

UNITED STATES OF AMERICA

v.

OMAR KHADR

D094- Supplemental Defense Motion

To Suppress Derivative Evidence from
Statements Procured Using Torture,
Coercion and Cruel, Inhuman, and
Degrading Treatment

12 April 2010

1. Timeliness: This motion is not filed within the timeframe established by the Military Judge's 4 January 2010 scheduling order. The defense asks for leave of the Commission to accept this late filing. The reason for the delay is two-fold. First, defense counsel have been diligently reviewing and reading thousands of classified and unclassified documents. Second, defense counsel have been waiting for the Secretary of Defense to provide revised rules for this commission case.

2. Relief Sought: The accused, Omar Khadr (Mr. Khadr), seeks an order declaring inadmissible into evidence all statements and derivative evidence pursuant to § 948r of the Military Commissions Act of 2009 (MCA or Act) and Military Rule of Evidence 304 (MRE 304).

3. Burden of Persuasion: Because this motion challenges the admissibility of Mr. Khadr's statements, and the evidence derived therefrom, on the basis that the statements were obtained by use of torture and other forms of cruel, inhuman, and degrading treatment, the prosecution bears the burden of establishing the admissibility of these statements and evidence. MRE 304.

4. Facts:

a. The facts in and attachments to this motion remain unchanged from the initial motion filed 7 November 2008.

b. The instant motion extends specifically to those items the government intends to introduce at trial (including but not limited to a video tape showing Mr. Khadr allegedly with men producing improvised explosive devices (IED) and all IED material seized at the compound).

c. The law and argument have been updated to reflect the recent changes to the MCA and the failure by the Secretary of Defense to promulgate a new Manual for Military Commissions.

5. Law and Argument:

ALL EVIDENCE SEIZED AT THE COMPOUND WHERE MR. KHADR WAS LIVING IS INADMISSIBLE AS FRUIT OF THE POISONOUS TREE.

a. All evidence recovered subsequent to any statement Mr. Khadr made in response to coercive interrogation must also be suppressed because failure to do so would reward the government for its misconduct.

b. Because the Secretary of Defense has failed to act in accordance with Section 1805 of the 2009 MCA, the Military Rules of Evidence which govern general courts-martial practice should be applied to this motion and any subsequent hearing. As of today, April 12, 2010, the Secretary of Defense has not submitted revised military commission rules. Because 90 days has passed since the enactment of the 2009 MCA, the 2006 version of the Manual for Military Commissions is no longer in effect. Therefore, the rules that apply to General Courts-Martial are now applicable to current military commission cases, except when the 2009 MCA is in conflict with such rules. In the context of this motion, Military Rule of Evidence 304(a) states “an involuntary statement or any derivative evidence therefrom may not be introduced against an accused who made the statement...”.

c. It is clear that the Constitution bars the use of evidence derived from coerced statements obtained in violation of the Fifth Amendment and Due Process Clause unless the means by which the evidence was discovered is free of the taint of the earlier violation: “[T]he Court requires the exclusion of the physical fruit of actually coerced statements.” *United States v. Patane*, 532 U.S. 640, 644 (2004) (distinguishing between Miranda violations and coerced statements obtained in violation of the Constitution for purposes of applying the derivative evidence rule). The Court has long applied the same rule (and the same distinction with regard to evidence derived from Miranda violations alone) in other contexts as well. See *Elstad v. Oregon*, 470 U.S. 298, 313 (1985) (“There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect’s will and the uncertain consequences of disclosure of a ‘guilty secret’ freely given in response to an unwarned but non-coercive question”); *Clewis v. Texas*, 386 U.S. 707 (1967) (applying derivative evidence rule to voluntary statement taken following coerced statements); see also cases cited at *Elstad*, *supra*, at 314 n.3. The derived evidence in this case falls squarely within this rule.

d. Absent a clearly applicable derivative evidence rule, the government has an incentive to intentionally violate the Military Commission Act’s provision that excludes statements obtained by torture or cruel, inhuman or degrading treatment, in the hopes of securing derivative evidence. Indeed, in some government agencies’ interrogators have been *trained* to violate an accused’s rights to maximize their chances of obtaining derivative evidence that may prove even more valuable than the accused’s statements, which, if the product of torture, cruel, inhuman or degrading treatment, are inadmissible. The Military Commission Act’s provision that excludes statements obtained by torture or cruel, inhuman or degrading treatment would mean little if this Commission is allowed to consider such evidence.

d. It is readily apparent from the discovery provided to the defense that the evidence Mr. Khadr seeks to suppress is a product of Mr. Khadr’s coerced statements at Bagram. [REDACTED] the commander of the initial raid on the compound, returned to the scene a month after the raid. He returned with the specific intent to find items that were buried in the compound. The items seized by [REDACTED] were buried in a location known only to the people living in the compound. The only survivor from the battle with intimate knowledge of the compound was Mr. Khadr. Because the statements which led to the discovery of this evidence were the poisonous tree, the evidence seized is the fruit of that poisonous tree and must be suppressed.

