UNITED STATES OF AMERICA	)	IN THE UNITED STATES COURT OF
	)	MILITARY COMMISSION REVIEW
Appellant,	)	
	)	APPELLANT MOTION FOR LEAVE
	)	TO FILE SUPPLEMENTAL PLEADING
	)	
	)	U.S.C.M.C.R. Case No. 14-001
	)	
	)	Arraigned at Guantanamo Bay, Cuba
v.	)	on November 9, 2011
	)	
	)	Before a Military Commission
	)	convened by Vice Admiral (ret.)
	)	Bruce E. MacDonald, USN
	)	
ABD AL RAHIM HUSSAYN	)	Presiding Military Judge
MUHAMMAD AL NASHIRI	)	Colonel Vance H. Spath, USAF
	)	
Appellee.	)	DATE: May 10, 2016

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

Under Rule 20(b) of this Court's Rules of Practice, Appellant United States respectfully moves the Court to grant leave to file a supplement to its merits briefs. *See* Br. on Behalf of Appellant (Sept. 29, 2014); Reply on Behalf of Appellant (Oct. 17, 2014). The Court should grant Appellant leave because the supplement alerts the Court to a new decision by the United States Court of Appeals for the District of Columbia Circuit—*United States v. Miranda*, 780 F.3d 1185 (D.C. Cir. 2015)—and a new decision by the United States Supreme Court—*United States v. Wong*, 135 S. Ct. 1625 (2015)—that bear upon the issues in this appeal. The Court should also grant Appellant leave because *Miranda* sheds new light on another D.C. Circuit decision—*United States v. Al Bahlul*, 767 F.3d 1, 10 n.6 (D.C. Cir. 2014)—that also bears upon the issues in this appeal. Granting Appellant leave will enable the Court to benefit from Appellant's explanation of how *Miranda*, as well as *Wong* and *Al Bahlul* in light of *Miranda*, show that the Commission erred in its September 16, 2014 Order.

Appellant does not object to Appellee Al Nashiri responding to the supplement.

Respectfully submitted,

//s//

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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 May 10, 2016.

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TO THE HONORABLE, THE JUDGES OF
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Appellant United States calls the Court's attention to the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *United States v. Miranda*, 780 F.3d 1185 (D.C. Cir. 2015), and the recent decision of the United States Supreme Court in *United States v. Wong*, 135 S. Ct. 1625 (2015). The D.C. Circuit's decision in *Miranda* further exposes the legal errors committed by the military commission in its September 16, 2014 Order. AE 168K/AE 241G (App. 465-471).[1] The Supreme Court's decision in *Wong*, echoing much of the D.C. Circuit's analysis, likewise exposes those legal errors. *Miranda* in particular provides strong and binding new authority supporting Appellant's position that the military judge misapplied the straightforward jurisdictional provision of 10 U.S.C. § 948d and unjustifiably invaded the province of the military commission panel, the lawful factfinder on the question of guilt or innocence. *See*

[1] All "App." citations are to the Appendix to Brief on Behalf of Appellant, filed on September 29, 2014.

Br. on Behalf of Appellant 16, 26-35 (Sept. 29, 2014); Reply on Behalf of Appellant 6-15 (Oct. 17, 2014).

The D.C. Circuit in *Miranda* holds up the Maritime Drug Law Enforcement Act ("MDLEA") as an example of what Congress writes when it chooses to speak to the subject-matter jurisdiction of a trial court. And in light of *Miranda,* the D.C. Circuit's recent *en banc* interpretation in *Bahlul* of the differently written Military Commissions Act now could not be clearer in its rejection of the view of jurisdiction relied upon by the military judge in his September 16 order, a view that led the military judge to require threshold proof of the hostilities element of each statutory offense as a prerequisite for the commission's exercise of subject matter jurisdiction. *Compare* AE 168K/AE 241G ¶ 12 (App. 469), *with United States v. Bahlul*, 767 F.3d 1, 10 & n.6, 12-13 (D.C. Cir. 2014) (App. 121, 124-25) (holding that the MCA "explicitly confers jurisdiction on military commissions to try the charged offenses" and that "[t]he question whether that Act is unconstitutional does not involve the court's statutory or constitutional *power* to adjudicate the case.") (internal quotation marks omitted).[2] This legal error of the military judge—more fully exposed than ever by *Miranda*—should bring this Court to reverse the September 16 order and reinstate the charges, as the commission *does have jurisdiction* to proceed to trial.

I. *MIRANDA* APPLIES A CLEAR TEST FOR WHETHER A STATUTORY CONDITION IS TRULY "JURISDICTIONAL"

Miranda and his fellow appellant were charged with conspiring to distribute a controlled substance on board "'vessel[s] subject to the jurisdiction of the United States,'" in violation of the MDLEA. *Miranda*, 780 F.3d at 1187 (alteration in original) (quoting 46 U.S.C. § 70503(a)(1)). This smuggling operation used "small boats capable of traveling undetected and at high speeds" "to move drugs from Colombia to various Central American countries." *Id.* "From 2006 to 2010, the smuggling organization transported large quantities of drugs in numerous shipments." *Id.*

[2] The early LEXIS publication of the *Bahlul en banc* decision—which was furnished to the Commission in AE 48M and to this Court at pages 117 to 168 of the Appendix—contains internal cross-references to the D.C. Circuit's slip opinion. The citation and quoted passage *infra* in this supplement now use the final pagination from the Federal 3d Reporter.

