UNITED STATES COURT OF MILITARY COMMISSION REVIEW

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

Richard Kammen
Kammen & Moudy
135 N. Pennsylvania St., Suite 1175
Indianapolis, IN 46204

Brian Mizer
CDR, JAGC, USN
U.S. Department of Defense
Office of the Chief Defense Counsel
1620 Defense Pentagon
Washington, DC 20301

Counsel for Appellee

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I. Was it an abuse of discretion for the military judge to dismiss the charges for lack of subject-matter jurisdiction prior to trial on the merits, rather than waiting for the government put in additional evidence in its case in chief at trial, where the government declined repeated opportunities to put in evidence on jurisdiction prior to the dismissal?

II. Was it an abuse of discretion for the Commission to reject the government's belated request to put in evidence, after it had repeatedly and deliberately declined to do so when given the opportunity?

STATEMENT OF JURISDICTION

Mr. Al Nashiri hereby reaffirms and incorporates his position and arguments that this Court is without jurisdiction and/or authority to hear and decide this case, as set out in his heretofore filed Motion to Recuse Judge Krauss and Judge Weber, Motion to Dismiss Appeal for Lack of Jurisdiction, and Motion For Appropriate Relief Regarding The Court's Improper Delegation Of Its Statutory Obligations.

To the extent that the Court nevertheless retains jurisdiction, it may only act with respect to matters of law. 10 U.S.C. § 950d(g).

STATEMENT OF THE CASE

On September 15, 2011, the United States formally charged Al Nashiri with committing, *inter alia*, four offenses related to his alleged role in the *MV Limburg* bombing.

On August 26, 2013, the defense moved the Commission to dismiss the *Limburg* charges for lack of subject-matter jurisdiction under international law. The defense asserted that there is no basis for the assertion of jurisdiction over the alleged attack on the *MV Limburg* by this Commission.

On March 7, 2014, Mr. Al-Nashiri supplemented his motion to dismiss Charges VII, VIII, and IX and moved the Commission to dismiss Charge IV (Specification 2). The original pleadings in this case limited argument to the question of whether France was a coalition partner as defined in Military Commission Act (M.C.A.) § 948a(7)(B), and whether the prosecution's assertion of jurisdiction over the charged offenses was consistent with *United States v. Hamdan*, 696 F. 3d 1238 (D.C. Cir. 2012) and international law. *See* A.E. 168A; 168C. However, at oral argument on the motion, the government asserted for the first time that it had jurisdiction under § 948a(7)(C), because Mr. Al-Nashiri was allegedly a member of "al Qaeda at the time of the alleged offense under this chapter." Tr. 3075. The defense supplemented its pleadings to reflect its position that, even with the government's new theory of jurisdiction, the end result is the same: international law does not afford an American court jurisdiction over alleged war crimes against French property or Bulgarian citizens without any nexus to the United States.

At no point did the government request an evidentiary hearing on the matter of either subject-matter or personal jurisdiction. Neither did the government present any other type of proof in support of its claim of jurisdiction over the offenses.

The government acknowledged its burden to prove that the Commission has jurisdiction over the alleged offenses. Specifically, the government asserted that the Commission's authority to try these cases – its jurisdiction -- rests on the protective theory of international law and pledged to put on proof to shore up that claim.

> STC [BG MARTINS]: "We maintain with regard to a choate attack that really happened that involved a cell -- a group of cells of al Qaeda that were the same cells that -- and we have to accomplish this, of course, that -- by facts, that carried out an attempt, a very advanced attempt on THE SULLIVANS and a successful attack on the USS COLE, and then this other attack in the very same general waters, these maritime lanes of southwest Asia and the ports in those -- in that area with an intent -- and we have to of course establish this – to disrupt the U.S. and world economies and to have effect on our economy with 90,000 barrels of oil being dumped into the ocean. We haven't specifically alleged it, but we will put on proof of the price of oil rising for all countries significantly because of insurance rates going up, the disruption. So these effects are real because they're carried out by the same cells that are doing a common plan which is the government's -- a governmental theory of liability. This is very much something that our law of war tribunals can haul an individual into court to be punished for." Tr. 3077.

