UNITED STATES OF AMERICA	)	**D-060**
	)	
v.	)	
	)	**Defense Reply to Government Response**
	)	
	)	**Defense Motion to Dismiss Charge IX**
	)	
KHALID SHEIKH MOHAMMED; WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI	)	**4 December 2008**

1. Timeliness: This motion is timely filed.

2. Relief Requested: The defense[1] respectfully requests this Military Commission dismiss Charge IX.

3. Overview: As is laid out in the Defense Motion to Dismiss Charge IX, D-060, dated 3 November 2008, Material Support for Terrorism did not apply extraterritorially in 2001 and carried a maximum punishment of ten years. The prosecution of these defendants for MST, therefore, is an Ex Post Facto application of the law. The government primarily argues that the defendants have no "ex post facto rights." This position is specious. The Ex Post Facto Clause is a structural constraint on Congress that prevents it from encroaching on the judicial function of determining the legal consequences of past conduct. Irrespective of whatever other Constitutional "rights" these defendants have, Charge IX is an impermissibly retroactive application of the criminal law and should therefore be dismissed.

4. Argument:

a. The Ex Post Facto Clause Applies

(1) Trial counsel's primary argument in defense of Charge IX is that "Alien unlawful enemy combatants, such as the accused, have no rights under the Ex Post Facto Clause." (Government Response to Joint Defense Motion to Dismiss Charge IX for Failure to

[1] Mr. Mohammed and Mr. Ali, through standby counsel, reserve the right to join this pleading at a later time after they have had adequate opportunity to consult with counsel.

Mr. Bin 'Attash reserves his right to join this motion at a later time, once he is able to fully consider it in his primary language of Arabic. Due to the inability of the contracted linguists to accomplish the necessary translations, as explained in Defense's Special Request for Relief D-047, Mr. Bin 'Attash is unable to review the material and make an informed decision in a timely fashion such that he can represent himself before this court.

Mr. bin al Shibh joins in this motion provisionally. In so joining, he does not waive any argument or motion relating to the pending question of his competency to stand trial.

State an Offense Over which the Commission has Jurisdiction, dated 21 November 2008, at 5(a) ("Gov't Resp.").) In support of this argument, trial counsel proffers its reading of *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), as addressing "a narrow question –whether the Suspension Clause of the Constitution, art. I § 9, cl. 2, applies to alien enemy combatants detained at Guantanamo Bay…." Gov't Resp., at 5(a). By trial counsel's logic, therefore, the Ex Post Facto Clause of the Constitution, art. I § 9, cl. 3, must not apply.

(2) If *Boumediene* decided anything, it is that the political branches of government do not have the power to "turn the Constitution on or off at will." *Boumediene*, 128 S. Ct., at 2259. The mere desire to evade the Constitution by "off-shoring" these trials is of no significance with respect to the powers the Constitution gives and withholds from the President and Congress.

(3) The Defense emphatically disputes the government's tired refrain that these defendants have no rights other than those afforded by political grace. *See* Def. Reply, D-059, Joint Motion for Relief - Requesting Commission Treat Constitution & Bill of Rights as Governing Law in Proceedings, dated 21 November 2008. That, however, is not the question before the military judge. The defense places no reliance upon (and frankly has never heard of) "ex post facto rights." The Defense rests on a proposition that trial counsel does not dispute – that *Boumediene* "was a decision concerning the separation of powers under the Constitution." Gov't Resp. at 5(c), citing *Boumediene*, 128 S. Ct., at 2259. "Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments … protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." *Id*. at 2246

(4) If this is undisputed, on what basis can trial counsel argue that the Ex Post Facto Clause does not apply, when the *adjacent clause* of Article I "has full effect at Guantanamo Bay"? *Id*. at 2262. Trial counsel does not answer this question. It instead offers the military judge pages of digression into the same arguments it makes every time a detainee dares to even mention the Constitution.