Miranda never left Colombia in furtherance of the conspiracy. His role was to provide logistical support. In 2011, Colombian officials arrested Miranda and soon thereafter extradited him to the United States. *Id.*

Miranda pleaded guilty unconditionally. On appeal, he argued that (1) the MDLEA was unconstitutional as applied to his conduct and (2) his charged offenses did not involve "vessel[s] subject to the jurisdiction of the United States" as defined by the MDLEA. The D.C. Circuit held that his guilty plea caused him to waive his right to appeal the first issue but not the second issue because, unlike the first issue, the second issue "goes to the district court's subject-matter jurisdiction." *Id.* at 1189. In its treatment of the latter issue, the D.C. Circuit applied a clear analysis for whether an issue truly is "jurisdictional" in the sense of going to the court's subject-matter jurisdiction and thus implicating the court's power to adjudicate the case. *Id.* at 1191-96.

Congress's grant of subject matter jurisdiction to federal district courts within the MDLEA focuses on the status of vessels that traffic in controlled substances, allowing it to reach conduct comprising the knowing or intentional manufacture, distribution, or possession with intent to distribute drugs "on board" such vessels. 46 U.S.C. § 70503(a). Specific statutory provisions containing the word "jurisdiction" contribute to the grant. Thus, the MDLEA expansively defines the term "Vessel subject to the jurisdiction of the United States." In addition to actual vessels of the United States, the MDLEA criminalizes drug trafficking aboard six categories of vessels originating from or registered outside the United States. 46 U.S.C. § 70502(c).

Having thus defined terms in the express framework of "jurisdiction," the MDLEA next sets forth a separate provision entitled "Jurisdiction," within a section entitled "Jurisdiction and venue":

> (a) **Jurisdiction.**—Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge.

46 U.S.C. § 70504(a). In *Miranda*, the D.C. Circuit noted that the district court, in applying these provisions, had found the charges against Munoz to involve "vessel[s] without nationality."

Miranda, 780 F.3d at 1192, 1197 (applying § 70502(c)(1)(A)). Although it would eventually affirm this finding of the trial court below, *id.* at 1197-98, the D.C. Circuit spends six pages of the opinion explaining why these "jurisdictional" provisions of the MDLEA really do speak to whether the district court had the power to proceed to trial against defendant Munoz, as distinct from provisions of statutes that merely describe limits on Congress's power to legislate. *Id.* at 1191-96; *see Wong*, 135 S. Ct. at 1632 (noting that jurisdiction refers to a "a court's power").

The latter sorts of provisions, the D.C. Circuit recognized in *Miranda*, have given rise to a "'colloquialism' used by '[l]awyers and judges,'" by which terms of a statute addressing the reach of Congress's legislative authority also may confusingly be referred to as "jurisdictional." *Miranda*, 780 F.3d at 1195 (alteration in original) (quoting *Hugi v. United States*, 164 F.3d 378, 380 (7th Cir. 1999)). In decisions cited within *Miranda*, the Supreme Court has acknowledged that "[j]urisdiction . . . is a word of many, too many, meanings," and that the Supreme Court itself, "no less than other courts, has sometimes been profligate in its use of the term." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)) (internal quotation marks omitted). An instance of "jurisdictional" being used to refer to Congress's power to legislate as distinct from a trial courts' power to adjudicate occurs, for example, when a judge or lawyer describes a requirement that an offense involving a firearm affects interstate commerce as a "jurisdictional element." *See Miranda*, 780 F.3d at 1195 (referring to 18 U.S.C. § 922(q)(2)(A)). To highlight this imprecise usage, the D.C. Circuit in *Miranda* occasionally identifies a statutory provision as a "so-called 'jurisdictional element.'" *See, e.g.*, *id.*

Yet the provisions of the MDLEA that require and guide a preliminary determination by the trial judge as to a vessel's status are truly jurisdictional and not merely "so called" by judges and lawyers. The D.C. Circuit arrives at this conclusion after painstaking analysis of the text of the MDLEA and frequent comparisons to other federal laws. The D.C. Circuit's overall approach is one of considering the statute's text and context. Looking at the text, "'[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts will be duly instructed and will not be left to wrestle with the issue.'" *Id.* at 1192 (quoting *Arbaugh*,

546 U.S. at 515-16 (footnote omitted)); *see Wong*, 135 S. Ct. at 1632 ("In recent years, we have repeatedly held that procedural rules, including time bars, cabin a court's power only if Congress has 'clearly state[d]' as much." (alteration in original)). "'But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character.'" *Miranda*, 780 F.3d at 1192-93 (quoting *Arbaugh*, 546 U.S. at 516).

The D.C. Circuit noticed that in the MDLEA, Congress itself had framed vessel status as a "'threshold limitation on [the] statute's scope,'" and thus "'the Legislature clearly state[d] that' it should 'count as jurisdictional.'" *Id.* at 1193 (alterations in original) (quoting *Arbaugh*, 546 U.S. at 515). Congress prescribed that the "'[j]urisdiction of the United States with respect to a vessel' is a '[j]urisdictional issue[].'" *Id.* (alterations in original) (quoting 46 U.S.C. § 70504(a)). Congress also deemed that "jurisdictional issue" to be a "'preliminary question[] of law . . . determined solely by the trial judge.'" *Id.* (alterations in original) (quoting 46 U.S.C. § 70504(a)). The "preliminary question" set out in § 70504(a), the Court reasoned, thus operates precisely in the nature of a condition on subject-matter jurisdiction: subject-matter jurisdiction presents a question of law for resolution by the court, and courts have an "'obligation to determine whether subject-matter jurisdiction exists'" as a preliminary matter. *Id.* (quoting *Arbaugh*, 546 U.S. at 514).

