raised by Petitioner that address the commission's procedural aspects will be ripe for adjudication. If the Supreme Court reverses the decision, then Petitioner's claims related to the commission will be rendered moot. Therefore, the Court shall stay all proceedings in this case before the Court pending a ruling by the Supreme Court in *Hamdan* to prevent irreparable injury to Petitioner based on the reasoning above, in the interest of judicial economy, and to avoid the expenditure of unnecessary resources by both parties.

IV. CONCLUSION

In keeping with the foregoing reasoning, Petitioner's [194] Motion to Stay Military Commission Proceedings is GRANTED such that Respondents are enjoined from going forward with any and all legal proceedings associated with the military commission process with respect to Petitioner based on the Supreme Court's grant of *certiorari* in *Hamdan v. Rumsfeld*, 415 F.3d.33 (D.C. Cir. 2005), and pending the issuance of a final and ultimate decision by the Supreme Court in that case. The proceedings in this case also shall be STAYED for all purposes based on the

Supreme Court's grant of *certiorari* in *Hamdan*, and pending the issuance of a final and ultimate decision by the Supreme Court in that case.

Date: November 14, 2005

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5062 **September Term, 2005**

04cv01142
04cv01166

Filed On: January 4, 2006 [940538]

Lakhdar Boumediene, Detainee, Camp Delta, et al.,
Appellants

v.

George W. Bush, President of the United States, et al.,
Appellees

Consolidated with 05-5063

05-5064

02cv00299
02cv00828
02cv01130
04cv01135
04cv01136
04cv01137
04cv01144
04cv01164
04cv01194
04cv01227
04cv01254

Khaled A. F. Al Odah, Next Friend of Fawzi Khalid Abdullah Fahad Al Odah, et al.,
Appellants

v.

United States of America, et al.,
Appellees

Consolidated with 05-5095, 05-5096, 05-5097, 05-5098, 05-5099, 05-5100, 05-5101, 05-5102, 05-5103, 05-5104, 05-5105, 05-5106, 05-5107,

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5062 **September Term, 2005**

05-5108, 05-5109, 05-5110, 05-5111, 05-5112,
05-5113, 05-5114, 05-5115, 05-5116

BEFORE: Sentelle, Randolph, and Rogers; Circuit Judges

ORDER

It is **ORDERED** by the Court, on its own motion, that the parties file, within 14 days of the date of this order, supplemental briefs of no more than 15-pages addressing the effect of section 1005 of the Department of Defense Appropriations Act of 2006, Pub. L. No. 109-__, §1005 (signed by the President on December 30, 2005) on these appeals.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

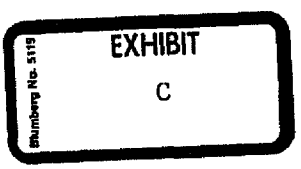
IBRAHIM AHMED MAHMOUD AL QOSI, Plaintiff, v. GEORGE W. BUSH, et al. Defendants.	Civil Action No. 04-1937 (PLF)

ORDER

Petitioner Ibrahim Ahmed Mamoud al Qosi is a detainee at the United States Naval Station at Guantanamo Bay, Cuba. On November 8, 2004, Mr. al Qosi filed a petition for a writ of habeas corpus challenging, *inter alia*, his continued detention at Guantanamo, the United States government's designation of Mr. al Qosi as an "enemy combatant," and the government's intention to subject him to trial by military commission.

Many of the arguments raised by Mr. al Qosi were also raised by petitioner Salim Ahmed in Hamdan v. Rumsfeld, No. 04-1519 (D.D.C. filed Sept. 2, 2004). On November 8, 2004, Judge Robertson issued a memorandum opinion resolving some of those questions in favor of Mr. Hamdan and denying the government's motion to dismiss the petition. See Hamdan v. Rumsfeld, 2004 U.S. DIST LEXIS 22724. The government has noticed an appeal from that ruling, and the Court of Appeals for the District of Columbia Circuit has set oral argument for March 8, 2005. See Hamdan v. Rumsfeld, No. 05-5393 (D.C. Cir. filed Nov. 16, 2004).

In light of the court of appeals' consideration in Hamdan of issues that might prove dispositive in this case, and of news reports indicating that the government has suspended



its system for the trial of individuals like Mr. Hamdan and Mr. al Qosi by military commissions at Guantanamo Bay, the Court on November 18, 2004 directed the parties to confer and, if possible, agree on a stipulation that would hold this case in abeyance pending the resolution of Hamdan by the court of appeals. The parties, however, could not agree to a stipulation. Petitioner instead filed a "Statement Opposing Abeyance," and the parties came before the Court for a status conference on December 13, 2004.

At the status conference, counsel for petitioner further articulated his reasons for opposing abeyance, while the government argued in favor of staying proceedings pending resolution of Hamdan. The government also tendered to the Court a directive from John D. Altenburg, Jr., Appointing Authority for Military Commissions in the Office of the Secretary of Defense, indicating that the military commission proceeding against petitioner would be held in abeyance pending resolution of Hamdan by the court of appeals. Counsel for the government represented that such abeyance will remain in effect until the court of appeals issues its mandate in Hamdan.

Upon consideration of the entire record in this case, and the arguments and representations of counsel, it is hereby

ORDERED that all proceedings in this matter will be held in abeyance pending resolution of Hamdan v. Rumsfeld by the court of appeals.

SO ORDERED.

/s/
PAUL L. FRIEDMAN
United States District Judge

DATE: December 17, 2004

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
GHASSAN ABDULLAH AL SHARBI	)	**CHARGE:**
a/k/a Abdullah al Muslim	)	**CONSPIRACY**
a/k/a Abu Muslim	)	

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Ghassan Abdullah al Sharbi (a/k/a/ Abdullah al Muslim a/k/a/ Abu Muslim hereinafter "al Sharbi") is subject to his Military Order of November 13, 2001.

2. The charged conduct alleged against al Sharbi is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.

4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.

5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.

6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.

7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.

8. In 1992 and 1993, al Qaida supported violent opposition of US. property and nationals by, among other things, transporting personnel, weapons, explosives, and ammunition to Yemen, Saudi Arabia, Somalia, and other countries.

9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.

10. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."

11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyian Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a/ Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.

14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:

    a. In 1998 Barhoumi, an Algerian citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated training camp, where he received training in constructing and dismantling electronically-controlled explosives.

    b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.

c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.

d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.

e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.

f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.

g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bayat* ("oath of allegiance") to Usama bin Laden.

h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.

i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.

j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.

k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.

l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.

m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately $1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.

n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia,* electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.

o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.

p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.

q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.

r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.

15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.

Trial Terms of the Military Commission
Guantanamo Naval Base, Cuba

4 May 2006

Setting trial terms and a docket requires full consideration of many factors, to include: the needs of the accused, counsel, and other participants; logistics; and long-range planning requirements. To best accommodate these needs, and so as to provide full and fair trials, the Presiding Officers have established the below trial terms. Some of these trial terms already have business docketed. Future trial orders and docketing decisions will be announced to associate specific cases and business with specific trial terms and dates.

In addition:

- Other trial terms may be added as necessary.
- Cases may be added to a trial term at any time.
- Trial terms may be extended to accommodate sessions that will require more than one week.

Counsel are responsible for being available to be present at ALL trial terms. Counsel must have absences from a trial term approved by the Presiding Officer.

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15 May – 19 May 2006: *US v. al Sharbi* and *US v. Zahir*.

5 June – 9 June 2006: Cases will be added to this trial term by the Presiding Officers.

12 June – 16 June 2006: Motions, *US v. Muhammad.*

19 June – 23 June: *US v. al Qahtani* and *US v. Barhoumi*.

26 June – 7 July (Two weeks.): Law motions in *US v. Khadr*.

10 July – 14 July 2006: *US v. al Qahtani* law motions (Docketed pending resolution of counsel calendar conflict.)

17 July – 21 July: Cases will be added to this trial term by the Presiding Officers.

31 July – 4 August 2006: Law motions, *US v. Muhammad* (Docketed, but subject to modification by PO based on resolution of pending motions.)

21 August – 1 September (Two weeks.): Zahir law motions followed by evidentiary motions in *US v. Khadr*.

12 September – 29 September 2006 (Three weeks). Motions, *US v. Zahir* followed by trial *in US v. Zahir*. Trial in *US v Khadr* continues until completed.

/s/
Keith Hodges
Assistant to the Presiding Officers

UNITED STATES OF AMERICA
v.
GHASSAN ABDULLAH AL SHARBI
a/k/a Abdullah al Muslim
a/k/a Abu Muslim

Protective Order # 1

Protection of Identities of All Witnesses

23 January 2006

This Protective Order has been issued pursuant to Commission Law sua sponte by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. This Protective Order protects the identities or other identifying information of all individuals identified in materials provided to the Defense by the prosecution. In addition, this Order also applies to any identifying information obtained by the Defense during their independent discovery efforts.

2. The names and background information of witnesses are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, IT IS HEREBY ORDERED:

   a. Names or other identifying information of witnesses that have been or may, from time to time, be disseminated to or obtained by the Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below;

   b. Names or other identifying information of any witness shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of witnesses must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal; and

   c. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

4. Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED

DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

UNITED STATES OF AMERICA
v.
GHASSAN ABDULLAH AL SHARBI
a/k/a Abdullah al Muslim
a/k/a Abu Muslim

Protective Order # 2
Protection of Identities of
Investigators and Interrogators

23 January 2006

This Protective Order has been issued pursuant to Commission Law sua sponte by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. This Protective Order protects the identities of law enforcement, intelligence, or other investigators and interrogators working on behalf of their government (collectively referred to as "investigators and interrogators") who participated in the investigation of the accused.

2. The names and background information of investigators and interrogators are considered sensitive material that constitutes Protected Information in accordance with Military Commission Order No. 1, Section 6(D)(5).

3. Accordingly, IT IS HEREBY ORDERED:

a. Names or other identifying information of investigators and interrogators that have been or may, from time to time, be disseminated to Defense Counsel for the accused, may be disclosed to members of the Defense team, such as paralegals, investigators, and administrative staff, with an official need to know. However, such information shall not be disclosed to the accused or to anyone outside of the Defense team other than the Military Commission panel subject to the limitations below; and

b. Names or other identifying information of investigators and interrogators shall not be disclosed in open court or in any unsealed filing. Any mention of the name or other identifying information of investigators and interrogators must occur in closed session and any filing to the Military Commission panel that includes such information shall be filed under seal.

4. The following actions do not violate this protective order:

a. Showing pictures of individuals who had questioned the accused for the purposes of discussing the nature of those interrogations with the accused;

b. Using "nicknames" or any other name (aliases) that the individual who questioned the accused told to the accused when questioned. This does NOT

include any name that the accused may have learned through some other means other than the individual themselves; and

c. Using physical descriptions of the individual who questioned the accused for the purposes of the defense discussing with the accused that specific interrogation.

5. The protective order protects the true identities of the individual from release to the accused and the public and of course any private information relating to the individual (family names, addresses, phone numbers, etc.).

6. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial.

7. Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED

DANIEL H. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

UNITED STATES OF AMERICA v. GHASSAN ABDULLAH AL SHARBI a/k/a Abdullah al Muslim a/k/a Abu Muslim	**Protective Order # 3** Protection of "For Official Use Only" or "Law Enforcement Sensitive" Marked Information and Information with Classified Markings **23 January 2006**

This Protective Order has been issued pursuant to Commission Law sua sponte by the Presiding Officer to ensure the protection of information, and so that the parties may begin the discovery process thus ensuring a full and fair trial. Counsel who desire this order modified or rescinded shall follow the Procedures in POM 9-1.

1. **Generally:** The following Order is issued to provide general guidance regarding the below-described documents and information. Unless otherwise noted, required, or requested, it does not preclude the use of such documents or information in open court.

2. **Scope:** This Order pertains to information, in any form, provided or disclosed to the defense team in their capacity as legal representatives of the accused before a military commission. Protection of information in regards to litigation separate from this military commission would be governed by whatever protective orders are issued by the judicial officer having cognizance over that litigation.

3. **Definition of Prosecution and Defense:** For the purpose of this Order, the term "Defense team" includes all counsel, co-counsel, counsel, paralegals, investigators, translators, administrative staff, and experts and consultants assisting the Defense in Military Commission proceedings against the accused. The term "Prosecution" includes all counsel, co-counsel, paralegals, investigators, translators, administrative staff, and experts and consultants who participate in the prosecution, investigation, or interrogation of the accused.

4. **Effective Dates and Classified Information**: This Protective Order shall remain in effect until rescinded or modified by the Presiding Officer or other competent authority. This Order shall not be interpreted to suggest that information classified under the laws or regulations of the United States may be disclosed in a manner or to those persons inconsistent with those statutes or regulations.

5. <u>UNCLASSIFIED SENSITIVE MATERIALS:</u>

   a. IT IS HEREBY ORDERED that documents marked "For Official Use Only (FOUO)" or "Law Enforcement Sensitive" and the information contained therein shall be handled strictly in accordance with and disseminated only pursuant to the limitations contained in the Memorandum of the Under Secretary of Defense ("Interim Information Security Guidance") dated April 18, 2004. If either party disagrees with the marking of a document, that party must continue to handle that document as marked unless and until proper authority removes such marking. If either party

wishes to disseminate FOUO or Law Enforcement Sensitive documents to the public or the media, they must make a request to the Presiding Officer.

b. IT IS FURTHER ORDERED that Criminal Investigation Task Force Forms 40 and Federal Bureau of Investigation FD-302s provided to the Defense shall, unless classified (marked "CONFIDENTIAL," "SECRET," or "TOP SECRET"), be handled and disseminated as "For Official Use Only" and/or "Law Enforcement Sensitive."

6. CLASSIFIED MATERIALS:

a. IT IS FURTHER ORDERED that all parties shall become familiar with Executive Order 12958 (as amended), Military Commission Order No. 1, and other directives applicable to the proper handling, storage, and protection of classified information. All parties shall disseminate classified documents (those marked "CONFIDENTIAL," "SECRET," or "TOP SECRET") and the information contained therein only to individuals who possess the requisite clearance and an official need to know the information to assist in the preparation of the case.

b. IT IS FURTHER ORDERED that all classified or sensitive discovery materials, and copies thereof, given to the Defense or shared with any authorized person by the Defense must and shall be returned to the government at the conclusion of this case's review and final decision by the President or, if designated, the Secretary of Defense, and any post-trial U.S. federal litigation that may occur.

7. BOOKS, ARTICLES, OR SPEECHES:

a. FINALLY, IT IS ORDERED that neither members of the Defense team nor the Prosecution shall divulge, publish or reveal, either by word, conduct, or any other means, any documents or information protected by this Order unless specifically authorized to do so. Prior to publication, members of the Defense team or the Prosecution shall submit any book, article, speech, or other publication derived from, or based upon information gained in the course of representation of the accused in military commission proceedings to the Department of Defense for review. This review is solely to ensure that no information is improperly disclosed that is classified, protected, or otherwise subject to a Protective Order. This restriction will remain binding after the conclusion of any proceedings that may occur against the accused.

b. The provisions in paragraph 7a apply to information learned in the course of representing the accused before this commission, no matter how that information was obtained. For example, paragraph 7a:

(1) Does not cover press conferences given immediately after a commission hearing answering questions regarding that hearing so long as it only addresses the aspects of the hearing that were open to the public.

(2) Does not cover public discourses of information or experiences in representing the accused before this military commission which is already known and available in the public forum, such as open commission hearings, and motions filed and made available to the public.

(3) Does cover information or knowledge obtained through any means, including experience, that is not in the public forum, and would and could only be known through such an intimate interaction in the commission process (for example, a defense counsel's experience logistically in meeting a client).

