	)	**D-062**
	)	
UNITED STATES OF AMERICA,	)	**Defense Reply**
	)	
vs.	)	Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder)
	)	
KHALID SHEIKH MOHAMMED, *et. al*	)	
	)	4 December 2008
_____	)	

1. **Timeliness**: This reply is timely filed under the Military Judge's 26 November 2008 e-mail order.[1]

2. **Overview**:

a. The government argues that the Accused may not invoke the protection of the Bill of Attainder Clause; and, if they may, the MCA does not constitute legislative punishment in violation of the Clause. Neither argument is correct.

b. For the reasons set forth in the defense submissions in support of D-059, Motion for Appropriate Relief – Constitution and Bill of Rights Applies in GTMO, the protections of the United States Constitution, including the Bill of Attainder clause, plainly run to these Accused. Furthermore, the Constitution's prohibition against bills of attainder is a structural limitation on the power of Congress – its application is not dependent upon the alienage or place of detention of the Accused.

c. The government does not contest that the MCA singles these Accused out for special treatment based on their past acts. Instead, it repeatedly points to the fact that the MCA defines various crimes and provides for a "trial" as a prerequisite to conviction. It therefore argues that no punishment will be imposed on the Accused without a judicial trial. It either does not grasp, or ignores, the fact that it is *the application itself of the MCA to the Accused* – not any sentence which may ultimately be imposed upon them – which constitutes "punishment," and makes the MCA a bill of attainder. Nothing in the government's response alters the inescapable fact that the MCA constitutes legislative punishment by depriving the Accused of the right to a fair and

[1] Mr. Mohammed and Mr. Ali reserve their 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.

regular trial, as well as other important civil and political rights. Congress's creation of a trial system, long after the alleged conduct of these Accused, employing specially-tailored rules of evidence and procedure designed to ensure their conviction, is plainly "punishment," imposed upon the Accused by legislative enactment without judicial trial.

3. **Reply**

a. The Bill of Attainder Clause Applies to These Accused.

(1) The government seeks to avoid the obvious conclusion that the MCA is an unconstitutional bill of attainder by arguing that the "protection" of the Bill of Attainder Clause (as well as "structural or other protections of the Constitution") does not apply to these Accused. The Bill of Attainder Clause, however, is a structural limitation on congressional power. It governs Congress's conduct regardless of whether the individuals adversely affected have independent legal rights under the Constitution. *See Downes v. Bidwell*, 182 U.S. 244, 277 (1901) ("when the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' . . . it goes to the competency of Congress to pass a bill of that description."); *see also Weaver v. Graham*, 450 U.S. 24, 29-30 (1981) ("The presence or absence of an affirmative, enforceable right is not relevant . . . to the ex post facto prohibition."). Accordingly, the Bill of Attainder Clause (like the Ex Post Facto Clause) prohibits legislative punishment regardless of where the individuals affected by it are detained.

(2) Furthermore, the Supreme Court has recognized that Guantanamo Bay is within the "territorial jurisdiction" of the United States. *See Rasul v. Bush*, 542 U.S. 466, 480 (2004) (interpreting habeas statute); *see also id.* ("[T]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base." (citing the terms of the 1903 lease agreement)); *id.* at 487 (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory . . . ."); *id*. ("From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it.") (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950).[2]

b. The MCA Constitutes Legislative Punishment.

(1) As noted above, the government does not contend that the MCA is anything other than an act aimed at an identifiable class of persons based on irreversible past conduct.[3] Instead,

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[2] The Accused also rely upon, and incorporate here by reference, their arguments in support of D-059, Motion for Appropriate Relief – Constitution and Bill of Rights Applies in GTMO, which establish that the United States Constitution is generally applicable to them.

[3] The government cites *Hamdan* for the dubious proposition that the Court "invited the politically accountable branches" to pass a bill of attainder. In support of this notion, the

the government argues that the MCA is not "legislative punishment" because any criminal penalties imposed on the Accused will only follow trial with "robust" procedures. (Govt. Resp. at 3.) By this argument the government at least concedes that when the MCA's procedural guarantees fall below some level, their application to the Accused would constitute a bill of attainder. The error in the argument is not only the claim that the MCA's procedural guarantees are "robust" (they are not), but also the assumption that if the procedures were "robust," they would be constitutional. In fact, it does not matter how "robust" the procedures authorized by the MCA may be – it is inescapably the case that they are less protective of the Accused than the procedures for trial by court-martial or by a federal court, and are designed to facilitate their conviction using evidence that does not meet conventional standards of reliability.

