IN THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES *Appellant*, v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**,** *Appellee*.	)	MOTION FOR LEAVE TO FILE A SURREPLY FOR THE APPELLEE Before Panel No. 2 CMCR Case No. 14-001

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

COMES NOW, Appellee, Abd AI-Rahim Hussein Al-Nashiri (" Al-Nashiri"), pursuant to Rule 20(d) of this Honorable Court's Rules of Practice, and moves this Honorable Court for leave to file the attached Surreply Brief for the Appellee.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on 24 October 2014, I caused copies of the foregoing to be served on the counsel for Appellant via electronic mail.

Respectfully submitted,

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UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES, *Appellant*, *v*. ABD AL-RAHIM HUSSEIN AL-NASHIRI, Appellee.	)	Case No. 14-001 **SURREPLY BRIEF FOR APPELLEE** Dated: 24 October 2014

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ARGUMENT

In its Reply, the government makes two new arguments, neither of which were raised before and both of which further confuse the issues on appeal. First, the government doubles down on its mistaken understanding of the actual jurisdictional question at issue, by arguing not just that Judge Spath's *should* have been decided on personal jurisdiction grounds (as it did in its original brief), but that subject-matter jurisdiction *is* in fact indistinguishable from personal jurisdiction. Second, the government invents from whole cloth the concept of "immunity" in order to explain its reliance on federal cases that conflict with the plain language of 10 U.S.C. § 949d(a)(1)(B).[1]

1. Initially, the government argues that "[t]he structure, location, and text of Section 948d reveal that the jurisdictional test is whether the Accused had alien unprivileged enemy

[1] The government also argues that jurisdiction is reviewed on appeal under a *de novo* standard, and that the Court of Military Appeals's decision holding that the standard was abuse of discretion is mistaken. Gov't Reply 1-2 (discussing *United States v. Labella*, 15 M.J. 228 (1983)). *LaBella* however, addressed a situation in which the trial court's jurisdictional ruling was based on findings of fact, which, like other factual findings, are subject to abuse of discretion review. *See United States v. Labella*, 14 M.J. 976, 978 n.2 (1982) (jurisdictional ruling based on finding "that the social events in question were always discussed on-base, and in some cases flyers were distributed on-base referring to them as 'keg' or 'BYOB' parties. He further found that 'No mention of marijuana in connection with the parties was ever made on board ...' asserting that, had there been any discussion of illicit activity on board the reservation, he would have found jurisdiction."), *rev'd*, 15 M.J. 228 (1983). Because the subject-matter jurisdiction in this case involves a factual element, *LaBella* is the appropriate standard.

In any event, resolution of this appeal is the same under either standard. The government has not appealed from Judge Spath's decision on the merits but only from his decision to decide the question prior to trial. Moreover, even if the merits of the jurisdictional question were raised here, the government has failed to carry its burden of proof as a matter of law (as well as logic) by failing to put in any evidence. Appellee Br. 15-16.

belligerent ("AUEB") status" at the time of the offenses.[2] (Gov't Reply 3) That is a gross misreading of the relevant statutory sections. Section 948c is titled "Persons subject to military commissions" and states "Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter."[3] It could not be clearer that this is the MCA's personal jurisdiction provision, insofar as it makes individuals with the status of AUEB subject to commission jurisdiction. Section 948d, on the other hand, adds to the personal jurisdiction requirement a separate and distinct *subject matter* jurisdictional requirement – to wit, that military commissions only have jurisdiction over "offense[s] made punishable by this chapter, sections 904 and 906 of this title (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war."[4]

The question presented below was whether Mr. al Nashiri's alleged conduct was sufficiently associated with "hostilities" against the United States to be "punishable by this chapter . . . or the law of war." The violations defined by the MCA require such a nexus to hostilities to be subject to trial by military commission,[5] as do violations of the law of war. Whether such a nexus exists is a factual as well as legal question. Having chosen not to introduce any evidence that would establish the factual predicate, it cannot now rely on the bare allegations of the charges to argue that subject-matter jurisdiction exists as a matter of law.

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[2] This statement is consistent with its other remarks treating subject-matter jurisdiction as determined by AUEB status alone. *See*, *e.g.*, Gov't Reply 8 (referring to "subject-matter jurisdiction (*i.e.*, status)"); *id*. 14 ("Section 948d makes AUEB status (via the personal jurisdiction provision of Section 948c) a chief component of that analysis"). The government no longer relies on its analysis based on *Solorio v. United States*, 483 U.S. 435 (1987), apparently conceding that it is irrelevant to this appeal. *See* Appellee Br. 17-21.

[3] 10 U.S.C. § 948c.

[4] 10 U.S.C. § 948d.

