[Receipt]

In the United States Court of Appeals for the
District of Columbia Circuit

Omar Khadr, Petitioner, v. Robert Gates, Secretary of Defense, Respondent, sued in his official capacity.	No. 07-1156

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF HIS EMERGENCY MOTION TO STAY MILITARY COMMISSION PROCEEDINGS

The government does not dispute that if a stay is denied, Omar Khadr will be the first person in modern history to be tried for alleged war crimes allegedly committed as a child. Mot. at 1. The government does not attempt to justify this radical departure from U.S. and international practice based on any affirmative act of Congress, treaty obligation, or norm of international law. Indeed, the government does not defend this treatment based on any CSRT consideration of Khadr's youth or any CSRT procedures providing for it.[1] Instead, the government relies on silence – silence by the Congress that has legislated the CSRTs and the military commissions whose jurisdiction they support, and silence in the CSRT record under review that is the only jurisdictional basis for this unprecedented trial.

But the law is not silent on this subject. Rather, in every relevant respect, Congress has made manifest that children shall not be held for criminal responsibility on the same basis as adults, certainly not without very deliberate consideration of why there should be an exception. Such consideration is not present in the record of this case. Correspondingly, there is an international consensus, endorsed and indeed fomented by the United States, that children should not be treated as war criminals for acts committed while under the age of

[1] We use the same abbreviations and Exhibit references as in the Motion. References to the government's opposition are to "Op." Attached hereto as complete Exhibit M, including MMC Part II, Rules 202 and 707.

18. It is against that background that this emergency motion must be viewed.

As troubling, the government seeks to write out of the MCA that the CSRT's decision is "dispositive" before the military commission as to personal jurisdiction, leaving it dispositive only at the government's whim. And the government does so in the name of a "speedy trial," a right it denies to detainees. Speed was not the government's concern when it detained Mr. Khadr at the age of 15 nor when it held and interrogated him at will for nearly five years before bringing these charges. The government's reliance on one bootstrap after another cannot be sustained, and the stay should be granted.

1. Jurisdiction. The government's suggestion that this Court is powerless to act cannot be squared with the text of the statutes and rules at issue. ***First***, this is not an action "relating to the prosecution, trial, or judgment of a military commission." 10 U.S.C. § 950j(b); see Op. at 6. Rather, the DTA specifically provides for this action to challenge the CSRT's determination. The All Writs Act and, inferentially, Fed. R. App. P. 18, authorize this Court to grant the stay Khadr seeks to preserve effective review of the CSRT and relief under the DTA. Nothing in the MCA or DTA prohibits it.

Second, the Court must grant this relief – and the military commission is powerless to do so – because Congress has specifically provided that the CSRT's unlawful-enemy-combatant determination is "dispositive" before the military

commission regarding personal jurisdiction. 10 U.S.C. § 948d(c); see MMC Part II, Rule 202(b), Ex. M. In suggesting that the commission could reverse an erroneous CSRT determination, the government elides this critical word.

"Dispositive" means "conclusive." B. Garner, A Dictionary of Modern Legal Usage 285 (2d ed. 1995). In Osborn v. Haley, 127 S. Ct. 881 (2007), the Supreme Court held that when Congress makes a certain finding "conclusive," it is not subject to reversal in the proceeding at issue. Id. at 888-89. Specifically, the Court held that because the Attorney General's scope-of-employment determination under the Westfall Act is "conclusive . . . for purposes of removal," 28 U.S.C. § 2679(d)(2), then even if the district court later concludes the Attorney General was wrong, the court nonetheless retains jurisdiction and may not remand the case to state court. Osborn, 127 S. Ct. at 894.

Like the Attorney General's determination, the CSRT's is "dispositive" – it is thus not subject to reversal by the military commission, even if the commission believes it to be wrong. As with the Westfall Act, the unlawful-enemy-combatant decision may be reevaluated in other contexts – as an element of a charge, for example. But the military commission has no power to reverse the CSRT's decision for purposes of the military commission's personal jurisdiction. The government does not contend that ***Khadr*** may challenge the CSRT's decision before the commission absent a reversal by this Court. See Op. at 9.

The government's suggestion that it could choose not to rely on the CSRT's determination here is likewise wrong. Op. at 11-12. As the MMC plainly acknowledges, "The M.C.A. recognizes, however, that with respect to individuals detained at Guantanamo Bay, the United States relies on the [CSRT] process to determine an individual's combatant status." MMC Part II, Rule 202(b) Discussion, Ex. M. Once reached, the CSRT's decision is "dispositive" and can no more be discarded by the government than by the commission.

