UNITED STATES OF AMERICA v. KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**Defense Motion** To Dismiss for Outrageous Government Conduct or for an Evidentiary Hearing and to Stay All Other Proceedings Pending Resolution of This Motion (RAMZI BIN AL SHIBH) 8 July 2008

1. **Timeliness:** This Motion is timely filed within the deadline prescribed by the Commission in the Order on Motions for Special Relief, ¶ 15, dated 1 July 2008.

2. **Relief Sought:** On behalf of Mr. Ramzi bin al Shibh, the defense moves under R.M.C. 905(b) and 907(b)(1)(A) for dismissal of the charges on the ground that the Commission lacks personal jurisdiction over him. Because this motion goes to the power of the Court to act, the Commission must decide it before deciding any other pending matters. Accordingly, the defense moves to stay all other matters in this case until the jurisdictional issue has been resolved.

3. **Overview:** The accused, Mr. bin al Shibh, seeks a dismissal of the charges because this Commission lacks personal jurisdiction due to the government’s outrageous conduct in acquiring jurisdiction over the accused. In so urging, the accused is fully cognizant that motions to dismiss premised upon outrageous government conduct are rarely justified, and thus rarely granted . *United States v. Pemberton,* 853 F.2d 730, 735 (9th Cir. 1988) (per curium). He is also aware that the relief he requests is extraordinary and the dismissal of his indictment would be seen in certain quarters as a calamity. The treatment of Mr. bin al Shibh, however, is a blot on this nation's character, shameful in its disrespect for the rule of law, and should never be repeated As such, the government's myriad and sundry due process violations visited upon Mr. bin al Shibh have divested it of jurisdiction to prosecute him in the instant matter.

In the alternative, the accused requests an evidentiary hearing to determine whether the accused's claims of coercive treatment rising to the level of torture, and other government misconduct, could be sustained. Because this motion goes to the power of the Court to act, the Commission must decide it before deciding any other pending matters. The accused therefore requests a stay of all other proceedings until the Commission has decided this motion.

4. Burden and Standard of Proof: Because this motion challenges the jurisdiction of the Commission, "the burden of persuasion shall be upon the prosecution," R.M.C. 905(c)(2)(B). The prosecution must establish jurisdiction by a preponderance of the evidence. R.M.C. 905(c)(1) To the extent Mr. bin al Shibh has an initial burden of producing evidence to support his claim of outrageous government conduct, he expects to do so, following appropriate discovery, at an evidentiary hearing.

5. Facts:[1]

a. The accused, Mr. bin al Shibh, was arrested in Pakistan on 11 September 2002. His legal status was not determined at the time of his arrest.[2] He was not charged with any offenses until February 2008.

b. Mr. bin al Shibh was transferred for interrogation to undisclosed CIA "black sites."[3] The detention and interrogation program that held Mr. bin al Shibh was operated by the

[1] The facts set forth below are based entirely on public or "open" sources. Following appropriate discovery and at a closed session (if necessary and appropriate, *see* R.M.C. 806(b)(2)(A)), Mr. bin al Shibh expects to present additional classified and unclassified facts in support of this motion.

[2] David Johnston with David Rohde, *Threats and Responses: Captives; Terrorism Suspect Taken to U.S. Base for Interrogation,* N.Y. TIMES, Sept. 17, 2002, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A0CE6DD1430F934A2575AC0A9649C8B63.

[3] The Washington Post reported Mr. bin al Shibh was transferred out of Pakistan shortly after his arrest. *See* Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1 ("Sept. 11 planner Ramzi Binalshibh [sic] was also captured in Pakistan and flown to Thailand.")

United States Central Intelligence Agency (CIA).[4]

c. Current and former intelligence sources have exposed the abusive interrogation methods used in these CIA facilities. These "enhanced interrogation techniques" included extended sleep deprivation combined with forced standing, as well as exposure to extreme cold.[5] "The program, known as SERE—an acronym for Survival, Evasion, Resistance, and Escape. . . . subjected trainees to simulated torture, including water boarding (simulated drowning), sleep deprivation, isolation, exposure to temperature extremes, enclosure in tiny spaces, bombardment with agonizing sounds, and religious and sexual humiliation."[6]

d. It has been widely reported that Mr. bin al Shibh has suffered severe mistreatment while he was held at these CIA black sites. According to one report: "Everything was tried – from water-boarding, deprivation of various forms, and death threats, to rambling Koranic conversations. . ."[7] This author goes on to report that "In the six months since [Mr. bin al Shibh's] capture, he'd received death threats, water-boarding, hot and cold treatments, sleeplessness, noise, and more death threats."[8]

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[4] American Civil Liberties Union, *CIA Finally Acknowledges Existence of Presidential Order on Detention Facilities Abroad,* Nov. 14, 2006, *available at* http://www.aclu.org/safefree/torture/27382prs20061114.html.

[5] Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described,* ABC NEWS, Nov. 15, 2005, *available at* http://abcnews.go.com/WNT/Investigation/story?id=1322866. ABC News reported that these techniques were first authorized in mid-March 2002, before Mr. bin al Shibh was captured.

[6] Jane Mayer, *The Black Sites*, THE NEW YORKER, Aug. 13, 2007, *available at* http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer.

