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<tr><td>UNITED STATES OF AMERICA

Appellant,

v.

ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI

Appellee.</td><td>)
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MILITARY COMMISSION REVIEW

REPLY ON BEHALF OF APPELLANT

U.S.C.M.C.R. Case No. 14-001

Arraigned at Guantanamo Bay, Cuba
on November 9, 2011

Before a Military Commission
convened by Vice Admiral (ret.)
Bruce E. MacDonald, USN

Presiding Military Judge
Colonel Vance H. Spath, USAF

DATE: October 17, 2014</td></tr>
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TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

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ARGUMENT

I. JURISDICTION IS A LEGAL QUESTION THIS COURT REVIEWS *DE NOVO*

Al Nashiri is incorrect when he asserts that Appellant concedes jurisdiction is a question the Court reviews for an abuse of discretion. Appellee Br. 2-3. To the contrary, Appellant evinced in its Brief that "[j]urisdiction is a legal question this Court reviews *de novo*." Appellant Br. 15. This Court has twice held it reviews "the military commission judge's decision whether the military commission had subject matter jurisdiction *de novo* because jurisdiction is a question of law." *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1263 (U.S.C.M.C.R. 2011), *rev'd on other grounds*, 696 F.3d 1238 (D.C. Cir. 2012); *accord United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1164 (U.S.C.M.C.R. 2011) ("Whether a military commission may exercise jurisdiction over the charged offenses is a question of law we review *de novo*.") (citation omitted). Indeed, "[r]egarding all matters of law, [the Court] review[s] the military judge's findings and conclusions *de novo*." *United States v. Khadr*, 717 F. Supp. 2d 1215, 1220 (U.S.C.M.C.R. 2007); *see United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012) ("Jurisdiction 'is a legal question which we review de novo.'") (citation omitted).

Al Nashiri ignores these binding U.S.C.M.C.R. cases and recent C.A.A.F. cases cited in Appellant's Brief, urging the Court to rely instead on *United States v. Labella*, 15 M.J. 228 (C.M.A. 1983). Appellee Br. at xiv (citing *Labella*, 15 M.J. at 229). The *Labella* court cited a 1980 A.F.C.M.R. case to support its proposition that "[a] motion to dismiss for lack of jurisdiction is an interlocutory matter addressed to the discretion of the military judge, para. 67, [M.C.M. of 1969 (Revised edition)], and his decision will be reviewed on the test of abuse of discretion as are other decisions on interlocutory matters." 15 M.J. at 229 (citing *United States v. Buckingham*, 9 M.J. 514 (A.F.C.M.R. 1980), *aff'd*, 11 M.J. 184 (C.M.A. 1981) (affirming C.M.A.'s result on other grounds)).

The Court should decline to rely on *Labella*. Nothing in paragraph 67 of the 1969 Manual sets the standard of review for motions to dismiss as the abuse-of-discretion standard. In fact, that paragraph does not mention the word "discretion" or any derivative of that word at all.

Further, the case cited by the *Labella* court—*Buckingham*—does not support applying the abuse-of-discretion standard here. First, *Buckingham* relies on two cases that are inapt: one concluding that courts review for an abuse of discretion a trial court's decision to grant a request for a continuance, *United States v. Knudson*, 16 C.M.R. 161 (C.M.A. 1954), and one concluding that courts review for an abuse of discretion a trial court's decision regarding pretrial confinement, *United States v. Otero*, 5 M.J. 781 (A.C.M.R. 1978). Neither such decision was at issue in *Buckingham*, much less so in this case. Second, although the C.M.A. ultimately affirmed the result in *Buckingham*, it did so on alternative grounds and without mentioning the abuse of discretion standard. *Buckingham*, 11 M.J. at 185. The Court should instead rely on binding precedent counseling the Court to review the jurisdiction question *de novo*. Applying this standard of review, the Court should reverse in light of any one of the several errors of law the Judge made—set forth in Appellant's Brief—even as the Military Judge sought to describe his own findings as extending only to insufficiency of evidence.