Third, post-trial review would not suffice. Op. at 23. This is not the ordinary criminal case on which the government relies for the contrary proposition. Op. at 23-24. In the ordinary criminal case, the trial court may correct its own jurisdictional errors at any time. Not so the military commission, which has no power to correct the CSRT's "dispositive" ruling. In Hamdan, the Supreme Court held that there is a right not to be tried by a military tribunal without lawful jurisdiction. Congress thereafter authorized military commission jurisdiction only where there is a proper determination that the individual is an unlawful enemy combatant, see 10 U.S.C. § 948d(a), and it made DTA review of the CSRT's determination an integral part of the process – again, as acknowledged by the MMC: the CSRT's decision becomes dispositive of personal jurisdiction precisely "[b]ecause the C.S.R.T. process provides detainees with the opportunity to challenge their status [in this Court under the DTA]." MMC Part II, Rule 202(b)

Discussion. To be meaningful, such review of the CSRT determination should be exercised before the military commission proceedings predicated on it. "[S]etting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." Hamdan v. Rumsfeld, 415 F.3d 33, 36-37 (D.C. Cir. 2005), rev'd on other grounds, 126 S. Ct. 2749 (2006).

Allowing trial to precede the DTA review would negate Congress's purpose. Congress sensibly provided for separate review of each stage – the CSRT first, the military commission only later. DTA § 1005(e)(2)-(3). After the Supreme Court rejected the Executive's power to make unilateral detention decisions and unilateral military commission procedures, Congress allowed for CSRTs, rather than courts, to make initial detention decisions that would be "dispositive" of personal jurisdiction at trial by military commission, 10 U.S.C. § 948d(c), only if the CSRTs' decisions were subject to review by this Court, DTA § 1005(e)(2), and Congress separately allowed for trial by military commission only if such trials were reviewable in this Court. Id. § 1005(e)(3). Both Congressional directives should be given effect, but the government's argument does not do so.[2]

[2] The government's preferred reading is not necessary to prevent "relitigation" of CSRT decisions. Op. at 8. There was no litigation to speak of before the CSRT. Instead, it is the government that would provoke excess litigation – first before the commission of an issue the commission is powerless to review, then before this Court under the DTA. The court should not allow the government to

Finally, while the government acknowledges that the military commission may not stay its own proceedings pending DTA review of the CSRT, it makes the unsupported argument that the MMC, promulgated by the Secretary, somehow can preclude this Court's power under the All Writs Act. Op. at 10-11. The Secretary lacks authority to do so, and he has not. To the contrary, the MMC pointedly suspends trial for "***[a]ll periods of time during which appellate courts have issued stays in the proceedings***." MMC Part II, Rule 707(c) (emphasis added), Ex. M.

2. Likelihood of Success. The government's position, Opp. at 15-16, is that there is no minimum age – a child could be an enemy combatant triable by military commission for war crimes allegedly committed from birth onward. This statutory construction is truly absurd. Congress's silence cannot be taken as authority to exercise enemy combatant jurisdiction over children, when Congress has always provided differently in the past – whether explicitly under the JDA or implicitly under the UCMJ – and when there is an international consensus that juveniles should not be tried for war crimes allegedly committed while children.

Whatever the CSRT's "administrative" origins may have been, the unlawful enemy-combatant determination is no longer merely about administrative

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"disaggregat[e] a statute Congress plainly envisioned as a package deal" to evade judicial review of the personal jurisdiction decision. See Hinck v. United States, No. 06-376, slip op. at 6 (U.S., May 21, 2007).

detention. Op. at 16. Rather, Congress made this status determination by the CSRT the trigger for criminal prosecution of the detainee by military commission. 10 U.S.C. § 948d(a). Under the MCA, the CSRT's determination is thus one of criminality from which criminal law consequences flow, as to which the government grudgingly concedes age "arguably" has a bearing, Op. at 16.

It is quite proper in this context to invoke the JDA. As the government acknowledges, "'[t]he purpose of the federal juvenile delinquency process is to remove juveniles from the ordinary criminal process.'" Op. at 19 (quoting United States v. Male Juvenile E.L.C., 396 F.3d 458, 461 (1st Cir. 2005)). The JDA withdrew general federal criminal jurisdiction over juveniles for acts that would be crimes if committed by adults and allowed it to be exercised in only limited circumstances. See In re: Sealed Case, 131 F.3d 208, 211 (D.C. Cir. 1997).[3] The JDA provides a screening process that presumes against a criminal trial for acts committed under age 18. Yet none of the JDA's protections or procedures were applied here.