8. REQUEST FOR EXCEPTIONS: Either party may file a motion, under seal and in accordance with POM 4-3 or 9-1 as appropriate, for appropriate relief to obtain an exception to this Order should they consider it necessary for a full and fair trial and/or, if necessary, any appeal.

9. BREACH: Any breach of this Protective Order may result in disciplinary action or other sanctions.

IT IS SO ORDERED

DANIEL E. O'TOOLE
CAPTAIN, JAGC, U.S. NAVY
Presiding Officer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GHASSAN ABDULLAH AL SHARBI, *et al.*, Petitioners, v. GEORGE WALKER BUSH, President of the United States, *et al.*, Respondents.	)	Civil Action No. 05-CV-2348 (EGS)

RESPONDENTS' OPPOSITION TO PETITIONER'S COUNSEL'S MOTION TO ENJOIN MILITARY COMMISSION PROCEEDINGS

Respondents hereby oppose the motion filed by petitioner's counsel to enjoin the military commission proceedings against petitioner. Dkt. No. 7 ("Petr's Mot."). The motion fails to meet the standards for the extraordinary remedy of a preliminary injunction. See Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1066 (D.C. Cir. 1998). In particular, the recent enactment of the Detainee Treatment Act of 2005 withdrawing this Court's jurisdiction in this case, combined with the preliminary nature of petitioner's military commission proceedings and the extraordinary relief sought in the motion, undermine petitioner's counsel's arguments and demonstrate that an injunction is neither needed nor appropriate. Accordingly, the Court should deny the request to enjoin the military commission.

ARGUMENT

Petitioner's counsel's motion should be denied because it fails to satisfy the standards for a preliminary injunction. It is well established that courts should grant preliminary injunctions only sparingly because they are extraordinary forms of judicial relief. See Dorfmann v. Boozer, 414 F.2d 1168, 1173 (D.C. Cir. 1969); Moore v. Summers, 113 F. Supp. 2d 5, 17 (D.D.C. 2000). As the Supreme Court has stated, "It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek, 520 U.S. at 972 (emphasis added) (citation and quotation marks omitted).

In assessing whether to grant preliminary injunctive relief a court must consider four factors: (1) whether the movant is substantially likely to succeed on the merits; (2) whether the movant would suffer irreparable injury if the injunction were not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the public interest would be furthered by the injunction. See Mova Pharm., 140 F.3d at 1066 (citation omitted). These factors "interrelate on a sliding scale and must be balanced against each other." Barton v. Dist. of Columbia, 131 F. Supp. 2d 236, 241 (D.D.C. 2001). Thus, a weak showing on one or more factors requires an especially strong showing on the remaining factors. See id. at 241-42; Sociedad Anonima Vina Santa Rita v. U.S. Dep't of Treasury, 193 F. Supp. 2d 6, 13-14 (D.D.C. 2001). In this case, the preliminary injunction standards have not been met with respect to the extraordinary relief petitioner's counsel seeks.

I. PETITIONER WOULD NOT SUFFER IRREPARABLE INJURY IF AN INJUNCTION IS NOT GRANTED.

Petitioner's counsel has not shown that petitioner will suffer irreparable harm if this Court does not enjoin petitioner's military commission proceedings, which are still preliminary in nature. Petitioner's counsel attempts to mislead the Court by suggesting that petitioner's military commission trial will begin next week. See Petr's Mot. at 7, 9. In fact, however, petitioner's military commission proceedings are still preliminary in nature; no trial has been scheduled. A preliminary injunction is neither warranted nor appropriate.

A party seeking preliminary injunctive relief must demonstrate irreparable injury because "[t]he basis of injunctive relief in the federal courts has always been irreparable harm." CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995) (quoting Sampson v. Murray, 415 U.S. 61, 88 (1974)). If the movant does not show irreparable injury, "that alone is sufficient" for a district court to deny preliminary injunctive relief. Id. Further, in this Circuit, injury is irreparable only if it is "both certain and great." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). This requires that the alleged harm "be actual and not theoretical" and "'of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'" Id. at 674 (quoting Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976)) (emphasis in original).

Implicit in the principles of Wisconsin Gas is the requirement that the movant substantiate any claim that irreparable injury is "likely" to occur. 758 F.2d at 674. Bare allegations of what is likely to occur are of no value since the Court must decide "whether the

harm will in fact occur." Id. (emphasis in original). The movant must provide proof indicating that the harm is certain to occur in the near future. Id.

Petitioner's counsel's argument that petitioner faces imminent irreparable harm does not withstand scrutiny because the preliminary nature of his military commission proceedings makes an injunction untimely. Petr. Mot. at 6-7.[1] On April 27, 2006, petitioner had the first and only session of his military commission so far, and a trial date is as yet not scheduled. At the last session, petitioner admitted fighting against the United States, stated that he wanted to represent himself, rejected his appointed military defense counsel, and said he did not want either a military replacement or a civilian defender.[2] See David Morgan, Saudi Man Admits Enemy Role at Guantanamo Trial, Wa. Post, April 27, 2006 (available at: http://www.washingtonpost.com/wp-dyn/content/article/2006/04/27/AR2006042700956.html) (copy attached as Exhibit 1). Currently, petitioner is scheduled to attend a second preliminary session with the military commission during the week of May 15, 2006. At the session, the Presiding Officer intends to consider and address the issue raised by petitioner's decision to reject his appointed military defense counsel. This would include consideration of what role counsel may have in future proceedings consistent with commission procedures and any

---

[1] The President determined on July 6, 2004, that petitioner is subject to the President's Military Order of November 13, 2001. See Charge Sheet (available at http://www.defenselink.mil/news/commissions_exhibits_sharbi.html). The Appointing Authority approved petitioner's charge of conspiracy on November 4, 2005, and on December 12, 2005, the Appointing Authority both appointed military commission members to hear petitioner's case and referred the charges to the military commission. See Approval of Charges; Charge Sheet; Appointing Order No. 05-0005; Referral (all available at http://www.defenselink.mil/news/commissions_exhibits_sharbi.html).

[2] Mr. Al Sharbi's refusal of civilian counsel raises an issue as to whether the motion to enjoin the military commission proceedings is authorized by Mr. Al Sharbi.

appropriate ethical constraints or obligations on counsel. If the representation issue is resolved, voir dire of the Presiding Officer by counsel may also occur. Further, matters of scheduling, including for motions and other matters to ensure a full and fair trial, may be discussed. Beyond these proceedings, nothing further is currently scheduled. As noted, no trial date has been established. In sum, petitioner's military commission proceedings are at preliminary stages and the chance of any substantive matters related to the case being litigated and resolved at the session next week is unlikely at best. Thus, the preliminary nature of petitioner's military commission warrants denial of petitioner's counsel's motion for an injunction.[3]

Although petitioner's counsel seeks to equate petitioner's case to that of David M. Hicks, the military commission proceedings involving Hicks had advanced much further than petitioner's nascent proceedings before being enjoined. Judge Kollar-Kotelly enjoined the Hicks military commission days before a "scheduled military commission motions hearing" that was to be closely followed by Hicks's trial. Hicks v. Bush, 397 F. Supp. 2d 36, 42 (D.D.C. 2005). Further, when the injunction was entered in Hicks, a substantial amount of prior motions practice already had occurred, including a number of hearings. Prior to entry of the injunction on November 14, 2005, the Hicks commission had convened on August 25, 2004, counsel were identified, and voir dire of the commission panel, which at the time consisted of a presiding officer and two other members sitting as both triers of fact and law, had been conducted. See Record of Trial Volume 6 and 7 (Transcript Aug. 25 and Nov. 1-3, 2004 Session) at 1-3 (available at http://www.defenselink.mil/news/commissions_exhibits_hicks.html). Hicks had

[3] The preliminary nature of petitioner's military commission proceedings makes petitioner's counsel's arguments regarding the rules of evidence applicable at trial premature since no trial has even been scheduled yet.

also been arraigned before the military commission and had entered a plea. Hicks, 397 F. Supp. 2d at 38. On November 1-3, 2004, the Hicks commission reconvened and approximately twenty defense motions were argued. See Record of Trial Volume 6 (available at http://www.defenselink.mil/news/commissions_exhibits_hicks.html). Moreover, from October 11, 2005 to November 14, 2005, Hicks's counsel filed approximately fifty-six motions which were followed by prosecution responses and Hicks's counsel's replies. Thus, Hicks's military proceedings had advanced much further along than petitioner's proceedings; indeed, a trial was imminent, before Judge Kollar-Kotelly enjoined the proceedings.

Furthermore, the Supreme Court heard oral argument in Hamdan v. Rumsfeld, No. 05-184, on March 28, 2006, and is likely to issue a ruling no later than June, 2006, the end of the current Supreme Court term. Unlike in the Hicks case, a trial for petitioner Al Sharbi is not scheduled to begin prior to the expected Supreme Court decision; indeed, as noted, no trial is scheduled at all at this point. The potentially imminent Supreme Court decision in Hamdan, which will provide guidance on military commission issues, further counsels against enjoining petitioner's military commission proceedings at this time.

Thus, the purported harm that petitioner's counsel alleges is not imminent. The preliminary nature of petitioner's military commission proceedings demonstrate that there will be no irreparable injury if an injunction is not granted at this early stage. Accordingly, petitioner's counsel's motion for a preliminary injunction should be denied.

II. PETITIONER CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS.

"It is particularly important for the [movant] to demonstrate a substantial likelihood of success on the merits." Id. at 242 (citing Benten v. Kessler, 505 U.S. 1084, 1085 (1992)) (emphasis added). Here, however, petitioner's counsel has failed to meet this burden because the Detainee Treatment Act of 2005 withdraws jurisdiction from this Court to grant any relief. Furthermore, the controlling opinion of the Court of Appeals in Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), upholds the validity of military commissions such as petitioner's. Petitioner's counsel, therefore, cannot demonstrate a likelihood of success on the merits of the claims related to the military commission, and the request for an injunction should be denied.

_____Petitioner's counsel is not likely to succeed on the merits of this preliminary injunction motion because the Detainee Treatment Act of 2005 withdraws jurisdiction from this Court to grant any relief. On December 30, 2005, the Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, 119 Stat. 2739 ("the Act"), became law. The Act, among other things, amends the federal habeas corpus statute to remove court jurisdiction to hear or consider applications for writs of habeas corpus and other actions brought in this Court by or on behalf of aliens detained at Guantanamo, such as petitioner. Section 1005(e)(1) of the Act amends 28 U.S.C. § 2241 to provide that "no court, justice, or judge shall have jurisdiction" to consider either (1) habeas petitions filed by aliens detained by the Department of Defense at Guantanamo, or (2) any other action relating to any aspect of the detention of such aliens. In addition, the Act creates an exclusive review mechanism in the Court of Appeals to address the validity of the detention of such aliens held as enemy combatants and, pertinent to the pending preliminary injunction

motion, the validity of final decisions of military commissions. Section 1005(e)(2) of the Act states that the Court of Appeals "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," and it further specifies the scope of that review. Section 1005(e)(3) of the Act in turn states that the Court of Appeals "shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 [which establishes procedures for military commission trials of individuals such as petitioner, see Petr's Mot. at Ex. F]," and it likewise specifies the scope of that review. Section 1005(e)(1), which eliminates the jurisdiction of the courts to consider habeas and other actions brought by Guantanamo detainees, was made immediately effective without reservation for pending cases, and § 1005(e)(2), which establishes the exclusive review mechanisms in the Court of Appeals, was made expressly applicable to pending claims. Id. § 1005(h).

As more fully explained in the government's motion to dismiss the Hamdan case currently pending before the Supreme Court, and the reply in support of that motion, which are attached hereto as Exhibits 2 and 3 and incorporated herein by reference, it is well settled that statutes such as § 1005(e)(1) that remove or extend jurisdiction apply to pending cases and ordinarily should be given immediate effect. The courts have "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994). This practice is followed because "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" Id. (citation omitted); see also Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1869) ("Jurisdiction is power to declare the law, and

when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

Because statutes removing jurisdiction presumptively apply to pending cases, Congress must expressly reserve pending cases in such statutes to preserve the federal courts' jurisdiction over them. See Bruner v. United States, 343 U.S. 112, 116-17 (1952) ("This rule — that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law — has been adhered to consistently by this Court.").[4] Accordingly, because the relevant provision of the Act does not contain any reservation saving pending cases, "all cases fall with the law." Id. That conclusion is underscored by the fact that the Act explicitly provides – without reservation – that the amendment to the habeas statute (28 U.S.C. § 2241) "shall take effect on the date of the enactment." Act § 1005(h)(1). Because subject-matter jurisdiction must subsist throughout the litigation, that language effects an immediate elimination of jurisdiction. Additionally, Congress not only declined to include a reservation saving pending cases, but expressly provided that the exclusive procedures established by the Act for review of challenges to military commission decisions apply to such claims "pending on or after" the Act's enactment. Id. § 1005(h)(2). Thus, Congress made clear that the district courts no longer have jurisdiction over any actions filed on behalf of Guantanamo detainees, and reinforced that result by providing that the exclusive review procedures in § 1005(e)(3) provide the only avenue for judicial relief.

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[4] See also Santos v. Territory of Guam, 436 F. 3d 1051 (9th Cir. 2006) (holding that, under Bruner and McCardle, court lacked jurisdiction to consider petition from Guam Supreme Court over which it had previously asserted jurisdiction because Congress passed law withdrawing its jurisdiction while case was pending).

Thus, in light of the new, statutory withdrawal of this Court's jurisdiction, and the creation of the exclusive review mechanism for military commission decisions in the Court of Appeals (under which only final military commission decisions are subject to judicial review), petitioner has no likelihood of success on the merits and his counsel's request for a preliminary injunction should be denied. Indeed, because the Act vests "exclusive" jurisdiction in the Court of Appeals "to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," id. § 1005(e)(1), it would be inappropriate for the Court to order relief in the interim that might infringe upon the Court of Appeals' exclusive jurisdiction. See Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 75, 78-79 (D.C. Cir. 1984) (request for relief in district court that might affect Court of Appeals' future, exclusive jurisdiction is subject to the exclusive review of the Court of Appeals).

The Court cannot and should not proceed to grant petitioner's counsel's request for relief, which seeks to interfere in and restrain the military from going forward with a proceeding meant ultimately to address accused violations of the laws of war by an enemy fighter during a time of ongoing military conflict, see infra at § III, without first determining the issue of the Court's jurisdiction under the Act. See, e.g., Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception.") (quoting Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382 (1884)). Two other Judges of the Court already recognized that it would be inappropriate to enjoin military commission proceedings still in their preliminary stages without determining the Court's

jurisdiction under the Detainee Treatment Act. Petitioners in O.K. v. Bush, No. 04-CV-1136 (JDB) (dkt. no. 147), and Al Jayfi v. Bush, No. 05-2104 (RBW) (dkt. no. 15), filed motions to enjoin initial proceedings in their military commission proceedings. In response, Judges Walton and Bates issued orders requiring the petitioners to address the issue of whether the Court retained jurisdiction to act in light of the Detainee Treatment Act. See O.K., Order (dkt. no. 148) (copy attached as Exhibit 4); Al Jayfi, Order (dkt. no. 17) (copy attached as Exhibit 5). Petitioners subsequently withdrew their preliminary injunction motions. See O.K. (dkt. no. 151); Al Jayfi (dkt. no. 19).

Aside from the lack of jurisdiction under the Detainee Treatment Act, petitioner's counsel also cannot demonstrate a likelihood of success because the Court of Appeals in Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), confirmed the Executive's power to establish and utilize military commissions, such as the one petitioner challenges and seeks to enjoin, in the current ongoing war against al Qaeda and the Taliban. Indeed, an injunction against the military commission proceeding here, in effect, would inappropriately fail to pay heed to the decision of this Circuit as established in Hamdan. Hamdan represents the applicable pronouncement of the Court of Appeals that should be implemented with respect to the question of whether an affirmative injunction against respondents should issue.