[7] RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11 164 (Simon & Schuster 2006).

[8] RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11 228 (Simon & Schuster 2006).

e. Mr. bin al Shibh remained a prisoner in the custody or control of the United States, at undisclosed CIA locations, until September 2006. On 6 September 2006, President Bush announced that Mr. bin al Shibh and other CIA-held prisoners had been transferred to Guantanamo Bay, Cuba.[9]

f. On 9 May 2008, the charges against Mr. bin al Shibh were referred as capital charges, for trial by military commission.

g. Mr. bin al Shibh was arraigned on 5 June 2008.

6. <u>Law and Argument</u>:

Mr. bin al Shibh seeks to dismiss the charges referred against him based on the government's outrageous conduct in detaining him without charges for nearly six years, and repeatedly and continuously subjecting him to interrogations and mistreatment from the time of his arrest, nearly six years ago. Such outrageous government misconduct invalidates the personal jurisdiction that the Commission purports to exercise over Mr. bin al Shibh.

The notion that the government's own conduct may preclude authority to exercise jurisdiction over a person is not a new concept in American jurisprudence. The Supreme Court has consistently held that due process is offended when government conduct is so egregious that it "shocks the conscience" and violates the "decencies of civilized conduct." *County of Sacramento v . Lewis*, 523 U .S. 833, 846 (1998) quoting *Rochin*, *342* U.S . at 172-73. According to the Supreme Court, the due process guarantees of the Constitution were

[9] Gerry J. Gilmore, *High-Value Detainees Moved to Gitmo; Bush Proposes Detainee Legislation*, AMERICAN FORCES PRESS SERVICE, Sept. 6, 2006, *available at* http://www.defenselink.mil/news/NewsArticle.aspx?ID=721.

intended to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression." *Collins v. Harker Heights,* 503 U .S . 115, 126 (1992) (quoting *DeShanev v. Winnebago County Dept . of Soc. Servs.,* 489 U.S. 189, 196 (1989) and *Davidson v. Cannon*, 474 U .S . 344, 348 (1986)). In *United States v. Russell*, 411 U.S. 423 (1973), the Supreme Court noted that situations may arise "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 431-32 (1973). *Russell* indicated that governmental conduct would be constitutionally impermissible where it went beyond that "'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." *Id.* (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960)). The Court relied on its earlier case, *Rochin v. California*, 342 U.S. 165 (1952), as an example of conduct that would as an example of the type of government activity that would so "shock the conscience" that it would violate due process. 411 U .S. at 432. In *Rochin,* police officers broke into the defendant ' s bedroom and unsuccessfully attempted to prevent the defendant from swallowing contraband drug capsules. The police took the defendant to the hospital where doctors forcibly pumped his stomach to retrieve the capsules . 342 U .S. at 166. The Supreme Court held:

> [W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically . This is conduct that shocks the conscience . Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents - as this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities . They are methods too close to the rack and the screw to permit of constitutional differentiation .

Id. at 172 .

More recently, the Eleventh Circuit has recognized the notion that governmental conduct may violate due process so as to deprive the court of jurisdiction. In *United States v. Edenfield*, 995 F.2d 197 (11th Cir. 1993), the court found that even in the investigative or pre-indictment stage of a case, government misconduct can violate "that fundamental fairness, shocking to the universal sense of justice mandated by the due process clause of the fifth amendment." *Id*. at 200 (quoting *United States v. Tobias*, 662 F.2d 381, 386-87 (5th Cir. 1981) and *Russell*, 411 U.S. at 432).

The Second Circuit, in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), has endorsed dismissal as a remedy for outrageous government conduct. In that case, the defendant was wanted on a warrant out of the Eastern District of New York. *Id*. at 268. The defendant, an Italian national living in Uruguay, was abducted and forcibly brought to the United States to face prosecution. *Id*. He maintained that the United States kidnapped him from his home in Uruguay and detained him for three weeks of interrogation accompanied by physical torture in Brazil. *Id*. at 269-70. Acknowledging the possibility that the government's conduct towards the defendant might preclude jurisdiction, the Second Circuit remanded the case for an evidentiary hearing to determine whether the defendant's claims of forcible abduction and torture could be sustained. *Id*. at 281. The *Toscanino* Court concluded that the court must "divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." *Id.* at 275. While acknowledging the continued validity of *Ker v. Illinois*, 119 U.S. 436 (1866) (power of court to try defendant not impaired by the fact that he was forcibly abducted), and *Frisbie v. Collins*, 342 U.S. 519 (1952) (due process merely requires the defendant's presence at the time of conviction after being appraised of the charges and after a constitutionally valid trial), *Toscanino* establishes

that due process does not permit a court to turn a blind eye when American forces capture non-citizens abroad, detain them for extended periods, and torture them. The court in *Toscanino* specifically found that where suppression of the evidence would not suffice, the indictment should be dismissed so that the government would not benefit from its illegal conduct:

> Where suppression of evidence will not suffice, however, we must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct. . . and, when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. . Accordingly, we view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.