Moreover, the UCMJ does not apply, and the JDA does, to individuals in military service who were too young to lawfully change their status to military members. That the UCMJ rather than the JDA may apply to certain children under

[3] Like the CSRT's determination, a JDA certification for trial as an adult is subject to interlocutory review. In re: Sealed Case, 131 F.3d at 210. Each determination is jurisdictional because the respective statutory schemes make each essential to authority to try the individual. See id.

18 is possible only because Congress specifically permitted enlistment and change of legal status at the age of 17. And the JDA applies to juveniles accompanying military forces overseas. Operational Law Handbook 139 (2006), Ex. N. It is no excuse that the military commission is not a "court of the United States." Op. at 19-20. Indeed, that is the point – the JDA permits the United States to proceed against juveniles only in a "court of the United States," specifically a United States District Court, 18 U.S.C. § 5032, and not some other tribunal.

In short, the JDA is the default rule creating a presumption against treating like adults juveniles who have been accused of acts that would constitute crimes if committed by adults. There is no indication that Congress intended to abrogate the rule in the case of juveniles taken on the battlefield.

Likewise, the default rule in the international law context is to remove children from the battlefield and rehabilitate them, not to treat them as criminals. Contrary to the government's contention, Op. at 17-18, the Statute for the Special Court for Sierra Leone provides as to acts committed between ages 15 and 18 that the court's power is expressly limited to ordering rehabilitative programs, not criminal sanctions such as the life imprisonment sought for Khadr. See SCSL Statute, art. 7.2, available at http:/www.sc-sl.org/scsl-statute.html. And even this limited jurisdiction over acts committed between ages 15 and 18 has been specifically disclaimed. IRIN, Sierra Leone: Special Court Will not Indict

Children – Prosecutor, Nov. 4, 2002, http://www.irinnews.org/Report.aspx?ReportId=35524.

The government's cite to Article 3.3 of the Child Soldier Protocol is similarly misplaced. Op. at 18. Article 3.3 only addresses State Parties, but Khadr's CSRT determination is based on his alleged affiliation with Al-Qaeda, a non-state armed group. Article 4 of the Protocol makes it illegal under any circumstances for non-state groups "to recruit or use in hostilities persons under the age of 18." State Parties are obligated to "take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service." Id. at Art. 6.3. The Protocol thus lends no support for treating Khadr as an unlawful enemy combatant.

Finally, Khadr does allege the CAT was violated in his CSRT. Mot. at 4; see Ex. B. The Executive Branch has acknowledged that CAT Art. 15 applies to the CSRTs, Mot. at 20, and the DTA specifically authorizes this Court to assess CSRT proceedings against applicable law. Khadr's statutory DTA Petition for Review thus does not depend on whether the CAT is self-executing or provides a private right of action.

3. Against Khadr's showing of likely success on the merits and irreparable injury, the government's stated interest in forcing him to trial hastily

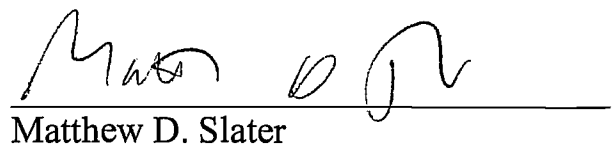
before a tribunal without jurisdiction affords no basis to deny a stay. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2805 (2006) (Kennedy, J., concurring) (after over four years of detention, a commission trial presented "no exigency requiring special speed or precluding careful consideration of evidence").

CONCLUSION

For all the foregoing reasons and those in the motion, the Court should stay the military commission proceedings.

Dated: May 30, 2007

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Emily C. Capehart, assistant managing clerk at the Washington, D.C. office of Cleary Gottlieb Steen & Hamilton LLP, hereby certify that:

On May 30, 2007, I caused copies of Petitioner Omar Khadr's Reply Memorandum in Support of his Emergency Motion to Stay Military Commission Proceedings, with attached Exhibit, to be served upon counsel of record, by agreement of the parties, by e-mail transmission and by causing a copy to be sent by first class mail to:

Douglas N. Letter, Esq.
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Dated: May 30, 2007

Emily C. Capehart

(E) The offense must be subject to military commission jurisdiction.

Discussion

See R.M.C. 203. The judgment of a military commission without jurisdiction is void and is entitled to no legal effect.

(c) *Contempt.* A military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.

Discussion

See R.M.C. 809 for procedures and standards for contempt proceedings.

(d) *Types of military commissions.* Except as otherwise expressly provided, the military commissions may try any person subject to the M.C.A. for any offense made punishable under the M.C.A. or the law of war. Upon a finding of guilty of an offense made punishable by the M.C.A. or the law of war, a military commission may, within limits prescribed by this Manual, adjudge any punishment authorized under R.M.C. 1003.