The government recognized that it had "an obligation to establish by a preponderance that the commission does have jurisdiction." *Id.* 3076. However, it declined to put on any actual evidence which would have established by a preponderance of the evidence the Commission's jurisdiction over the offenses. It appears to have been the government's position that factual assertions by trial counsel were sufficient to establish jurisdiction over the offense by a preponderance of the evidence. The government argued that "at this point the commission is to look at the facts in a light favorable to the government, as we haven't yet had an opportunity to put on the case and the full proof, so to look at the charges and determine if the commission has jurisdiction." *Id*. Moreover, the government was on notice throughout the proceedings that it had provided the Military Judge with no evidence to review on this issue. At the 24 February 2014 session of the Commission, Judge Pohl asked defense counsel whether "the Limburg would meet the definition of coalition partners" set forth in Section 948a(7) of the M.C.A. What followed

was a colloquy between the Military Judge and Defense Counsel regarding jurisdiction as both an element of the charges and a threshold matter (*Id.* At 3070-71):

> MJ [COL POHL]: Is that an issue of proof?
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> ADDC [CDR MIZER]: "Well, it could be, Your Honor, and if Your Honor's decision is in this case to hold an evidentiary hearing, I think that that may be a very legitimate decision to have, and we could have an evidentiary hearing with respect to the *Limburg* the next session or the session after that."
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> MJ [COL POHL]: Well, let's -- let's make sure we understand the bidding here. I as a general proposition don't direct counsel to file any type of motions. You file what you do. If this is an issue of proof, and therefore it's an element, you know, you can choose the way forward as you deem fit.
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> ADDC [CDR MIZER]: Yes, Your Honor.
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> MJ [COL POHL]: Because even if there was no motion, it would still have to be presented to the fact-finder as an element, right?
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> ADDC [CDR MIZER]: Well, Your Honor ----
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> MJ [COL POHL]: But what I'm simply saying, if you wish to make it a motion, which would basically be a jurisdictional motion and you can handle it as an interlocutory matter, that's also an option. But again, that would be a decision of the parties, not a decision of the judge.
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> ADDC [CDR MIZER]: Yes, Your Honor. And should Your Honor determine that this is a matter of fact, that would be our intent, is that it not go to the members, that this be addressed beforehand. We believe that the evidence as it stands suggests that there's no jurisdiction, just based upon the facts that are before the court and that the government doesn't dispute, French oil tanker, Iranian oil, Malaysian contract, Bulgarian national. (Tr. 3071-2.)

Later, at the 24 April 2014 session, the Military Judge reminded the government that factual assertions by trial counsel in motions and argument were not proof and could not be used as a basis to decide motions:

> MJ: "If you say as a matter of law there's jurisdiction and you decide it on the pleadings and the argument – and I'm with you on that, I mean, as a procedure. But if you say it's based on the status of oil shipping or other evidence or what happened in 2002 as far as how much oil came to the United States, that's not evidence. And you're in a position – you're not testifying.

ATC (MAJ SEAMONE): Yes, Your Honor.

MJ: So I'm saying if your argument is that this is dependent upon this evidentiary predicate, where is that?

And later:

MJ: So let me see if I got this correct. You want to give me facts to consider on this motion?

ATC: Well, Your Honor, if you believe it would be helpful to know what the nexus is, since the defense has raised the question and stated there's no nexus at all, then the government can give you that information.

MJ: It doesn't work that way. I don't tell you what I think I need for the government to prevail or for the defense to prevail. You got their motion. You're arguing the government's position on it. You take whatever – you present whatever you want to present. I mean, as far as I am seeing right now, the government's presentation is that this is a legal issue and can be decided on the briefs and the argument. Got it. But I'm not going to tell you what I think you or the defense or anybody should do.

ATC [MAJ SEAMONE]: Would you excuse me for one moment, Your Honor?

MJ [COL POHL]: Sure.

ATC [MAJ SEAMONE]: Thank you so much. Well, Your Honor, the government will contain its comments at this point to some of the responses that have already been made, as you mentioned, Your Honor, in the motions to highlight how -- highlight the fact that there is evidence of a nexus that would -- without the need to go further into an offer of evidence at this point on the fact. (*Id.* At 3897-99).