Toscanino, 500 F.2d. at 275, citing *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *see generally, Russell*, 411 U.S. at 431-32 ("we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction,"); *cf. United States v. Fialkowski*, 2 M.J. 858 (A.C.M.R. 1976) (citing *Toscanino* as an example of "shocking misconduct which was held to preclude the acquisition of jurisdiction in personam")

The case of *Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000), also suggests the kind of governmental conduct that is outrageous, shocks the conscience, and would be constitutionally impermissible. In *Harbury*, the plaintiff alleged that persons operating under the aegis of the CIA had "psychologically abused and physically tortured [her husband,] . . . chained and bound him naked to a bed, beat and threatened him, and encased him in a fullbody cast to prevent escape." *Id.* at 598. Referring to these allegations, the District of Columbia Circuit Court of Appeals asserted that "No one doubts that under Supreme Court precedent, interrogation by torture like that alleged by [appellant] shocks the conscience." *Id. at* 602, citing *Rochin v.*

California, 342 U.S. 165, 172-73 (1952), overruled on other grounds by *Christopher v. Harbury*, 536 U.S. 403 (2002); *see also Palko v. Connecticut*, 302 U.S. 319, 326 (1937), overruled on other grounds by *Benton v. Maryland*, 395 U.S. 784 (1969) (noting that the Due Process Clause must at least "give protection against torture, physical or mental").

In light of these precedents, deliberate and severe mistreatment of an individual at the hands of the CIA constitutes conduct that shocks the conscience. The CIA's treatment of Mr. bin al Shibh in this case is every bit as shocking and outrageous, if not more so, than any cases U.S. courts have faced. According to open sources of information, Mr. bin al Shibh was seized in Pakistan, held for six years, transported to various locations around the globe, deprived of any meaningful communication with the outside world (effectively 'disappeared' from any possible public scrutiny), and interrogated numerous times.[10] He was never permitted to consult with counsel until five and a half years into his detention.[11] It is known that procedures dubbed as "enhanced interrogation techniques" were employed on high value detainees such as Mr. bin al

[10] *See* RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11, at 164-65, 228-29 (detailing interrogation techniques ostensibly employed, and Mr. bin al Shibh's resistance over time)

[11] Mr. bin al Shibh's isolation, alone, constitutes severe treatment which has been eschewed by the Supreme Court. *See In re Meyer* 134 U.S. 160, 168-70 (1890) (striking down Colorado's use of isolation on a prisoner awaiting a death sentence, and noting the ill-effects of isolation observed on prisoners: "a considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane ; others still, committed suicide ; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community."); *see also, Madrid v. Gomez*, 889 F. Supp. 1146, 1230-1231 (N .D. Cal . 1995) ("Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances.")(citing Stuart Grassian, M.D., *Psychopathological Effects of Solitary Confinement,* 140 Am . J . Psychiatry 1450 (1983))

Shibh.[12] The government's conduct was plainly outrageous; it violates the Due Process Clause, warrants relinquishment of personal jurisdiction, and dismissal of charges.

The Due Process concerns are of particular importance here, where the death penalty is the possible sentence. The Due Process guarantee implicates not only individual interests, but also society's interest in ensuring that the government does not deprive a person of life without adhering scrupulously to standards of fundamental fairness. *See Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (noting that death is "a different kind of punishment" not only to the defendant because of the finality and severity of the punishment, but also from the point of view of society, to whom it is vitally important that the choice to impose death be based on reason and fair procedures rather than emotion (citing *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977))); *see also Reid v. Covert*, 354 U.S. 1, 77-78 (1957) (Harlan, J., concurring) (emphasizing significance of death penalty in determining constitutional protections).

7. Request for Oral Argument: The defense requests oral argument and an evidentiary hearing.

8. Conference with Opposing Counsel: On 7 July 2008, the defense conferred with the Prosecution regarding its requested relief. The prosecution opposes this motion.

[12] United States Senate Select Intelligence Committee, Testimony of Director Michael Hayden, Central Intelligence Agency, February 5, 2008 (acknowledging that so-called enhanced interrogation techniques were employed at black sites)

9. **Attachments:** None, though the defense reserves the right to supplement this motion with additional, possibly classified, facts, at a later time.

Respectfully submitted,

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UNITED STATES OF AMERICA v. KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	D-014 **Prosecution Response to Defense Motion To Dismiss for Outrageous Government Conduct or for an Evidentiary Hearing and to Stay All Other Proceedings Pending Resolution of This Motion (RAMZI BIN AL SHIBH)** **7 August 2008**

1. **Timeliness:** This motion is filed within the extended deadline granted by the Military Judge.

2. **Relief:** The Prosecution respectfully requests the Military Judge deny the Defense request to dismiss the referred charges for outrageous government conduct.

3. **Overview:**

a. In light of Bin al Shibh's request to represent himself, the Detailed Defense Counsel's motion to dismiss the charges for outrageous government conduct is premature. The first and most pressing matter before this military commission must be to determine whether or not to grant Bin al Shibh's request to represent himself. If the military judge determines that the accused competently and properly made his *pro se* representation election, then the accused will have the opportunity personally to determine the course of his defense, which may or may not include a motion to dismiss based on outrageous government conduct

b. The Defense Counsel's motion also calls for a remedy not authorized by law. Federal courts have firmly and consistently held that charges may not be dismissed due to supposed "outrageous government conduct" arising out of the defendant's treatment while detained. The accused's remedy, if any, lies in the civil process or prosecution of any offenders;[1] he is not entitled to a free pass from his own criminal conduct. The Defense motion should be denied as a matter of law, and no evidentiary hearing is required.