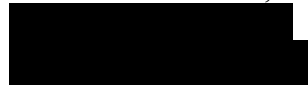
6. Witnesses and Evidence: The defense requests this matter be taken up at the April 28, 2010, hearing to address the suppression of Mr. Khadr's statements. No additional witnesses need be produced by the defense other than those requested pursuant to D-094.

7. Certificate of Conference: The Defense understands the Prosecution intends to introduce this evidence at trial and therefore would object to the requested relief.

/s/

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UNITED STATES OF AMERICA

D-111
Government Response

v.

OMAR AHMED KHADR

To the Defense Motion
To Suppress
(Video of Accused)

a/k/a “Akhbar Farnad”

a/k/a “Akhbar Farhad”

a/k/a “Ahmed Muhammed Khali

23 April 2010

1. Timeliness: The Government initially requested that the Military Judge permit the parties to brief this issue after the revised Manual for Military Commissions has been issued. On 19 April, the Military Judge indicated this motion would be addressed independently of D094, and directed the Government to file a response to the motion in accordance with the current rules applicable before this Military Commission.

2. Relief Sought: The Government respectfully asks the Commission to deny the Defense motion to suppress the video of the accused making and planting improvised explosive devices (IED) recovered from the rubble of the compound in which the accused was captured, as there is no basis to suppress the video.

3. Overview: The discovery, in the rubble of the compound in which the accused was captured, of a video of the accused making and planting IEDs was completely independent of, and unrelated to, any statement made by the accused. The video, therefore, is not derivative of any statement by the accused whatsoever. Further, even if the Commission were to determine the accused made a statement excludable under 10 U.S.C. § 948r and that discovery of the video was somehow derivative of that statement, the video is still admissible because it would have inevitably been discovered. United States forces had sufficient independent reason to return and search the compound, quite apart from any statement the accused might have made.

4. Burden of Proof: The Military Judge may, and in this case should, require the Defense to specify the grounds upon which it moves to suppress the video of the accused. MCRE 304(d)(3); *see also* MRE 304(d)(3), MCM (2008). The Commission should require the Defense to come forward, as an initial matter, with some evidence to establish that discovery of the video was derived from an excludable statement by the accused. If and when the Defense does so, the burden is on the Government to demonstrate, by a preponderance of the evidence, the admissibility of the evidence. MCRE 304(e); *see also* MRE 304(e).

5. Facts:

a. On or about [REDACTED], U.S. forces under the command of then-[REDACTED] captured the accused after a firefight at a compound near Khowst, Afghanistan.

b. One month later, on [REDACTED] August 2002, while exploiting the compound where the accused was captured, U.S. forces discovered a videotape. The videotape shows the accused and other al Qaeda operatives constructing and planting improvised explosive devices while wearing civilian attire.

c. On [REDACTED] July, when the accused was captured, U.S. forces could only hastily exploit the compound for intelligence due to the urgent need to evacuate the injured, including the accused, for medical attention.

d. At that time, [REDACTED] formed the intent to return at a later date to more fully exploit the compound. Based on the intensity of the combat at the compound, [REDACTED] surmised the location might contain important intelligence on al Qaeda and/or the Taliban.

e. In addition, [REDACTED] had intelligence there might be tunnels concealed under the compound. Based on that intelligence, he determined that, when he did return to exploit the site, he would require earthmoving/excavation equipment. [REDACTED] also believed it possible that bodies were buried in the rubble of the compound, and thought he would need a bulldozer to recover those bodies.

f. The principal reason [REDACTED] did not return to the compound to exploit it until a month after the accused's capture was that he had been unable to secure the services of a bulldozer any sooner.

g. At the time [REDACTED] returned to the compound on [REDACTED] August, he had no information from the accused giving him reason to believe there was anything of value to be found in the compound.

h. The accused never provided any information during the time between his capture and the date on which [REDACTED] returned to the compound that caused anyone to recommend or suggest the compound should be searched.