Courts look to the text to also determine whether the language of subject matter jurisdiction is actually used by Congress and to where the provision in question is placed within the statute. The D.C. Circuit notices that "[s]tatutes that establish 'jurisdictional elements' . . . contain no use of the term 'jurisdiction,'" an observation readily confirmed upon study of the comparative examples cited in *Miranda*. *Id.* at 1195; *see Wong*, 135 S. Ct. at 1632 (looking to the text of, and the text's placement within, the Federal Tort Claims Act to determine whether the statute's time bar is jurisdictional). For example, 18 U.S.C. § 656 criminalizes certain conduct by an individual who is "an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank" with an absence of "jurisdiction" language altogether. Meanwhile, "a provision's 'placement within' the statute can 'indicat[e] that Congress wanted that provision to be treated as

having jurisdictional attributes.'" *Miranda*, 780 F.3d at 1196 (alteration in original) (quoting *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1205 (2011)); *see Wong*, 135 S. Ct. at 1633 (concluding that the time limitations in the Federal Tort Claims Act were not jurisdictional because, among other reasons, the time limitations were "house[d]" in "a different section of Title 28" than that which "confers power on federal district court to hear [Federal Tort Claims Act] claims").

Applying this part of the analysis, the D.C. Circuit notices that § 70504(a) expressly speaks of "jurisdiction" and that

> [t]he placement of § 70504(a) reinforces that it pertains to the subject-matter jurisdiction of district courts rather than the legislative "jurisdiction" of Congress. Congress situated § 70504(a) within a provision addressing, per its title, "Jurisdiction and venue." 46 U.S.C. § 70504; *see INS v. Nat'l Cent. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text."). The subject of "venue," addressed in § 70504(b), by nature speaks to the authority of a district court to hear a case. The subject of "jurisdiction," addressed in § 70504(a), is best understood likewise to address the authority of district courts to hear a case rather than Congress's own authority to regulate. In other instances in which Congress uses the term "jurisdiction and venue," the statute indisputably pertains to the jurisdiction of the courts. *See, e.g.*, 7 U.S.C. § 941; 29 U.S.C. § 1370; 40 U.S.C. § 123. Congress did the same in § 70504.

Miranda, 780 F.3d at 1196. The attentiveness to language and placement in *Miranda* also militates in favor of finding true "jurisdictional attributes" in § 70502(c), which in addition to "jurisdiction," expressly includes "subject to," a phrase that can denote Congress's purpose of identifying what *subject* matter is properly under the court's power. *Cf. Wong*, 135 S. Ct. at 1632 (concluding that the time limitations in the Federal Tort Claims Act were not jurisdictional because, among other reasons, Congress "provided no clear statement" that the time limitations "deprive a court of jurisdiction").

In determining whether a statutory provision is "jurisdictional," courts also look to context. *Miranda*, 780 F.3d at 1193 ("In addition, 'context . . . is relevant to whether a statute ranks a requirement as jurisdictional,' and here, the context of § 70504(a) strongly suggests a requirement of subject-matter jurisdiction." (alteration in original) (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010))); *see Wong*, 135 S. Ct. at 1633. Although "branding a rule as going to

a court's subject matter jurisdiction" has the burdensome effect of imposing an independent obligation upon judges in every case—and at every level of appellate review—to assure its satisfaction, and although such practical considerations "ordinarily weigh in favor of construing a threshold statutory condition to be non-jurisdictional," *Miranda*, 780 F.3d at 1193 (internal quotation marks omitted), other contextual factors can nonetheless provide additional weight in favor of finding such statutory conditions to be jurisdictional after all. In *Miranda*, the D.C. Circuit divined, in particular, that Congress made vessel status jurisdictional "to minimize the extent to which the MDLEA's application might otherwise cause friction with foreign nations." *Id.* at 1193. This sensitivity is reflected in § 70502(c)'s express concern for foreign nations' "consent," "waiver," or "response," reactions that "play[] a central role in determining whether a vessel is 'subject to the jurisdiction of the United States' under the MDLEA." *Id.* at 1194. It is also reflected in another provision of the MDLEA, "under which a defendant lacks 'standing to raise a claim of failure to comply with international law as a basis for a defense' because the defense 'may be made only by a foreign nation.'" *Id.* at 1194-95 (quoting 46 U.S.C. § 70505).