II. THE COMMISSION HAS JURISDICTION TO PROCEED TO TRIAL, AND DURING PRETRIAL THE ALLEGATIONS SHOULD BE TAKEN AS TRUE

While mistaking the reason, Al Nashiri is correct that this appeal raises a straightforward matter. Congress has provided a simple and workable jurisdictional analysis in Section 948d of the Military Commissions Act of 2009 ("M.C.A."), a point the government made at the outset below to defense objection. Unofficial/Unauthenticated Tr. at 3086 ("Tr.") ("Your Honor, you go back to the base jurisdictional provision which is 948d, you have an unprivileged enemy belligerent and you have the individual charge for any offense made punishable under this chapter, you have jurisdiction.") (App. 21).[1] Section 948d is the controlling provision from which Al Nashiri distanced himself in oral argument below—Tr. at 3068 (App. 3), 3098 (App. 33), 3874-3904 (App. 37, 38, 40, 47, 63, 67) (urging instead Article 21 of the UCMJ as the correct statute and arguing that "the MCA doesn't even enter into this discussion" (Tr. 3877

[1] All citations to the record and other materials are included in the Appendix filed with Appellant's Brief on September 29, 2014.

(App. 40)))—but on this appeal feels compelled to defend because the Military Judge referred to it for the first time in his September 16 final order dismissing the MV *Limburg* charges. App. 466; *but see* Tr. at 3083-86 (App. 18-21), 3900 (App. 63), 3902-03 (App. 65-66) (showing Military Judge's statutory focus at oral argument instead upon Section 948a(7)'s definition of "unprivileged enemy belligerent," despite eventual claim not to be questioning the status of the Accused). The structure, location, and text of Section 948d reveal that the jurisdictional test is whether the Accused had alien unprivileged enemy belligerent ("AUEB") status when he committed these properly pleaded and referred offenses under the M.C.A. Because this straightforward test is met, the Commission has jurisdiction to proceed to trial in this case, even as the Military Judge can continue to re-assess jurisdiction within his lawful role and while respecting the province of the referral process and of the fact-finder on the general issue of guilt or innocence. Appellant Br. 17-26.

It is well-established that trial courts may rely on allegations in the charge sheet for the purpose of determining jurisdiction to try the offense. *United States v. Vitillo*, 490 F.3d 314, 320 (3d Cir. 2007). This involves no invasion by the judge of either the province of the charging process or the province of the factfinder on the general issue of guilt. Yet, as Appellant explains in its Brief, the Judge erred in declining to accept the allegations as true for this purpose, instead requiring the government to produce its proof before trial and dismissing the charges for purported failure of that proof. Appellant Br. 36; *see* App. 466-467. In doing so, the Judge cited *McKevitt v. Mueller*, 689 F. Supp. 2d 661 (S.D.N.Y. 2010), App. 466-467, a civil case in which the court invoked "that body of decisional law that has developed under Federal Rule of Civil Procedure 56" governing summary judgment to resolve the defendant's motion to dismiss for lack of subject-matter jurisdiction, *McKevitt*, 689 F. Supp. 2d at 665. Al Nashiri compounds the error, likewise citing two summary-judgment cases—*Conner v. Reckitt & Colman, Inc.*, 84 F.3d 1100 (8th Cir. 1996), and *United States v. Ahrens*, 530 F.2d 781 (8th Cir. 1976)—to argue that the Judge properly dismissed the charges because the government refused to offer proof and thus

"failed as a matter of law." Appellee Br. 15-16 n.51; *cf.* App. 245 ("The Commission need not reach any conclusions of law . . . .").

Like *McKevitt*, these cases do not support dismissal here. *Conner* and *Ahrens* are civil cases in which the court granted a party summary judgment where the opposing party failed to produce any evidence to support its claim (*Conner*) and failed to rebut the presumption that a notice of a tax deficiency was valid (*Ahrens*). Criminal procedure has no equivalent to the summary-judgment motion, so—unlike these civil cases and with two important qualifications discussed below and thus far not implicated in Al Nashiri's proceedings—courts may not test the sufficiency of the government's proof before trial in a criminal case, not even under the rubric of a jurisdictional challenge. Appellant Br. 31-32 (citing cases). Rather, in reviewing an indictment on a pretrial motion to dismiss, "the allegations of the indictment must be taken as true." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n.16 (1952); *accord Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006) ("*Hamdan I*") ("We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true."). Failing to do so, the Judge erred, and this Court should accordingly reverse.