Finally, petitioner's counsel's argument that the Supreme Court's grant of certiorari in Hamdan nonetheless automatically demonstrates that petitioner enjoys a substantial likelihood of success on the merits, Petr's Mot. at 3, 5, fails to take into account that the Supreme Court's granting of certiorari "is discretionary and depends on numerous factors other than the perceived correctness of the judgment . . . [under] review." Ross v. Moffitt, 417 U.S. 600, 616-17 (1974);

see also Robert L. Stern, et al., SUPREME COURT PRACTICE 243-255 (8th ed. 2002) (certiorari may be granted because of, inter alia, the importance or uniqueness of the constitutional, factual, federal jurisdictional, or procedural issues in a case or other factors). Moreover, it also fails to take into account that the Detainee Treatment Act of 2005 became law well after the grant of certiorari in Hamdan.

For these reasons, petitioner's counsel has failed to demonstrate a substantial likelihood of success on the merits that would support an injunction against petitioner's military commission proceedings.

III. AN INJUNCTION WOULD SUBSTANTIALLY INJURE RESPONDENTS AND BE CONTRARY TO THE PUBLIC INTEREST.

Of primary concern in considering the request for injunctive relief in the unique context of this case is the inescapable fact that the requested injunction would result in substantial injury to respondents and be contrary to the public interest. See Mova Pharm., 140 F.3d at 1066. Despite petitioner's counsel's dismissive treatment of an injunction halting petitioner's military commission proceedings, such an injunction would result in substantial harms to the public interest. The requested relief is especially extraordinary and drastic because it seeks to restrain the military from going forward with proceedings meant to address accused violations of the laws of war by an enemy fighter during a time of ongoing military conflict. The requested injunction, therefore, would force upon the Executive further delays in carrying out an important aspect of the war effort, one grounded and confirmed in historical and judicial precedent, including the Court of Appeals's decision in Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) (holding that military commission could go forward).

_____An injunction would also undermine the separation of powers of the three branches of the United States government. As explained in Hamdan, the President's power to establish and utilize military commissions is long-standing, and both Congress and the Judiciary historically have approved the Executive's use of military commissions during wartime. A decision by the Court to enjoin the military commission from proceeding with petitioner's case would be an intrusion by the Judiciary into the realm of the Executive, it would further delay and constrain the Executive's ability to carry out a significant aspect of the war against al Qaeda and its supporters, and, thus, it would hurt the public interest in the separation of powers. This is especially so where Congress has expressed by statute, the Detainee Treatment Act, that district court jurisdiction to take such action should be withdrawn.

In these ways, an injunction would be contrary to the strong public interest in petitioner's military commission proceedings going forward and would substantially injure respondents.

* * *

In sum, petitioner's counsel's motion has failed to demonstrate that petitioner is likely to suffer imminent, irreparable harm if an injunction is not issued at this preliminary stage of petitioner's military commission proceeding. Further, petitioner's counsel cannot demonstrate a substantial likelihood of success on the merits due to the withdrawal of this Court's jurisdiction under the Detainee Treatment Act of 2005 and due to the decision of the Court of Appeals in Hamdan. In addition, an injunction would be contrary to the strong public interest in carrying out a significant aspect of the war against al Qaeda and its supporters.

CONCLUSION

For the foregoing reasons, as explained above, the motion for a preliminary injunction should be denied.

Dated: May 9, 2006

Respectfully submitted,

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EXHIBIT 1

washingtonpost.com

Saudi man admits enemy role at Guantanamo trial

By David Morgan
Reuters
Thursday, April 27, 2006; 11:53 AM

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GUANTANAMO BAY U.S. NAVAL BASE, Cuba (Reuters) - An al Qaeda suspect told a U.S. military tribunal that he had fought against the United States and said on Thursday he was willing to spend the rest of his life in prison as a "matter of honor."

"I came here to tell you I did what I did and I'm willing to pay the price, no matter how many years you sentence me," said Ghassan Abdullah al Sharbi, a U.S.-educated Saudi who allegedly met al Qaeda leader Osama bin Laden at a training camp in Afghanistan months before the September 11 attacks.

"Even if I spend hundreds of years in jail, that would be a matter of honor to me," he said.

Sporting long dark hair and a beard, Sharbi appeared at a pretrial tribunal hearing near the U.S. prison camp at Guantanamo Bay, Cuba, as one of 10 detainees who face up to life imprisonment if convicted on war crimes charges.

The tribunal has also held hearings this week for his two alleged co-conspirators -- Algerian Sufyian Barhoumi and Saudi Jabran Said bin al Qahtani. The U.S. military says the three were part of an al Qaeda bomb-making cell.

"I fought the United States," Sharbi told the hearing's presiding officer, Navy Capt. Daniel O'Toole. "I'm going to make it short and easy for you guys: I'm proud of what I did and there isn't any reason of hiding."

But Sharbi eschewed the notion that he was "guilty" of wrongdoing and politely said he wanted to represent himself at the tribunal. He firmly rejected his appointed military defense lawyer, Navy Lt. William Kuebler, and said he wanted neither a military replacement nor a civilian defender.

"It's the same circus, different clown," said Sharbi, a fluent English speaker who earned an electrical engineering degree at Embry Riddle Aeronautical University in Arizona before leaving the United States for Afghanistan in 2000.

O'Toole tried to order Kuebler to remain Sharbi's lawyer, citing the detainee's ignorance of military judicial rules. But Kuebler told the presiding officer that state legal authorities in California had advised him it would be unethical to represent an unwilling client.

O'Toole then cut short the proceedings and set a May 17 hearing to consider the ethics issues raised by Kuebler.

The legality of the tribunals, which President George W. Bush created to try foreigners suspected of terrorism after the September 11 attacks, was challenged last month before the U.S. Supreme Court. A high court ruling is expected in June. The tribunals are known formally as commissions.

Sharbi appeared before O'Toole in the beige garb of a detainee classed as "compliant" and refused the presiding officer's advice to wear civilian clothes to avoid prejudicing his case.

"I want to wear the same suit I have been wearing for four years. In fact, I miss my orange suit," said Sharbi, referring to the orange uniforms worn by "noncompliant" prisoners among the 490 detainees at Guantanamo.

Military documents allege that Sharbi was introduced to bin Laden in July 2001 at al Qaeda's al Farouq training camp in Afghanistan, where he underwent basic training, stood guard and kept watch for U.S. air strikes after the September 11 attacks.

He was moved by former al Qaeda operations director Abu Zubaydah to a safe house in Faisalabad, Pakistan, for training in the construction of electronic detonators later used in car bomb attacks on U.S. forces in Afghanistan, the military says.

Sharbi, Barhoumi, Qahtani and Zubaydah were captured there together in March 2002, military documents say.

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EXHIBIT 2

No. 05-184

In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

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§ 1005(e)(2)(A), 119 Stat. 2742 ..... 7, 8a
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§ 1005(e)(3), 119 Stat. 2743 ..... 3, 8, 13, 16, 17, 18, 19, 22, 9a
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In the Supreme Court of the United States

No. 05-184

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

INTRODUCTION

This case involves an action brought by an alien who is held at the U.S. Naval Base at Guantanamo Bay, Cuba, and has been charged with an offense against the law of war and designated by the President for trial before a military commission. The Court granted certiorari in this case on November 7, 2005. 126 S. Ct. 622. Congress then enacted the Detainee Treatment Act of 2005 (the DTA or Act), Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739, which was signed into law on December 30, 2005. See Appendix. Section 1005(e)(1) of that Act amends the habeas statute to provide that "no court, justice, or judge shall have jurisdiction to hear or consider" any action filed by or on behalf of an alien held in military custody at Guantanamo Bay for a writ of habeas

corpus or any other form of relief, except pursuant to exclusive statutory review procedures established by the Act. The Act further states that this provision "shall take effect on the date of the enactment of this Act." *Id.* § 1005(h)(1), 119 Stat. 2743.[1]

For more than a century, this Court has consistently recognized that statutes removing jurisdiction must be given immediate effect, including by this Court. See, *e.g.*, *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541, 544-545 (1867); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Bruner* v. *United States*, 343 U.S. 112 (1952); *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994). Because the courts must have jurisdiction over a case or controversy throughout the litigation, the removal of jurisdiction results in immediate dismissal no matter what stage the litigation has reached. As the Court explained in *McCardle:* "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." 74 U.S. (7 Wall.) at 514. And, as the Court continued, "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer." *Id.* at 515. Congress is presumed to be aware of that settled practice, and "expects its statutes to be

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[1] The Detainee Treatment Act was enacted after the Court granted certiorari in this case. Because (for the reasons explained below) the Act immediately removes the jurisdiction of the district court and ultimately the jurisdiction of this Court over this action, and because respondents' brief on the merits is not due until February, this motion is filed pursuant to this Court's Rule 21. See Robert L. Stern, et al. *Supreme Court Practice* § 16.8(b), at 750-751 (8th ed. 2002) ("[A]fter the petition for certiorari has been granted * * *, a motion to dismiss may be received if not based upon grounds already advanced.").

read in conformity with th[e] Court's precedents." *United States* v. *Wells*, 519 U.S. 482, 495 (1997).

Because the Detainee Treatment Act in plain terms removes the Court's jurisdiction to hear this action, the Court should dismiss this case for want of jurisdiction or vacate with instructions for the lower courts to dismiss, or, at a minimum, dismiss the writ as improvidently granted. That does not leave petitioner without any avenue of judicial review. Petitioner may seek review in the U.S. Court of Appeals for the District of Columbia Circuit of any final decision rendered against him by a military commission pursuant to the special review procedures established by Congress. DTA § 1005(e)(3), 119 Stat. 2743. And he may seek review in this Court of any adverse decision rendered by the District of Columbia Circuit pursuant to those procedures. But the Act (§ 1005(e)(1), 119 Stat. 2743)) plainly divests the courts of jurisdiction to "hear or consider" the instant pre-trial challenge brought by petitioner to the military commission. Accordingly, "the only function remaining to the court is that of announcing that fact and dismissing the cause." *McCardle*, 74 U.S. (7 Wall.) at 514.

STATEMENT

1. In the wake of the September 11 attacks, the President ordered the establishment of military commissions to try members of al Qaeda and others involved in international terrorism against the United States. In doing so, the President expressly relied on "the authority vested in me * * * as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and

836 of title 10, United States Code." *Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 3 C.F.R. 918 (2002) (Military Order).[2] In the Military Order, the President expressly found that

> To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order * * * to be detained, and when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

Military Order § 1(e), 3 C.F.R. 918.

In July 2003, the President, acting pursuant to the Military Order, designated petitioner, who is detained at Guantanamo Bay, as an individual subject to his order

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[2] Section 821 of Title 10, United States Code, provides in relevant part:

> **Art. 21. Jurisdiction of courts-martial not exclusive**
>
> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions * * * of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions.

Section 836 of Title 10, United States Code, provides in relevant part:

> **Art. 36. President may prescribe rules**
>
> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, * * * may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

and eligible for trial before a military commission, finding "that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States." Pet. App. 1a-2a. On July 13, 2004, the Appointing Authority for Military Commissions approved and referred to a military commission a Charge alleging that petitioner conspired with Osama bin Laden, Dr. Ayman al Zawahiri, and other members and associates of al Qaeda to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism. *Id.* at 62a-67a. While at Guantanamo, petitioner received a hearing before a Combatant Status Review Tribunal, which confirmed that he is subject to continued detention as an enemy combatant. *Id.* at 2a.

2. Petitioner's counsel instituted these proceedings by filing a petition for habeas corpus and/or mandamus in the United States District Court for the Western District of Washington, seeking to enjoin enforcement of the President's Military Order on the ground that trial before a military commission rather than a court-martial convened under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.*, would be unconstitutional and violate the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 (the Geneva Convention). See C.A. App. 38-68. While petitioner acknowledged that he worked for bin Laden for many years before his capture, see *id.* at 50-51 (paras. 15-16)—during which bin Laden planned and executed major terrorist attacks against the United States and its allies—petitioner asserted that he had not knowingly participated in terrorist attacks against the United States, *id.* at 52 (para. 19). The District Court in

Washington transferred the case to the District of Columbia. *Id.* at 195.

3. On November 8, 2004, one month before petitioner's scheduled trial date and in the face of the government's request that the district court abstain pending the completion of military commission proceedings, the district court took the historically unprecedented step of enjoining the ongoing military commission proceedings on the ground that the scheduled trial would not comply with the Geneva Convention or the UCMJ. Pet. App. 49a.

The court of appeals reversed. Pet. App. 1a-18a. That court also declined to abstain with respect to claims that it viewed as going to the jurisdiction of the military commission, but on the merits it rejected all of petitioner's claims. *Ibid.* Specifically, the court held that Congress had authorized the President to establish military commissions pursuant to the UCMJ, 10 U.S.C. 821, 836, and the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224. In addition, the court rejected petitioner's reliance on the Geneva Convention on the ground that it does not create judicially enforceable rights and, in any event, did not extend any protections to petitioner. Pet. App. 3a-15a.

4. Petitioner filed a petition for a writ of certiorari, which this Court granted on November 7, 2005. 126 S. Ct. 622. On December 19, 2005, petitioner filed a petition for an extraordinary writ, or, in the alternative, for an original writ of habeas corpus (No. 05-790).

5. Congress enacted the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739, which was signed into law on December 30, 2005. Section 1005(e)(1) of the Act amends the habeas corpus stat-

ute, 28 U.S.C. 2241, by adding the following new subsection:

> (e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—
>
> > (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
> >
> > (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—
> >
> > > (A) is currently in military custody; or
> > >
> > > (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

Section 1005 further provides that the District of Columbia Circuit has "exclusive jurisdiction" to review the final decisions of Combatant Status Review Tribunals (CSRTs) (DTA § 1005(e)(2)(A), 119 Stat. 2742) and military commissions (§ 1005(e)(3)(A), 119 Stat. 2743). The review procedure that the Act establishes for military commission decisions "shall be as of right" for those aliens sentenced in "a capital case" or "to a term of imprisonment of 10 years or more" and "shall be at the discretion of the [District of Columbia Circuit]" in "any

other case." § 1005(e)(3)(B), 119 Stat. 2743. The Act limits the jurisdiction that Section 1005(e)(3) vests in the District of Columbia Circuit to appeals "brought by or on behalf of an alien" who was detained at Guantanamo Bay "at the time of the [military commission] proceedings" and "for whom a final decision has been rendered." § 1005(e)(3)(C), 119 Stat. 2743. The Act further confines the District of Columbia Circuit's jurisdiction to consideration of "whether the final decision was consistent with the standards and procedures specified in [Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)]," and "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States." § 1005(e)(3)(D), 119 Stat. 2743.

The Act provides that Section 1005 "shall take effect on the date of the enactment of this Act." DTA § 1005(h)(1), 119 Stat. 2743. It further specifies that the exclusive statutory procedures that the Act establishes for review of CSRT and military commission decisions "shall apply with respect to any claim whose review is governed by" those procedures and "that is pending on or after the date of the enactment of this Act." § 1005(h)(2), 119 Stat. 2743.

ARGUMENT

UNDER WELL-SETTLED PRINCIPLES, CONGRESS'S DECISION TO REMOVE JURISDICTION OVER THIS ACTION AND OTHERS LIKE IT MUST BE GIVEN IMMEDIATE EFFECT

Section 1005(e)(1) of the Act—which Congress explicitly made effective on the date of its enactment —amends the habeas corpus statute to provide that "no

court, justice, or judge shall have jurisdiction to hear or consider" a habeas corpus petition or "any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense" filed by an alien in military custody at Guantanamo Bay. DTA § 1005(e)(1), 119 Stat. 2742. This action plainly falls within that provision because it was filed against executive officers on behalf of an alien held at Guantanamo Bay and relates to the alien's detention.[3] As such, the courts—including this Court—lack jurisdiction to "hear or consider" this action.