The D.C. Circuit emphasized that courts should respect the distinction between statutory conditions that go to subject-matter jurisdiction from those that function as elements. *Id.* at 1193 (citing *Arbaugh*, 546 U.S. at 514). According to the D.C. Circuit, this distinction is critical because the trial judge resolves the former, whereas juries resolve the latter. Thus, the D.C. Circuit stresses how in the MDLEA, "Congress not only specified that the 'jurisdiction of the United States with respect to a vessel' is a threshold question determined by the court, but also that it is 'not an element of the offense,' *fortifying its jurisdictional character.*" *Id.* (emphasis added) (quoting 46 U.S.C. § 70504(a)). As to statutory conditions that function as elements, the D.C. Circuit in *Miranda* notes that "proof of [a jurisdictional element] is no different from proof of any other element of a federal crime." *Id.* at 1195 (alteration in original) (quoting *Hugi*, 164 U.S. at 381). By contrast, the D.C. Circuit observes, "§ 70504(a) specifically provides that the 'jurisdiction of the United States with respect to a vessel' is not an element of the offense and is to be determined by the court rather than by the jury, signifying that Congress did not intend [merely] to establish a [so-called]

'jurisdictional element.'" *Id.* at 1195. While the district court trial judge was empowered to make factual determinations as a predicate to deciding as a matter of law whether a vessel is subject to the court's jurisdiction, the stipulations by which such facts were established in Miranda's case respected the jury's province to determine whether the elements of the drug offenses had been proven. *Id.* at 1197-98.

For the foregoing reasons, the D.C. Circuit concluded that § 70504(a) actually relates to the subject-matter jurisdiction of the district courts themselves rather than merely Congress's jurisdiction. The entry of unconditional guilty pleas by Miranda and his co-accused thus did not result in effective waiver of the question whether the pertinent vessels were "subject to the jurisdiction of the United States" within the meaning of the MDLEA. *Id.* at 1196.

II. *MIRANDA* SHOWS THAT THE 10 U.S.C. § 950p(c) "COMMON CIRCUMSTANCE" THAT OFFENSES BE "COMMITTED IN THE CONTEXT OF AND ASSOCIATED WITH HOSTILITIES" DOES NOT GO TO THE COMMISSION'S SUBJECT MATTER JURISDICTION, WHILE CONFIRMING THE ACCUSED'S STATUS AS AN ALIEN UNPRIVILEGED ENEMY BELLIGERENT *DOES* GO TO SUCH JURISDICTION

The D.C. Circuit's decision and analysis in *Miranda* provides a framework for assessing whether the hostilities "element" of each *Limburg* bombing charge is truly "jurisdictional," as it was found to be by the newly detailed military judge. In short, the MDLEA's unique and specific statutory language compels a threshold determination by the trial court regarding subject matter jurisdiction that is distinct from that required by a military commission under the MCA. Also, whether the offense was committed "in the context of and associated with hostilities"—reflected in the MCA as a "Common Circumstance[ ]" and in duly promulgated rules as an "element"—is *not* truly jurisdictional but rather is a condition that goes to the reach of Congress's legislative authority. It must therefore be proven at trial on the merits.

A. The *Miranda* Analysis Applied to the "Common Circumstances" Provision of the Military Commissions Act Reveals That This Provision Is Not Jurisdictional

Greater understanding of how Congress intended a military commission to receive its subject matter and bring it fairly and effectively to trial before a jury panel is attained by applying the *Miranda* analysis to 10 U.S.C. § 950p(c):

> COMMON CIRCUMSTANCES.—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.

First, according to the D.C. Circuit, if a limitation on a statute's scope counts as jurisdictional, then "courts will be duly instructed and will not be left to wrestle with the issue," but "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character." *Id.* at 1192-93 (internal quotation marks omitted); *see infra* p. 4. In this respect, the "Common Circumstances" provision of 10 U.S.C. § 950p(c) is accompanied by no instruction from Congress that it is to count as jurisdictional, in sharp contrast to the specific instructional language regarding jurisdiction that Congress included in the MDLEA, in 46 U.S.C. § 70504. The military judge thus should not have wrestled with the matter and should have instead treated it as not jurisdictional in character, even though imprecision in the language of jurisdiction is something to which the Supreme Court itself has confessed.

This interpretation attends to whether the language of subject matter jurisdiction is actually used by Congress and to where the provision in question is placed within the statute. As the D.C. Circuit observed in *Miranda*, so-called "jurisdictional elements" contain no use of the term "jurisdiction," so it is telling that the "Common Circumstances" provision of 10 U.S.C. § 950p(c) omits any such use. In addition, a provision's placement within the statute can indicate that Congress wanted that provision to be treated as having jurisdictional attributes. *See Wong*, 135 S. Ct. at 1633. Applying this part of the analysis to the "Common Circumstances" provision, one notes that the provision appears within a subchapter entitled "Punitive Matters"—also devoid of any mention of "jurisdiction"—and that it is "common" to each of the thirty-two offenses codified in another section within the same subchapter, namely 10 U.S.C. § 950t. The language and

placement of the "Common Circumstances" provision thus disfavor the finding of "jurisdictional attributes."