If properly taken as true, the allegations provide facts pertinent to the Commission's exercise of jurisdiction over the offense pending the full presentation of evidence at trial, a time until which the judge may defer a final determination of such jurisdiction for good cause. R.M.C. 905(d). These jurisdictional facts are compelling but nowhere taken as true by the Military Judge in his dismissal orders. Al Nashiri is a non-citizen and member of an enemy force, and also one who lacks combatant immunity for not complying with the Geneva Convention requirements to possess such immunity (*i.e.*, he is, as alleged in each charge, an AUEB). Beginning four years before the completed *Limburg* attack, Al Nashiri had been planning, with Usama Bin Laden, "a boats operation to attack ships in the Arabian Peninsula . . . ." App. 83 (Overt Act 2). The *Limburg* attack in October 2002 was preceded by an attempt and then a completed attack on a U.S. warship, also along the coast of Yemen (App. 84-86 (Overt Acts 9 to 22); App. 80 (Charge I)), making the MV *Limburg* last in a series that utilized

suicide bombers to pilot explosives-laden boats alongside the target ships and other common techniques and preparations (App. 85-86 (Overt Acts 15, 16, and 24)). In May of 2001, Al Nashiri "met with bin Laden and another high-ranking member of al Qaeda at bin Laden's compound in Qandahar, Afghanistan." App. 86 (Overt Act 23). In 2001 and 2002, following the September 11th attacks, Al Nashiri "and other co-conspirators implemented operational security measures to avoid detection." App. 86 (Overt Act 25). Al Nashiri's purpose for what became the attack on the MV *Limburg* was terrorism and murder. App. 82-86 (Charge V, notified by trial counsel to Judge and counsel beginning in January 2013 as describing also the co-conspirator theory of liability for all completed offenses, as well as principal theories). Al Nashiri's specific intent with regard to the former purpose (terrorism) was "to influence and affect the conduct of the United States government by intimidation and coercion and to retaliate against the United States government . . . ." App. 81-82 (Charge IV, Specification 2). The attack, when carried out by the suicide bombers on the MV *Limburg* near the port of Al Mukallah, Yemen, blasted a hole in the French supertanker, "resulting in the death of a crewmember, injury to approximately 12 crewmembers, and spillage of approximately 90,000 barrels of oil into the Gulf of Aden." App. 86 (Overt Act 26). The crewmember, Atanas Atanasov, and the others on board the MV *Limburg* were civilians (App. 89 (Charge VII)), and the MV *Limburg* itself was not military (*id.* (Charge VIII)). As a result of the attack, the MV *Limburg* lost the ability to operate and navigate. *Id.* (Charge IX). Even without any of the further outlines of evidence provided by trial counsel (many of which outlines defense counsel below disputed),[2] and even assuming that neither casualties nor cargo nor origin nor destination of the French ship were American, these jurisdictional facts are "more than enough" for the Commission to exercise jurisdiction and proceed to trial on the merits. *See United States v.*

[2] The Military Judge's August Order notes that many outlines of evidence by the parties in pleadings and oral argument are in dispute. However, apparently unnoticed by the Judge was the admission by defense counsel below that U.S. Naval investigators were dispatched to the MV *Limburg* following the attack, App. 214; Tr. 3069 (App. 4), a jurisdictionally significant linkage of the bombing to U.S. security interests.

Yousef, 327 F.3d 56, 111 (2d Cir. 2003) (finding that the intent to carry out attacks on Americans using the same plan and modus operandi was "more than enough to permit the United States to claim jurisdiction over Yousef under the protective principle," notwithstanding that the charge in question involved a non-American airplane, a flight route from the Philippines to Japan, and no American casualties).