On July 10, 2014, Judge Pohl, as Chief Trial Judge, detailed Colonel Vance Spath as the military judge in the case. Upon being detailed, Judge Spath stated that he would decide all outstanding motions, basing his rulings on the written filings and on the record, which memorialized both parties' positions during comprehensive oral argument on these issues on both 24 February 2012 and 24 April 2012.

On August 11, 2014, Judge Spath granted the motions to dismiss Specification 2 of Charge IV and Charges VII, VIII, and IX. App. 245 ("August Order") on the grounds of an insufficiency of evidence to establish jurisdiction over the *Limburg* offenses. Judge Spath

pointed out that although "the Prosecution on several instances averred it would provide evidence to the panel during the merits portion of the trial to establish jurisdiction," the government failed to satisfy its burden to persuade the Commission by a preponderance of evidence before trial that it has jurisdiction "as to the charges and specification involving the MV Limburg." App. 242-243, 245. In particular, Judge Spath concluded that the government failed to request an evidentiary hearing or otherwise prove specific "facts to support its assertion of jurisdiction," one of which was that "'hostilities,' as the term is defined in 10 U.S.C. § 948a(9), against the United States existed." In his ruling, Judge Spath listed no fewer than 18 proffers made by the government without offer of actual evidence or request for an evidentiary hearing. Judge Spath did not rule on the issue of jurisdiction as a matter of law.

On 18 August 2014, the government filed a motion to asking Judge Spath to reconsider his ruling. The motion alleged that Judge Spath had inappropriately dismissed the Limburg charges on the basis of subject-matter jurisdiction when, it complained, the defense had not challenged personal jurisdiction. The government asked Judge Spath to either deny the defense motions to dismiss the charges without prejudice or, in the alternative, to hold an evidentiary hearing on personal jurisdiction.

On 16 September 2014, Judge Spath granted the government's motion to reconsider, but denied their request to dismiss the defense motion without prejudice or to hold an evidentiary hearing.

Throughout the proceedings, the defense maintained that international law does not provide a basis for Congress to criminalize conduct that affects a French ship carrying Iranian oil with Bulgarian crew members in Yemeni waters, and which has no cognizable effect on the

United States, its territories, or its citizens, and that the Military Commissions Act's definition of "hostilities" must be interpreted in *pari materia* with that law.

The defense's position below was that the issue of jurisdiction in these charges is both an element of the charged offenses that the government must prove at trial beyond a reasonable doubt *and* a threshold matter that the Commission itself must hear and which must be proved be a preponderance of the evidence, as Judge Pohl recognized at oral argument on the matter: "The personal jurisdiction aspect of it . . . would appear to maybe go to both the judge and at members … And whether or not this goes before the members or not does – normal jurisdictional challenge can be made – if it can be made in both places, can be made in both places." *Id*. at 3902-03. The defense has also repeatedly pointed out the government's refusal to provide any evidence related to jurisdiction:

> DDC [CDR MIZER]: Your Honor, I would think there would have to be the same factual predicate for that laid out and there hasn't even been the bare minimum of a factual predicate laid out here. And I think there are equally likely scenarios here that this was targeted at the Yemeni government, at the finances of the Yemeni government, and this has nothing to do even with France or Bulgaria; that this may be part of a civil war that is simmering in Yemen and has been simmering since the early 1990s between the north and the south. The simple point here is that it's not our obligation when we say, hey, what's the basis for jurisdiction here to offer that evidence? And the time for them to do that is now, Judge, and they simply haven't done it. *Id.*at 3882-3883.

And:

> DDC [CDR MIZER]: Yes, Your Honor, here it's a judge question. And we would submit that the government had the opportunity to have an evidentiary hearing. They could have requested it, they could have brought the oil experts in here to say, look, there is actually some nexus. There is no evidence to us, to the defense, that such a nexus exists. And more importantly, there's no evidence before Your Honor. *Id.* at 3903.

The government filed its appeal from Judge Spath's 16 September order on 19 September 2014.