6. Discussion:

EVEN IF THE COMMISSION APPLIES THE RULES FOR COURTS-MARTIAL, THE VIDEO THE ACCUSED SEEKS TO SUPPRESS IS ADMISSIBLE BECAUSE IT WAS NOT DERIVED FROM ANY EXCLUDABLE STATEMENT.

a. Under derivative evidence rule the Defense urges the Commission to apply,¹ the video of the accused making and planting IEDs may be admitted against the accused if the Military Judge finds, by a preponderance of the evidence, that the evidence was not

¹ The Commission need not decide what rules apply to this hearing in order to resolve the Defense motion to suppress the video of the accused. Even if Rule for Courts-Martial 304, MCM (2008), were to apply, as the Defense argues, the Government would still prevail and the video would be admissible, as it is in no way derived from excludable statements.

obtained by use of an involuntary statement. *See* MILITARY RULE OF EVIDENCE (MRE) 304(b)(3).

b. The testimony of now-██████████ will establish that his unit found the video of the accused completely independent of any statements by the accused. Indeed, ██████████ testimony will establish he formed the intent to return and exploit the compound before he ever left the compound on the day the accused was captured. Further, ██████████ will testify he had no knowledge of any statement by the accused concerning material of value in the compound, so he his decision to return there – which led to his discovery of the video – was completely independent of any statement by the accused, voluntary or involuntary. Because the evidence will establish discovery of the video was not obtained by use of any statement by the accused, MRE 304 provides no basis to suppress it.

EVEN IF THE COMMISSION APPLIES THE RULES FOR COURTS-MARTIAL, AND FINDS THE ACCUSED MADE EXCLUDABLE STATEMENTS RELATED TO THE VIDEO, THE VIDEO IS ADMISSIBLE BECAUSE U.S. FORCES WOULD HAVE INEVITABLY DISCOVERED THE VIDEO.

c. Under the derivative evidence rule the Defense urges the Commission to apply, the video of the accused making and planting IEDs may be admitted against the accused if the Military Judge finds, by a preponderance of the evidence, that the video would have been obtained even if the excludable statement had not been made. *See* MRE 304(b)(3). That standard is met here. ██████████ and his unit had sufficient independent reason to return and search the compound, apart from any statement by the accused.

d. As noted above, ██████████ will testify he had intelligence from sources completely independent of the accused that there might be tunnels under the compound, and he desired to excavate the compound to locate those tunnels, if they did indeed exist. As well, ██████████ will testify he formed the intent to return and search the compound on ██████████ July 2002, the day the accused was captured, as a result of the intensity of the combat required to take the compound. From that fact, he concluded the compound must be an important location likely to contain valuable intelligence about the enemy. Further, ██████████ will testify that, over the course of the intervening month, he made efforts that eventually resulted in obtaining the services of a bulldozer to assist in exploitation of the compound. These facts establish that U.S. forces would have returned and searched the compound, and found the video of the accused, regardless of anything the accused might have said. Consequently, the video would have inevitably been discovered, and there is no basis under MRE 304 to exclude it.

THE VIDEO IS ADMISSIBLE AS NO DERIVATIVE EVIDENCE RULE EXISTS TO BAR ITS ADMISSION; NOR DOES THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION APPLY IN THIS MATTER.

1. No Derivative Evidence Rule Applies To Bar Admission Of The Video.

e. The rules of procedure and evidence contained in the 2007 Manual for Military Commissions (MMC) remain in effect. Under the Military Commissions Act (MCA) of 2009, Congress intended the rules and procedures contained in the 2007 MMC to remain in effect until the Secretary of Defense promulgated new rules and procedures to replace them. To that end, Congress provided that the 2007 MMC should remain in effect, to the extent not inconsistent with the 2009 MCA, despite the wholesale adoption of a new Military Commissions Act in 2009. P.L. 111-84, §1804(d)(2), 123 Stat. 2613. While the statute does contain language that the 2007 MMC would remain in effect until the earlier of the date on which the Secretary submitted to Congress the new Manual or 90 days after the date of enactment of the Act, *id.*, that language must be understood in context.