III. MILITARY JUDGES, LIKE FEDERAL JUDGES, MUST RESPECT THE PROVINCE OF THE CRIMINAL TRIAL JURY

Al Nashiri strains to minimize the importance of federal appellate cases hostile to his position, which apply Federal Rule of Criminal Procedure 12(b), and even claims that military judges' power to make findings regarding matters that may go to elements of a charged crime "are less restricted than their federal counterparts," all to no avail. Appellee Br. 14. Article 39(a)(1) & (2) of the UCMJ, the near-identically worded forerunner to M.C.A. section 949d(a)(1)(A) & (B), was specifically added by Congress to the 1968 Military Justice Act—

> to *conform military criminal procedure with the rules of criminal procedure applicable in the U.S. district courts* and otherwise to give statutory sanction to pretrial and other hearings without the presence of the members concerning those matters *which are amenable to disposition on either a tentative or final basis by the military judge*.

App. 517 (emphases added). The legislative history further states that "[t]he pretrial disposition of motions raising defenses and objections is in accordance with rule 12 of the Federal Rules of Criminal Procedure," *id.*, which, too, contains near-identical wording to the operative provisions of Article 39(a)(1)(A), M.C.A. Section 949d(a)(1)(A), R.C.M./R.M.C. 905(b), and R.C.M./R.M.C. 907(a), and which, in conjunction with other Federal Rules of Criminal Procedure, aligns closely the then-new statutory powers given to military judges with those that federal judges routinely exercise. Thus, federal judges state their essential findings on the record when factual issues are involved in deciding a motion (Fed. R. Crim. P. 12(d)), hold one or more pretrial conferences to promote a fair and expeditious trial (Fed. R. Crim. P. 17.1), and consider

motions to suppress evidence that involve hearings on matters later considered by the jury (Fed. R. Crim. P. 12(b)(3)(C), 12(h)).[3]

Al Nashiri's notion that Article 39(a) and M.C.A. Section 949d(a) give military judges extraordinary new substantive powers beyond those exercised by Article III district court judges is novel and unsupported, and also at odds with Al Nashiri's near-simultaneous exclusion of military courts from "the realm of 'judicial power.'" Appellee Br. 14 (internal quotation marks omitted). The lone case cited for the proposition that military judges are less restricted than federal judges "in ruling before trial on jurisdictional facts that correspond to elements," *id.* (citing *United States v. Bailey*, 6 M.J. 965, 968 (N.C.M.R. 1979)), hazards no such bold comparative claim and rather is fully consistent with situations in which federal appellate courts have upheld district court judges' pretrial rulings based on jurisdictional facts that also go to elements. *See, e.g.*, *United States v. Yakou*, 428 F.3d 241, 246-47 (D.C. Cir. 2005) (upholding district court's pretrial determination that Yakou lacked status as a "U.S. person" at the time of the offense, a proper question of law as well as a jurisdictional element that could also be decided prior to trial because "the existence of undisputed facts obviated the need for the district court to make factual determinations properly reserved for a jury"). Military judges preside over military offenses in which the status of the accused is both an interlocutory issue for which pretrial fact-finding and determination is appropriate and a matter for the panel—about which more below. But federal judges also have power and responsibility, where necessary, to

[3] *United States v. Mullican*, 21 C.M.R. 334 (C.M.A. 1956), helped spur the evolution that led to military judges having the procedural powers of federal judges to hold sessions outside the factfinder's presence on the general issue, to decide motions "capable of determination without trial," and to rule upon matters that may also be "appropriate for later consideration or decision by the members." UCMJ art. 39(a)(1) & (2). In *Mullican*, the C.M.A. endorsed the then still-unusual procedure in military practice, used by the law officer before trial and outside the members' presence, to determine the admissibility of prosecution exhibits. The Court invoked Federal Rule of Criminal Procedure 12(b) and suggested that a more formalized adoption of a rule conforming military to federal practice should be undertaken. *Mullican*, 21 C.M.R. at 336-37. Twelve years later, Congress referenced *Mullican* in making this adoption statutory. App. 517. The longstanding and close conformity of military to federal criminal court regarding a judge's procedural powers in motions practice—and limitations on those powers—makes Al Nashiri's attempted minimization of Rule 12(b) precedents all the more unavailing.

vindicate a defendant's status- or immunity-based claims seeking to bar prosecution. That they do so while also seeking to respect the province of the jury is authoritative and instructive, not indicative of a lack of power relative to military judges, as Al Nashiri mistakenly claims.