STANDARDS OF REVIEW

"A motion to dismiss for lack of jurisdiction is an interlocutory matter addressed to the discretion of the military judge . . . and his decision will be reviewed on the test of abuse of discretion as are other decisions on interlocutory matters." *United States v. Labella*, 15 M.J. 228, 229 (1983). The decision whether to hold an evidentiary hearing on an issue of jurisdiction is discretionary and is reviewed for abuse of discretion. *See United States v. Khadr*, 717 F.Supp.2d 1215, 1234 (U.S.C.M.C.R. 2007).

ARGUMENT

Although the government's brief suggests otherwise, the issues presented in this appeal are straightforward. The government does not contest that it bears the burden of establishing the commission's jurisdiction.[1] Nor can it contest that – as of the time the charges were dismissed -- it had failed to meet that burden, since it had put in no evidence to meet it.[2] Nor does it contest that the commission repeatedly gave it the opportunity to put in evidence to meet that burden, and that its failure to do so was a deliberate, considered decision on its part.

Accordingly, there are only two questions at issue here are: Was it an abuse of discretion for the Commission to dismiss the charges for lack of subject-matter jurisdiction prior to trial on the merits, where the government offered no evidence to meet its burden of proving the existence of such jurisdiction? And, if not, was it an abuse of discretion for the Commission to reject the government's belated request to put in evidence, after it had repeatedly and deliberately declined to do so when given the opportunity?

We address these questions, which are dispositive of this appeal, below.

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[1] Appellant's Brief (App.Br.) at 34 (*quoting United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002) ("'Jurisdiction is an interlocutory issue to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence.'"); AE 168J/AE 241J at 2 (".

[2] App. Br. 28 (although "the facts are disputed . . . the government has not made a full proffer of evidence, as the Commission acknowledged.").

I. THE MILITARY COMMISSION DID NOT ABUSE ITS DISCRETION IN DISMISSING THE CHARGES ON JURISDICTIONAL GROUNDS PRIOR TO TRIAL ON THE MERITS, WHERE THE GOVERNMENT FAILED TO MEET ITS BURDEN OF PROVING THE EXISTENCE OF SUCH JURISDICTION.

The initial question presented in this appeal is a simple one: whether the Commission abused its discretion in dismissing the *Limburg* charges before trial, where the government repeatedly declined to request an evidentiary hearing or put on evidence supporting subject-matter jurisdiction over the charges. Unfortunately, the government's Brief on the Merits muddies these clear waters to the point of opacity. We address its confusions in Subsection B. below, after addressing the actual issue in Subsection A.

A. The military judge was well within his discretion in dismissing the *Limburg* charges before trial, where the government repeatedly and deliberately declined the opportunity to put in evidence supporting the commission's jurisdiction.

Section 949d of the Military Commissions Act authorizes the military judge, "[a]t any time after the service of charges," to hold sessions for the purpose of "hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members."[3] Jurisdiction is one such matter; indeed, it is for the military judge alone to decide.[4] When challenged, it is the government's burden to prove it by a preponderance of the evidence.[5] The decision whether to dismiss on jurisdictional grounds, including instances when the challenged jurisdictional facts

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[3] 10 U.S.C. § 949d(a)(1)(B).

[4] *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002) ("Jurisdiction is an interlocutory issue, to be decided by the military judge").

[5] RMC 905(c)(2)(B); *Oliver*, 57 M.J. at 172.

may later be re-litigated at trial as elements of the crime, is a matter committed to the sound discretion of the commission,[6] and is reviewed by this Court under an abuse of discretion standard.[7] The government contests none of these principles.

In the proceedings below, pursuant to the above provisions, the defense challenged the Commission's subject-matter jurisdiction over the charges related to the *MV Limburg*, arguing that the government had failed to meet its burden of proving that Mr. Al Nashiri's alleged hostile conduct fell within the scope of the MCA's subject-matter provision, 10 U.S.C. § 948d, and the United States's prescriptive jurisdiction under international law.[8] The government does not contest that the defense challenge was to the Commission's subject-matter jurisdiction,[9] which is

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[6] The government agrees that the decision whether to dismiss on jurisdictional grounds before trial is committed to the Commission's discretion, even if the jurisdictional fact must also be litigated as an element. *See* Gov't Br. 15 ("While enjoying discretion to resolve questions of law and certain interlocutory questions of fact even, in some special contexts, when this entails relitigating issues before the panel, the Military Judge here abused his discretion . . . ."); *see generally United States v. Labella*, 15 M.J. 228, 229 (1983) ("A motion to dismiss for lack of jurisdiction is an interlocutory matter addressed to the discretion of the military judge . . . and his decision will be reviewed on the test of abuse of discretion as are other decisions on interlocutory matters.").

