

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

AE251(AAA)

**Defense Motion to Dismiss
 Charges III and V as Barred
 by the Statute of Limitations**

22 November 2013

1. **Timeliness**: This motion is timely filed.
2. **Relief Sought**: The Defense requests that the Commission dismiss Charge III, Attacking Civilian Objects, 10 U.S.C. § 950t(3); and Charge V, Destruction of Property in Violation of the Law of War, 10 U.S.C. § 950t(16), because they were not charged within the period of limitations applicable to those offenses at the time the crimes were committed.
3. **Burden and Standard of Proof**: The burden of proof rests with the moving party.¹
4. **Facts**: This motion presents a pure question of law. The only pertinent facts are:
 - a. Charges III and V allege an offense date of September 11, 2001.
 - b. The Military Commissions Act of 2006 became effective October 17, 2006.
 - c. Charges against the defendants were originally leveled under the Military Commissions Act of 2006 on 11 February 2008.²

¹ M.C. 3.8.a; *see also* R.M.C. 905(c).

² The original charges were withdrawn on 21 January 2010. Subsequently, new charges (including Counts III and V) were sworn against all defendants on 31 May 2011 pursuant to the new Military Commissions Act of 2009. The new Act included the following language:

[A]ny charges or specifications sworn or referred pursuant to [the Military Commission Act of 2006] . . . shall be deemed to have been sworn or referred pursuant to [the Military Commissions Act of 2009]. National Defense Authorization Act for Fiscal Year 2010, Pub. L. 111-84, 123 Stat. 2190, 2612, § 1804(b)(1) (28 October 2009).

5. **Argument**: On the date of the crimes charged in Charges III and V, 11 September 2001, these crimes were subject to the five-year statute of limitations found in 18 U.S.C. § 3282. At that time, section 3282 provided as follows:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.³

Similarly, Article 43 of the Uniform Code of Military Justice (“UCMJ”) provided in relevant part:

- (a) A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation.
- (b) (1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.⁴

Neither 10 U.S.C. § 950t(3) (Charge III) nor 10 U.S.C. § 950t(16) (Charge V), as defined in the Military Commissions Act of 2009 (“MCA”), are capital.⁵ Nor could they be, because only homicide crimes are punishable by death.⁶ Causation of death is neither an element of § 950t(3) nor 10 U.S.C. § 950t(16).⁷ Accordingly, because they are not capital, and because the

Although this provision adds additional *Ex Post Facto* Clause and other constitutional problems, these need not be addressed here because the original charging date (11 February 2008) already lies outside the applicable statute of limitations for the crimes.

³ 18 U.S.C. § 3282 (2001).

⁴ 10 U.S.C. § 843 (2001).

⁵ The MCA states that the defendants could have been chargeable with the same (non-capital) crimes at the time of the offense. *See* 10 U.S.C. § 950p(d) (“This chapter does not establish new crimes that did not exist before the date of the enactment of this subchapter, as amended by the National Defense Authorization Act for Fiscal Year 2010, but rather codifies those crimes for trial by military commission.”).

⁶ *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008).

⁷ For that reason, neither Charge III nor Charge V allege that death resulted from the crimes.

charges were first brought on 11 February 2008 – over five years after the crime was allegedly committed on 11 September 2001 – the charges must be dismissed.

Nevertheless, the 2006 MCA and 2009 MCA purport to authorize prosecution and punishment for the crimes leveled in Charges III and V “at any time without limitation.”⁸ Because the statute of limitations on these crimes had already run at the time of their enactment, however, Congress’s attempt to resurrect these time-barred charges violates the *Ex Post Facto* Clause.

The Supreme Court has held that “it [is] well-settled that the *Ex Post Facto* Clause forbids resurrection of a time-barred prosecution.”⁹ In *Stogner v. California*, the defendant allegedly committed child sex crimes between 1955 and 1973, and the statute of limitations ran on the prosecution in 1976.¹⁰ In 1993, California passed a law reviving child sex prosecutions barred by prior statutes of limitations if certain conditions were met.¹¹ The Supreme Court explained that “to resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient.”¹² Allowing a legislature to retroactively revive an expired statute of limitations “risks both ‘arbitrary and potentially vindictive legislation’ and erosion of the separation of powers.”¹³

⁸ 10 U.S.C. § 950v(b) (2007); 10 U.S.C. § 950t (2010).

⁹ *Stogner v. California*, 539 U.S. 607, 616 (2003); see also *United States v. Lopez de Victoria*, 66 M.J. 67, 73 (C.A.A.F. 2008) (explaining *Stogner*).

¹⁰ *Stogner*, 539 U.S. at 610.

¹¹ *Id.* at 609.

¹² *Id.* at 616.

¹³ *Id.* at 611 (quoting *Weaver v. Graham*, 450 U.S. 24, 29 (1981)); see also *Falter v. United States*, 23 F.2d 420, 425-26 (1928) (Learned Hand, J.) (describing the resurrection of an expired statute of limitations as “unfair and dishonest”).

Here, Congress's first attempt to extend the statute of limitations for the crimes became effective on October 17, 2006, the date that the 2006 MCA was enacted. Because the limitations period had already run by that time – on 11 September 2006 – allowing the non-capital charges to proceed would violate the *Ex Post Facto* Clause.

Accordingly, Charges III and V must be dismissed with prejudice.

6. **Conference:** The prosecution opposes the requested relief.
7. **Request for Oral Argument:** The defense requests oral argument.
8. **Request for Witnesses and Evidence:** None.
9. **Additional Information:** None.
10. **Attachments:**
 - A. Certificate of Service

Very respectfully,

//s//

JAMES G. CONNELL, III
Learned Counsel

Counsel for Mr. al Baluchi

//s//

STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 22nd day of November, 2013, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III

Learned Counsel