Appellant has never suggested that jurisdictional challenges are unimportant—even as it here assigns several errors of law to the Military Judge's post-dismissal insistence upon a separate trial to establish an other-than-status element of each offense, and even as it here also identifies abuse of discretion in his not receiving evidence on aspects of subject-matter jurisdiction (*i.e.*, status) that could support eventual findings and yet not invade the province of the panel. Jurisdiction is of course essential to the adjudication of any case, and the government has never wavered in acknowledging its burden. But not all requisites of jurisdiction are identical in the manner and timing by which they must be assured, and the law demands that determinations of jurisdiction respect the provinces of charging process and jury, even while acknowledging the necessity of those legal determinations and the establishment of a proper factual record for appellate court review. The pre-M.C.A. Supreme Court cases cited by Al Nashiri to support the proposition that "challenges to military commission subject-matter jurisdiction may be decided pretrial without waiting for findings by the panel," Appellee Br. 6, do not hold what Al Nashiri requires in this appeal. For the Supreme Court in *Ex parte Quirin*, 317 U.S. 1 (1942), *In Re Yamashita*, 327 U.S. 1 (1942), and *Hamdan I* was reviewing the *legal* question of whether the charged offenses in question were triable by military commission.[4]

[4] *Quirin*, 317 U.S. at 25, 46 (granting petitioners, eight alleged saboteurs, access to federal court via habeas challenge and then ruling, based upon facts stipulated by the parties, that the acts alleged and stipulated to "constitute an offense against the law of war which the Constitution authorizes to be tried by military commission"); *Yamashita*, 327 U.S. at 5, 25 (noting that the commission itself resolved the pretrial challenge to jurisdiction over the offense against Yamashita and then proceeded to trial, whereupon—on post-trial habeas review of a 3,000-page testimonial record involving 286 witnesses—the Supreme Court ruled that "petitioner was charged with violation of the law of war, and that the commission had authority to proceed with the trial"); *Hamdan I*, 548 U.S. at 595-613, 635 (lacking a majority on the challenge to jurisdiction over the conspiracy offense, while finding on other grounds that the commission did not have authority to proceed).

There is no question that a trial judge's proper province includes deciding questions of law, nor that jurisdiction is in the end a legal question, but Al Nashiri needs precedent to support what the Judge did *here*, which was dismiss charges for lack of jurisdiction over the offense based on insufficiency-of-evidence grounds and while professing to reach no matter of law. Notably, the pretrial challenges of *Quirin*, in which the Supreme Court upheld jurisdiction, and *Hamdan I*, in which it did not, cannot help Al Nashiri; nor can *Yamashita*, which was a post-trial review of the lawfulness of jurisdiction based upon a full record of trial. And most relevant to the analysis here, the *Hamdan I* majority interrupted movement toward trial not on the issue of the commission's jurisdiction over the charged offense (a portion of the opinion joined by only four justices), but rather on the grounds that the commission lacked uniformity "insofar as practicable" with courts-martial and was not a regularly constituted court as required by Common Article 3 of the Geneva Conventions. 548 U.S. at 613-33. These defects have been fully addressed by the M.C.A., *see Khadr*, 717 F. Supp. 2d at 1222-23, causing federal courts hearing collateral attacks on the process to abstain from interceding. *See, e.g.*, *Al-Nashiri v. MacDonald*, No. 11-5907, 2012 WL 1642206 (W.D. Wash. May 10, 2012), *aff'd*, 741 F. 3d 1002 (9th Cir. 2013). In light of the strong statutory and Constitutional grounds for the exercise of jurisdiction over this Accused and these properly pleaded and referred offenses, the foregoing authorities caution the Military Judge to respect the province of the charging process and panel. He could do this by hearing such evidence as goes to the status of the Accused or is not intertwined with other-than-status elements of the offense—see below—and then by awaiting trial make any final factual findings in aid of the subject matter jurisdictional determination. Failing to do so in these circumstances is both legal error and an abuse of discretion.