1. Petitioner suggests that Congress did not intend the Act to remove this Court's jurisdiction to hear this action. See 05-790 Pet. for an Extraordinary Writ at 6-7. That contention is contradicted not only by the plain terms of the Act, but also by this Court's precedents.

It is well settled that statutes that remove jurisdiction apply to pending cases and ordinarily should be given immediate effect. More than a century ago, this Court held that an Act of Congress repealed its jurisdiction to review a circuit court decision denying a habeas corpus petition filed by a Mississippi resident, McCardle, who sought release from "custody by military authority for trial before a military commission." *Ex*

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[3] Petitioner labeled his petition as one for mandamus or for habeas corpus. As respondents have explained before, petitioner's challenge to the President's authority to hold him in custody for trial by military commission (and ultimately to confine him pursuant to a military commission judgment) is a paradigmatic habeas action. See Gov't Dist. Ct. Reply Mem. of P. & A. in Supp. of Mot. to Dismiss or Transfer 9-11. In any event, even if petitioner could properly characterize his suit as something other than a habeas action, the catch-all provision eliminating jurisdiction over "any other action * * * relating to any aspect of the detention" (DTA § 1005(e)(1), 119 Stat. 2742) would bar review of his claim.

parte McCardle, 74 U.S. (7 Wall.) 506, 508 (1868).[4] Although the Court had asserted jurisdiction over the matter and heard oral argument before the law was passed, the Court nonetheless concluded that, after the law was enacted, it could not "proceed at all" with the case and dismissed the appeal for "want of jurisdiction." *Id.* at 515. As the Court explained, "[j]urisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 514. Moreover, the Court continued, application of the new law to a pending matter flowed from "the general rule" that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." *Ibid.* (citation omitted).

This Court has "regularly" applied that rule to "intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994); see *ibid.* (describing "consistent practice") (internal quotation marks and bracket omitted); accord *id.* at 292 (Scalia, J., concurring in the judgment) (noting "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction"). The Court reaffirmed that rule just two terms ago. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 693 (2004) (noting that in *Landgraf*, "we sanctioned the application to all pending and future cases of 'inter-

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[4] The 1868 Act provided "[t]hat so much of the act approved February [5, 1867], * * * as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is hereby repealed." Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44.

vening' statutes that merely 'confe[r] or ous[t] jurisdiction'") (quoting *Landgraf*, 511 U.S. at 274). As the Court has explained, "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Landgraf*, 511 U.S. at 274 (quoting *Republic Nat'l Bank* v. *United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). In addition, such statutes "usually 'take[] away no substantive right but simply change[] the tribunal that is to hear the case.'" *Ibid.* (quoting *Hallowell* v. *Commons*, 239 U.S. 506, 508-509 (1916)). See *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 951 (1997).

Because statutes removing jurisdiction presumptively apply to pending cases, Congress must expressly reserve pending cases to preserve the federal courts' jurisdiction over them. As the Court put it in *Bruner* v. *United States*, 343 U.S. 112 (1952), the "rule" that "has been adhered to consistently by this Court" is "that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Id.* at 116-117 & n.8 (citing *McCardle* and other cases). That is true no matter how far the pending litigation has progressed. *Bruner* involved a statute that was enacted after the Court had granted certiorari in the case and repealed federal district court jurisdiction over certain Tucker Act claims. The Court held that, "[a]bsent such a reservation [as to pending cases]," the district court lacked jurisdiction over the plaintiff's claim "even though the District Court had jurisdiction * * * when petitioner's action was brought." *Id.* at 115. Accordingly, the Court concluded that the case should be dismissed for want of jurisdiction. *Id.* at 117.

Numerous other cases are to the same effect. See *Gallardo* v. *Santini Fertilizer Co.*, 275 U.S. 62, 63 (1927)

(Holmes, J.) (ordering that suit brought to enjoin the collection of taxes in Puerto Rico "be dismissed for want of jurisdiction" because, after the district court issued an injunction, Congress passed a law "that took away the jurisdiction of the District Court in this class of cases"); *Hallowell*, 239 U.S. at 508-509 (Holmes, J.) (affirming dismissal of action seeking to establish equitable title to decedent's property "for want of jurisdiction" because, while the action was pending, Congress enacted law that "made [the Secretary of the Interior's] jurisdiction exclusive in terms" and "made no exception for pending litigation"); *Sherman* v. *Grinnell*, 123 U.S. 679, 680 (1887) (dismissing writ for lack of jurisdiction based on law that repealed Court's jurisdiction to review pre-repeal circuit court order remanding case to state court); *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541, 544-545 (1867) (dismissing appeal for want of jurisdiction because statute eliminated jurisdictional basis for underlying suit); see also *Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870) ("[I]nasmuch as the [jurisdiction] repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress.").[5]

Congress "expects its statutes to be read in conformity with this Court's precedents." *United States* v.

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[5] In *Santos* v. *Territory of Guam*, No. 03-70472, 2005 WL 3579022 (Jan. 3, 2006), the Ninth Circuit held that, under *Bruner* and *McCardle*, it lacked jurisdiction to consider a petition from the Guam Supreme Court over which it had previously asserted jurisdiction because Congress passed a law withdrawing its jurisdiction while the case was pending. See *id.* at *4 (Wallace, J., concurring) ("Because there was no 'reservation as to pending cases' in the statute at issue here, we lack jurisdiction over the present appeal.") (quoting *Bruner*, 343 U.S. at 116).

Wells, 519 U.S. 482, 495 (1997); see *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995). Accordingly, because the relevant provision of the Detainee Treatment Act does not contain any reservation saving pending cases, "all cases fall with the law." *Bruner*, 343 U.S. at 116-117. That conclusion is underscored by the fact that the Act explicitly provides—without reservation—that it "shall take effect on the date of the enactment." DTA § 1005(h)(1), 119 Stat. 2743. Because subject-matter jurisdiction must subsist throughout the litigation, that language effects an immediate elimination of jurisdiction.[6]

In addition, Congress not only declined to include a reservation saving pending cases, but it expressly provided that the exclusive procedures established by the Act for review of challenges to completed CSRTs and military commission trials apply to cases "pending on or after" the Act's enactment. § 1005(h)(2), 119 Stat. 2743. Thus, Congress made clear that the federal courts no longer have jurisdiction over actions filed on behalf of Guantanamo detainees, and it reinforced that result by providing that, without regard to whether an action is "pending on or after" the date of enactment, the exclusive review procedures in Section 1005(e)(2) and (3) provide the only avenue for judicial relief.[7]

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[6] Whether Section 1005(h)(1) is construed to eliminate this Court's appellate jurisdiction or the district court's jurisdiction over the action (or both), it is appropriate to dismiss the petition for want of jurisdiction. See, *e.g.*, *Ritchie*, 72 U.S. (5 Wall.) at 544-545. In the alternative, the Court could vacate and remand with instructions to the lower courts to dismiss the action. See, *e.g.*, *Gallardo*, 275 U.S. at 63-64.

[7] Relying on legislative history, petitioner contends (05-790 Pet. for Extraordinary Relief 6-7) that Congress did not intend to "interfere with *this* case." Because the statute's jurisdiction-ousting provision

2. Several other considerations support the conclusion that follows from a plain reading of the statute and the Court's uniform practice of construing provisions removing jurisdiction to apply to pending cases absent an express reservation by Congress.

First, application of the jurisdictional provision to pending cases does not involve any retroactive application of a statute. Because the courts must have jurisdiction throughout the litigation, a change in jurisdiction that takes effect after an action has been filed should be understood, not as undoing past judicial action in the case, but regulating the courts' authority to act prospectively in the case. See *Landgraf*, 511 U.S. at 293 (Scalia, J., concurring in the judgment). That is particularly true in a case like this that involves prospective relief. As this Court recognized in *Landgraf*, "[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive." 511 U.S. at 273; *id.* at 293 (Scalia, J., con-

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unambiguously applies to pending cases, there is no need to "turn to the more controversial realm of legislative history." *Lamie* v. *United States Trustee*, 540 U.S. 526, 536 (2004). In any event, legislative history supports the conclusion that Congress was aware that the Act's jurisdiction-ousting rule would extend to pending cases, including this case. See, *e.g.*, 151 Cong. Rec. S14,263 (daily ed. Dec. 21, 2005) (statement of co-sponsor Sen. Kyl) ("The courts' rule of construction for these types of statutes is that legislation ousting the courts of jurisdiction is applied to pending cases. It has to. We're not just changing the law governing the action. We are eliminating the forum in which that action can be heard."); *id.* at S14,264 (statement of Sen. Kyl) ("[T]he court should dismiss Hamdan for want of jurisdiction. That is what they did in Ex Parte McCardle. * * * I think that a majority of the court would do the right thing—to send Hamdan back to the military commission, and then allow him to appeal pursuant to section [1005]."). And the statements of Senator Levin or others quoted by petitioner can in no way alter the effect of the text duly enacted by Congress.

curring in the judgment) ("Courts traditionally withhold requested injunctions that are not authorized by then-current law, even if they were authorized at the time suit commenced and at the time the primary conduct sought to be enjoined was first engaged in."). This Court has recognized and applied that principle in several cases. See, *e.g.*, *American Steel Foundries* v. *Tri-City Cent. Trades Council*, 257 U.S. 184 (1921); *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 464 (1921). In light of Congress's elimination of the District Court's jurisdiction, there is no basis for that court's injunctive order to have any prospective effect.

Second, at the same time that it repealed existing habeas jurisdiction over claims filed on behalf of Guantanamo detainees, Congress created a special procedure for bringing later challenges to completed military commission proceedings exclusively in the District of Columbia Circuit. That reality both ameliorates the effect of removing jurisdiction and underscores the appropriateness of applying the statute to pending cases. Congress has not barred military commission defendants such as petitioner from seeking *any* federal forum; rather, the Act requires them to await a final decision from the military commission and vests exclusive jurisdiction in the District of Columbia Circuit to consider challenges to such a decision. DTA § 1005(e)(3)(A), 119 Stat. 2743; see *Landgraf*, 511 U.S. at 292-293 (Scalia, J., concurring in the judgment) (noting that rule applying jurisdictional provisions immediately to pending cases applies even though "[a] jurisdictional rule can deny a litigant a forum for his claim entirely").[8]

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[8] By vesting "exclusive jurisdiction" in the District of Columbia Circuit, Congress has excluded district courts from the review process,

Congress has thus codified the principle of judicial abstention from military proceedings that this Court had heretofore applied in the absence of specific direction from Congress, see *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), and channeled review of legal challenges to military commission proceedings through the District of Columbia Circuit. Particularly in view of the fact that the Act permits petitioner to seek judicial review of a final decision of the military commission, there is no basis to justify the extraordinary step of asserting jurisdiction over his request for pre-trial injunctive relief in the face of the repeal of statutory habeas—or any other—jurisdiction and the creation of an exclusive system of review that requires as a precondition entry of a final military commission judgment.

Third, even if Congress had not divested courts of jurisdiction over petitioner's challenge to his military commission in Section 1005(e)(1), petitioner would nonetheless be required to avail himself of the exclusive review provision established with respect to military commissions in Section 1005(e)(3). The settled rule is that when Congress creates an exclusive review mechanism, it forecloses a court from asserting jurisdiction under a more general grant of jurisdiction. For example, in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), the Court held that the district court lacked jurisdiction over a pre-enforcement challenge to a decision under the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. 801 *et seq*. The Court explained that, although that Act was "silent with respect to pre-en-

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but it has not excluded this Court's eventual participation. This Court presumably could exercise its certiorari jurisdiction to review a decision of the District of Columbia Circuit concerning the validity of a final decision of a military commission. See 28 U.S.C. 1254(1).

forcement claims," the vesting of exclusive jurisdiction in the court of appeals to review adverse administrative decisions "demonstrates that Congress intended to preclude [pre-enforcement] challenges." 510 U.S. at 208. See also *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) ("[l]itigants may not evade" exclusive review provisions for final agency orders "by requesting the District Court to enjoin action that is the outcome of the agency's order"); cf. 5 U.S.C. 703 ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute, or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for * * * writs of * * * habeas corpus.").

Here, Congress has specified that the District of Columbia Circuit has "exclusive jurisdiction" to consider challenges to military commission proceedings and further specified that such challenges may be brought only after a "final decision has been rendered." DTA § 1005(e)(3)(A) and (C)(ii), 119 Stat. 2743. That exclusive review procedure makes clear Congress's intent that judicial review of military commission proceedings should occur only after those proceedings have been completed. Even if the Act omitted Section 1005(e)(1) entirely, therefore, this Court's cases would call upon the courts to give effect to the special review provision created by Section 1005(e)(3) by dismissing pre-trial challenges to military commissions and requiring detainees to invoke the special review procedure created by Congress after careful deliberation for challenging military commission proceedings.

3. Contrary to petitioner's suggestion (05-790 Pet. for Extraordinary Writ at 6-7), Congress's specification

that the exclusive review procedures for CSRT and military commission proceedings apply to cases "governed by" those review procedures that are "pending on or after the date of the enactment of this Act" (DTA § 1005(h)(2), 119 Stat. 2743) does not trigger any negative implication that Congress intended to preserve habeas jurisdiction over pending cases and apply Section 1005(e)(1) only to petitions sought to be filed after the date of enactment.

Because Congress was aware of this Court's well-established rule that provisions removing jurisdiction apply to pending cases unless those cases are expressly reserved by a savings clause, Congress had no need to specify that the Act's repeal of habeas jurisdiction applies to pending cases. In contrast to the Court's consistent practice concerning *jurisdictional* provisions, the rules addressing when procedural revisions trigger the presumption against retroactivity have been less clear. See *Landgraf*, 511 U.S. at 277 (clarifying that despite "language suggest[ing] a categorical presumption in favor of application of *all* new rules of law," this Court's decision in *Bradley* v. *School Bd.*, 416 U.S. 696 (1974), did not alter the traditional rule); cf. *Lindh* v. *Murphy*, 521 U.S. 320, 327 (1997). Accordingly, Congress sensibly specified that the new judicial review procedures in Section 1005(e)(2) and (3) would apply to cases "pending on or after" the Act's enactment to avoid any possibility that Section 1005's scope of review provisions, see § 1005(e)(2)(C) and (e)(3)(D), 119 Stat. 2742-2743, could be construed to affect detainees' substantive entitlement

to relief (if any) and therefore trigger the presumption against retroactivity.[9]

Particularly in light of the case law addressing when procedural revisions trigger the presumption against retroactivity and the clarity of the rule that provisions eliminating jurisdiction have immediate effect on pending cases, the most natural reading of the statute is that, precisely because Congress was eliminating habeas jurisdiction over all pending cases involving Guantanamo detainees and simultaneously creating special procedures for some eliminated claims, Congress wanted to remove any doubt that the new procedures would apply to cases that are jurisdictionally ousted under Section 1005(e)(1) but present a claim amenable to review under the special procedures created by Section 1005(e)(2) and (3). Moreover, making clear that the special review provisions apply to pending cases answers the question of what to do with those cases once the threshold jurisdiction-removing provision is given effect.