Also, the "context" of 10 U.S.C. § 950p(c) and of neighboring subsections "is relevant to whether a statute ranks a requirement as jurisdictional," and here, the context contains none of the strong suggestions present in the MDLEA with respect to § 70504(a). Instead, the use of the term "circumstances," which denotes facts or conditions connected to an event or action, suggests determinations that are made at trial on the merits, not as a preliminary or threshold matter. The same term is used elsewhere in the section, within the definition of "military objective," which refers to persons or objects whose capture or destruction "would constitute a definite military advantage to the attacker under the circumstances at the time of an attack." 10 U.S.C. § 950p(a)(1). That "circumstances" in this subchapter of the statute go to the merits rather than to the subject matter jurisdiction of the commission is further suggested by the contents of specific crime subsections, such as "Attacking Civilians," *id.* § 950t(2), and "Hazarding a Vessel," *id.* § 950t(23), which incorporate the definition of "military objective." Not surprisingly in light of these contextual factors, the Secretary of Defense, under rulemaking authority given to him by Congress, *see* 10 U.S.C. § 949a(a), recognized the non-jurisdictional character of the "Common Circumstances" provision by specifically enumerating appropriate adaptations to its language as the final element of each offense. *See* Manual for Military Commissions, United States, pt. IV ¶¶ 5(2), 5(3) (2012) (listing as the fifth element of the crimes of "Attacking Civilians" and "Attacking Civilian Objects" that "The attack took place in the context of and associated with hostilities"); *id.* ¶ 5(23) (listing the fourth element of the crime of "Hijacking or Hazarding a Vessel or Aircraft" that "The conduct took place in the context of and was associated with hostilities"); *id.* ¶ 5(24) (listing the third element of the crime of "Terrorism" that "The killing, harm or wanton disregard for human life took place in the context of and was associated with hostilities").

Under *Miranda*, the question whether a statutory provision is truly "jurisdictional' in character should consider and respect the distinction between the trial judge's function in answering a preliminary question of law and the jury's function in determining the general issue

of guilt or innocence. *See infra* p. 5. Whereas *Miranda* sharply "distinguish[ed] statutory conditions that function as 'element[s] of a claim' from those that go to subject-matter jurisdiction, and explain[ed] that courts resolve the latter whereas juries resolve the former," 780 F.3d at 1193 (first alteration in original), the ruling in AE 168K/241G demands pre-trial establishment with proof, to judge alone, of "the last statutory element of each offense . . .," AE 168K/AE 241G ¶ 12 (App. 469). *Miranda* thus highlights that the requirement imposed by the military judge is confused, as the military judge—we maintain with all due respect to the judge's lawful role—has no business demanding that the government prove an element of the offense to anyone but the panel at trial on the merits. *See* Br. on Behalf of Appellant 16, 26-35; Reply on Behalf of Appellant 6-15. Under the MDLEA, the status of a vessel is "not an element of the offense" and is expressly reserved for threshold judicial determination. *See Miranda*, 780 F.3d at 1192. Under the MCA, whether the *offense* is *committed* in the context of hostilities is emphatically an element of the offense. While Congress is attentive in both statutes to the distinct roles of criminal trial judge and criminal trial jury, the military judge's view of the "Common Circumstances" provision ignores this fundamental separation of function.

B. The *Miranda* Analysis—Applied to the Sections of the Military Commissions Act that Actually Employ the Language of Jurisdiction—Confirms that Alien Unprivileged Enemy Belligerent Status *Does* Go to the Subject Matter Jurisdiction of a Commission

The analysis of the D.C. Circuit in *Miranda* enables courts and counsel consulting the Military Commissions Act to readily locate the provisions that have true "jurisdictional attributes" and are not merely "so-called jurisdictional." These provisions are located in the first subchapter, which is entitled "General Provisions." Whereas the MDLEA focuses upon the status of vessels used to traffic narcotics, significant direction in the MCA is provided by defining "alien unprivileged enemy belligerent," a term that does considerable work in these "General Provisions," given that "*[a]ny* alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter," 10 U.S.C. § 948c (emphasis added), and "[a] military commission . . . *shall have jurisdiction to try persons subject to this chapter* for any offense made

punishable by this chapter . . . ," 10 U.S.C. § 948d (emphasis added); *see* Reply on Behalf of Appellant at 2-3.

The language and placement of 10 U.S.C. §§ 948a, 948b, 948c, and 948d within the MCA reveal that these sections have genuine "jurisdictional attributes." The title and contents of 10 U.S.C. § 948d expressly include the term "jurisdiction," and 10 U.S.C. § 948c speaks of persons "*subject* to military commission" and "*subject* to trial," phrases that denote the granting of "*subject* matter" jurisdiction to a court process. Moreover, these sections are contained at subchapter I, separate from the thirty-two listed offenses and the "Common Circumstances" regarding those offenses, all of which appear in the final "Punitive Matters" subchapter of the MCA. 10 U.S.C. §§ 950p – 950t (subchapter VIII). Meanwhile, the limitation to *alien* unprivileged enemy belligerents similarly conveys a restriction on a military commission's power rather than on Congress's, both by the incorporation of alien status within 10 U.S.C. § 948d via 10 U.S.C. § 948c and by Constitutional holdings of federal courts that give legal meaning to the distinction between citizens and noncitizens with respect to criminal trial process. *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 774-75, 783-85 (1950).