(5) As a matter of litigation strategy, this is understandable. Trial counsel has no other choice. Even a summary review of the precedent on the Ex Post Facto Clause makes abundantly clear that the Ex Post Facto Clause "upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Weaver v. Graham*, 450 U.S. 24, n. 10 (1981); *see also Ogden v. Blackledge*, 2 Cranch 272, 277 (1804) ("To declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is that the legislative power shall be separated from the judicial."). Indeed, in one of the very first of the *Insular Cases* (which *Boumediene* identified as controlling on GTMO as they are on Puerto Rico, *Boumediene*, 128 S. Ct., at 2254), the Supreme Court held that even with respect to the unincorporated territories, "when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description*." *Downes v. Bidwell*, 182 U.S. 244, 277 (1901) (emphasis in original). More than any other provision of Article I, the Ex Post Facto Clause keeps the political branches out of the judicial function of deciding the criminal consequences of past acts –of deciding "what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

(6) If trial counsel's argument that *only* the Suspension Clause constrains the political branches' authority over GTMO is correct, nothing would prevent Congress from taking an up-or-down vote on the guilt of these defendants or even from vesting them with a titles of nobility. Indeed, nothing would prevent the political branches from instituting chattel slavery or authorizing medical experimentation on GTMO detainees generally.

(7) While basic trust in the political branches makes these horribles unlikely, basic trust is not a replacement for the Constitution:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

THE FEDERALIST, NO. 78 (Madison). In short, *Boumediene* held that the political branches cannot use the legal forms of a lease agreement with Cuba to contract for themselves powers the Constitution denies them. *Boumediene*, 128 S. Ct., at 2258-59 ("[T]he Government's view is that the Constitution had no effect [in GTMO], at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint. Our basic charter cannot be contracted away like this.").

b. Charge IX Violates the Ex Post Facto Clause

(1) There is a reason trial counsel must argue that the Constitution does not apply. There is no dispute that the Ex Post Facto Clause prohibits Congress from "retroactively altering the definition of crimes or increasing the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990); Gov't Resp. at 7. Since Charge IX does *both* of these things by 1) covering extraterritorial acts that MST did not cover in 2001 and 2) raising the penalty from 10 years to life, it is difficult to see how else Charge IX could be sustained.

(2) The half of trial counsel's brief dedicated to the merits of the Ex Post Facto claim is a patchwork of briefs the government has filed in other commission cases on issues that range from the commission's jurisdiction over criminal enterprise offenses, *see United States v. Hamdan*, Ruling on Defense Motion D-022 to Dismiss Conspiracy, 1 June 2008, to the various civil war era precedents relating to the now defunct theory of "unprivileged belligerency." *See United States v. Jawad*, D-007, Ruling on Defense Motion to Dismiss – Lack of Subject Matter Jurisdiction (24 September 2008). Defense counsel is at a loss for how to respond other than by reference to the briefing on those issues in this case and the rulings elsewhere that addressed them squarely.

(3) Not until page twelve of its fourteen-page brief is Material Support for Terrorism (MST) addressed at all. Rather than account for MST's rapidly evolving fifteen years of legislative history, trial counsel attempts to argue by analogy to another litany of inapposite

precedents from the Civil War. Gov't Resp, at 5(o). Even if the precedents cited stood for the proposition that "joining" proscribed groups was historically a crime, MST cuts far wider than "joining." By *express incorporation* of Title 18, MST covers activity that could even arise out of arms-length business transactions. *See Boim v. Holy Land Foundation for Relief and Development*, 2008 WL 5071758, at *5 (7th Cir. 2008) ("Primary liability in the form of material support to terrorism has the character of secondary liability. Through a chain of incorporations by reference, Congress has expressly imposed liability on a class of aiders and abettors."); *United States v. Al-Arian*, 308 F.Supp.2d 1322, 1337-38 (M.D.Fla. 2004) (recognizing extensive debate in the federal courts about the scope of MST and concluding that in some Circuits "a cab driver could be guilty for giving a ride to a [Foreign Terrorist Organization (FTO)] member to the UN, if he knows that the person is a member of a FTO or the member or his organization at sometime conducted an unlawful activity in a foreign country. Similarly, a hotel clerk in New York could be committing a crime by providing lodging to that same FTO member under similar circumstances as the cab driver.").