f. In the very next section of the statute, Congress explicitly directed the Secretary to submit revised rules not later than 90 days after enactment. *Id.* at § 1805, 123 Stat. 2614. Congress' expectation was that revised rules would be promulgated within 90 days, and that, by virtue of the prior section of the law, the 2007 MMC would continue in force until the revised rules supplanted them. That view is buttressed by the entire milieu in which both the 2006 and 2009 MCA were enacted. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the U.S. Supreme Court held, in part, that the system of military commissions established by the President in his Military Order of November 13, 2001, 3 CFR, 2001 Comp., §1(e), p. 918 (2002), was invalid because it violated Article 36(b), Uniform Code of Military Justice (UCMJ). *Hamdan*, 548 U.S. at 624. In response, the Congress quickly enacted the Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600. That Act specifically amended Article 36(b), UCMJ, to eliminate the requirement, as interpreted by the Supreme Court, that the rules applicable in military commissions be uniform with those applicable in courts-martial. *Id.* at §4(a)(3)(B), 120 Stat. 2631. Subsequently, pursuant to the 2006 MCA, the Secretary promulgated the 2007 MMC, which, while largely congruent with the Manual for Courts-Martial (MCM), diverged from the MCM in various significant respects.

g. When Congress revisited the question of military commissions in the 2009 MCA, it left unchanged its 2006 amendment of Article 36, UCMJ. Further, it again explicitly empowered the Secretary to prescribe rules for military commissions, and authorized him to “make such exceptions in the applicability of the procedures and rules of evidence otherwise applicable in general courts-martial as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need consistent with” the statute. 10 U.S.C. § 949a(b)(1) (2009). Finally, Congress directed the Secretary to submit “the revised rules for military commissions prescribed by the Secretary” to the House and Senate Armed Services Committee. Pub. L. 111-84, § 1805(a), 123 Stat. 2614.

h. Congress, therefore, never intended the MCM should apply, *in toto*, to military commissions convened pursuant to the 2009 MCA. Rather, Congress intended the Secretary to issue rules and procedures tailored for military commissions under the Act, as he had done under the 2006 MCA, and that the 2007 MMC would remain in effect pending a seamless transition to the revised manual.

i. MCRE 304, MMC (2007), does not contain any derivative evidence rule, and the absence of any such rule, when contrasted with MRE 304(b)(3), MCM (2008), is even more striking. Because the 2007 MMC continues to apply and because it contains no derivative evidence rule, there is no basis to suppress the video on the grounds that it may have been derived from excludable statements.

j. Even if the Commission were to conclude section 1804(d)(2)(B) of the 2009 MCA extinguished the 2007 MMC on the 90th day after enactment of the 2009 MCA (i.e. 26 January 2010), nothing in the law mandates application of the MCM at this time; rather, only the statute would control.

k. As noted above, in enacting both the 2006 and 2009 MCAs, Congress intended that special rules apply to trials by military commission. While Congress required those special rules be based upon the rules applicable in trial by general courts-martial, it also recognized that those rules are not apt for trial by military commission without modification. Consequently, it makes no sense, and would undermine the clear congressional intent, to read the MCA as in some way requiring the application of the MCM to trials by military commission.

l. The Defense cites the language in section 949r(a) which says, “Except as otherwise provided in this chapter or chapter 47 of this title, the procedures and rules of evidence applicable in trials by general courts-martial of the United States shall apply in trials by military commission.” 10 U.S.C. § 949r(a). This language, however, must be read in context and in light of the previously discussed congressional intent.

m. Taken in context, this language serves not to directly impose the MCM on military commissions, but rather as direction to the Secretary, and a limit on his discretion in the exercise of his delegated authority to make rules for military commissions. The quoted language comes just after the point in the statute where Congress delegates authority to the Secretary to prescribe rules and procedures for trial by military commission. It then tells the Secretary the procedures he promulgates may not be inconsistent with the 2009 MCA, and that he must follow the Manual for Courts-Martial, *except as otherwise provided* by MCA or UCMJ. *Id.* The next section then sets out authorized exceptions, and says the Secretary may “make such exceptions in the applicability of the procedures and rules of evidence otherwise applicable in general courts-martial as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need consistent with” the 2009 MCA. 10 U.S.C. § 949a(b)(1). That section goes on to include a number of provisions that the revised rules for military commissions must include.

n. The Defense, therefore, is mistaken when it reads the statute to directly apply the MCM to trials by military commission. That reading ignores the context of the language on which it relies, and goes contrary to congressional intent. Properly understood, the MCA merely establishes limits on the Secretary’s exercise of his delegated discretion to make rules for military commission, and says nothing about what rules actually apply.

o. Consequently, if the Commission concludes that the 2007 MMC is no longer operative, then it must conclude that no rules currently are in force, and that the proceedings are governed

solely by the statute. As the statute contains no derivative evidence rule – despite detailed rules on the admissibility of statements by the accused, 10 U.S.C. § 948r – there is no basis to exclude the video from evidence on the grounds it might have been derived from excludable statements.