2. The government now argues that the inapposite federal cases cited in its original brief rest on the previously unmentioned concept of "immunity," which, it claims, "harmonize" or "explain" those cases.[6] The concept of "immunity" does not exist, however, in the sense that the government uses it in its reply. The case upon which it primarily relies – *United States v. DeLaurentis* – mentions the term[7] but provides no explanation for it, and the cases that the court string-cites afterward do not even mention the concept.[8] Moreover, since Third Circuit does not employ the notion of "immunity" in its holding or reasoning, it is unclear, at best, what it is talking about. Rather, the court reversed the trial court's holding under the principle that pretrial dismissal on the basis of "the insufficiency of the evidence to prove the indictment's charges"[9] is generally not allowed in federal court prosecutions. That is not the issue presented here, however. Judge Spath dismissed the *Limburg* charges before trial for failure to prove a *jurisdictional* fact, not an element of the crime, a ruling that is explicitly authorized by Section 949d(a)(1)(B) and the many cases cited in Mr. al Nashiri's earlier brief applying the identical language of Article 39(a)(2).[10] (Appellee's Br. 8-12)

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[5] 10 U.S.C. § 950p(c) ("An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities.")

[6] Gov't Reply 10 ("The *DeLaurentis* restatement [including its reference to "immunity"] harmonizes all cases relevant to this appeal") *id*. 11 ("The 'immunity' qualifier explains the remaining [cases]."); *see generally id*. 9-15.

[7] *United States v. DeLaurentis*, 230 F.3d 659, 660 (3d Cir. 2000) ("Unless there is a stipulated record, or unless immunity issues are implicated, a pretrial motion to dismiss an indictment is not a permissible vehicle for addressing the sufficiency of the government's evidence.").

[8] *See DeLaurentis*, 230 F.3d at 660 (citing *United States v. Knox*, 396 U.S. 77, 83 n. 7 (1969), *United States v. Gallagher*, 602 F.2d 1139, 1142 (3d Cir.1979); *United States v. King*, 581 F.2d 800, 802 (10th Cir.1978)).

[9] *DeLaurentis*, 230 F.3d at 661.

[10] In addition to those cases, *see United States v. Lange*, 11 M.J. 884, 886 n.5 (A.F.C.M.R. 1981) ("We hold that such reference to and consideration of the drug rehabilitation

The only other case the government cites for the proposition that only facts going to "immunity" may be decided before trial is *United States v. Covington*.[11] (Gov't Reply 11) *Covington* does not mention immunity, however, and the principle that the government says it stands for – that the decision in a "suppression hearing to determine the admissibility of a confession" is "the classic 'immunities issues' case" (*id*.) – cannot possibly represent "immunity" in the government's sense, because a trial can go on whether or not a confession is suppressed.

In sum, "immunity" is a term without content or support in any case. Calling its discredited argument by a new name thus does nothing justify the government's reliance on federal cases that the MCA itself, through 10 U.S.C. § 949d(a)(1)(B), makes irrelevant.

CONCLUSION

For the foregoing reasons, the decision of the Military Commission should be affirmed.

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efforts [evidence of the "service connection" jurisdictional predicate] were a permissible exercise of the trial court's inherent power to entertain and rule upon challenges to its jurisdiction [under] Article 39(a)(2), Uniform Code of Military Justice.") The government cites the legislative history of the Military Justice Act of 1968 (the source of Article 39(a)(2)) for the proposition that it is limited to the authority granted to federal judges under Federal Rule of Criminal Procedure 12 (Gov't Reply 6). However, "[w]hen [courts] find the terms of a statute unambiguous, judicial inquiry is complete, except "in 'rare and exceptional circumstances.'" *Rubin v. United States*, 449 U.S. 424, 430 (1981) (cites omitted). No such rare and exceptional circumstances exist here, because the context of the language the government quotes makes it clear that the sole point of the addition of Art. 39 was to expand the role of the military judge, not to limit it. S. REP. 90-1601, at 4510. In any event, the government's quote is misleading. The full quote is "[t]he effect of the amendment, *generally*, is to conform military criminal procedure with the rules of criminal procedure applicable in the U.S. district courts." *Id*. (emphasis added). The government's excerpt fails to include the qualifier "generally," which gives the lie to its claim that Congress intended to specifically limit military judges in a way that contradicts the plain statutory language of the amendment. In fact, and not surprisingly, nothing in the Report's discussion suggests any intent to limit the role of the military judge, because such a limitation would be contrary to the purpose of the Act, which was "to make court-martial procedures more efficient and give added procedural safeguards to the accused." Joint Report of the Court of Military Appeals and the Judge Advocates General of Armed Forces and General Counsel of Department of Transportation ("Code Committee") (1968) at 2.

[11] *United States v. Covington*, 397 U.S. 57 (1969).

Respectfully submitted,

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