



U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

November 28, 2003

BY HAND

Honorable Rosemary S. Pooler
Honorable Barrington D. Parker
Honorable Richard C. Wesley
United States Court of Appeals
for the Second Circuit
40 Centre Street
New York, New York 10007

Re: Padilla v. Bush, Dkt. No. 03-2235

Dear Judges Pooler, Parker, and Wesley:

The Court's order of November 20, 2003 directed the government to indicate whether Senator Robert Byrd's description of the "original form of the joint resolution submitted by the White House" was accurate and to furnish three copies of "the President's original language." In reviewing the available Executive Branch records, we were unable to identify any official presidential proposal to the Senate with regard to the Joint Resolution enacted on September 18, 2001. Accordingly, we cannot verify Senator Byrd's description in his October 1, 2001 floor statement or provide the Court with copies of the "President's original language." At the same time, however, we are aware of no reason to believe that Senator Byrd's floor statement does not accurately describe proposed legislative language that may have originated more informally with someone within the Executive Branch.

The Court's order of November 20, 2003 also directed the parties to furnish copies of the Articles of War referenced by the Supreme Court in *Ex Parte Quirin*, 317 U.S. 1, 26-28, 35 (1942), and the order establishing the military commissions authorized by Article 15 of those Articles of War. Copies of those materials have been submitted to the Court as attachments to the letter of AUSA Eric Bruce dated November 26, 2003. Article 15 was first added to the Articles of War, the standing

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body of law that governed the armed forces before the creation of the Uniform Code of Military Justice, in 1916. For the Court's convenience, three copies of the relevant legislative history from 1916 are attached, including the testimony of the Judge Advocate General, Major General Crowder, explaining that the purpose of the provision was to preserve the existing jurisdiction of military commissions when the jurisdiction of general courts martial was expanded. (See Exhibit A). Also attached are three copies of testimony given by Major General Crowder regarding Article 15 before a House Committee in 1912. (See Exhibit B). Finally, the same provision was incorporated verbatim into the Uniform Code of Military Justice in 1950. Three copies of the current version of the Uniform Code of Military Justice (codified in 10 U.S.C. § 801 et seq.), including the provision in question (codified in 10 U.S.C. § 821), are also attached. (See Exhibit C). The legislative history of this provision is also extensively discussed in *Madsen v. Kinsella*, 343 U.S. 341, 350-56 & n.17 (1952), and *Yamashita v. Styer*, 327 U.S. 1, 18-20 (1946).

Respectfully submitted,

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