2. The Fifth Amendment Is Inapplicable.

p. Nor does the Fifth Amendment to the U.S. Constitution provide a basis for excluding the video. The U.S. Supreme Court has held that enemy aliens detained on a U.S. military base in Germany have no rights under the Fifth Amendment. *Johnson v. Eisentrager*, 339 U.S. 763, 782-85 (1950). More recently, in *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229 (2008), the Supreme Court addressed the narrow question whether the Suspension Clause of the Constitution, art. I, § 9, cl. 2, applies to alien enemy combatants detained at Guantanamo Bay, solely upon the determination of a Combatant Status Review Tribunal. The Court concluded that uncharged enemy combatants at Guantanamo Bay must, after some period of time, be afforded the right to challenge their detention through habeas corpus. In reaching that conclusion, the Court considered both the historical reaches of the writ of habeas corpus, *id.* at 2244-51, and the “adequacy of the process” that the petitioners had received. The Court signaled no intention of extending the individual rights protections of the Constitution to alien enemy combatants being tried by military commission.

q. To the contrary, the Court emphasized that “[i]t bears repeating that our opinion does not address the content of the law that governs petitioners’ detention.” *Id.* at 2240, 2277. The Court observed that the petitioners in that case had been held for over six years without ever receiving a hearing before a judge, *id.* at 2275, and the Court specifically contrasted the circumstances of the petitioners with the enemy combatants in *Quirin* and *Yamashita* who had received a trial before a military commission (under procedures far more circumscribed than those applicable here). The Court noted that it would be entirely appropriate for “habeas corpus review . . . to be more circumscribed” if the court were in the posture of reviewing, not the detention of uncharged enemy combatants, but those who had had a hearing before a military commission “involving enemy aliens tried for war crimes.” *Id.* at 2270-71.

r. *Boumediene*, thus, was a decision concerning the separation of powers under the Constitution and the role that the courts may play, under the unique circumstances of the detention at Guantanamo Bay, in ensuring judicial review of the detentions of individuals who had not received any adversarial hearing before a court or military commission. *Id.* at 2259 (“[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers.”). In considering whether the Suspension Clause would apply, *Boumediene* articulated a multi-factored test of which the first factor required consideration of “the detainees’ citizenship and status and the adequacy of the process through which status was determined.” *Id.* at 2237. In this case, there is no challenge before this commission to the legal presumption that Khadr is an alien unlawful enemy combatant, and he is being tried before a military commission established by an Act of Congress and with the panoply of rights secured by the MCA. Thus, under the test set forth in *Boumediene*, the accused could not claim any rights under the Suspension Clause. It goes without saying that he may not lay claim to any of the other individual rights secured by the Constitution.

s. Indeed, even if the Defense could claim an entitlement under *Boumediene* to rights under the Suspension Clause, the Supreme Court’s decision did not, in any way, upset the well-established holding, previously recognized by these Commissions, that the Fifth Amendment and other individual rights secured by the Constitution do not apply to alien enemy combatants lacking any voluntary connection to the United States. The Supreme Court has recognized that the writ of habeas corpus historically has had an “extraordinary territorial ambit.” *See Rasul v. Bush*, 542 U.S. 466, 482 n.12 (2004). By contrast, the Court has made clear—in precedents that *Boumediene* did not question—that the individual rights provisions of the Constitution run only to aliens with a substantial connection to our country and not to alien enemy combatants detained abroad. *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *see also Johnson v. Eisentrager*, 339 U.S. 763 (1950) (finding “no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses”).

t. Indeed, even when an alien is found within United States territory (as was the nonresident alien in *Verdugo-Urquidez*) the degree to which constitutional protections apply depends on whether the alien has developed substantial *voluntary* contacts with the United States. *Id.* at 271. The accused’s contacts with the United States, which consist solely of unlawfully waging war against the nation and being detained in a U.S. military base, “is not the sort to indicate any substantial connection with our country.” *Id.*; *see Eisentrager*, 339 U.S. at 783 (finding “no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses”). As the *Eisentrager* Court explained, “[i]f [the Fifth] Amendment invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers” because “American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans.” 339 U.S. at 783.