(2) There can be little doubt that deprivation of the right to a fair trial itself constitutes punishment. The government does not contend otherwise, nor does it address the Accused's argument that the need for reliability in the guilt phase of a criminal trial is vastly enlarged when a death sentence is sought. *See* D-062, Joint Defense Motion to Dismiss Charges for Lack of Jurisdiction (Bill of Attainder), 3 November 2008, at pp. 6-7. Instead, the government argues that the Accused will receive a fair trial under the "robust" procedures for trial by military commission. The government lists in its response a number of purported rights available under the military commission system,[4] but the relevant question is not what rights the MCA provides, rather it is what rights it takes away. The government contends that the MCA is "modeled after" courts-martial, however, the MCA explicitly breaks from court-martial procedures in key respects. In Section 948b(d) ("Inapplicability of Certain Provisions"), the MCA identifies three crucial UCMJ protections that do not apply, including "any rule of courts-martial relating to speedy trial," 10 U.S.C. § 948b(d)(1)(A), the rules "relating to compulsory self-incrimination,"

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prosecution selectively cites Justice Breyer's statement that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary," *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring), emphasizing the word "[n]othing." (Govt. Resp. at 4.) But of course, Justice Breyer did not give Congress or the Executive authority to disregard the Constitution. The government omits Justice Breyer's complete statement of his views: "If Congress, after due consideration, deems it appropriate to change the controlling statutes, *in conformance with the Constitution and other laws*, it has the power and prerogative to do so." *Hamdan*, 126 S. Ct. at 2800 (Breyer, J., concurring) (emphasis added). Obviously, the President is free to "seek"—and Congress to grant—the authority the President believes is necessary, but only within the bounds of the Constitution.

[4] It is worth noting that some of the "rights" the Government identifies exist more in theory than they do in practice. For example, the Government states the accused has the right to cross-examine witnesses who testify against him, but because the Government can base its case exclusively on documentary and hearsay evidence, the accused may have no witnesses and/or no witnesses with personal knowledge to cross-examine. *See* 10 U.S.C. § 949a(b)(2). The Government also claims that the accused has the right to present evidence in his defense, but the accused cannot compel the attendance of witnesses at a commission in Guantanamo Bay.

id. § 948b(d)(1)(B), and those relating to pretrial investigation, *id.* § 948b(d)(1)(C). The other rules "shall apply to trial by military commission only to the extent provided by this chapter." *Id.* § 948b(d)(2) (emphasis added). This is little comfort, since the MCA provides, among other things, that court-martial principles of law and rules of evidence shall apply only insofar "as the Secretary [of Defense] considers practicable or consistent with military or intelligence activities." *Id.* § 949a(a). The very same section of the MCA notes that the Secretary may prescribe that under certain circumstances the "hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission." *Id.* § 949a(b)(2)(E). This includes, notably, the admission in certain circumstances of coerced testimony. *Id.* § 948r. Thus, application of the MCA to this case deprives the Accused of many rights which are routinely provided in courts-martial. It does so notwithstanding the fact that the rules and procedures for courts-martial are flexible and designed to accommodate the needs of military operations. *See, e.g.*, M.R.E. 505 (governing discovery and use of classified information), 803, 804, and 807 (relating to hearsay).

(3) The government attempts to defend these irregularities on the basis of necessity, claiming that the "limited differences between court-martial rules and those under the MCA merely reflect military and intelligence realities." (Govt. Resp. at 6.) This is nonsense. The only "reality" the MCA is designed to account for is the fact that the United States Government has relied on absurd and outdated legal positions to indefinitely detain and mistreat numerous suspected "terrorists" in the so-called "Global War on Terror,"[5] and now finds itself in the position of having to create a justice system from whole cloth to facilitate convictions of select detainees using unreliable evidence. *See* MCA § 948r (providing for use of evidence obtained through coercion).

(4) The government's reference to evidence collected in "the midst of a battle" (Govt. Resp. at 6) as a justification for disregarding traditional restrictions on hearsay is a complete red herring. Well-developed rules of evidence exist providing for the use of hearsay under exigent circumstances, providing that the evidence can be shown to be reliable. *See, e.g.*, M.R.E. 803, 804, and 807. Moreover, interrogations conducted for operational or intelligence purposes have been specifically exempted from requirements to comply with Article 31b of the UCMJ (10 U.S.C. § 831). *See, e.g. United States v. Loukas*, 29 M.J. 385 (C.M.A. 1990); *United States v. Lonetree*, 35 M.J. 396 (C.M.A. 1992). It is only because the government seeks to convict on the basis of statements and other evidence taken for law enforcement purposes that is unreliable that the special evidentiary rules of the MCA are necessary. Likewise, the government's invocation of the need to shield "classified information" is unpersuasive. Again, a well-developed body of

