MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE 106C ORDER Motion to Dismiss The Charges Because The Military Commission Act of 2009 Violates the Due Process Clause March 7, 2014

1. Mr. Aziz Ali filed a motion requesting the charges be dismissed because the Military Commissions Act of 2009 (MCA) allegedly violates the equal protection component of the Due Process Clause of the Fifth Amendment of the U.S. Constitution (AE 106(AAA)). He acknowledged the Court of Military Commission Review (C.M.C.R.) declared that the equal protection component of the Fifth Amendment's Due Process Clause does not apply to 'alien unlawful enemy combatants,'[1] such as himself, but argued the C.M.C.R.'s holding is directly contrary to controlling law. In its response, the Prosecution requested the Commission deny the motion relying on *Hamdan*.[2] Subsequently, Messrs.' Mohammad, bin 'Attash, bin al Shibh and Hawsawi joined in the motion and requested relief. Mr. Aziz Ali filed two supplemental pleadings updating the Commission on multiple orders by the U.S. Court of Appeals for the District of Columbia in *Ali Hamza Ahmad Suliman al Bahlul v. United States*.[3] Mr. bin al Shibh

[1] The M.C.A 2009 changed the jurisdictional basis from "Alien Unlawful Enemy Combatants" to "Alien Unprivileged Enemy Belligerent" *see* 10 U.S.C. §948a(1) and (6).
[2] *United States v. Hamdan*, 801 F.Supp. 2d 1247, (C.M.C.R. 2011), *hearing en banc denied* (Oct 2011)
[3] No. 11-1324 (D.C. Cir. Jan. 25, 2013, Apr. 23, 2013, and May 2, 2013).

joined Mr. Aziz Ali's supplemental filings. The motion was argued during the session on 22 August 2013.[4]

2. **DISCUSSION**:

a. The Commission does not conclude the Accused has a right to the protections of the Constitutional prohibition of the enactment of due process laws. Assuming, without deciding for the purpose of resolving this motion, that the Accused is entitled to protections provided by the equal protection component of the Due Process Clause of the Constitution, the Commission will evaluate the application of 10 U.S.C. §949a(b)(3)(D) and M.C.R.E. 803(b).

b. The United States Court of Military Commission Review previously decided this issue in *United States v. Hamdan*,[5] when it stated,

> "We recognize that the life, liberty, and property of persons tried before an American court or tribunal established under our Constitution are protected by due process. Analyzing the comparative rights and protections afforded by the M.C.A. in comparison to the Uniform Code of Military Justice and criminal defendants in domestic federal District Courts, we are satisfied that the equal protection element of the due process clause has been met in this case."[6]

c. In *United States v. al Bahlul*, the C.M.C.R. also resolved this issue "against appellant for the reasons stated in *Hamdan*."[7] Although the U.S. Court of Appeals for the District of Columbia later vacated Mr. al Bahlul's conviction, it did so on grounds other than the equal protection component of the Due Process Clause of the Fifth Amendment, U.S. Const. amend V § 1. Although both al Bahlul and Hamdan alleged equal protection violations on appeal, neither the C.M.C.R. nor the D.C. Circuit agreed or reversed based on equal protection concerns.

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[4] *See* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 08/22/2013, 2:18 p.mp – 4:28 p.m., pp 5024-47.
[5] 801 F.Supp. 2d 1247 (C.M.C.R. 2011), *rev'd on other grounds, Hamdan v. United States*, 696 F.3d 1238 (DC Cir. 2012).
[6] *Id.* at 1314-16.
[7] *United States v. Hamdan*, 801 F.Supp. 2d 1247, (C.M.C.R. 2011), *hearing en banc denied* (Oct 2011).

d. The cases cited by the Defense as authority for the application of the Equal Protection Clause in this case address the issue in the context of the Equal Protection Clause of the Fourteenth Amendment to the Constitution rather than the Fifth Amendment. As the Hamdan court noted

> "While the analysis and approach of equal protection claims under the Fifth and Fourteenth Amendments are the same, the Supreme Court has recognized that there are special circumstances where federal interests compete with equal protection. In those cases where the Court found competing national interests, they found 'special deference to the political branches of the federal government [are] appropriate.'"[8]

After conducting a detailed analysis, the court concluded "the Fifth Amendment's equal protection component is not applicable to Alien Unlawful Enemy Combatants (AUEC), who are tried at Guantanamo, Cuba, under the M.C.A."[9]

3. **RULING.** Although *al Bahlul* was vacated on other grounds, *Hamdan* and *al Bahlul* are controlling law on this issue. Both cases held the M.C.A. (2006) did not violate the equal protection component of the Due Process Clause. The M.C.A. (2009) does not violate the equal protection component of the Due Process Clause. Accordingly, the Defense Motion is DENIED.

So ORDERED this 7th day of March, 2014.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

[8] *Hamdan*, 801 F.Supp. 2d at 1319 (citations omitted).
[9] *Id.* at 1322.