It is noteworthy that the operative language of 10 U.S.C. §§ 948c and 948d of the MCA is nearly identical to that of 10 U.S.C. §§ 802 and 818, the subject matter jurisdictional provisions applicable to general courts-martial under the UCMJ. Thus § 948c and § 802 specify "Persons subject to" trial by military commissions and courts-martial, respectively. And § 948d and § 818 bear the titles "Jurisdiction of military commissions" and "Jurisdiction of general courts-martial," respectively, with both stating, word-for-word, that they "have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter . . . ." Item-by-item application of the *Miranda* statutory analysis to these counterpart Uniform Code of Military Justice provisions readily yields the conclusion that 10 U.S.C. §§ 802 and 818 are jurisdictional in character. It is an additional noteworthy part of the context here that Congress used identical operative language in the MCA that it has long used in the UCMJ in order to establish jurisdiction for military commissions, and also that, according to the Supreme Court, "military jurisdiction has always been

based on the 'status' of the accused . . . ." *Solorio v. United States*, 483 U.S. 435, 439-40 (1987) (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 243 (1960)); *see also id.* at 439 (citing *Ex parte Milligan*, 4 Wall. 2, 123 (1866), a military commission case, as one of an unbroken line of decisions in which the military status of the accused was held by the Supreme Court to be the test for subject matter jurisdiction of a military court). From this context, Congress can thus be interpreted as having sought to make the status limitations of the MCA count as jurisdictional, just as the parallel provisions of the UCMJ count as jurisdictional.[3]

C. The *Bahlul* Decision Foreshadowed the Distinction—Now Fortified by *Miranda*—Between the Power of Congress to Legislate an Offense and the Power of the Military Commission to Try an Offense

The *Miranda* analysis conforms to and both elaborates and cements a portion of the reasoning in the majority opinion of the *en banc* D.C. Circuit in the case of *United States v. Bahlul*. A long footnote in that *Bahlul en banc* opinion interprets Rules for Military Commission 905 and 907, the precise procedural rules under which Al Nashiri brought the pretrial motion to dismiss that has led to the present interlocutory appeal of the military judge's September 16th order. *Bahlul*, 767 F.3d at 10 & n.6, 12-13 (App. 121, 124-25). This common procedural context—and the fact that the *en banc* majority's footnote and related passages are interpreting provisions of the Military Commissions Act of 2006 that are nearly identical to those in the 2009 MCA at issue on this appeal—makes the *Bahlul en banc* opinion even more pertinent in light of *Miranda* than it was when included in the Appendix with Appellant's original brief, on September 29, 2014.

Miranda's basic test regarding whether a condition shall rank as jurisdictional is foreshadowed in the *Bahlul en banc* footnote. The footnote states that "the 2006 MCA *explicitly*

[3] Although not elaborated in this supplement, it is also instructive to use the *Miranda* analysis with regard to whether a military commission "under this chapter," 10 U.S.C. §§ 948b(b) & 948b(d), is convened by a properly empowered official, *id.* at § 948h, whether it is composed of personnel in requisite numbers and with necessary qualifications, *id.* at §§ 948i & 948m, and whether the charges have been referred to it by competent authority, *id.* at § 948a. In short, such careful statutory analysis indicates that each of these requirements counts as jurisdictional, while even further exposing why the "Common Circumstances" provision, *id.* at § 950p(c), cannot count as jurisdictional under the D.C. Circuit's now clearly binding method of interpretation.

confers jurisdiction on military commissions to try the charged offenses," *id.* at 10 n.6 (emphasis added), and the ensuing portion of the *en banc* opinion that is incorporated into the footnote by reference reiterates that "[t]*here could hardly be a clearer statement of the Congress's intent to confer jurisdiction* on military commissions to try the enumerated crimes . . . ." *Id.* at 12 (emphasis added). It is consistent with this interpretation of the MCA of 2006 that the *en banc* court finds *no* support in that statute for Bahlul's belated claim on appeal that either the Ex Post Facto clause or the 2006 MCA statement "[t]his chapter does not establish new crimes," 10 U.S.C. § 950p(a) (2006), operated as a limit on the military commission's jurisdiction over the charges. If Congress had intended that, it would have said so, both *Bahlul* and *Miranda* strongly indicate.

The reasoning in *Bahlul* footnote 6 also fully respects the distinction between the trial judge's function in answering a question of law and the jury panel's function in determining the general issue of guilt or innocence. *See* Br. on Behalf of Appellant 16, 26-35; Reply on Behalf of Appellant 6-15. At the start of the footnote, the court specifically references R.M.C.s 905 and 907, which allow the pre-trial raising of and ruling upon defenses or objections "capable of determination without trial of the general issue of guilt," a phrase that polices the boundary between these distinct functions. R.M.C. 905(b); R.M.C. 907(a). And the conclusions that "Bahlul's *ex post* facto argument [is not] jurisdictional," and that even a meritorious but forfeited *ex post facto* argument "does not oust a court of jurisdiction," *Bahlul*, 767 F.3d at 10 n.6 (internal quotation marks omitted), necessarily imply that judges do *not* "bear an independent obligation" to address it, including "at every level of appellate review . . . regardless of whether a party were to raise it," one of the consequences of deeming a claim or issue to be truly jurisdictional. *Miranda*, 780 F.3d at 1193. For "[j]urisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1869)). Even if it were to be determined by the trial judge or an appellate court that a charge is unconstitutional or otherwise defective, that "does not affect the jurisdiction of the trial court to determine the case presented by the indictment." *United States v. Williams*, 341 U.S. 58, 66 (1951).