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[9] In *Lindh*, the Court refused to apply to a pending case certain amendments to the habeas corpus statute because those amendments revised prior law "to change standards of proof and persuasion in a way favorable to a State," 521 U.S. at 327; *id.* at 329, and because Congress had not expressly provided that those particular amendments applied to pending cases whereas it had so provided with respect to other amendments. The provisions in Section 1005(e)(2) and (3) that do more than remove jurisdiction, but that also limit the scope of cognizable claims are more akin to the provisions at issue in *Lindh*. Thus, Congress was well-served to specify their application to pending cases. Section 1005(e)(1), by contrast, falls squarely within the class of "'intervening' statutes that merely 'confe[r] or ous[t] jurisdiction'" that this Court has repeatedly held and reaffirmed post-*Lindh* apply "to all pending and future cases." *Altmann*, 541 U.S. at 693 (quoting *Landgraf*, 511 U.S. at 274).

The Act clearly evinces Congress's intent in the wake of this Court's decision in *Rasul* v. *Bush*, 542 U.S. 466 (2004), strictly to limit the judicial review available to aliens detained at Guantanamo during the ongoing conflict. Reading the statute to permit pending cases to survive would be manifestly at odds with that intent because it would permit hundreds of pending cases —collectively involving the large majority of Guantanamo detainees and countless challenges to the operation of Guantanamo—to proceed.[10] In addition, such a reading would produce an absurd result because it would require many of those cases to be carved up in order to allow them to proceed under the exclusive review procedure in the District of Columbia Circuit (for claims "governed by" the CSRT review procedure) and general habeas review (for all other claims). That would only further complicate the detainee litigation by creating a hodgepodge of claims arising in the same case pending in separate courts, would do nothing to address hundreds of detainee cases now pending in district court, and cannot possibly be what Congress intended.

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[10] Habeas petitions have been filed on behalf of a purported 600 detainees. Because more than 100 of those appear to be duplicate filings, and other filings identify names that cannot be matched with actual detainees, the precise number of detainees with cases pending is unknown, although the number is well over 300. Moreover, a petition was filed (a "John Does 1-570" action) purporting (erroneously, for a number of reasons) to seek relief on behalf of every Guantanamo detainee who has not already filed an action. Petition for Writ of Habeas Corpus, *John Does 1-570* v. *Bush*, No. 1:05CV00313 (CKK) (D.D.C. Feb. 10, 2005). These actions collectively have consumed enormous resources and disrupted the operation of Guantanamo during time of war.

In any event, the "negative implication" line of argument cannot benefit petitioner. As explained above, even if Congress had not eliminated habeas jurisdiction over pending claims on behalf of Guantanamo detainees, this Court applies the rule that when Congress establishes an exclusive review procedure, the courts cannot exercise jurisdiction under a more general grant. See pp. 16-17, *supra*.

4. Petitioner cannot circumvent the Act's repeal of habeas jurisdiction by seeking to invoke this Court's jurisdiction under the All Writs Act, 28 U.S.C. 1651, or under 28 U.S.C. 2241(a). First, Section 1005(e)(1) by its plain terms eliminates this Court's jurisdiction to consider an original habeas petition just as it does this Court's jurisdiction to consider a habeas petition filed in the district court.[11] Under new 28 U.S.C. 2241(e) (as added by DTA § 1005(e)(1), 119 Stat. 2742), "no court, justice, or judge shall have jurisdiction to hear or consider" any habeas application filed by an alien detained at Guantanamo Bay. Second, Section 1005(e)(1) also plainly withdraws any jurisdiction to consider "any other action"—such as a "writ of mandamus" (05-790 Pet. for Extraordinary Writ at 10)—filed by a Guantanamo detainee that "relate[s] to any aspect of the detention." Thus, petitioner's latest filing runs headlong into the same jurisdictional obstacles that remove this Court's jurisdiction over the writ.

Petitioner's recourse to the All Writs Act fails on numerous other grounds. Even if Section 1005(e)(1) did not by its terms foreclose petitions by Guantanamo de-

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[11] While common usage calls petitions for habeas corpus filed directly in this Court "original" petitions, the Court's jurisdiction to consider such petitions, for purposes of Article III, is appellate. See *Felker* v. *Turpin*, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring).

tainees for extraordinary writs, its removal of this Court's habeas jurisdiction would accomplish the same result. That is because "the All Writs Act does not, by its specific terms, provide federal courts with an independent grant of jurisdiction." *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 33 (2002) (internal quotation marks omitted). Rather, the "express terms of the All Writs Act confine a court to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Ibid.* (internal quotation marks and citation omitted). Moreover, even if some other form of jurisdiction could be established, petitioner falls far short of meeting the requirements for obtaining extraordinary relief.

Most fundamentally, petitioner cannot demonstrate that he has "no other adequate means to attain the relief he desires," *Cheney* v. *United States Dist. Ct.*, 542 U.S. 367, 380 (2004) (citation omitted); see Sup. Ct. R. 20.1, 20.4(a), because Section 1005(e)(3) affords him an avenue for review in the District of Columbia Circuit (and this Court) after the military commission renders a final judgment. As this Court has explained, "[a]lthough th[e] [All Writs] Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Corr.* v. *United States Marshals Serv.*, 474 U.S. 34, 43 (1985). This Court should thus reject petitioner's attempt to thwart Congress's repeal of habeas jurisdiction by resort to the extraordinary writ.

* * * * *

This Court should dismiss the writ for want of jurisdiction or remand the case with instructions to dismiss.

At a minimum, this Court should dismiss the writ as improvidently granted. By establishing an exclusive review procedure for military commission challenges, Congress has made plain its judgment that judicial review of military commission proceedings should occur only after those proceedings have been completed.

CONCLUSION

The writ of certiorari should be dismissed for want of jurisdiction or, at a minimum, the writ should be dismissed as improvidently granted.

Respectfully submitted.

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JANUARY 2006

APPENDIX

Pub. L. No. 109-148, 119 Stat. 2680, provides in pertinent part:

An Act

Making appropriations for the Department of Defense for the fiscal year ending September 30, 2006, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2006

* * * * *

TITLE X—MATTERS RELATING TO DETAINEES

SEC. 1001. SHORT TITLE.

This title may be cited as the "Detainee Treatment Act of 2005".

SEC. 1002. UNIFORM STANDARDS FOR THE INTERROGATION OF PERSONS UNDER THE DETENTION OF THE DEPARTMENT OF DEFENSE.

(a) IN GENERAL.—No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United

States Army Field Manual on Intelligence Interrogation.

(b) APPLICABILITY.—Subsection (a) shall not apply with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States.

(c) CONSTRUCTION.—Nothing in this section shall be construed to affect the rights under the United States Constitution of any person in the custody or under the physical jurisdiction of the United States.

SEC. 1003. PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT OF PERSONS UNDER CUSTODY OR CONTROL OF THE UNITED STATES GOVERNMENT.

(a) IN GENERAL.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) CONSTRUCTION.—Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) LIMITATION ON SUPERSEDURE.—The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

(d) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

SEC. 1004. PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL ENGAGED IN AUTHORIZED INTERROGATIONS.

(a) PROTECTION OF UNITED STATES GOVERNMENT PERSONNEL.—In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith

reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

(b) COUNSEL.—The United States Government may provide or employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation of an officer, employee, member of the Armed Forces, or other agent described in subsection (a), with respect to any civil action or criminal prosecution arising out of practices described in that subsection, under the same conditions, and to the same extent, to which such services and payments are authorized under section 1037 of title 10, United States Code.

SEC. 1005. PROCEDURES FOR STATUS REVIEW OF DETAINEES OUTSIDE THE UNITED STATES.

(a) SUBMITTAL OF PROCEDURES FOR STATUS REVIEW OF DETAINEES AT GUANTANAMO BAY, CUBA, AND IN AFGHANISTAN AND IRAQ.—

(1) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives a report setting forth—

(A) the procedures of the Combatant Status Review Tribunals and the Administrative Review Boards established by direction of the Secretary of Defense that are in operation at Guantanamo Bay, Cuba, for determining the status of the detainees held at Guantanamo Bay or to provide an annual review to determine the need to continue to detain an alien who is a detainee; and

(B) the procedures in operation in Afghanistan and Iraq for a determination of the status of aliens detained in the custody or under the physical control of the Department of Defense in those countries.

(2) DESIGNATED CIVILIAN OFFICIAL.—The procedures submitted to Congress pursuant to paragraph (1)(A) shall ensure that the official of the Department of Defense who is designated by the President or Secretary of Defense to be the final review authority within the Department of Defense with respect to decisions of any such tribunal or board (referred to as the "Designated Civilian Official") shall be a civilian officer of the Department of Defense holding an office to which appointments are required by law to be made by the President, by and with the advice and consent of the Senate.

(3) CONSIDERATION OF NEW EVIDENCE.—The procedures submitted under paragraph (1)(A) shall provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee.

(b) CONSIDERATION OF STATEMENTS DERIVED WITH COERCION.—

(1) ASSESSMENT.—The procedures submitted to Congress pursuant to subsection (a)(1)(A) shall ensure that a Combatant Status Review Tribunal or Administrative Review Board, or any similar or successor administrative tribunal or board, in making a determination of status or disposition of any detainee under such procedures, shall, to the extent practicable, assess—

(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and

(B) the probative value (if any) of any such statement.

(2) APPLICABILITY.—Paragraph (1) applies with respect to any proceeding beginning on or after the date of the enactment of this Act.

(c) REPORT ON MODIFICATION OF PROCEDURES.—The Secretary of Defense shall submit to the committees specified in subsection (a)(1) a report on any modification of the procedures submitted under subsection (a). Any such report shall be submitted not later than 60 days before the date on which such modification goes into effect.

(d) ANNUAL REPORT.—

(1) REPORT REQUIRED.—The Secretary of Defense shall submit to Congress an annual report on the annual review process for aliens in the custody of the Department of Defense outside the United States. Each such report shall be submitted in unclassified form, with a classified annex, if necessary.

The report shall be submitted not later than December 31 each year.

(2) ELEMENTS OF REPORT.—Each such report shall include the following with respect to the year covered by the report:

(A) The number of detainees whose status was reviewed.

(B) The procedures used at each location.

(e) JUDICIAL REVIEW OF DETENTION OF ENEMY COMBATANTS.—

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by adding at the end the following:

"(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.".

(2) REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.

(B) LIMITATION ON CLAIMS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to claims brought by or on behalf of an alien—

(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense.

(C) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on any claims with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent

with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

(D) TERMINATION ON RELEASE FROM CUSTODY.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit with respect to the claims of an alien under this paragraph shall cease upon the release of such alien from the custody of the Department of Defense.

(3) REVIEW OF FINAL DECISIONS OF MILITARY COMMISSIONS.—

(A) IN GENERAL.—Subject to subparagraphs (B), (C), and (D), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order).

(B) GRANT OF REVIEW.—Review under this paragraph—

(i) with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more, shall be as of right; or

(ii) with respect to any other case, shall be at the discretion of the United States Court of Appeals for the District of Columbia Circuit.

(C) LIMITATION ON APPEALS.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit under this paragraph shall be limited to an appeal brought by or on behalf of an alien—

(i) who was, at the time of the proceedings pursuant to the military order referred to in subparagraph (A), detained by the Department of Defense at Guantanamo Bay, Cuba; and

(ii) for whom a final decision has been rendered pursuant to such military order.

(D) SCOPE OF REVIEW.—The jurisdiction of the United States Court of Appeals for the District of Columbia Circuit on an appeal of a final decision with respect to an alien under this paragraph shall be limited to the consideration of—

(i) whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

(ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

(4) RESPONDENT.—The Secretary of Defense shall be the named respondent in any appeal to the United States Court of Appeals for the District of Columbia Circuit under this subsection.

(f) CONSTRUCTION.—Nothing in this section shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States.

(g) UNITED STATES DEFINED.—For purposes of this section, the term "United States", when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba.

(h) EFFECTIVE DATE.—

(1) IN GENERAL.—This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS.—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

* * * * *

EXHIBIT 3

No. 05-184

In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

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REPLY BRIEF IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

INTRODUCTION

Petitioner's response fails to account for the plain import of the text enacted by Congress and this Court's precedents. In clear and unmistakable terms, Congress eliminated the power of the federal courts to "hear or consider" habeas petitions and any other actions by aliens such as petitioner detained by the United States at Guantanamo Bay, Cuba. Detainee Treatment Act of 2005 (the DTA or Act), Pub. L. No. 109-148, Div. A., Tit. X, § 1005(e)(1), 119 Stat. 2742.[1] As Congress is presumed to be aware, the settled rule is that statutes that remove jurisdiction apply immediately to eliminate jurisdiction over pending cases unless jurisdiction over such cases is expressly preserved. See *Republic of Austria* v. *Altman*, 541 U.S. 677, 693 (2004); *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994); *id.* at 292 (Scalia, J., concurring in the judgment). Congress did not expressly preserve petitioner's action, or any other pending action brought on behalf of Guantanamo detainees. And petitioner has supplied no basis for this Court to disregard its precedents and override the statutory text by permitting this pre-trial challenge to petitioner's military commission to proceed.

Despite petitioner's extended rhetoric, that result is neither unusual nor unconstitutional. This Court has repeatedly given effect to such jurisdiction-removing provisions and long ago recognized that "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer." *Ex parte*

[1] Identical provisions are included in the National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 109-163, Div. A, Tit. XIV, § 1405(e)(1), 119 Stat. 3477.

McCardle, 74 U.S. (7 Wall.) 506, 515 (1868). What is more, performing that duty in this case does not deprive petitioner of an opportunity for judicial review. At the same time that Congress removed the power of the courts to entertain pending actions filed on behalf of Guantanamo detainees, it created an exclusive procedure for challenging adverse military commission or Combatant Status Review Tribunal (CSRT) determinations. Accordingly, the DTA amounts to a statutory abstention requirement for detainees like petitioner who face a military commission, such that giving effect to the plain terms of the DTA will terminate only petitioner's *pre-trial* challenge to his military commission. He may invoke the DTA's exclusive review procedures (and/or challenge any limitations on that review) if he is convicted by a military commission, but his current action must be dismissed.

ARGUMENT

I. THE DTA ELIMINATES THE POWER OF THE COURTS TO HEAR PENDING ACTIONS, SUCH AS PETITIONER'S, BROUGHT ON BEHALF OF GUANTANAMO DETAINEES

Petitioner's primary argument boils down to the proposition that the DTA has no effect on the numerous pending actions, including his own, filed on behalf of hundreds of Guantanamo detainees and challenging virtually all facets of the operation of Guantanamo. That contention is directly contradicted by the text and history of the Act, and cannot be squared with the context that Congress confronted.

In plain terms, Section 1005(e)(1) of the Act removed jurisdiction over habeas petitions and any other actions related to detention filed by or on behalf of aliens at Guantanamo, except as provided in subsections (e)(2) and (e)(3), which, in turn, permit challenges only to *final* CSRT and military commission decisions in the District of Columbia Circuit. See DTA § 1005(e)(2) and (3). As explained (Gov't Mot. to Dismiss (Gov't Mot.) 9-13), this Court has "consistently" adhered

to the rule that jurisdiction-removing provisions apply to pending cases unless those cases are expressly preserved by Congress through a savings clause. *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952). Applying that settled rule compels the conclusion that the DTA's jurisdiction-removing provision takes immediate effect and removes jurisdiction over pending cases such that, going forward, federal court jurisdiction over Guantanamo detainees would be confined to the "exclusive" review system created by the DTA.[2]

A. The DTA Does Not Support Petitioner's "Inference" That Congress Intended To Preserve Habeas Jurisdiction Over Pending Cases

Petitioner maintains that the hundreds of Guantanamo detainees with pending actions are entitled to the benefit of *both* the habeas jurisdiction that Congress removed in Section 1005(e)(1) *and* the exclusive review procedure that Congress granted in Section 1005(e)(2) and (3). As a practical matter, that would attribute to Congress an intent to create *more* litigation, not less. Petitioner nonetheless contends (Pet. Opp. 7) that this counterintuitive result is compelled by an *inference* that petitioner draws based on the fact that Congress specified that the exclusive review system applies to pending and future claims. That contention is mistaken.