4. **Facts:**

a. On 11 September 2001, four hijacked civilian airliners were intentionally crashed into the North and South Towers of the World Trade Center, the Pentagon, and a field in Shanksville, Pennsylvania. These attacks, which had been carried out by members of the international terrorist organization known as al Qaeda, killed 2,973 people.

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[1] This reference is not to be construed as an acknowledgment or statement of belief that the accused has a cause of action; only that the forum for the accused to pursue his allegations lies elsewhere.

b. In or about April 2002, Ramzi bin al Shibh and Khalid Sheikh Mohammed gave an interview to al Jazeera journalist Yosri Fouda in which they detailed their roles in the September 11th attacks and characterized the attacks as part of an on-going war against America.

c. On or about 11 September 2002, Ramzi bin al Shibh was captured in Karachi, Pakistan.

5. Discussion:

a. In light of Bin al Shibh's pending request to represent himself, the Detailed Defense Counsel's motion is premature. While normally detailed defense counsel would not require an invitation from the military judge to file motions it deemed necessary, this cannot be the case when an accused has invoked his privilege of self-representation on the record and in doing so has specifically disavowed the participation of his detailed defense counsel.

b. The first and most pressing matter before this military commission must be to determine whether or not to grant Bin al Shibh's request to represent himself. If the military judge determines that the accused competently and properly made his *pro se* representation election, then the accused will have the opportunity personally to determine the course of his defense, which may or may not include a motion to dismiss based on outrageous government conduct.

c. As the right to self representation is specifically granted by the Military Commissions Act, *see* 10 U.S.C. § 949a(b)(1)(D), and the accused is presumed to be competent to stand trial, *see* RMC 909(b), the Military Judge must protect the accused's rights in this regard and not entertain any motion, *at this time,* that does not bear on the issue of whether the accused competently elected to represent himself. If the accused's request to represent himself is denied by the military judge for any reason, or if the accused elects to be represented by counsel, it goes without saying that the Defense motion could be entertained at that time.

d. If the Military Judge decides to entertain this motion at this time, he should deny the Defense motion as a matter of law as the law plainly does not permit the remedy the Defense seeks: Dismissal of the referred charges and divestiture of this commission's personal jurisdiction over the accused. No evidentiary hearing is required as the issues can be handled as a pure matter of law.

An alien unlawful enemy combatant, such as Bin al Shibh, who has been charged under the MCA, has no rights under the Due Process Clause.

e. Invoking the Due Process Clause of the Fifth Amendment, Ramzi Bin al Shibh asks this commission to "relinquish personal jurisdiction" over him and for the commission to dismiss the charges based on what he characterizes as "plainly outrageous" governmental conduct in violation of the Due Process Clause. *See* Motion to Dismiss at 9. However, the Due Process Clause does not extend to alien unlawful enemy

combatants, such as the accused, who are detained at Guantanamo Bay, Cuba, to be tried for war crimes. *See Johnson v. Eisentrager*, 339 U.S. 763, 783-85 (1950).

f. In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Supreme Court addressed a narrow question—whether the Suspension Clause of the Constitution, art. I, § 9, cl. 2, applies to alien enemy combatants detained at Guantanamo Bay, who are being held based 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 reach of the writ of habeas corpus, *see* 128 S. Ct. at 2244-51, and the "adequacy of the process" that the petitioners had received, *see id.* at 2262-74. The Court signaled no intention of extending the individual rights protections of the Constitution to alien enemy combatants tried by military commission.

g. 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. That is a matter yet to be determined." *Id.* at 2277. The Court emphasized that the petitioners in that case had been held for over six years without ever receiving a hearing before a judge, *see 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 (albeit under procedures far more circumscribed than those applying 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 held a hearing before a judgment of a military commission "involving enemy aliens tried for war crimes." *See id.* at 2270-71.

h. *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 detention at Guantanamo Bay, in providing for the judicial review of the detentions of individuals who had not received any adversarial hearing before a court or military commission. *See id.* at 2259 ("[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers."); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality op.) ("[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."). 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." *See id.* at 2237. In this case, there is no dispute that the accused is an alien, 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. If the accused chooses to contest his status an alien unlawful enemy combatant—something he has not done to-date before this Commission—the Commission will determine his status only after a full and fair adversarial hearing before the Military Judge.

i. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a group of German nationals—who were captured in China by U.S. forces during World War II and imprisoned in a U.S. military base in Germany—sought habeas relief in federal court. Although the military base in Germany was controlled by the U.S. Army, *id.* at 766, the Supreme Court held that these prisoners, detained as enemies outside the United States, had no rights under the Fifth Amendment, *see id.* at 782-85. In so holding, the Court noted that to invest nonresident alien enemy combatants with rights under the Due Process Clause would potentially put them in "a more protected position than our own soldiers," who are liable to trial in courts-martial, rather than in Article III civilian courts. *Id.* at 783. The Court easily rejected the argument that alien enemy combatants should have more rights than our servicemen and women, and held instead that the Fifth Amendment had no application to alien enemy combatants detained outside the territorial borders of the United States. *See id.* at 784-85 ("Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.") (citation omitted).