[7] The government agrees that the appropriate standard of review on this appeal is abuse of discretion. *See* Gov't Br. 15 ("The Court reviews for an abuse of discretion a decision to resolve jurisdictional questions without first considering the admissibility and merits of evidence offered on those questions."); *see also Labella*, 15 M.J. at 229.

[8] AE 168 at 2 ("Because international law provides no basis for the assertion of military jurisdiction over Mr. Al-Nashiri for the alleged attack on the *MV Lindburg*, and because the expansive jurisdiction provisions of 10 U.S.C. §§ 948c and 948d must be construed so as not to conflict with international law, this Commission lacks jurisdiction to try Mr. Al-Nashiri for crimes related to the *MV Lindburg*.").

[9] Gov't Br. 16 ("The question presented by the defense motions to dismiss was whether Congress exceeded its power (jurisdiction) to criminalize Al Nashiri's alleged conduct.").

governed by § 948d.[10] It was reminded on numerous occasions by the Commission and the defense that it had the burden to establish that jurisdiction by a preponderance of the evidence.[11] Both military judges urged it to request an evidentiary hearing to sustain that burden. It nevertheless declined and deliberately chose not to introduce any such evidence. Accordingly, and properly, the Military Commission dismissed the *Limburg* charges for failure to establish jurisdiction beyond the minimal burden of proof required under § 948d.[12] That decision was final under RMC 801(e)(1)(A), which provides that "[a]ny ruling by the military judge upon a question of law, including a motion for a finding of not guilty, *or upon any interlocutory question* is final" (emphasis added). That decision was appealable,[13] but, for tactical reasons, the government has not appealed it here, since by declining to introduce any evidence of jurisdiction, it has failed to meet its burden of proof as a matter of law. That should end the matter.

Nevertheless, the government argues that it was an abuse of discretion for Judge Spath to have ruled on jurisdiction before trial without first waiting to consider whatever evidence it

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[10] The MCA has two jurisdictional provisions, 10 U.S.C. §§ 948c and 948d. Section 948c deals with personal jurisdiction and section 948d with subject-matter jurisdiction. *See* 10 U.S.C. § 948c ("Persons subject to military commissions") (personal jurisdiction limited to alien unlawful enemy combatants); § 948d ("Jurisdiction of the military commissions") (commission jurisdiction limited to "offense[s] made punishable by this chapter, sections 904 and 906 of this title . . . or the law of war."). Strangely, the government states that "Al Nashiri did not challenge the Commission's power to adjudicate the case under Section 948d or otherwise challenge his status as an AUEB subject to trial by military commission." (Gov't Br. 26) It appears that the government is here confusing § 948d with § 948c. In any event, while it is true that Mr. Al Nashiri has not yet challenged his alleged AUEB status – as he repeatedly informed the commission and the government – as noted above, he cited to § 948d in his initial motion. *See* AE 168 at 2.

[11] Tr. 3878 (Gov't App. 41).

[12] AE 168K/AE 241G at 2 ¶ 4.

[13] *See* 10 U.S.C. § 950d(a)(1) (interlocutory appeals by the government).

might introduce in its case in chief. Because the government is not appealing the merits of the dismissal, that timing issue (along with the subsidiary issue of whether it was entitled to an evidentiary hearing, addressed in Section II *infra*), are the only issues before this Court.