Petitioner's "inference" theory is grounded on this Court's decision in *Lindh* v. *Murphy*, 521 U.S. 320 (1997). In *Lindh*, the Court held that chapter 153 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was not applicable to pending cases, because chapter 154 of AEDPA, which

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[2] Relying on *INS* v. *St. Cyr*, 533 U.S. 289 (2001), petitioner suggests (Pet. Opp. 17-18) that the *Bruner* rule should not apply to the removal of habeas jurisdiction, because *St. Cyr* applied a clear-statement rule in determining whether Congress eliminated habeas review. The DTA, however, expressly provides such a clear statement. See DTA § 1005(e)(1) (expressly amending 28 U.S.C. 2241 to eliminate habeas review).

was parallel to chapter 153 in that it too established new standards of review for habeas corpus applications, was made expressly applicable to pending cases while chapter 153 was not. Because both chapters addressed the same subject—"standards affecting entitlement to relief"—the Court reasoned that "[n]othing, * * * but a different intent explains the different treatment." *Lindh*, 521 U.S. at 329. The statutory provisions at issue in this case are fundamentally different from those at issue in *Lindh* for two reasons, and those differences defeat the kind of inference that this Court drew in *Lindh*.

First, unlike *Lindh*, the relevant statutory provisions on which petitioner would base his negative inference address different subjects—Section 1005(e)(1) and (h)(1) remove jurisdiction, while Section 1005(e)(2), (3) and (h)(2) create an exclusive review mechanism and define the nature of that review. When two provisions address the same subject, as in *Lindh*, there may be a basis for drawing a negative inference from the omission of language in one of the two provisions. That same inference cannot be drawn when the provisions address different subjects, particularly when one of the provisions removes jurisdiction and implicates the rule of *Bruner*.

Section 1005(e)(1) speaks solely to the power of the courts and withdraws their pre-existing jurisdiction over pending cases. Because that section is purely a jurisdiction-removing provision, no difficult questions about retroactivity, or the need to resort to inferences, ever arise. This Court has consistently held that jurisdiction-removing provisions apply to pending cases absent a savings clause. Indeed, because of the courts' continuing need to have jurisdiction over a controversy, such provisions have no retroactive application. They apply prospectively and immediately. See *Landgraf*, 511 U.S. at 293 (Scalia, J., concurring in the judgment). Because the law on jurisdiction-removing provisions is clear, Congress had no reason to add special language to ensure the application of

Section 1005(e)(1) to pending cases. To the contrary, the burden would have been on Congress to add a savings clause if it had intended to preserve pending cases.

Martin v. *Hadix*, 527 U.S. 343 (1999), reinforces the conclusion that petitioner's reliance on *Lindh* is misplaced. In that case, this Court rejected a "negative inference" (*id.* at 356) argument based on *Lindh*. The plaintiff in *Martin* argued that the section of a statute (Section 803) governing the award of attorney's fees should not be applied to pending cases because it lacked language specifying that it applied to pending cases that appeared in a different part of the statute (Section 802) establishing "new standards" limiting the availability of certain remedies. *Id.* at 356. The Court rejected the negative-inference rationale and the relevance of *Lindh* because the provisions at issue addressed different subject matters. Therefore, "there [was] no reason to conclude that if Congress was concerned that § 802 apply to pending cases, it would 'have been just as concerned' that § 803 apply to pending cases." *Id.* at 357 (quoting *Lindh*, 521 U.S. at 329). The same reasoning applies here, *a fortiori*, in light of the clear rule concerning jurisdiction-removing provisions.[3]

Second, petitioner's negative-inference argument fails because it ignores a much more obvious explanation for Section 1005(h)(2)'s reference to pending cases that would not give rise to any negative inference. Congress presumably specified that the exclusive review mechanism would apply to pending and future claims *not* for the farfetched purpose of

[3] Petitioner's "negative inference" rationale also fails to account for other provisions in the DTA, which expressly exclude pending proceedings. Section 1005(b)(2) specifies that the provision imposing certain procedural requirements on CSRTs "applies with respect to any proceeding beginning on or after the date of the enactment of this Act." Rather than indulge dueling negative inferences from explicit language specifying or foreclosing application to pending proceedings, this Court should simply read Section 1005(e)(1) in light of the Court's consistent practice and give it immediate effect.

having the courts draw from that a negative inference that the ordinary rule governing jurisdiction-removing provisions should not apply, but to *reinforce* the jurisdiction-removing effect of Section 1005(h)(1) by making clear that pending claims that are amenable to review under the exclusive review system must proceed under the DTA.[4] Thus, far from demonstrating that Congress sought to *preserve* habeas cases, Section 1005(h)(2) demonstrates that Congress sought to accomplish a relatively seamless transition by *displacing* habeas jurisdiction with DTA-created jurisdiction.[5]

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[4] Congress was aware that there are many pending habeas claims raising challenges to the CSRT proceedings, and sought to ensure that jurisdiction would be available under the exclusive review procedures. See, *e.g.*, 151 Cong. Rec. S14,263 (Dec. 21, 2005) (statement of Sen. Graham) ("Obviously, no pending case seeks judicial review in the DC Circuit pursuant to section [1005]. What [Section 1005(h)(2)] means is that, at the same time that the courts like the DC district courts kick these cases out of their courtrooms, they can also tell them where they should go next."); *ibid.* (statement of Sen. Graham) (pending habeas claims challenging detention should "be recast as appeal of the[] CSRT determinations" pursuant to Section 1005(e)); *ibid.* (statement of Sen. Graham) ("if, for example, a habeas action currently is in the D.C. Circuit, that court can simply construe that action as a request for review of the detainee's CSRT pursuant to [Section 1005(e)]").

[5] The burden of a negative-inference argument—especially petitioner's, which must overcome the clear rule that jurisdiction-removing provisions take immediate effect—is that the inclusion of express language in one section of a statute was intended to create a negative implication, rather than reflecting some other purpose, such as making sure a particular provision applied to pending cases in a cautious, belt-and-suspenders manner. Obviously, some degree of cautious "belt and suspenders" drafting is reflected in Section 1005(h)(2), because Congress specified the application of subsections (e)(2) and (3) to *future* claims. Not even petitioner would detect a negative inference that Section 1005(e)(1) does not apply in the future, and it is hard to understand why one half of Congress's reference to pending and future claims creates a negative inference, when the other half does not. Instead, Congress's cautious approach counsels against drawing any inferences from Section 1005(h)(2).

Petitioner's "inference" rationale also produces an absurd result. The upshot of petitioner's argument is that the fact that Congress made the *exclusive* review system expressly applicable to *pending* claims itself compels the conclusion that Congress intended to *preserve* habeas jurisdiction over them. The jurisdiction of the District of Columbia Circuit under the DTA will hardly be "exclusive," however, if the federal courts continue to maintain ordinary habeas jurisdiction over the pending cases involving hundreds of detainees—including, presumably, the appeals filed in such cases. So petitioner's construction of the DTA means that the Act creates an *additional*, not exclusive, means of judicial review. Not even petitioner or his amici suggest that the purpose of the DTA was to *enlarge* the jurisdiction of the federal courts over detainee actions. To the contrary, the common-sense reading of the statute is that Congress sought to address the burgeoning detainee litigation by eliminating habeas jurisdiction with respect to all pending cases, but sought to ameliorate that result by creating an exclusive review procedure that applied to pending (as well as future) claims.

B. The Legislative History Of The DTA Cannot Preserve The Jurisdiction That The Plain Language Of The DTA Removed

Petitioner relies heavily (Pet. Opp. 8-12) on a one-sided account of the legislative history of the DTA to avoid the result compelled by the text and the Court's precedents. In particular, petitioner relies on the fact that the text of the original bill specified that the provision removing habeas jurisdiction applied to pending cases, and that Senator Levin cosponsored an amendment, the Graham-Levin-Kyl amendment (S. Amdt. 2524), that, among other things, eliminated the reference to pending cases.[6] Relying almost exclusively on Sena-

[6] The original Graham-Kyl-Chambliss amendment (S. Amdt. 2515) also contained no provision for review of military commissions and limited

tor Levin's own statements, petitioner argues that the only explanation for that change is that Congress decided to insulate pending cases from the elimination of habeas jurisdiction. See Pet. Opp. 8-12. That argument fails.

First, no amount of legislative history—especially legislative history largely generated by a single Senator—can overcome the unambiguous result that follows from the text of the Act enacted by Congress and the settled rule that jurisdiction-removing provisions apply to pending cases absent a savings clause. See Gov't Mot. 13-14 n.7. Second, and in any event, the legislative history is not one-sided as petitioner suggests. The amendment on which petitioner focuses had two other co-sponsors, and those Senators' statements are consistent with the text they proposed. While Senators Graham and Kyl agreed with Senator Levin that their amendment altered the original bill by providing for an exclusive review mechanism to challenge completed military commission determinations, they emphatically did not share Senator Levin's view that their amendment exempted pending cases from the Act's jurisdiction-removing provision. See note 7, *infra*; Gov't Mot. 13-14 n.7.

Petitioner seeks to minimize that disagreement by contending (Pet. Opp. 11-12) that Senators Graham and Kyl made their views known only after the legislation was enacted. That is not so.[7] Thus, although the plain text of the

challenges to a CSRT decision to claims that the decision was not "consistent with the procedures and standards specified by the Secretary of Defense." See 151 Cong. Rec. S12,655 (Nov. 10, 2005).

[7] Senator Graham made his views clear before the Senate approved the amendment. See 151 Cong. Rec. S12,754 (Nov. 14, 2005) (statement of Sen. Graham) (the Graham-Kyl-Levin amendment "give[]s every enemy combatant, all 500, a chance to go to Federal court, the Circuit Court of Appeals for the District of Columbia"); *ibid.* (statement of Senator Graham) (federal court oversight "will be a one-time deal"); *id.* at S12,756 ("When that [military commission] verdict is rendered, the Federal courts of the United States of America will look at the military action to see if it comports with the Con-

statute and the *Bruner* rule of construction render resort to legislative history unnecessary, see, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994), the legislative history itself tells a much different story than the one suggested by petitioner. Moreover, the fact that much of the legislative history relied on by petitioner was generated by a single Senator makes it a particularly suspect basis on which to override the plain import of the text enacted by Congress.

C. Application Of The DTA's Jurisdiction-Removing Provision To Pending Cases Does Not Have Retroactive Effect

Faced with the longstanding rule that jurisdiction-removing statutes apply to pending cases, petitioner contends (Pet. Opp. 12-19) that the rule is inapplicable because the removal of habeas jurisdiction will have retroactive effect. That is wrong.

"[A]pplication of a new jurisdictional statute to cases filed after its enactment is not 'retroactive' even if the conduct sued upon predates the statute." *Altman*, 541 U.S. at 703 (Scalia, J., concurring). That is because "the purpose of provisions * * * eliminating jurisdiction is to * * * forbid the exercise of judicial power" at "the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. at 293 (Scalia, J., concurring in the judgment); see *Altman*, 541 U.S. at 697 n. 17 (in assessing claim of retroactive effect, the Court must look to "the relevant activity that the rule regulates"); *id.* at 722 (Kennedy, J., dissenting) ("[I]f the [Foreign Sovereign Immunities Act] did not create new jurisdiction—including where it in fact stripped previously existing jurisdiction from the courts—we may apply its statutory terms without

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stitution."); *id.* at S12,801 (Nov. 15, 2005) (statement of Sen. Graham) ("This Levin-Graham-Kyl amendment allows every detainee under our control to have their day in court. They are allowed to appeal their convictions if they are tried by military commissions."). Senator Kyl also expressed his views before the DTA was enacted. See Gov't Mot. 13-14 n.7.

fear of working any retroactive effect."); *Lindh*, 521 U.S. at 342 n.3 (Rehnquist, C.J., dissenting) ("Although in *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997), we recently rejected a presumption favoring retroactivity for jurisdiction-*creating* statutes, nothing in *Hughes* disparaged our longstanding practice of applying jurisdiction-*ousting* statutes to pending cases.") (citation omitted). Application of Section 1005(e)(1)'s jurisdiction-removing provision is not retroactive in any respect because that provision, by its terms, applies immediately and prospectively to remove the power of the courts *now*—"the moment at which that power is sought to be exercised" (*Landgraf*, 511 U.S. at 293 (Scalia, J., concurring in the judgment))—to hear or consider pending detainee actions.

Petitioner nevertheless contends that this Court should create an exception to its longstanding rule here because, unlike the jurisdiction-removing statutes that this Court has consistently applied to pending cases, "the DTA purports to strip jurisdiction from *any* court to consider [petitioner's] claim." Pet. Opp. 13. That premise, however, is unfounded. The DTA (Section 1005(e)(3)) permits petitioner to seek judicial review of any adverse final decision by the military commission under the Act's exclusive review procedures.[8]

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[8] Petitioner contends (Pet. Opp. 14) that the DTA "preclud[es] numerous constitutional and other claims that could otherwise be made in a traditional habeas petition, including the very claims this Court has granted certiorari to decide." The DTA, however, specifically permits detainees who are convicted by a military commission to challenge whether "the use of [the military commission] standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States" to the extent they are applicable. See DTA § 1005(e)(3)(D)(ii). Thus, while the DTA's elimination of habeas jurisdiction over particular claims provides no basis for refusing to give it immediate effect, petitioner errs in suggesting that he will be unable to advance constitutional and statutory challenges to his military commission in the event he is convicted.

In any event, even assuming contrary to the plain terms of the DTA that it extinguished all federal jurisdiction over detainee challenges to military commissions, and thereby put Guantanamo detainees on the same footing as foreign enemy fighters detained outside the United States in prior armed conflicts, see *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), that would provide no basis for departing from application of the longstanding *Bruner* rule. Indeed, as explained (Gov't Mot. 12), in *Hallowell* v. *Commons*, 239 U.S. 506 (1916) (Holmes, J.), this Court applied the same clear rule it applied in *Bruner* to a statute that eliminated federal court jurisdiction entirely and relegated the plaintiff to seeking relief exclusively before the Executive Branch. As Justice Holmes explained, the statute "made [the Secretary's] jurisdiction exclusive in terms, * * * made no exception for pending litigation, but purported to be universal and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States." *Id.* at 508. The Court rejected the contention that the fact that plaintiff brought the suit before the statute was enacted "intensified, strengthened or enlarged the plaintiff's rights." *Id.* at 509. See *LaFontant* v. *INS*, 135 F.3d 158, 164-165 (D.C. Cir. 1998).

Petitioner relegates his discussion of *Hallowell* to footnotes and purports to distinguish it on the ground that it "concerned a reallocation of jurisdiction, and not the divestiture thereof." Pet. Opp. 16 n.12. But petitioner has it backwards. The statute in *Hallowell* called for "a divestiture" of federal court jurisdiction, whereas the DTA calls for "a reallocation * * * thereof." Thus, even if the DTA had relegated petitioner to raising all of his claims exclusively before the Executive Branch (*i.e.*, through a CSRT or military commission), petitioner's position would require the Court to overrule *Hallowell*, something even petitioner does not ask this Court to do. See *Landgraf*, 511 U.S. at 274 (citing *Hallowell* as example of the *Bruner* rule).