j. In *Boumediene*, the Supreme Court cited *Eisentrager* approvingly. *See, e.g.*, 128 S. Ct. at 2259 ("[T]he outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in *Eisentrager*."). The Supreme Court also "d[id] not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay." *Id.* at 2252. The Supreme Court in *Boumediene* expressly contrasted the petitioners in that case to the litigants in *Eisentrager*:

> Applying this framework, we note at the onset that the status of these detainees is a matter of dispute. The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in Eisentrager did not contest, it seems, the Court's assertion that they were "enemy alien[s]." *Ibid.* In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager*, *supra*, at 766, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The *Eisentrager* petitioners were charged by a bill of particulars that made detailed factual allegations against them. To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses.
>
> In comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of

> the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. . . .

Id. at 2259-60 (alteration in original) (citations omitted).

k. Thus, in contrast to the *Eisentrager* petitioners who had received an adversarial trial and who were found not to enjoy constitutional protections, the *Boumediene* petitioners had not received a "trial by military commission for violations of the laws of war." *Id.* at 2259. As the Supreme Court said, "The difference is not trivial." *Id.* In reliance on such a distinction, the District Court in the recent habeas appeal of Salim Hamdan, which had sought to enjoin his then-imminent military commission, held that the differences between a robust trial by military commission under the MCA versus the much lower degree of process afforded the *Boumediene* petitioners made reliance on *Boumediene* largely inapposite with respect to military commission defendants:

> Unlike the detainees in *Boumediene*, Hamdan has been informed of the charges against him and guaranteed the assistance of counsel. He has been afforded discovery. He will be able to call and cross-examine witnesses, to challenge the use of hearsay, and to introduce his own exculpatory evidence. He is entitled to the presumption of innocence. And, most importantly, if Hamdan is convicted, he will be able to raise each of his legal arguments before the D.C. Circuit, and, potentially, the Supreme Court.

Hamdan v. Gates, Civil Action No. 04-1519, Memorandum Order, at 12-13 (D.D.C. 18 July 2008) (denying motion for preliminary injunction of Hamdan's military commission). Thus, *Boumediene* did not provide either Hamdan or Bin al Shibh with any rights under the Suspension Clause. It goes without saying that Bin al Shibh may not lay claim to any other rights referenced in the Constitution.

l. Indeed, even if Bin al Shibh could claim an entitlement under *Boumediene* to rights under the Suspension Clause, the Supreme Court's decision did not, in any terms, upset the well-established holdings that the Fifth Amendment and other individual rights principles of 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").

m. 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. 494 U.S. 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." *Id.*

n. *Boumediene*'s holding was premised on the unique role of habeas corpus in policing the separation of powers in our constitutional system, *see 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 so contest their status and thus required a remedy in habeas. *See 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 before 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. Because the Supreme Court did not disturb those holdings in *Boumediene*, they remain binding precedent before this Commission. 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, 1355 (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.'") (alteration in original) (quoting *Agostini*, 521 U.S. at 237). Thus, the recognition that *Boumediene* did not overrule those cases is sufficient in and of itself to deny the accused's motion.

o. *Boumediene* did not, *sub silentio*, overrule the Court's existing precedents and providing a multi-factored test for the analysis of other constitutional rights. It is clear, rather, that the test enunciated by the Court to determine whether the Suspension Clause applied to the *Boumediene*-petitioners was specifically geared to measuring whether the Suspension Clause—and not any other constitutional provision—applies to those petitioners. *See id.* at 2237. That three-part test was clearly intended by the Court only to resolve the limited issue before it, and is inapposite to the question whether others portions of the Constitution apply to alien detainees at Guantanamo.

p. Even so, under the functional analysis endorsed in *Boumediene* with respect to the Suspension Clause, 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) (holding that, in applying constitutional scrutiny to challenged Executive action within the United States, court must give particular deference to political branches' evaluation of our interests in the 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) (recognizing that the 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) (recognizing that it is "a routine and normally legitimate part" of the business of the federal Government to classify on the basis of alien status and to "take into account the character of the relationship between the alien and this country"). In this context, application of the Due Process Clause to limit the political branches' treatment of aliens abroad would improperly interfere with those branches' implementation of our foreign policy and their ability to prosecute a foreign war successfully.