At the outset, although one would never know it from the government's brief, the notion that a military judge is required to wait for proof at trial before answering the jurisdictional question is directly contradicted by the Military Commissions Act, the Rules for Military Commissions, and the relevant case law. If 10 U.S.C. § 949d means anything at all,[14] it means that a military judge may rule *before trial* on jurisdictional facts whether or not they are also to be decided by the panel; otherwise, the concluding clause – "whether or not the matter is appropriate for later consideration or decision by the members"[15] – would be entirely nugatory. By the same token, because the finding of disputed facts, including elements, are "appropriate for later . . . decision by the members,"[16] it is also within the military judge's purview to make findings after holding an evidentiary hearing to resolve factual disputes. The Rules for Military Commission are to the same effect.[17]

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[14] 10 U.S.C. § 949d(a)(1)(B) ("At any time after the service of charges which have been referred for trial by military commission under this chapter, the military judge may call the military commission into session without the presence of the members for the purpose of . . . hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members."); *see also United States v. Jessie*, 5 M.J. 573, 575 (A.C.M.R. 1978) ("The question of jurisdiction usually arises . . . by a motion to dismiss . . . [and] is normally decided as an interlocutory matter by the military judge.").

[15] 10 U.S.C. § 949d(a)(1)(B).

[16] *See, e.g., United States v. Mason*, 14 M.J. 92, 95 (C.M.A. 1982) ("it is the function of the fact-finder—here the court members—to resolve conflicting testimony").

[17] *See* RMC 803(a)(2).

Consistent with these military commission authorities, under the (substantively identical) rules of the Uniform Code of Military Justice,[18] courts-martial have routinely received evidence, considered, and ruled on jurisdictional challenges after they were raised by motion before trial, without waiting on the government's trial evidence, both with respect to personal[19] and subject-matter jurisdiction.[20]

Finally, the leading military commission cases, all decided by the Supreme Court, are unanimous in holding that challenges to military commission subject-matter jurisdiction may be decided pretrial without waiting for findings by the panel. In *Ex parte Quirin*, the Court addressed whether the charges leveled at the accused were cognizable under the law of war – the question presented here as well – and rejected the government's argument that the accuseds' status as enemy combatants "foreclose[d] consideration by the courts of petitioners' contentions

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[18] *See* Article 39(a)(2), 10 U.S.C. § 839(a)(2).

[19] *See*, *e.g.*, *United States v. King*, 27 M.J. 327 (C.M.A. 1989) (charges dismissed pretrial for lack of jurisdiction; reversed and remanded for trial on appeal); *United States v. Roe*, 15 M.J. 818, 819 (N.M.C.C.A. 1983) (pretrial evidentiary hearing on jurisdiction denied; affirmed on appeal); *United States v. Laws*, 11 M.J. 475, 475-6 (CMA 1981) (court first denied pretrial motion for lack of jurisdiction, then submitted jurisdictional question to members before hearing the government's case in chief)

[20] *See*, *e.g.*, *United States v. Toro*, 2013 WL 5880883 (A.F.C.C.A. 2013) (pretrial hearing and finding of subject-matter jurisdiction; upheld on mandamus review); *United States v. Ali*, 70 M.J. 514, 517 (A.C.C.A. 2011) (motion to dismiss for subject-matter jurisdiction denied prior to entering into pretrial agreement; affirmed on appeal), *aff'd*, *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012) (discussing jurisdiction over the offense); *United States v. LaBella*, 15 M.J. 228 (C.M.A. 1983) (military judge dismissed for want of subject-matter jurisdiction (service connection); Navy-Marine Corp Court of Military Review reversed on mandamus; Court of Military Appeals reversed holding mandamus not available remedy for review of interlocutory dismissal on jurisdiction and reinstated the trial court's dismissal of charges); *United States v. LaBella*, 14 M.J. 688 (N.M.C.C.R. 1982) (different case than prior case; same caption because mandamus petition seeking relief against the same military judge) (military judge dismissed charges pretrial for lack of subject matter jurisdiction (service connection); appellate court upheld pretrial dismissal on mandamus review).

that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."[21] In *In re Yamashita*, the Court re-affirmed that "[*Quirin*] has not foreclosed [the accused's] right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial."[22] And in *Hamdan v. Rumsfeld*,[23] the Court similarly considered a pretrial challenge to jurisdiction and ruled for the accused.[24] *Yamashita* in particular is telling because one of the jurisdictional issues decided there, whether the commission was convened during the existence of hostilities, is very close to the jurisdictional issue decided by the Commission in this case (whether the alleged conduct occurred in connection with "hostilities" within the meaning of the MCA).[25]

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[21] *Ex parte Quirin*, 317 U.S. 1, 26 (1942).