(1) *Non-capital commissions.* All cases not referred capital by the convening authority are non-capital cases, even if they contemplate trial of one or more capital offenses.

(2) *Capital commission.* Any commission in which:

(A) The case has been referred with a special instruction that the case be tried as capital; and

(B) A sentence of death is specifically authorized under the M.C.A. or the law of war for one or more offenses referred to trial.

Rule 202. Persons subject to the jurisdiction of the military commissions

(a) *In general.* The military commissions may try any person when authorized to do so under the M.C.A.

(b) *Determination of unlawful enemy combatant status by Combatant Status Review Tribunal or other competent tribunal dispositive.* A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by a military commission under the M.C.A. The determination by the tribunal shall apply for purposes of military commission jurisdiction without regard to any pending petitions for review or other appeals.

Discussion

Military commissions have personal jurisdiction over alien unlawful enemy combatants. *See* 10 U.S.C. § 948c. The M.C.A. recognizes, however, that with respect to individuals detained at Guantanamo Bay, the United States relies on the Combatant Status Review Tribunal ("C.S.R.T.") process to determine an individual's combatant status. The C.S.R.T. process includes a right of appeal to the United States Court of Appeals for the District of Columbia Circuit. Because the C.S.R.T. process provides detainees with the opportunity to challenge their status, the M.C.A. recognizes that status determination to be dispositive for purposes of the personal jurisdiction of a military commission. The M.C.A. provides that an individual is deemed an unlawful enemy combatant for purposes of the personal jurisdiction of a military commission if the individual has been determined to be an unlawful enemy combatant by a C.S.R.T. or other competent tribunal. Where combatant status of the accused may otherwise be relevant, the parties may establish the accused's status by evidence adduced in accordance with the commission rules. The determination of an individual's combatant status for purposes of establishing a commission's jurisdiction does not preclude him from raising any affirmative defenses, nor does it obviate the Government's obligation to prove beyond a reasonable doubt the elements of each substantive offense charged under the M.C.A. and this Manual.

Combatant Status Review Tribunal. The M.C.A. provides that an alien determined to be an unlawful enemy combatant by a C.S.R.T. shall be subject to military commission jurisdiction, whether the C.S.R.T. determined was made "before, on, or after the date of the enactment" of the M.C.A. *See* 10 U.S.C. § 948a(1)(ii). At the time of the enactment of the M.C.A., C.S.R.T. regulations provided that an individual should be deemed to be an "enemy combatant" if he "was part of or supporting al Qaeda or the Taliban, or associated forces engaged in armed conflict against the United States or its coalition partners." The United States previously determined that members of al Qaeda and the Taliban are unlawful combatants under the Geneva Conventions.

Other Competent Tribunal. The M.C.A. also provides that an individual shall be deemed an "unlawful enemy combatant" if he has been so determined by a competent tribunal established consistent with the law of war. *See* 10 U.S.C. § 948a(1)(ii).

The M.C.A. does not require that an individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a military commission proceeding. If, however, the accused has not received such a determination, he may challenge the personal jurisdiction of the commission through a motion to dismiss.

(c) *Procedure.* The jurisdiction of a military commission over an individual attaches upon the swearing of charges.

Rule 203. Jurisdiction over the offense

Military commissions may try any offense under the M.C.A. or the law of war.

(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense? Other appropriate questions may also be included.

(3) *Directions to board.* In addition to the requirements specified in subsection (c)(2) of this rule, the order to the board shall specify:

(A) That upon completion of the board's investigation, a statement consisting only of the board's ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused's confinement official, and to all counsel in the case, the convening authority, and, after referral, to the military judge;

(B) That the full report of the board may be released by the board or other medical personnel only to other medical personnel for medical purposes, unless otherwise authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report shall be furnished to the defense and, upon request, to the confinement commanding officer of the accused; and

(C) That neither the contents of the full report nor any matter considered by the board during its investigation shall be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge.

(4) No person, other than the defense counsel, the accused, or, after referral of charges, the military judge may disclose to the trial counsel any statement made by the accused to the board or any statement derived from such statement.

Rule 707. Timing of pretrial matters

(a) *In general*

(1) Within 30 days of the service of charges, the accused shall be brought to trial. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.M.C. 904 or, if arraignment is not required (such as in the case of a sentence-only rehearing), at the time of the first session under R.M.C. 803.

(2) Within 120 days of the service of charges, the military judge shall announce the assembly of the military commission, in accordance with R.M.C. 911.