Even if the Due Process Clause were applicable, Bin al Shibh's Motion Should Be Denied as a Matter of Law because His Requested Remedy—Dismissal of All Charges Against Him—Is Not Authorized by Law.

q. In order to assess whether the Defense motion is legally insufficient, this commission may accept the Defense allegations as true,[2] and determine whether the Defense has stated a cognizable claim. *See generally United States v. Padilla*, 2007 U.S. Dist. LEXIS 26077, 12-13 (S.D. Fla. 2007). Even accepting the Defense allegations as true, and even if the commission concluded that the accused suffered "shocking" due process violations during his detention, dismissal of the referred charges is unwarranted as a matter of law. The Defense does not cite a single case authorizing the relief it seeks in this circumstance, and the Supreme Court and other federal Circuit Courts have rejected similar arguments.

r. The Defense relies on dicta from *United States* v. *Russell*, 411 U.S. 423 (1973), to the effect that "we may some day be presented with a situation in which the conduct of *law enforcement agents* is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 431-432 (emphasis added). Holding aside that *Russell* did not involve alleged misconduct during a detention distinct from the pending criminal prosecution, reliance on *Russell* is misplaced. In *Hampton v. United States*, 425 U.S. 484 (1976), a case decided

[2] The Prosecution makes no averment as to the truth of the allegations set forth by the Defense.

just three years after *Russell*—a plurality opinion authored by then-Justice Rehnquist (who also authored *Russell*) cautioned that *Russell*'s dicta was "not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it [does] not approve." *Id.* at 490 (internal quotation marks omitted). The plurality opinion in *Hampton* explained that "[i]f the police engage in illegal activity," "the remedy lies . . . not in freeing the equally culpable defendant . . . but in prosecuting the police under the applicable provisions of state or federal law." *Id.* Subsequent courts have highlighted this language from *Hampton* to quash any lingering argument that the dicta in *Russell* permits a court to bar prosecution of an individual based upon his alleged mistreatment prior to trial. *See United States v. Tucker*, 28 F.3d 1420, 1423 (6th Cir. 1994) ("Recognizing the internal inconsistency of *Russell*, then-Justice . . . Rehnquist, who had penned the decision in *Russell*, soon sought to recant its 'maybe someday' dicta . . . [i]n *Hampton*[.]").

s. The Defense also cites to *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), but *Toscanino* is likewise unavailing. That case involved a defendant who alleged that government agents "kidnapped [him abroad], used illegal electronic surveillance, tortured him and abducted him to the United States for the purpose of prosecuting him here." *Id.* at 268. The Second Circuit, noting these allegations and relying on the dicta from *Russell*, found that "due process . . . requir[es] a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." 500 F.2d at 275. The court acknowledged the Supreme Court's longstanding rule—widely known as the *Ker-Frisbie* doctrine—that "the power of a court to try a person for a crime is not impaired by the fact that he has been brought within the court's jurisdiction by reason of a forcible abduction." *Id.* at 272 (citations omitted). But the Second Circuit believed that "the *Ker-Frisbie* rule cannot be reconciled with the Supreme Court's expansion of the concept of due process" in *Russell*. *Id.* at 275. The court then remanded the case to the district court for factual proceedings to determine if dismissal was warranted. The Defense fails to mention that *Toscanino* was decided two years before *Hampton*, which repudiates *Russell*'s dicta.

t. The Defense also fails to cite to a myriad of federal circuit courts that have either declined to endorse *Toscanino,* have questioned it, or rejected it outright. *See United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986) ("This court has declined to adopt the *Toscanino* approach."), *cert. denied*, 480 U.S. 919 (1987); *United States v. Darby*, 744 F.2d 1508, 1531 (11th Cir. 1984) ("The continuing validity of the *Toscanino* approach is questionable."); *United States v. Winter*, 509 F.2d 975, 987 (5th Cir. 1975) (same); *United States v. Herrera*, 504 F.2d 859, 860 (5th Cir. 1974) (same); *United States v. Best,* 304 F.3d 308, 312-313 (3d Cir. 2002) ("Subsequent decisions of the Supreme Court indicate that there is reason to doubt the soundness of the *Toscanino* exception, even as limited to its flagrant facts.") (quotations, citations, and alterations omitted); *United States v. Postal*, 589 F.2d 862, 874 (5th Cir. 1979) ("This circuit has declined to follow the *Toscanino* rationale and its continuing validity is questionable after the intervening Supreme Court decision in *Gerstein v. Pugh* . . . .") (quotations, citations, and alterations omitted); *United States v. Lopez*, 542 F.2d 283, 285 (5th Cir. 1976) ("[T]he so-called *Ker-Frisbie* rule—is that a Court's jurisdiction over a defendant cannot

be defeated because of the manner in which the defendant was brought before the Court. The exception to this rule announced in *Toscanino* has been strictly limited in later Second Circuit cases, and so far we have declined to apply it in this Circuit.") (quotations, citations, and alterations omitted); *United States v. Matta-Ballesteros*, 71 F.3d 754, 763 (9th Cir. 1995) ("[A]ttempts to expand due process rights into the realm of foreign abductions, as the Second Circuit did in *United States v. Toscanino,* have been cut short.") (quotations, citations, and alterations omitted); *United States v. Mitchell*, 957 F.2d 465, 470 (7th Cir. 1992) ("[A]lthough the Second Circuit recognized an "outrageous conduct" or "shock-the-conscience" exception to the *Ker-Frisbie* doctrine in *United States v. Toscanino* we have declined to follow the exclusionary rule grounds of *Toscanino* and have questioned its continuing constitutional vitality.") (quotations, citations, and alterations omitted). The Defense's argument flies in the face of decisions in the Third, Fifth, Seventh, Ninth and Eleventh Circuit Courts of Appeal; all of which post-date the *Toscanino* decision in the Second Circuit.