The *en banc Bahlul* opinion, like *Miranda*, is keenly attentive to the language and placement of statutory provisions for signals as to whether a requirement is truly jurisdictional or merely "so-called" jurisdictional. The passage cited in the *Bahlul* footnote from the D.C. Circuit's *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004) case highlights that the substantive criminal statute being considered in that appeal, 8 U.S.C. § 1324(a), "does not so much as mention the court's 'jurisdiction.'" *Id.* at 1342. Similarly, the portion of the Supreme Court's *Steel Co.* case invoked by the *Bahlul* footnote carefully parses for true jurisdictional effect different provisions of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), codified at 42 U.S.C. § 11001 et seq., under which the defendant *Steel Co.* had been sued by a citizens' advocacy group to enforce specific EPCRA requirements. A truly jurisdictional provision, the Court found, is 42 U.S.C. § 11046(c):

> The district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement.

The authority to bring the actions, meanwhile, is separately contained in 42 U.S.C. § 11046(a), which specifies that "any person may commence a civil action on his own behalf against . . . [a]n owner or operator of a facility for failure to do any of" several enumerated and referenced technical requirements, including "[c]omplete and submit an inventory form under section 11022(a)," and "[c]omplete and submit a toxic chemical release form under section 11023(a)." 42 U.S.C. § 11046(a)(1)(A). While the Supreme Court went on to find that the plaintiff citizen's advocacy group lacked standing—a truly threshold jurisdictional analysis of its own stemming from the "case or controversy" clause in Article III of the Constitution—the Court firmly rejected the notion that the substantive provisions of §§ 11046(a) and 11022 were jurisdictional:

> It is unreasonable to read [42 U.S.C. § 11046(c)] as making all the elements of the cause of action under subsection (a) jurisdictional, rather than as merely specifying the remedial powers of the *court*, viz., to enforce the violated requirement and impose civil remedies.

Steel Co., 523 U.S. at 90. To do this, the Court concluded, is to "attempt to convert the merits issue in this case into a jurisdictional one," something that it chides the dissent for doing. *Id.* at

93. Because this close textual analysis from the D.C. Circuit in *Bahlul* and *Miranda* thus further exposes one of the central legal errors of the military judge's September 16th order, it is important to highlight it in the instant supplement.

The distinct statutory context cited by the *en banc Bahlul* court provides no support for the revolutionary idea, relied upon by the military judge's September 16th ruling, that elements of an offense were made "jurisdictional" by the Military Commissions Act of 2009. *See* AE 168K/AE 241G ¶ 12 (App. 469). "Congress . . . did not create such a strange scheme." *Steel Co.*, 523 U.S. at 93. To the contrary, *Bahlul* recounts that Congress was concerned with "establishing a system to prosecute the terrorists who on [September 11, 2001] murdered thousands of innocent civilians . . . . ," *Bahlul*, 767 F.3d at 14 n.8 (App. 124), and with allowing "the criminal prosecutions of those who purposefully and materially supported [the 9/11 conspiracy]," *id.* (internal quotation marks omitted), *not* with upending the basic principle of our criminal and military justice systems that judges decide questions of law and juries are the factfinders for guilt or innocence. There is also extensive discussion in *Bahlul* about how "four justices in [the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring); *id.* at 637 (Kennedy, J., concurring)] 'specifically invited Congress to clarify the scope of the President's statutory authority to use military commissions to try unlawful alien enemy combatants for war crimes,'" *Bahlul*, 767 F.3d at 13 (App. 123) (quoting *Hamdan v. United States*, 696 F. 3d 1238, 1243 (D.C. Cir. 2012)), as well as pointed admonitions that courts must heed such inter-branch dialogue. *Id.*

Yet Appellee claims that 10 U.S.C. § 948d's phrase "offense made punishable by this chapter" creates a "separate and distinct *subject matter* jurisdictional requirement" demanding the introduction of pre-trial *evidence* of a nexus between Al Nashiri's alleged conduct and hostilities between the United States. Surreply Br. for Appellee 2 (Oct. 24, 2014). In light of the foregoing analysis and context from *Miranda* and *Bahlul*, this claim is clearly wrong. It is just as unreasonable to read "offense made punishable by this chapter" as making the hostilities element jurisdictional as it was for the dissent in *Steel Co.* to read "actions brought under subsection (a)" as making the elements of those actions jurisdictional. *Steel Co.*, 523 U.S. at 90. In each of these

instances, and also in the phrase "triable by military commission under this chapter only if," 10 U.S.C. § 950p(c), Congress means suits or prosecutions "*contending* that" the law requires or proscribes certain conduct, contentions that the trial process is designed to methodically test on their merits. And whatever lack of power in Congress under the Constitution may prevent criminalization of conduct not sufficiently connected to hostilities against the United States,[4] such lack of power deprives the *military commission* of jurisdiction no more than does a lack of power in Congress under the Constitution to enact an Ex Post Facto law. Which is to say that it does *not* deprive the military commission of jurisdiction to proceed to try the *Limburg* bombing charges against Al Nashiri—whose alien unprivileged belligerent status has not been challenged by parties or judge.