u. *Boumediene*’s holding was premised on the unique role of habeas corpus in policing the separation of powers in our constitutional system, *Boumediene*, 128 S. Ct. at 2259, and on a factual difference between *Eisentrager*’s petitioners and those in *Boumediene*: the former did not contest their *status* as enemy combatants; the latter did and thus required a remedy in habeas. *Id.* Nothing in *Boumediene*, however, casts doubt on *Eisentrager*’s well-established (and subsequently applied) denial that the Constitution applies *in toto* to nonresident aliens. *Boumediene* certainly does not extend the Constitution’s individual-rights protections, contrary to *Eisentrager*, *Verdugo-Urquidez* and other cases, to alien unlawful enemy combatants facing congressionally-constituted military commissions. To paraphrase the *Boumediene* Court itself, “if the [petitioner’s] reading of [*Boumediene*] were correct, the opinion would have marked not only a change in, but a complete repudiation of” long-standing precedent. *Id.* at 2258. As the Court explained in *Agostini v. Felton*, 521 U.S. 203 (1997), “if a precedent of this Court has direct application in a case, yet appears to rest on reason rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Id.* at 237-38 (quotation omitted); *see also Public Citizen v. U.S. Dist. Court for Dist. of Columbia*, 486 F.3d 1342 (D.C. Cir. 2007) (“The Supreme Court has repeatedly cautioned that we ‘should [not] conclude [that its] more recent cases have, by implication, overruled an earlier precedent.’”) (quoting *Agostini*, 521 U.S. at 237) (alteration

in original). Thus, the recognition that *Boumediene* did not overrule those cases is sufficient in and of itself to deny the Defense's motion.

v. Contrary to *Agostini*, however, the Defense would read *Boumediene* as, *sub silentio*, overruling the Court's existing precedents and providing a multi-factored test for the analysis of other constitutional rights. It is clear, however, that the test enunciated by the Court to determine whether the Suspension Clause applied to the *Boumediene*-petitioners was specifically tailored to measuring whether the Suspension Clause—and not any other constitutional provision—applies to those petitioners. *See id.* at 2237.

w. Under that functional analysis endorsed in *Boumediene* for purposes of the Suspension Clause, it is clear that enemy aliens abroad do not come within the protection of the Due Process Clause. The Government has broad latitude when it operates in the international sphere, where the need to protect the national security and conduct our foreign relations is paramount. *See Haig v. Agee*, 453 U.S. 280, 292, 307-308 (1981); *see also Palestine Information Office v. Schultz*, 853 F.2d 932, 937 (D.C. Cir. 1988) (in applying constitutional scrutiny to challenged Executive action within United States, court must give particular deference to political branches' evaluation of our interests in realm of foreign relations and selection of means to further those interests). In the international arena, distinctions based on alienage are commonplace in the conduct of foreign affairs. *See, e.g., DKT Memorial Fund, Inc. v. Agency for International Development*, 887 F.2d 275, 290-291 (D.C. Cir. 1989) (Government speaks in the international sphere "not only with its words and its funds, but also with its associations"). Drawing a distinction between aliens abroad, on the one hand, and those who make up part of our political community, on the other hand, is a basic feature of sovereignty. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982); *Foley v. Connelie*, 435 U.S. 291, 295-296 (1978); *cf. Mathews v. Diaz*, 426 U.S. 67, 80, 85 (1976) (it is "a routine and normally legitimate part" of business of Federal Government to classify on basis of alien status and "take into account the character of the relationship between the alien and this country"). In this context, application of due process principles to limit the political branches' treatment of aliens abroad—particularly with respect to interrogations that may be used to gather intelligence—would improperly interfere with those branches' implementation of our foreign policy and their ability to successfully prosecute a foreign war.

7. Oral Argument: The Government does not request oral argument but is prepared to argue this motion should the Commission find it helpful.

8. Witnesses: The Government will call [REDACTED], to explain his involvement in the seizure of the videotape and other bomb-making materials in question.

9. Conference: Not applicable.

10. Attachments: None.

11. Additional Information: None.

12. Submitted by:

//s//

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