u. The Defense asserts that the referred charges should be dismissed because of alleged "outrageous government conduct," but does not cite a single case entering such an order. That is not surprising, because federal courts have refused to recognize such a defense, let alone dismiss charges on that basis. *See United States* v. *Boyd*, 55 F.3d 239, 241 (7th Cir. 1995) (Posner, C.J.) ("[T]he doctrine of outrageous governmental misconduct . . . certainly has no support in the decisions of this court, which go out of their way to criticize the doctrine. . . . Today we let the other shoe drop, and hold that the doctrine does not exist in this circuit.") (quotations, citations, and alterations omitted); *United States* v. *Tucker*, 28 F.3d 1420, 1422-1427 (6th Cir. 1994) (concluding that "such a defense simply does not exist"), *cert. denied*, 514 U.S. 1049 (1995); *cf. United States* v. *Santana*, 6 F.3d 1, 4 (1st Cir. 1993) ("[T]he doctrine is moribund; in practice, courts have rejected its application with almost monotonous regularity.")

v. In *United States* v. *Matta*, 937 F.2d 567 (11th Cir. 1991),[3] the Eleventh

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[3] The *Matta* litigation arose out of the prosecution of a Honduran citizen named Matta facing narcotics and escape charges in Arizona, California, and Florida. 896 F.2d at 256. He fled from the United States to Honduras but was captured there by Honduran military troops working in conjunction with several United States Marshals. *See id.* Matta alleged, and provided various affidavits bearing out, that the Marshals "tortured him before transporting him to the United States to face trial on [the] pending criminal charges." *Id.* As summarized by the Seventh Circuit in its opinion: [Matta] was arrested and handcuffed[.] . . . A black hood was placed over his head and he was pushed onto the floor of a car driven by the United States Marshals.. . . During the ride, Matta claims that he was severely beaten and burned . . . at the direction of the United States Marshals. Once he arrived at the airport, Matta was flown to the United States. He claims that during this flight, he was once again beaten and shocked about the body, including on his testicles and feet, again by the United States Marshals. . . . Matta was subsequently examined by a physician who found abrasions on his head, face, scalp, neck, arms, feet, and penis, as well as blistering on his back. *Id.* After being detained in an Illinois penitentiary, Matta filed a habeas petition in the Southern District of Illinois, claiming that the Marshals had tortured him and thereby violated his substantive due process rights. *See id.* Matta's petition "demanded his release back to Honduras on the basis [that] the United States was without jurisdiction to prosecute him as a result of [these] violations." *Id.* at 256-257. The district court rejected Matta's due process claim as a matter of law without holding an evidentiary hearing, *id.* at 257; this was the ruling addressed by the Seventh Circuit in its opinion. In the meantime, Matta was transferred to the Northern

Circuit affirmed the denial of a motion to dismiss premised on *Toscanino* filed by a defendant who alleged that government agents had physically mistreated him prior to trial contrary to his due process rights. The Eleventh Circuit affirmed the denial of the motion "for the reasons stated" by the Seventh Circuit in an earlier opinion in the case. *Id.* at 568 (citing *Matta-Ballesteros* v. *Henman*, 896 F.2d 255, 261 (7th Cir.) *cert. denied*, 498 U.S. 878 (1990)). In *Matta-Ballesteros*, the Seventh Circuit squarely rejected *Toscanino* and concluded that the United States had jurisdiction to prosecute a defendant even if alleged due process violations occurred. *Id.* at 259 (holding that "taking his allegations to be true" the defendant's due process claim still failed "as a matter of law"). More broadly, the Seventh Circuit emphasized the established rule that "'illegal arrest or detention does not void a subsequent conviction,'" *id.* at 260 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 199 (1975)), and reiterated that "[t]he remedy . . . for violations of the due process clause during pre-trial detention is not the divestiture of jurisdiction, but rather an injunction or money damages," *id.* at 261 n.7 (emphasis added). There is no reason to believe that *Toscanino* could be nonetheless expanded and applied in a totally distinct context to dismiss charges outright—something *Toscanino* itself did not do—based upon alleged post-conduct mistreatment while in detention prior to criminal prosecution. Such a holding would be totally without precedent and contrary to law.

w. In *United States v. Padilla*, the United States District Court in the Southern District of Florida (Miami) dealt with similar claims to those set forth by the Defense: Allegations of outrageous government conduct related to the accused's detention as an enemy combatant. In denying Padilla's motion in that case, the district court noted that many of the cases involving outrageous government conduct are cases in the context of governmental participation in the crime charged and entrapment:

> The *only* instance where the claim may be properly invoked is within this governmental participation context. *United States v. Gutierrez, Jr.*, 343 F.3d 415 (5th Cir. 2003) (holding that a defendant claiming 'outrageous government conduct,' need demonstrate "both substantial government involvement in the offense and a passive role by the defendant"); *United States v. Blood*, 435 F.3d 612 (6th Cir. 2006) ("To establish outrageous government conduct a defendant must show that "the government's involvement in creating his crime (*i.e.*, the means and degrees of inducement) was so great that a criminal prosecution for the crime violates the fundamental principles of due process.") (quotations omitted); *United States v. Garcia*, 411 F.3d 1173 (10th Cir. 2005) ("To succeed on an outrageous conduct defense, the defendant must show either (1) excessive government involvement in the creation of the crime, or (2) significant governmental coercion to induce the crime.") (quotations omitted).