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[5] *See, e.g.*, the authorities cited at pp. 7-8 of the government's response (and elsewhere in the government response briefs) to support the proposition that "unlawful combatants" lack enforceable rights and can be "shot on sight" or summarily executed under the law of war. The position, of course, ignores a century and a half of evolution of the law of armed conflict and was definitively rejected by the Supreme Court in *Hamdan*.

law exists to deal with classified information in courts-martial. *See, e.g.*, M.R.E. 505. The only "necessity" justifying military commissions' extraordinary departures from court-martial practice is the "necessity" to ensure convictions.

(5) The MCA deprives the Accused of other important rights, including those under the Geneva Conventions. The government argues that the only right the Accused have under the Geneva Conventions is to be tried by a "regularly constituted court" affording indispensable judicial guarantees, under Common Article 3 thereof. Because Congress has declared that military commissions meet this requirement, the government argues, there is no deprivation. (Govt. Resp. at pp. 5-6.) The argument is fallacious for at least two reasons.

(i) First, the right to a fair trial is not the only right guaranteed under Common Article 3, which also protects a detainee from "violence to life and person, in particular ... mutilation, cruel treatment and torture," and "outrages upon personal dignity, in particular humiliating and degrading treatment[.]" [redacted], and public source reporting reveals that his repeated and sustained torture has been far more extensive than that. These gross violations of Mr. Mohammed's personal liberty debase the government of the United States and are a blight on this country's reputation as a guarantor of human rights. They cry out for a judicial remedy. Yet the MCA not only purports to deprive the Accused of their right to access the courts to seek redress for these violations – it even provides that evidence obtained as a result may be used against them at trial.

(ii) Second, the military commission by which the Accused will be tried under the MCA is not a "regularly constituted court" affording all indispensable judicial guarantees. Congress's declaration to the contrary is of no avail because Congress has no power to declare the MCA compliant with Common Article 3. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Crediting its effort to do so "would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'" *Boumediene*, 122 S.Ct. at 2259 (quoting *Marbury*, 1 Cranch at 177). In *Hamdan*, a majority of the Supreme Court defined a "regularly constituted court" for purposes of Common Article 3 as one "established and organized in accordance with the laws and procedures *already in force* in a country." *Hamdan*, 126 S.Ct. at 2797 (emphasis added). Thus, the Supreme Court concluded that Mr. Hamdan was entitled under Common Article 3 to be tried by a tribunal employing the rules and procedures applicable in trial by courts-martial absent some "practical need" justifying deviation from court-martial practice. *Id*. Because the government had not shown any practical need justifying deviation from court-martial practice, Mr. Hamdan's military commission was deemed "illegal."

(iii) Nothing has changed. As shown above, the rules and procedures for courts-martial are designed to be flexible and to accommodate exigencies associated with military operations. The only "practical need" justifying the procedures for military commissions under

the MCA is the "need" to secure convictions using tainted evidence. As a result, the military commission that will try the Accused is not a regularly constituted court affording indispensable judicial guarantees, and the MCA constitutes punishment because it seeks to strip them of this right as well.

(6) Finally, the government argues that the habeas stripping provisions of the MCA do not constitute punishment because these Accused have no right to a habeas remedy in the first place. This is so, the government argues, because – unlike the petitioners in *Boumediene* – these Accused have actually been charged with offenses under the MCA. (Govt. Resp. at p. 7.) It is, of course, this very fact – the application of the MCA to the Accused – which constitutes punishment and gives rise to their bill of attainder claim. Nothing about the *Boumediene* decision, however, suggests that it would have been resolved differently had the petitioners there been prosecuted in a military commission. Indeed, these Accused were subjected to the same Combat Status Review Tribunal process which was found lacking in *Boumediene*. The government's anomalous argument would make more sense if the Accused had been promptly charged and prosecuted in a court-martial or federal district court.

4. **Conclusion**

The MCA is intended to deprive these Accused (and other detainees at Guantanamo Bay) of the right to a fair and regular trial and other important civil and political rights. It singles them out specifically and on the basis of past conduct. It is therefore an unconstitutional bill of attainder. As the MCA is the sole basis for the Commission's jurisdiction, all charges and specifications against these Accused should be dismissed.

DATED this 4th day of December, 2008.

Respectfully submitted,

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