Al Nashiri simply cannot distinguish the cases of *United States v. Nukida*, 8 F.3d 665 (9th Cir. 1993), *United States v. Jensen*, 93 F.3d 667 (9th Cir. 1996), *United States v. Alfonso*, 143 F.3d 772 (2d Cir. 1998), and *United States v. DeLaurentis*, 230 F.3d 659 (3d Cir. 2000), each of which involved appellate courts reversing trial judge dismissals of charges that were based upon insufficiency of evidence and that involved other-than-status jurisdictional elements of the

charged offenses. Nor can Al Nashiri or the Judge harmonize *Yakou*, our superior court's case that approvingly cites *Alfonso* and *DeLaurentis* and cautions prosecutors against acceding to evidentiary hearings on jurisdiction over the offense, as doing so is tantamount to a stipulation and precludes later objection to invading the factfinder's province.

The Judge is not invading that province when he is deciding pure issues of law. Nor is he invading when he finds facts on issues, such as whether the court-martial or commission is properly composed, for which the evidence is entirely segregable from the general issue of guilt. Nor is he invading when there are either stipulated facts or a legal claim, such as one based on status, that essentially immunizes the accused from prosecution and that compels up front fact-finding in aid of enforcing the status or immunity. This is perhaps clearest in *DeLaurentis*, which reinstated charges on grounds that the judge had decided—before a Federal Rule of Criminal Procedure 29 motion (our equivalent to R.M.C. 917)—something not "capable of determination without trial" as understood in Federal Rule of Criminal Procedure 12(b).

James DeLaurentis was Supervisor of Detectives in Hammonton, New Jersey. He was indicted for accepting bribes to intercede with the town council to save the license of a problem establishment under a statute that makes doing so a federal offense if the local government "receives, in any one year period, benefits in excess of $10,000 under a Federal program." *DeLaurentis*, 230 F.3d at 661. Using reasoning common to this line of cases, the appellate court ruled that the trial judge erred as a matter of law in not accepting the allegations in the indictment as true and in failing to recognize that criminal procedure has no pretrial equivalent to summary judgment in civil procedure. The *DeLaurentis* court succinctly restated the rule that clarifies what "capable of determination without trial" means and does not mean:

> 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.

Id. at 660. The *DeLaurentis* restatement harmonizes all cases relevant to this appeal, including the cases involving military offenses that Al Nashiri mistakenly believes justify wholesale and indiscriminate pretrial judicial fact-finding on the elements. The "stipulated record" qualifier

explains many instances in which courts often do fact-finding before trial, even on matters that bear upon the general issue of guilt: it is generally not an invasion if the parties invite the judge into a province not normally his own, though Congress's preclusion of judge-alone trials on guilt or innocence in the M.C.A. indicates there are outer limits to this waiver-as-abdication principle.

The "immunity" qualifier explains the remaining instances. The classic "immunity issues" case is the suppression hearing to determine the admissibility of a confession, which implicates the accused's privilege against compulsory self-incrimination. *United States v. Covington*, 395 U.S. 57, 60 (1969) (concluding that the self-incrimination defense to a Marijuana Tax Act prosecution was "capable of determination without trial" because the privilege against self-incrimination barred prosecution); *see also United States v. Knox*, 396 U.S. 77, 83-84 & n.7 (1969) (reversing pretrial dismissal and reinstating indictment because accused's 5th Amendment privilege was not implicated and thus Knox was not immune from prosecution, making duress defense not "capable of determination without trial"). Lacking status as one of the categories of persons subject to the Code under Article 2 of the UCMJ also operates to immunize from prosecution. *See, e.g.*, *United States v. McDonagh*, 10 M.J. 698, 705 (A.C.M.R. 1981) (describing the effect of Article 2 as establishing jurisdiction of courts-martial over persons who otherwise would "escape military jurisdiction, and remain immune from military discipline"); *Ali*, 71 M.J. at 264 (involving agreed upon pretrial hearing into *status* of Ali, including whether he was serving with or accompanying armed forces in the field during a contingency operation under Article 2(a)(10), with minimal overlap between status inquiry and guilty plea trial of offenses under Articles 107, 121, and 134). And in the case of an enemy fighter under the M.C.A.'s counterpart to Article 2 (*i.e.*, Section 948c), status as a lawful belligerent provides "combatant immunity" from prosecution. *Khadr*, 717 F. Supp. 2d at 1221.