(4) The issue is not, however, the viability of the analogy to Nineteenth Century law, since Congress did not vest this commission with jurisdiction over common law crimes. Jurisdiction is over MST, a statutory offense that explicitly incorporates a definition of "material support," as a defined term of art. As a defined term, "material support" has been repeatedly redefined and was revised as late as 2006. USA PATRIOT Reauthorization and Improvement Act of 2006, PL 109-177, Title I, § 110(b)(3)(B) (9 March 2006). The military judge does not need to rely upon the canon of construction that says Congress intends terms of art to have the same meaning across the U.S. Code. *Cf. Branch v. Smith*, 538 U.S. 254, 281 (2003); *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972); *United States v. Freeman*, 3 How. 556, 564-565 (1845). Congress expressly said so. "In this paragraph, the term 'material support or resources' has the meaning given that term in section 2339A(b) of title 18." MCA § 950v(b)(25)(B).

(5) While the Ex Post Facto Clause may not prohibit changes to "where or how criminal liability is adjudicated," Gov't Resp., at 8, it unambiguously prohibits against *who*, for *what* and from *when* specific criminal liability can attach. These defendants could not have been charged in 2001 with MST *in any court* for the conduct alleged in Charge IX. It is a categorical Ex Post Facto application of the law, since it "inflict[s] *punishments*, where the party was not, by *law*, liable to *any punishment.*" *Stogner v. California*, 539 U.S. 607, 613 (2003) (emphasis in original).

c. Conclusion

As is detailed in the motion to dismiss, MST in Title 18 could not have reached these defendants for the conduct alleged in Charge IX in 2001. The MCA was passed in 2006. These defendants were charged in 2008. A crime that could not be charged in 2001 cannot be resurrected seven years later because of trial counsel's irresponsible and discredited litigation position that "The accused are not entitled to any constitutional protections, including with respect to the Ex Post Facto Clause." Gov't Resp., at ¶ 6. "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene v. Bush*, 128 S.Ct. 2229, 2277 (2008). Accordingly, Charge IX should be dismissed.

Respectfully submitted,

FOR: _____
Khalid Sheikh Mohammed, *Pro Se*

FOR:_____
Walid Bin 'Attash, *Pro Se*
LCDR James Hatcher, JAGC, USN
Capt Christina Jimenez, JAGC, USAF
Standby Counsel for Mr. Bin 'Attash
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, D.C. 20301

Ed McMahon
Advisory Civilian Counsel
1307 New Hampshire Avenue, NW
2nd Floor
Washington, DC 20036

FOR: _____
Ali Abdul Aziz Ali, *Pro Se*
LCDR Brian Mizer, JAGC, USN
MAJ Amy Fitzgibbons, JA, USA
Standby Counsel for Mr. Ali
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, D.C. 20301

Jeffery Robinson
Amanda Lee
Schroeter Goldmark & Bender
Advisory Civilian Counsel
500 Central Building 810 Third Ave
Seattle, WA 98104

BY: _____*Suzanne Lachelier*_____
CDR Suzanne Lachelier, JAGC, USNR
LT Richard Federico, JAGC, USN
Detailed Counsel for
Ramzi bin al Shibh
Office of the Chief Defense Counsel
[redacted]

Thomas Anthony Durkin, Esq.
DURKIN & ROBERTS
53 West Jackson Blvd., Ste 615
Chicago, IL 60604

BY: _____*Jon Jackson*_____
MAJ Jon Jackson, JA, USAR
LT Gretchen Sosbee, JAGC, USN
Detailed Counsel for
Mustafa al Hawsawi
Office of the Chief Defense Counsel
[redacted]

Nina Ginsberg, Esq.
DIMURO GINSBERG, PC
908 King Street, Ste. 200
Alexandria, VA 22314