[22] *In re Yamashita*, 327 U.S. 1, 9 (1942). *Yamashita* was decided after the trial had concluded, but the challenge was filed before trial and, as the quoted language demonstrates, the Court made clear that trial was precluded unless jurisdiction was sustained.

[23] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[24] *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006); *see also id*. at 589 n.20 ("Hamdan raises a substantial argument that, because the military commission that has been convened to try him is not a " 'regularly constituted court' " under the Geneva Conventions, it is *ultra vires* and thus lacks jurisdiction over him."). All three of these challenges were made in pretrial federal petitions for habeas corpus, but that fact is irrelevant to Judge Spath's authority to decide the pretrial jurisdictional issue, since "[a] A military commission always has jurisdiction to determine whether it has jurisdiction." RMC 201(b); *United States v. Khadr*, 717 F.Supp.2d 1215, 1234 (C.M.C.R. 2007) ("'[A] federal court always has jurisdiction to determine its own jurisdiction' [and] [a] military commission is no different"; *quoting United States v. Ruiz*, 536 U.S. 622, 627 (2002)).

[25] *Compare Yamashita*, 327 U.S. at 12 ("We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation") *with* AE 168K/AE 241G at 5 ¶ 412 ("In order to establish subject matter jurisdiction as to the charged offenses . . . the Prosecution must establish by a preponderance of the evidence the last statutory element for each offense, which is whether 'the conduct took place in the context of and was associated with hostilities.'"); *see also Ali*, 70 M.J. at 517 ("Because the United States has not been in a state of declared war since World War II, we first must determine

The government fails to discuss, cite, mention or, apparently, contest any of this authority. Instead, it asserts, without good authority, a general rule ytat would hold that jurisdiction should only be decided before trial "'if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of [those grounds].'"[26]

That proposition is flatly inconsistent with logic, with military practice, and with the case law, which holds that facts that go to both jurisdiction and guilt/innocence are different findings decided under different burdens of proof by different fact-finders at different stages of the proceedings with different consequences for the accused. When the government fails to establish the "dual fact" beyond a reasonable doubt at trial, the accused is found not guilty; but when it fails to establish that fact by a preponderance of the evidence as a matter of jurisdiction, the government has no "authority to proceed with the trial" in the first instance, and thus the guilt/innocence hearing before the members will never occur.[27] As a matter of logic, then, where an accused challenges a jurisdictional fact before trial and fails, the trial proceeds and he may challenge it again as a matter not of jurisdiction, but of his guilt or innocence of the crime. Where, however, the accused challenges jurisdiction and *succeeds* – which is what happened below – the trial may *not* proceed and the panel never gets to consider these facts or provide

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whether or not a 'contingency operation' existed during the time of the offenses and at the time of trial.").

[26] Gov't Br. 27 (*quoting United States v. Covington*, 395 U.S. 57, 60 (1969)).

[27] *Yamashita*, 327 U.S. at 9 (military commission accused has the "right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial.").

"assistance in determining [their] validity."[28] Not surprisingly, that is exactly what the case law holds.

The problem of facts that go to both jurisdiction and guilt ("dual facts") has arisen most recently in "military offense" cases, that is, cases in which the accused's status as a member of the armed forces must be proved at trial before the panel members as well as addressed separately as a jurisdictional matter by the military judge. A military offense is one in which "the elements of the underlying crime, either directly or by necessary implication, require that the accused be a member of the military."[29] As such, military membership must be proved in such cases to establish the particular element beyond a reasonable doubt at trial.[30] However, because court-martial jurisdiction over the accused is almost always also based on military status, it must also be established by a preponderance of the evidence, typically by way of a pretrial motion.[31] The first, elemental finding is committed exclusively to the panel members; the latter, jurisdictional finding, exclusively to the judge.[32]

The upshot of these rules is that where the military judge finds that the government has failed to meet its burden of proof on jurisdiction, there can be no trial before a panel and

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[28] Gov't Br. 27.