Determining if the Accused is of a certain status is a threshold legal question, and the Judge has power to gain necessary facts to aid that determination and no good cause for deferring the matter, because the immunity accompanying the status would have no impact without judicious exercise of such procedural power. In the case of the privilege against self-

incrimination, a pretrial suppression hearing is necessary to prevent jurors from hearing a statement that the judge ultimately is going to deem inadmissible. In the case of a civilian being court-martialed, a pretrial evidentiary hearing on status is necessary so as not to prolong unauthorized detention and trial. In the case of a lawful combatant or noncombatant, a pretrial evidentiary hearing on status is necessary to prevent unauthorized trial for warlike acts. Significantly, the privileges and immunities flowing from status attach to the person of an accused while that status is enjoyed, not to the accused's conduct. *See, e.g.*, *Ballantine's Law Dictionary* 584 (2010) (defining "immunity" as "a *personal* favor granted by law" (emphasis added)).

But these considerations of immunity resulting from status do not apply to factual disputes over the charged offense. Thus the judge invades the province of both the charging process and the guilt/innocence fact-finding process by requiring a pretrial evidentiary hearing in which the prosecution must specifically set out to prove for final judicial determination (albeit to a preponderance) an other-than-status element of properly pleaded and referred offenses. Even at the height of the now-discredited service-connection test that this Court should not resurrect, no reported case ever came close to ruling that it was the prosecution's pretrial requirement to "establish by a preponderance of the evidence the last statutory element for each offense," App. 469, particularly where that element does not deal with the accused's status. Its location within the M.C.A., *see* 10 U.S.C. § 950p(c); its listing as a common element in the Manual, *see* Manual for Military Commissions, United States pt. IV (2012); its distinction from the provisions defining and attaching consequence to being an AUEB, *see* 10 U.S.C. § 948a(1)-(9); *id.* § 948c; *id.* § 948d; its reference to the "context" and "associat[ion] with hostilities" of the attack or other *conduct* of the accused; and its separate mention in each pleading from the statement that the accused is an AUEB—these textual details together make clear that the element Judge Spath now insists the prosecution was supposed to have proved is not about *status*.

The examples of evidentiary hearings during military offense prosecutions offered by Al Nashiri are more correctly explained by the *DeLaurentis* restatement of the applicable rule than

by the accused-always-gets-two-bites-at-the-apple explanation contained in Al Nashiri's response. Appellee Br. 10-12. Military offenses are ones in which "the elements of the underlying crime, either directly or by necessary implication, require that the accused be a member of the military." *United States v. Contreras*, 69 M.J. 120, 123 (C.A.A.F. 2010). In a pretrial interlocutory hearing that might involve testimony from an accused and his recruiter (*e.g.*, in a prosecution for desertion under Article 85 of the UCMJ), the accused challenging jurisdiction does indeed have the first of two opportunities to test the evidence on which his status as a service-member can be concluded—this first opportunity as part of the judge's fact-finding, with a second opportunity at trial, as part of the determination of the general issue of guilt by the panel. *United States v. Ornelas*, 6 C.M.R. 96 (C.M.A. 1952). But the judge's fact-finding in such cases is in aid of giving force to an immunity being claimed by the Accused, namely that immunity from prosecution altogether stemming from his status as someone not subject to the UCMJ.

Al Nashiri's bites-at-the-apple formulation leaves nugatory Section 949d(a)(1)(A), which gives a military judge necessary procedural powers but also limits his authority to "hear[] and determin[e] motions" to only such motions as "rais[e] defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty." The *DeLaurentis* restatement of law binding on this jurisdiction preserves meaning for Section 949d(a)(1)(A) while also giving meaning to Section 949d(a)(1)(B)'s grant of authority to rule upon matters that may also be "appropriate for later consideration or decision by the members," a grant lawfully exercised in suppression hearings and pretrial evidentiary hearings on an accused's status. It is a basic principle of statutory interpretation that courts should avoid constructions that fail to give effect to every clause of a statute. *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1883). Al Nashiri's interpretation defies this canon, thus excusing injudicious invasions into the fact-finding province of the panel.