III. *MIRANDA* THUS CONFIRMS THAT THE JUDGE ERRONEOUSLY CHANGED A PRE-TRIAL CHALLENGE TO CONGRESS'S POWER TO LEGISLATE THE MV *LIMBURG* OFFENSES INTO AN UNFOUNDED CHALLENGE TO THE MILITARY COMMISSION'S POWER TO TRY THE OFFENSES

This new case from our reviewing court thus provides strong and binding additional authority for Appellant's position. The military judge misconstrued, and thereby converted, a challenge to Congress's power to legislate the offenses into a challenge to the military commission's power to try the offenses. *See* Br. on Behalf of Appellant 16. The original challenge should have been addressed by consulting the statute; by considering as true for this purpose the multiple, sworn, and concrete allegations in the referred charge sheet that the accused Al Nashiri personally controlled and directed against the United States over a period of many months until

[4] It is important to note that such a scenario would be in sharp contrast to the multiple, sworn, and concrete allegations in the referred charge sheet here, under which the accused Al Nashiri—an alien unprivileged enemy belligerent as defined in the statute—committed, through others, the four charged offenses "in the context of and associated with hostilities" against the United States. This connection to the United States, strongly manifested in the attack on the MV *Limburg* despite there being no U.S. casualties, is "more than enough," under the protective principle, to provide the Congress "jurisdiction to prescribe" under customary international law. *See, e.g.*, *United States v. 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); *see also* Br. on Behalf of Appellant 5-6.

his capture Al Qaeda's terrorist "boats operation" in the Arabian Peninsula; and then by deciding as *a matter of law* whether Congress had exceeded its power. The previous military judge had already ruled—we believe correctly—that whether hostilities between Al Qaeda and the United States existed on the dates of the accused's alleged acts was a question of fact and an element of proof that the government was required to carry at trial on the merits and that to the extent hostilities was a question of law, that hostilities existed. AE 104F (App. 203-08). The previous military judge had also already correctly ruled that the *Limburg* charges themselves properly state offenses and that additional matters regarding the *Limburg* were, in the words of the previous military judge, questions of fact that must be resolved by the factfinder. AE 174C (App. 472-73).

In switching the question before him, we respectfully maintain that the new military judge then committed legal error, and, in ignoring or silently overruling these and other previous decisions of the commission, in refusing the government's request for a first opportunity to be heard before him on the matter, and in refusing the government's offer and request for an appropriate evidentiary hearing in its motion for reconsideration (*i.e.*, to establish alien unprivileged enemy belligerency, if the judge's difficult-to-discern actions were actually a *sua sponte* challenge to jurisdiction), that he also abused his discretion. *See generally* Br. on Behalf of Appellant Brief; Reply on Behalf of Appellant. As for legal error, there can hardly be a clearer statement of Congress's intent to create jurisdiction than 10 U.S.C. §§ 948c & 948d. Those sections clearly give a properly convened and composed military commission jurisdiction to try any alien unprivileged enemy belligerent for any offense made punishable by the MCA.

While Mr. Al Nashiri's counsel has suggested that he intends to challenge his alien unprivileged enemy belligerent status as a defense on the merits, and while he has frequently misapplied case precedents that feature status-based challenges to jurisdiction, Mr. Al Nashiri in his brief to this court concedes that he has never challenged his alien unprivileged belligerent status and that it remains unchallenged. Br. on Behalf of Appellant 20-21. Under the doctrine applied by this court in *United States v. Khadr*, 717 F. Supp. 2d 1215 (U.S.C.M.C.R. 2007), unless and until a requisite of jurisdiction is challenged, a regular and proper referral process provides a basis

to exercise jurisdiction and proceed to trial. *Id.* at 1235. Meanwhile, each of the four offenses at issue on this appeal is specifically made punishable by this chapter—Chapter 47A of Title 10 of the United States Code. *See also United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012) (finding that "[b]ecause Ali was charged with and convicted of misconduct punishable by Articles 107, 121, and 134 of the UCMJ, the court-martial had jurisdiction over the offenses" and then proceeding to assess whether Ali was a person subject to the UCMJ in order to complete the subject matter jurisdictional analysis).

This legal error is alone basis to reverse and to reinstate the charges, as the commission does have jurisdiction to proceed to trial. *Miranda* reinforces this conclusion by showing clearly that jurisdiction to try the case is different from so-called "jurisdiction" to legislate the offense.

IV. CONCLUSION

For the foregoing reasons, *Miranda* further exposes the legal errors committed by the military commission below in its order of September 16, 2014. This strong and binding new authority confirms that the military judge misapplied the straightforward jurisdictional provision of 10 U.S.C. § 948d and also unjustifiably invaded the province of the military commission panel, the lawful factfinder on the question of guilt or innocence.

Miranda evinces that Defense's original challenge before the judge to the *Limburg* charges was *not* truly jurisdictional. The military judge erred in dismissing the charges for lack of subject matter jurisdiction when the Defense thus did not ask the Commission to decide a genuinely jurisdictional question and did not challenge alien unprivileged enemy belligerent status. Upon nonetheless considering whether to dismiss for lack of subject matter jurisdiction, the military judge did not alert the parties or give the government an opportunity to show the Commission has jurisdiction to proceed under the controlling statutory provisions, properly applied.

Miranda also shows that military judge confused subject matter jurisdiction with a "jurisdictional element." Under the D.C. Circuit's test in *Miranda* for determining whether a certain provision is jurisdictional, the element is not jurisdictional. So the Commission's rationale

for dismissing the charge—that the government must prove subject matter jurisdiction before trial because subject matter jurisdiction is an element of the offense—is legal error. The element is instead a "jurisdictional element," the type of element jury panels, not judges, decide.

The Court should thus reverse and reinstate the charges.

Respectfully submitted,

//s//

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CERTIFICATE OF COMPLIANCE

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I certify that a copy of the foregoing was sent by electronic mail to Counsel for Mr. Al Nashiri on May 10, 2016.

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