Padilla, 2007 U.S. Dist. LEXIS 26077, at 12-13.

District of Florida to face prosecution in that district. Once there, he raised the same argument he first advanced in Illinois.

x. In *United States v. Boone*, 437 F.3d 829, 841-42 (8th Cir. 2006),[4] the court held that "the rule that outrageous government conduct can foreclose criminal charges has been applied by our court almost exclusively to situations involving entrapment, where law enforcement officers have sought to create crimes in order to lure a defendant into illegal activity that she was not otherwise ready and willing to commit." *Id.* at 842 (quotations omitted). The court concluded that since the defendant "has not even alleged that any government official had engaged in such conduct she has not shown any due process bar to her attempted murder conviction." *Id.* "In *Boone*, the Eighth Circuit echoed the holdings of its sister circuits by articulating that in order to invoke an outrageous government conduct claim, the government need first involve itself in the criminal scheme along with the defendant. This makes practical sense since the claim itself is borne out of 'due process' concerns." *See Padilla* 2007 U.S. Dist. LEXIS 26077, at 14 (citing *Russell*, 411 U.S. at 431-32).

y. The conduct alleged by the Defense is analogous to the conduct that Padilla claimed constituted outrageous government conduct: Alleged governmental conduct perpetrated after the commission of the accused's alleged crimes while the accused was being held as an enemy combatant. Since there is no connection whatsoever to the governmental actions alleged and the actual commission of the crimes that Bin al Shibh is alleged to have committed, there is simply no due process violation:

> First, the fact that the governmental conduct occurred at a time and place removed from the crimes charged makes the remedy Padilla is seeking considerably more attenuated and arbitrary. Short of resorting to a 'two wrongs make a right' judicial process, it is difficult for this Court to ascertain how the remedy sought emanates from the infirmity defendant describes. This is considerably distinguishable from a government entrapment scenario, where the crime that the defendant is charged with is the crux of the outrageous government conduct claim.

Padilla, 2007 U.S. Dist. LEXIS 26077, at 14-15.

z. The foregoing authorities squarely foreclose the Defense claim that the due process violations alleged in his motion have divested this commission of jurisdiction to prosecute him in the instant matter. A defendant's recourse for such mistreatment is not amnesty from prosecution —given the fact that the accused is charged with the murder of 2,973 people and the public's strong interest in seeing these charges resolved—but rather whatever relief may be available through the civil process or prosecution of his alleged oppressors. *See Matta-Ballesteros*, 896 F.2d at 261 n.7; *see generally Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388-390 (1971). Simply put, the remedy sought by the Defense in this motion is neither permissible nor appropriate.

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[4] In *United States v. Boone*, the defendant argued that the attempted murder charge against her should have been dismissed due to the outrageous government conduct of an FBI agent. Defendant claimed that she was threatened, intimidated, verbally abused, and subjected to other inappropriate conduct by the FBI agent during the investigation of the crime and the subsequent arrest.

aa. The absence of any authority for the Defense's position is understandable, because even in cases involving prosecutorial misconduct (which this is not), the Supreme Court has long counseled against setting aside convictions "where means more narrowly tailored to deter objectionable . . . conduct are available." *United States v. Hasting*, 461 U.S. 499, 506 (1983). Dismissal "must be approached with some caution" and "with a view toward balancing the interests involved." *Hasting*, 461 U.S. at 506. This principle applies with special force here, because the Defense does not allege that the *prosecution* has violated his due process rights but rather that the CIA violated the accused's rights during a period of armed conflict when gathering intelligence was vital to the national security of the United States. Even if one were to believe the Defense's claims that he was mistreated during his detention, the prosecution team and the public to which it answers should not be punished for such misconduct by outright dismissal of these charges.

bb. The cases cited by the Defense also deal primarily with law enforcement officers and subsequent domestic criminal prosecutions. The allegations raised by Ramzi bin al Shibh, however, deal with intelligence agencies trying to determine (from the man who openly admitted to the press in May of 2002 that he had coordinated these attacks) the next big attack in an on-going armed conflict between al Qaeda and the United States. To view the conduct of an intelligence agency during a time of war through the same prism as that of a domestic law enforcement officer would be neither warranted nor appropriate.

cc. The Defense is correct in one regard; the dismissal of the charges and divestiture of this commissions jurisdiction over Ramzi bin al Shibh, in which he is charged with directly participating in attacks that killed 2,973 people, based solely on allegations of governmental conduct committed after the September 11, 2001 attacks, would be seen by many as a calamity. *See* Def. Mot. at 1.

6. **Conclusion:** For the foregoing reasons, the Defense Motion to Dismiss for "Outrageous Government Conduct" should be denied as a matter of law. As it may be decided as a matter of law, there is no need for an evidentiary hearing.

7. **Attachment:** *Hamdan v. Gates*, Civil Action No. 04-1519, Memorandum Order (D.D.C. 18 July 2008) (may also be viewed at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv1519-108).

Respectfully submitted,

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