(3) As soon as practicable after the service of charges, the military judge shall set an appropriate schedule for discovery.

(b) *Accountability*

(1) *In general.* The date of the service of charges against the accused shall not count for purpose of computing time under section (a) of this rule. The date on which the accused is

brought to trial or the military judge announces the assembly of the military commission, as the case may be, shall count.

(2) *Multiple charges.* When charges are served at different times, accountability for each charge shall be determined from the appropriate date under section (a) of this rule for that charge.

(3) *Pretrial orders.* By appropriate judicial order, the military judge shall direct all parties to abide by the time limits set forth in section (a) of this rule, and shall grant departures from such time limits only as provided by subsection (b)(4) of this rule.

(4) *Events which affect time periods*

(A) *Dismissal or mistrial.* If charges are dismissed, or if a mistrial is granted, new time periods under this rule shall begin on the date of dismissal or mistrial.

(B) *Government appeals.* If notice of appeal under R.M.C. 908 is filed, new time periods under section (a) of this rule shall begin, for all charges neither proceeded on nor severed under R.M.C. 908(b)(8), on the date of notice to the parties under R.M.C. 908(b)(12) or 908(c)(3), unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. After the decision of the Court of Military Commission Review under R.M.C. 908, if there is a further appeal to the United States Court of Appeals for the District of Columbia Circuit or, subsequently, to the Supreme Court, new time periods under section (a) of this rule shall begin on the date the parties are notified of the final decision of the United States Court of Appeals for the District of Columbia Circuit or, if appropriate, the Supreme Court.

(C) *Rehearings.* If a rehearing is ordered or authorized by an appellate court, new time periods under section (a) of this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing.

(D) *Commitment of the incompetent accused.* If the accused is hospitalized or treated as provided in R.M.C. 909(f), all periods of such commitment shall be excluded when determining whether the time periods in section (a) of this rule have run. If, at the end of the period of commitment, the accused is returned to the custody of the convening authority, new time periods under section (a) of this rule shall begin on the date of such return to custody.

(E) *Continuances granted only in the interests of justice*

(i) The military judge shall grant a continuance or other departure from the requirements of this rule only upon finding that the interests of justice served by taking such action outweigh the best interests of both the public and the accused in a prompt trial of the accused.

(ii) No such period of delay resulting from a continuance granted by the military judge in accordance with paragraph (b)(4)(E)(i) shall be excludable unless the military

judge sets forth, in the record of the case, either orally or in writing: (A) the military judge's reasons for finding that the interests of justice served by the granting of such continuance outweigh the best interests of both the public and the accused in a prompt trial of the accused, and (B) the identity of the party or parties responsible for the delay.

(F) *Appeal of certain matters not grounds for departure.* Delay occasioned by the accused's appeal of a finding by a Combatant Status Review Tribunal, or another competent tribunal established under the authority of the President or the Secretary of Defense, that the accused is an unlawful enemy combatant shall not constitute a basis for departing from any time limit set forth in section (a) of this rule.

(c) *Excludable delay.* All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized or treated as provided in R.M.C. 909(f), shall be excluded when determining whether new time periods under section (a) of this rule have run. All other pretrial delays approved by the military judge in accordance with subsection (b)(4) of this rule, or by the convening authority, shall be excluded when determining whether any time period in section (a) of this rule has run.

(1) *Procedure.* Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary of Defense, to a military judge for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

(2) *Motions.* Upon a party's timely motion to a military judge under R.M.C. 905 for relief under this rule, the proponent of the motion should provide the court with a chronology detailing the processing of the case from the date of the swearing of charges. This chronology should be made a part of the appellate record.

(d) *Remedy.* A failure to comply with this rule will result in dismissal of the affected charges, or, in a sentence-only rehearing, sentence relief as appropriate.

(1) *Dismissal.* Dismissal will be with or without prejudice to the government's right to reinstitute military commission proceedings against the accused for the same offense at a later date. In determining whether to dismiss charges with or without prejudice, the military judge shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a prompt trial under this rule.

(2) *Sentence relief.* In determining whether or how much sentence relief is appropriate, the military judge shall consider, among others, each of the following factors: the length of the delay, the reasons for the delay, the accused's demand for a speedy trial, and any prejudice to the accused from the delay. Any sentence relief granted will be applied against the sentence approved by the convening authority.

(e) *Waiver.* Except as provided in R.M.C. 910(a)(2), a plea of guilty which results in a finding of guilty waives any application of the instant rule as to that offense.

Discussion

Application of this rule may also be waived by a failure to raise the issue at trial. *See* R.M.C. 905(e) and 907(b)(2).