Petitioner also attempts to distinguish *Hallowell* on the ground (Pet. Opp. 17 n.14) that his alleged "right" not to be tried before his claims are heard is more important than the plaintiff's rights at issue in *Hallowell*. However, petitioner has no right to immunity from military trial either in general or by virtue of his filing a challenge to the lawfulness of the tribunal before the DTA's enactment.[9] Petitioner is a confirmed enemy combatant who is "a member of or affiliated with Al Qaeda" (Pet. App. 2a) detained outside the United States. No decision of this Court supports the notion that a captured alien enemy combatant possesses an absolute immunity from trial for war crimes that vested when he filed a pretrial challenge. To the contrary, this Court has held that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy." *Eisentrager*, 339 U.S. at 785. *Ex parte Quirin*, 317 U.S. 1 (1942), on which petitioner relies (Pet. Opp. 14), is not to the contrary. The Court never attempted to enforce an immunity by stopping the commission proceedings at issue in *Quirin*, which had virtually concluded by the time the Court heard the case. See Resp. Br. in Opp. at 15 & n.8 (No. 05-184). The district court injunction at issue—barring the trial of an alien enemy combatant held outside the United States—is unprecedented.

D. The Doctrines Of Abstention And Exclusive Review Also Call For Dismissal Of Petitioner's Case

The DTA's immediate removal of federal court habeas jurisdiction over actions filed on behalf of Guantanamo detain-

[9] Even if such immunity existed, which, as explained in the text, it does not, it is implausible to suggest that petitioner relied on a right to collaterally attack his prosecution for war crimes *before* that prosecution occurred when he engaged in the acts in Afghanistan that form the basis for the military commission Charge. Cf. *Lindh*, 521 U.S. at 342 (Rehnquist, C.J., dissenting) ("[t]he federal habeas proceeding at issue here is, in a sense, tertiary conduct").

ees requires dismissal of this action. The same result is required by application of the doctrine of federal court abstention from military proceedings, see *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), which Congress has now reinforced and effectively codified by requiring Guantanamo detainees subject to trial by military commission to obtain a "final decision" in order to qualify for the DTA's exclusive review mechanism. DTA § 1005(e)(3)(C)(ii). Given that Congress has determined that post-trial review is sufficient to protect any rights Guantanamo detainees may assert under the laws and Constitution of the United States, the Court may also dismiss the writ of certiorari as improvidently granted and thereby give effect to Congress's judgment that any judicial review should await a final adverse decision of a military commission.

The same result may also be reached by application of Section 1005(e)(3), the exclusive review provision for challenges to military commissions. Petitioner contends (Pet. Opp. 19) that his claims are not textually "governed by" that provision (DTA § 1005(h)(2)), but this Court typically construes exclusive review statutes to preclude claims that are not expressly referenced in the statute to effectuate congressional intent to channel judicial review (even in the absence of a companion provision like Section 1005(e)(1) eliminating jurisdiction over such claims). See Gov't Mot. 16-17 (citing cases). Petitioner attempts to distinguish these authorities on the ground that his challenge to the commissions is not governed by the Administrative Procedure Act (APA). See Pet. Opp. 21 n.19 (citing 5 U.S.C. 701(b)(1)(F)). But the fact that military commissions are exempt from APA review is no reason to permit petitioner to bypass Congress's exclusive review regime for military commissions. To the contrary, that fact should counsel in favor of even *greater* judicial restraint when Congress establishes what it refers to as an "exclusive" review mechanism for military commissions, because the APA exemption

reflects a legislative choice to *reject* judicial supervision of military commissions.

Petitioner further argues that cases such as *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), are distinguishable because (1) he has raised claims that are outside the expertise of the military commission; (2) post-trial judicial review is inadequate; and (3) he will suffer irreparable harm from sitting through a trial by a commission that lacks jurisdiction. Pet. Opp. 20-21. First, the claims raised are not outside the expertise of the commission. Many of petitioner's claims, including his "threshold" challenge to the legitimacy of the commission (Pet. Opp. 22), revolve around the proper interpretation of provisions of the Uniform Code of Military Justice, with which the military is undeniably well-versed. Moreover, the panel that will review the commission judgment if petitioner is found guilty is comprised of "some of the most distinguished civilian lawyers in the country," including former and current judges. Pet. App. 39a. Second, as explained above, the exclusive review system will not "foreclose all meaningful judicial review." *Thunder Basin*, 510 U.S. at 212-213. It is true that "review is not guaranteed unless the inmate receives a sentence of more than ten years' imprisonment." Pet. Opp. 13. But even if petitioner received a sentence of 10 years or less, he could still seek review of that sentence in the District of Columbia Circuit and if (as petitioner alleges) review were necessary to avoid any constitutional difficulties, the court of appeals would presumably choose to exercise review. Finally, petitioner will not suffer irreparable harm from sitting through a trial before seeking such judicial review. See *Councilman*, 420 U.S. at 755.

II. NEITHER PETITIONER'S CERTIORARI PETITION NOR HIS ORIGINAL HABEAS ACTION ALLOW HIM TO CIRCUMVENT THE DTA

Petitioner suggests that this Court may exercise jurisdiction over his habeas case even if it determines that the DTA removed habeas jurisdiction over pending actions, because "nothing in the DTA restricts this Court's traditional certiorari jurisdiction." Pet. Opp. 24. That argument is mistaken. Section 1005(e)(1) unmistakably removes this Court's jurisdiction as well because it explicitly states that, "[e]xcept as provided in section 1005 of the Detainee Treatment Act of 2005, no *court*, *justice*, or judge shall have jurisdiction to hear or consider" claims filed on behalf of Guantanamo detainees such as petitioner. DTA § 1005(e)(1) (emphasis added). Thus, the only jurisdiction that the DTA authorizes with respect to claims filed on behalf of Guantanamo detainees is that exercised pursuant to the exclusive review system that Section 1005(e)(2) and (3) of the DTA establishes. Because petitioner's current action does not satisfy the jurisdictional prerequisites of the exclusive review regime, "no court, justice, or judge" has jurisdiction to "hear or consider it."[10]

Petitioner's reliance on *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), is misplaced. There, the Court ruled that an 1868

[10] In any event, contrary to petitioner's contention (Pet. Opp. 30-31), even if the DTA only removed the lower courts' jurisdiction over actions filed on behalf of Guantanamo detainees, this Court could not continue to exercise jurisdiction and render a decision that would require a district court (which lacks jurisdiction under the DTA) to grant petitioner habeas relief. See, *e.g.*, *Bruner*, 343 U.S. at 116-118 (requiring dismissal of action brought before repeal of district court's jurisdiction); *Gallardo* v. *Santini Fertilizer Co.*, 275 U.S. 62, 63-64 (1927) (ordering dismissal of action for injunctive relief brought before repeal of the district court's jurisdiction to grant such relief); *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541, 544-545 (1867) (dismissing appeal from circuit court for want of jurisdiction because statute prohibiting exercise of circuit court jurisdiction was enacted after suit was brought).

statute that withdrew from this Court's appellate jurisdiction the authority to review habeas corpus decisions of lower federal courts was inapplicable by its terms to the Court's original habeas jurisdiction "derived from the Constitution and defined by the act of 1789." *Id.* at 102. The 1868 law's targeted removal of this Court's jurisdiction to review lower court judgments stands in stark contrast to the DTA, which amends 28 U.S.C. 2241 to eliminate all habeas jurisdiction over Guantanamo detainees and authorizes in its place jurisdiction over actions brought by them only to the extent "provided in section 1005." DTA § 1005(e)(1). Accordingly, the DTA, unlike the 1868 law in *Yerger*, removes this Court's jurisdiction to hear petitioner's "original" habeas petition.[11]

Furthermore, petitioner's reading of the DTA would effectively shift the pending detainee litigation from the lower courts to this Court, either by way of certiorari petitions or original petitions for habeas corpus. Nothing in the Act permits that result. See Gov't Mot. 20 n.10.[12]

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[11] Petitioner misleadingly cites (Pet. Opp. 27) a statement from Senator Kyl to support his contention that the DTA did not remove Supreme Court jurisdiction over petitioner's habeas application. Read in context, Senator Kyl's statement makes clear that the Supreme Court review to which he was referring was review of a decision rendered by the District of Columbia Circuit pursuant to its exclusive DTA jurisdiction. See 151 Cong. Rec. S14268 (Dec. 21, 2005) (statement of Sen. Kyl) (after observing that "[a]ll habeas actions are terminated by [the DTA]," Senator Kyl explains that, with respect to the District of Columbia Circuit's "exclusive jurisdiction," Supreme Court "appellate review" will be available).

[12] Petitioner contends (Pet. Opp. 21 n.19) that if this Court cannot exercise jurisdiction now, it cannot exercise jurisdiction to review a decision by the District of Columbia Circuit issued under the DTA's exclusive review procedures. That is incorrect. This Court cannot exercise jurisdiction now because Section 1005(e)(1) removes habeas jurisdiction over petitioner's existing action and provides that no court—or "justice"—may hear or consider actions filed on behalf of Guantanamo detainees except as provided by the DTA. The only judicial review of military commissions that the DTA authorizes is of "final decisions of military commissions." DTA § 1005(e)(3). While the DTA does not

III. THE DTA'S REMOVAL OF HABEAS JURISDICTION OVER PENDING CASES DOES NOT RAISE ANY SERIOUS CONSTITUTIONAL QUESTIONS

Petitioner argues (Pet. Opp. 25) that reading the DTA to preclude this Court's review of the judgment below "would raise grave constitutional questions" under the Exceptions Clause because it would deprive this Court of its "supremacy" under Article III. That is incorrect. Even assuming petitioner had standing to invoke the Exceptions Clause (but see pp. 18-20, *infra*), respondents have not suggested that the DTA requires this Court to leave the judgment below intact. See Gov't Mot. 3, 13 n.6 (suggesting as an alternative disposition that the Court could vacate and remand with instructions to dismiss the petition).[13] Because the Court retains the authority to vacate the judgment below, there is no Exceptions Clause issue. This Court may dispose of the case in any manner consistent with the recognition that the federal courts may no longer exercise jurisdiction over petitioner's habeas case.

Petitioner's Suspension Clause challenge is similarly unavailing. First, as petitioner acknowledges (Pet. Opp. 37), "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain* v. *Pressley*, 430 U.S. 372, 381 (1977). See *St. Cyr*, 533 U.S. at 314 & n.38 ("Congress could, without raising

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expressly call for Supreme Court review of the District of Columbia Circuit's decisions, Section 1005(e)(2) and (3)—unlike Section 1005(e)(1)—do not remove this Court's jurisdiction over such decisions under 28 U.S.C. 1254(1).

[13] This Court should deny petitioner's extravagant request for yet "additional briefing" (Pet. Opp. 5 n.1) on the issue of vacatur of the decision below. As the statements cited in the text above demonstrate, respondents specifically suggested in their motion to dismiss that the Court could vacate the judgment below if it believes that vacatur is the most appropriate course.

any constitutional questions, provide an adequate substitute through the courts of appeals."). While petitioner emphasizes that the DTA's exclusive review procedure is not unlimited, that is not the test. Rather, petitioner must show that the remedy created by Congress is "inadequate" or "ineffective." Because the DTA authorizes petitioner to challenge whether "the use of [military commission] standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States" to the extent they are applicable, DTA § 1005(e)(3)(D)(ii), petitioner cannot meet his "burden of demonstrating inadequacy and ineffectiveness." *Fisher* v. *Gibson*, 262 F.3d 1135, 1145 (10th Cir. 2001), cert. denied, 535 U.S. 1030 (2002). See *United States* v. *Hayman*, 342 U.S. 205, 223 (1952). Moreover, if petitioner is convicted and is subsequently foreclosed by application of the DTA from raising certain claims, the Court could consider his Suspension Clause challenge when the complaint would be ripe. See *ibid.* Awaiting such a challenge would provide a concrete record on which to review petitioner's contention that he has been denied review with respect to particular claims and, in all likelihood, a decision from the District of Columbia Circuit addressing that contention.

Furthermore, as an alien enemy combatant detained outside the United States, petitioner is not entitled to any constitutional protection under the Suspension Clause. In *Eisentrager*, *supra*, the Court held that alien enemy combatants detained outside the United States have no constitutional right to habeas relief, 339 U.S. at 777-781, and no Fifth Amendment rights, *id.* at 781-785. As this Court explained, if the Constitution conferred rights on foreign enemy combatants, "enemy elements * * * could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the Fourth, as well as rights to jury trial as in the

Fifth and Sixth Amendments." *Id.* at 784. Had the Bill of Rights been meant to extend so far, the Court observed, "it could scarcely have failed to excite contemporary comment," yet "[n]ot one word can be cited," and "[n]o decision of this Court supports such a view." *Ibid.*

This Court has repeatedly reaffirmed that holding of *Eisentrager*. Indeed, in *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), this Court reiterated *Eisentrager*'s "emphatic" rejection of the extension of constitutional protections to nonresident aliens abroad such as petitioner in the course of rejecting the defendant's claim that a search of his Mexican residence violated the Fourth Amendment and the equal protection component of the Fifth Amendment. The Court explained that "[n]ot only are history and case law against [defendant], but as pointed out in [*Eisentrager*], the result of accepting his claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." *Id.* at 273. The Court further observed that because the defendant "is an alien who has had no previous significant voluntary connection with the United States," cases establishing that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country," *id.* at 271, "avail him not," *ibid.* See *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."). Those precedents apply with full force to aliens held outside the United States at Guantanamo. See DTA § 1005(g).

Rasul v. *Bush*, 542 U.S. 466 (2004), is not to the contrary. In *Rasul*, this Court held that the "statutory predicate" for the Court's holding in *Eisentrager* was "overruled" by this Court's decision in *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973). *Id.* at 479; see *id.* at 475 ("The question now

before us is whether the *habeas statute* confers a right to judicial review of the legality of Executive detention of aliens [at Guantanamo].") (emphasis added). The Court did not, however, cast any doubt on *Eisentrager*'s ruling that the *Constitution* does not guarantee aliens held abroad a right to habeas corpus. See *id.* at 478.

Accordingly, petitioner, who has never entered the United States and who was determined by a CSRT to be an enemy combatant based on his affiliation with al Qaeda, cannot claim the protection of our Constitution.

CONCLUSION

For the reasons stated above and in respondents' motion to dismiss, this Court should dismiss the writ for want of jurisdiction, vacate and remand with instructions to dismiss the case, or dismiss the writ as improvidently granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

FEBRUARY 2006

EXHIBIT 4

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.K.,* et al., **Petitioners,** **v.** **GEORGE W. BUSH, et al.,** **Respondents.**	**Civil Action No. 04-1136 (JDB)**

ORDER

Upon consideration of petitioners' Motion to Stay Military Commission Proceedings and request for expedited consideration of the motion, it is this 30th day of December, 2005, hereby

ORDERED that petitioners shall, by not later than January 5, 2006, file a memorandum that addresses the following: (1) the extent to which the Court retains jurisdiction to consider the motion while this case is before the United States Court of Appeals for the District of Columbia Circuit; (2) assuming that there is no bar to considering the motion due to the pendency of the appeal, whether this motion nonetheless is covered by the February 3, 2005, order that stayed proceedings in this case "for all purposes," pending resolution of the appeal; and (3) assuming that the Detainee Treatment Act of 2005 ("DTA"), H.R. 1815, 109th Cong. §§ 1401-06 (2005), is enacted into law, whether -- and if so, to what extent -- the DTA affects the jurisdiction of the Court to consider this motion; it is further

---

* Because petitioner O.K. was a minor when the habeas petition in this case was filed, the Court uses his initials, consistent with the rules of this Court and the practice of the parties throughout this litigation. See L.Civ.R. 5.4(f)(2).