An approach respectful of the provinces of judge and panel is to be found in how federal district trial courts address the other-than-status jurisdictional element of crimes that must have

occurred within the special maritime and territorial jurisdiction of the United States. The judge's province is the law, and upon challenge he must decide the legal question of whether the offense took place within such jurisdiction. He also may consider evidence to support that legal question (*i.e.*, by examining maps and deeds establishing the Government's exclusive control or by taking judicial notice of such control). The jury then decides whether the actual conduct occurred within the federal installation in question by evaluating the testimony, making credibility and testimonial capacity determinations, etc.—with the fact-finding province on the general issue respected and preserved. *See, e.g.*, *Higgs v. United States*, 711 F. Supp. 2d 479, 550 (D. Md. 2010) ("While the jury is obliged to make the factual determination of whether the crime at issue occurred on a particular piece of property, the court, as a matter of law, has the authority to determine whether federal jurisdiction extends to a particular piece of property."). Such an approach seemed to have been adopted by the prior Military Judge with regard to the other-than-status element that the Accused's conduct occur "in the context of and associated with hostilities," App. 207 (ruling that hostilities "is a question of fact and an element of proof" and deferring before trial to the political branches' determination that a state of hostilities existed); App. 473 (ruling that "matters concerning the MV Limburg's and the Accused's legal status at the time of the alleged attack . . . are questions of fact and must be resolved by the fact-finder"). Judge Spath's departure from this approach resulted from errors of law; and in failing to return the Commission to such an approach upon being alerted to his errors in Appellant's Motion for Reconsideration below, the Judge abused his discretion.

An evidentiary hearing on the Accused's AUEB status, meanwhile, would not invade the province of the panel and would provide the Judge interim concrete factual findings pertinent to his analysis of subject-matter jurisdiction, given that Section 948d makes AUEB status (via the personal jurisdiction provision of Section 948c) a chief component of that analysis. Al Nashiri complains that such a hearing is unnecessary because he does not challenge personal jurisdiction, but both Al Nashiri and the Judge fail to take status seriously or to recognize its centrality to subject-matter jurisdiction. In such a hearing, the prosecution intends to call the two witnesses

and to introduce other evidence drawn from the attachments listed in paragraph 12 of its Motion for Reconsideration and submitted with it. App. 270-454 (including referral binder on DVD). This evidence would include, for instance, leases, receipts, and other documents reflecting Al Nashiri's preparations for attacks on USS THE SULLIVANS (DDG 68) and USS COLE (DDG 67) in the city of Aden, Yemen, written records of statements from now unavailable witnesses who saw Al Nashiri's activities in Aden, news articles reporting Usama Bin Laden's claiming of credit for the attack on the MV *Limburg*, Al Nashiri's own statement regarding the anti-U.S. purpose of that attack, documents reflecting the involvement of NATO and France in the response to September 11th, and even declarations of knowledgeable persons attesting to the impact of the *Limburg* bombing on the oil and shipping insurance markets, App. 307-310, and explaining how the bombing threatened three of the five most significant pieces of global maritime transportation infrastructure on which the United States relies for commerce and security. App. 303-305. Critically, though, these limited matters would be offered to establish AUEB status and not to prove the other-than-status element of each offense identified by the judge; they would thus avoid a contested and potentially open-ended pretrial trial on the *Limburg* attack's connections to the United States. Trial will, and must, be permitted to reveal the full nature of such connections.

CONCLUSION

For these reasons, the Court should reverse the dismissal and remand for an evidentiary hearing on the Accused's status as an AUEB and movement toward trial on the merits.

Respectfully submitted,
//s//

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 14(i) because it contains 5,758 words.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail to Counsel for Mr. Al Nashiri on October 17, 2014.

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