ORDERED that respondents shall, by not later than January 9, 2006, file a memorandum that addresses the same issues and that further provides an anticipated timetable for O.K.'s trial by military commission and any other pertinent information that may affect the extent to which expedited consideration of petitioners' motion would be warranted were the Court to determine that the motion is properly before it; and it is further

ORDERED that respondents' obligation to respond to the merits of petitioners' Motion to Stay Military Commission Proceedings is continued pending the Court's consideration of these threshold jurisdictional and prudential questions.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

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Counsel for respondents

EXHIBIT 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ISSAM HAMID ALI BIN ALI AL JAYFI, et al.,	)	
Petitioners,	)	
v.	)	Civil Action No: 05-2104 (RBW)
GEORGE WALKER BUSH, et al.,	)	
Respondents.	)	

ORDER

On December 30, 2005, President Bush signed into law H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006 ("the Act"). Section 1005(e) of the Act, entitled Judicial Review of Detention of Enemy Combatants, provides that

> (1) IN GENERAL- Section 2241 of title 28, United States Code, is amended by adding at the end the following:
>
> '(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider–
>
> > '(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
> >
> > '(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who–
> >
> > > '(A) is currently in military custody; or
> > >
> > > '(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.'.

The Act raises serious questions concerning whether this Court retains jurisdiction to hear this case and all related matters. Accordingly, it is, this 4th day of January, 2006, hereby

ORDERED that the petitioners shall show cause by January 12, 2006, why this action should not be dismissed for lack of jurisdiction. It is further

ORDERED that the respondents shall file any response thereto by January 19, 2006, and the petitioners shall file a reply, if any, by January 24, 2006.

SO ORDERED.

REGGIE B. WALTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GHASSAN ABDULLAH Al SHARBI, Petitioner, v. GEORGE WALKER BUSH, President of the United States, *et al.,* Respondents.	Civil Action No. 05-CV-2348 (EGS)

UNOPPOSED MOTION FOR FIRST NUNC PRO TUNC EXTENSION OF TIME TO FILE RESPONDENTS' OPPOSITION TO PETITIONER'S COUNSEL'S MOTION TO ENJOIN MILITARY COMMISSION PROCEEDINGS

Respondents, through undersigned counsel, hereby move this Court for an extension of time until 5:00 p.m., May 9, 2006, in which respondents may file their opposition to petitioner's counsel's motion to enjoin military commission proceedings in this case. Petitioner's counsel has concurred in this request. The reasons for this request are as follows:

1. Petitioner's counsel's motion to enjoin military commission proceedings was filed on May 8, 2006. Later that day, the Court entered a Minute Order making respondents' opposition due at 12:00 p.m. on May 9, 2006.
2. Respondents' counsel did not receive an e-mail notification through the ECF system of the Court's May 8, 2006 Minute Order.
3. On May 9, 2006, respondents' counsel did receive an e-mail notification through the ECF system entitled "Set Deadline/Hearings," which stated that respondents' opposition was due on May 9, 2006, but did not specify a specific hour the opposition was due. Respondents' counsel did not learn of the time the opposition was due until the deadline for filing had passed.

4. Petitioner's counsel has advised that he does not oppose the extension of time requested herein.

5. Respondents' counsel understands that the briefing schedule established in the Court's May 8, 2006 Minute Order will be modified to extend petitioner's counsel's time to file a reply to 5:00 p.m. on May 10, 2006, and has no objection to the extension.

Accordingly, respondents request an extension of time until 5:00 p.m., May 9, 2006, for respondents to file their opposition to petitioner's counsel's motion to enjoin military commission proceedings.

Dated: May 9, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ Terry M. Henry / Nicholas J. Patterson
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GHASSAN ABDULLAH Al SHARBI, Petitioner, v. GEORGE WALKER BUSH, President of the United States, *et al.*, Respondents.	Civil Action No. 05-CV-2348 (EGS)

ORDER

Respondents' Unopposed Motion for First Nunc Pro Tunc Extension of Time to File Respondents' Opposition to Petitioner's Counsel's Motion to Enjoin Military Commission Proceedings is GRANTED.

Respondents' opposition to the motion to enjoin military commission proceedings (dkt. no. 7) may be filed by 5:00 p.m. on May 9, 2006. Petitioner's counsel's reply may be filed by 5:00 p.m. on May 10, 2006.

SO ORDERED.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GHASSAN ABDULLAH AL SHARBI, *et al.*, Petitioners, v. GEORGE WALKER BUSH, President of the United States, *et al.*, Respondents.	)	Civil Action No. 05-CV-2348 (EGS)

NOTICE OF CORRECTION TO RESPONDENTS' OPPOSITION TO PETITIONER'S COUNSEL'S MOTION TO ENJOIN MILITARY COMMISSION PROCEEDINGS

Respondents hereby notify the Court and petitioner's counsel of an inadvertent citation error in Respondent's Opposition to Petitioner's Counsel's Motion to Enjoin Military Commission Proceedings (dkt. no. 9), filed May 9, 2006. At the top of page 7 of respondent's opposition, the text currently reads:

> "It is particularly important for the [movant] to demonstrate a substantial likelihood of success on the merits." Id. at 242 (citing Benten v. Kessler, 505 U.S. 1084, 1085 (1992)) (emphasis added).

The citation is erroneous. The text should read:

> "It is particularly important for the [movant] to demonstrate a substantial likelihood of success on the merits." Barton v. District of Columbia, 131 F. Supp. 2d 236, 242 (D.D.C. 2001) (citing Benten v. Kessler, 505 U.S. 1084, 1085 (1992)) (emphasis added).

Dated: May 10, 2006

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ Terry M. Henry
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Attorneys for Respondents

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GHASSAN ABDULLAH AL SHARBI, by his father and next friend, Abdullah Al Sharbi, Petitioner,	)	
v.	)	
GEORGE W. BUSH, President of the United States; DONALD RUMSFELD, United States Secretary of Defense; GORDON R. ENGLAND, Secretary of the United States Navy; JOHN D. ALTENBURG, JR., Appointing Authority for Military Commissions, Department of Defense; Brigadier General JAY HOOD, Commander, Joint Task Force, Guantánamo Bay, Cuba, and Colonel BRICE A. GYURISKO, Commander, Joint Detention Operations Group, Joint Task, Guantánamo Bay, Cuba, Respondents.	)	1:05-cv-2348 EGS

PETITIONER GHASSAN ABDULLAH AL-SHARBI'S RESPONSE TO RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION TO ENJOIN MILITARY COMMISSION PROCEEDINGS

Petitioner responds to Respondents' Opposition [Document No. 9] to his Motion to Enjoin Military Commission Proceedings [Document No. 7].

1. **Respondents' Exhibit 1 Eloquently Demonstrates the Severity of the Injury that a Continuation of the Military Commission Proceedings will Occasion Petitioner.**

While seeking to trivialize the extent of the injury which continued proceedings before a tribunal of dubious and challenged legitimacy will cause Petitioner, Respondents present this Court with an article from the Washington Post describing the proceedings of the Commission

on April 27, 2006, at which Petitioner was present. The article accurately[1] describes several self-incriminating statements made by Petitioner. While Respondents characterize the present Commission proceedings as "preliminary in nature," Resp's Opp. At 3, they have, by their own submission demonstrated just how injurious such "preliminary" proceedings can be to Petitioner.

Petitioner, detained at Guantánamo without charges for over four years, blurted out statements which, taken at face value, can be interpreted as serious admissions against interest. Judge Kollar-Kotelly in *Hicks* and in the cases she cited (*See* Pet. Mot. To Enjoin, Exhibit A [1]) made no distinction based on the particular stage of an illegitimate proceeding in order to find irreparable injury. It makes no difference whether the Commission proceeding is at a preliminary stage or in full bloom. Irreparable injury consists in compulsory submission to an illegitimate tribunal at <u>any</u> stage.

In addition, Respondents err in asserting that the Commission proceedings against Petitioner are "preliminary in nature." The trial calendar recently issued by the Commision (Pet. Mot. To Enjoin, Exhibit E [5]) sets Petitioner's case for the week of May 15th with no limitation of what will occur during that session (or those sessions).

2. <u>This Court should Refrain from a Dispositive Ruling based on the Detainee Treatment Act.</u>

Respondents here, as they have done elsewhere, have invoked the Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, 119 Stat. 2739 ("DTA"), arguing that the DTA strips this

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[1] The undersigned was present at that hearing, although not in the capacity of Petitioner's Military Commision counsel. The undersigned confirms the accuracy of the Washington Post's report of his statements.

Court of all jurisdiction over Guantánamo detainees. Respondents cite no cases (and none are known to the undersigned) in which a court has acceded to the Government's efforts to preempt the judiciary before the constitutionality and applicability of the DTA has been definitively ruled on by an appellate court. Such efforts by the Government are advanced on the apparent assumption that a District Court will rule needlessly on a critical and potentially-dispositive issue that is already before the D.C.Circuit Court of Appeals in *Al Odah* (*See* Pet. Mot. To Enj., Exhibit B [2]) and raised *sua sponte* by the United States Supreme Court in the oral argument of *Hamdan* on March 28, 2006.

While the Respondents here cannot be faulted for raising the issue, lest it later be deemed to have been waived, it is neither necessary nor desirable that this Court now rule definitively – one way or the other – on the DTA before appellate courts now pondering the issue have pronounced on it.

3. **The Factual Distinctions in *Hicks*, Urged by Respondents, is Irelevant.**

Repondents argue (Resp's Opp. At 5-6) that the Order in *Hicks* should not control here, because *Hicks* was farther along before the Commission than Petitioner's case. Significantly, Respondents do not contend that Judge Kollar-Kotelly's order was in error – only that the underlying commission proceeding had evolved more fully than Petitioner's case. Respondents are arguing, in effect, that this Court should wait awhile, until Petitioner has had further opportunities to suffer injury, before intervening to stop the proceedings until the Supreme Court has ruled in *Hamdan*.

Judge Kollar-Kotelly's order did not turn on the specific stage of the Commission proceedings in *Hicks*. It is irrational to suggest that an illegitimate proceeding (as such it may

ultimately be judged) should be allowed to carry on until it has advanced beyond what Respondents are pleased to characterize as the "preliminary" stage. Respondents' position is comparable to suggesting that an ill patient should refrain from seeking treatment until his condition becomes critical.

4. **A Stay of the Military Commission Proceedings Comports with the Posture of this Court in Having Stayed all Guantánamo Habeas Corpus Cases Pending the Decision in *Al Odah*.**

This Judge and others of this Court have sensibly stayed habeas corpus proceedings in essentially all pending cases, in light of the global consideration being given to such cases by the D.C. Circuit Court of Appeals in *Al Odah*. There is little point in a multitude of possibly conflicting rulings issuing from different judges of this Court, when the overall viability of such actions is presently before the D.C. Circuit Court of Appeals. Likewise, it is prudent and sensible to call a halt to Military Commission proceedings – proceedings that may shortly be held to be invalid or otherwise flawed – when that issue is presently with the United States Supreme Court awaiting decision. Respondents optimistically suggest that the Supreme Court "is likely to issue a ruling no later than June, 2006" (Resp's Opp. At 6). One can only hope that Respondents' optimism proves prophetic, as an early resolution of the critical constitutional issues swirling around the military commissions is plainly in the interest of all concerned. If Respondents are correct in their prediction, then the stay/injunction requested here by Petitioner will be short, if the commissions and their present procedures are upheld. If, however, the Supreme Court requires more time than Respondents anticipate to resolve these issues, or if an opinion is issued which requires

significant changes in commission procedure, Petitioner's need of a stay/injunction will be correspondingly all the greater.

Furthermore, the supposedly short interval between now and a Supreme Court decision is quite irrelevant on the issue of Petitioner's injury. We've already seen, thanks to Respondents' own exhibit, how much damage Petitioner can do to himself, even at a preliminary hearing. On the other hand, the short interval between now and a Supreme Court decision predicted by Respondents demonstrates how slight the inconvenience to Respondents will be. Even if Respondents' predictions about the timing of the *Hamdan* decision should prove sanguine, and the time to decision is much greater than they expect, any inconvenience to the Government will be purely logistical. The potential damage to Petitioner, in contrast, is grave.

Burlington, Vermont
May 10, 2006

DOWNS RACHLIN MARTIN PLLC

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GHASSAN ABDULLAH AL SHARBI

BTV 481127 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GHASSAN ABDULLAH AL SHARBI,	)	
Petitioner,	)	
v.	)	Civil Action No. 05-2348 (EGS)
GEORGE BUSH, *et al.*,	)	
Respondents.	)	

ORDER

Pending before the Court is petitioner's Emergency Motion to Enjoin Military Commission Proceedings. Petitioner has been detained since March of 2002 and is currently being held at the United States Naval Station, Guantanamo Bay, Cuba ("Guantanamo"). Petitioner requests that the Court enjoin the military commission("commission") proceedings that are to resume against him on May 15, 2006, until the Supreme Court has issued a final decision in the appeal of *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

A motions hearing was held on May 11, 2006.[1] Upon consideration of the motion, the response and reply thereto, the oral arguments, and the Supreme Court's grant of *writ of certiorari* in *Hamdan*, which has been fully briefed and argued,

[1] Petitioner's motion was filed on May 8, 2006, and the briefing was completed on an expedited basis, in order to accommodate the time constraints of this case.

the Court concludes that petitioner's motion is **GRANTED** and any military commission proceedings[2] scheduled to resume on May 15, 2006, shall be **STAYED** pending the issuance of a final decision by the Supreme Court in *Hamdan*.

"To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*." *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Hicks v. Bush*, 397 F. Supp. 2d 36, 44 (D.D.C. 2005).

The harm to the petitioner is undoubtedly irreparable. Next week, petitioner faces proceedings before a commission that may be deemed illegal within a month. On the other hand, the Court fails to see any prejudice to the respondents by waiting for the Supreme Court's determination that its commission does not violate the Constitution. The government contends that it would suffer a "practical prejudice" if it were unable to proceed as quickly as it would like. The government's approach, however, to continue proceedings before a military commission whose very legality is under review by the Supreme Court, hardly seems more

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[2] Includes all pretrial proceedings, such as a preliminary hearing, motions hearing or others.

practical.[3] The government also claims that this brief delay would imperil the war effort. The government has not explained, however, why the Court must adhere to the laws of war now, rather than wait a few weeks so that it may follow the rule of law, as it will be determined by the Supreme Court.

The premise of the government's final argument, that this Court is without jurisdiction to entertain any habeas corpus petition filed by a Guantanamo detainee, including one already pending when the Detainee Treatment Act was signed into law on December 30, 2005 - is a disputed issue that was litigated and is currently under consideration by the United States Court of Appeals for the District of Columbia, *Kalid v. Bush,* 355 F. Supp. 2d 311 (D.D.C. 2005), *appeal docketed sub nom. Boumediene v. Bush*, Nos. 05-5062, 05-5063 (D.C. Cir. Mar. 10, 2006), and by the Supreme Court in *Hamdan*. Until that dispute is resolved by these higher courts, respondent's argument is premature. *See Adem v. Bush*, No. 05-723, 2006 WL 1193853 (D.D.C. Apr. 28, 2006).[4]

Thus, for the foregoing reasons, petitioner's motion is

---

[3]Indeed, as early as December of 2004, the government recognized the practicality of staying military commission proceedings pending the outcome of *Hamdan*. *See Al Qosi v. Bush*, No. 04-1937, slip op. at 2 (Dec. 17, 2004). Although policy changes are certainly within the government's prerogative, the Court cannot understand how staying military commission proceedings in the present case, when a final decision in *Hamdan* is even more imminent, is any less practical.

[4]No appeal has yet been docketed.

GRANTED and respondents are enjoined from further proceedings associated with the military commission process with respect to petitioner, pending a final decision by the Supreme Court in *Hamden*. A status hearing is scheduled for June 29, 2006 at 11:30 a.m.

Signed by: **EMMET G. SULLIVAN**
UNITED STATES DISTRICT JUDGE
May 12, 2006