[29] *United States v. Contreras*, 69 M.J. 120, 123 (C.A.A.F. 2010)

[30] *United States v. Bailey*, 6 M.J. 965, 969 (N.M.C.R. 1978) (*en banc*).

[31] *See Jessie*, 5 M.J. at 575 ("The question of jurisdiction usually arises . . . by a motion to dismiss . . . [and] is normally decided as an interlocutory matter by the military judge.").

[32] *See United States v. Bailey*, 6 M.J. 965, 968 (N.M.C.R. 1978) (*en banc*):

We believe that the military judge must resolve such [jurisdictional] matters alone, as an interlocutory matter. But when a question of fact involved in the jurisdictional issue also goes to the ultimate question of the accused's guilt or innocence of the offense charged, then the factual question, upon being raised after a plea of not guilty is entered, must be resolved by the court members.

therefore no second opportunity for the government to put in evidence on jurisdiction. That is why the cases hold – contrary to the government's mistaken interpretation – that the members have the opportunity to make a guilt/innocence determination of a fact that is also, separately, a jurisdictional fact *only where the military judge has denied* the accused's pretrial jurisdictional motion. Where the motion is granted, the case is over. There will no trial and no opportunity for the government to introduce further evidence. Thus, as the court in *Bailey* explained,

> [I]f during a trial for desertion the accused makes a motion to dismiss for lack of jurisdiction and presents evidence tending to show that he is not a member of an armed force, his status as a military person reaches the ultimate question of guilt or innocence, *and, if the motion is denied*, the disputed facts must be resolved by each member of the court in connection with his deliberation upon the findings.[33]

Put another way, the rule allowing re-litigation of a jurisdictional fact when it is also a fact relevant to guilt/innocence is a rule for the *accused's* benefit, not the government's. It simply recognizes that it would be unfair (and unconstitutional) to lift the government's burden of proving beyond a reasonable doubt all facts necessary to establish guilt on the basis that the military judge had found the facts against the accused for a different purpose (jurisdiction) and under a lower standard of proof (preponderance of the evidence). It is not intended to allow the government a second bite at the jurisdictional apple.

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[33] *Bailey*, 6 M.J. at 967 (*quoting* Manual for Courts-Martial (1069), ¶ 57B. Substantially identical language appears in the Discussion under Rule for Courts-Martial 801(e)(5) (2012). The government's citation of *Bailey* is perplexing (Gov't Br. 27), since it squarely supports Mr. Al Nashiri's position. The government also misunderstands the import of *United States v. Ornelas*, 6 C.M.R. 96 (C.M.A. 1952), which courts, *see Bailey*, 6 M.J. at 968, and other authorities, *see* Manual for Courts-Martial (2012), App. 21 at A21-44, have interpreted consistently with the *Bailey* rule.

This principle has been applied consistently by appellate courts faced with dual fact issues. Thus, in *United States v. LaBella*, after a pretrial hearing, the military judge dismissed ten specifications against the accused for lack of a service connection, and the government petitioned for mandamus. The Navy Court of Military Review disagreed with the trial judge's ruling on the merits; nevertheless, it did not find it so unjustifiable as to warrant the extraordinary remedy of mandamus and denied the petition. As a result, the accused was not required to stand trial on the specifications and the government did not get a second chance to buttress its case for jurisdiction, even though the appellate court itself would have allowed trial to continue.[34] Similarly, in a different case before the same judge involving another government mandamus petition, the trial court had dismissed charges and specifications for lack of a service connection. The government petitioned for mandamus. The Navy-Marine Corps Court of Military Review granted the petition and reinstated the dismissed charges. On appeal from that decision, the Court of Military Appeals held that mandamus was not an available remedy and ordered the charges dismissed per the trial judge's original order. Again, the accused did not go to trial and the government had no additional chance to prove jurisdiction, despite having convinced one appellate court that it had the right to proceed.[35] In other words, the government

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[34] *DiBella*, 14 M.J. at 689-90. The Supreme Court in *Solorio v. United States*, 483 U.S. 435 (1987), subsequently held that "service connection" was not a valid requirement of subject-matter jurisdiction, but that is immaterial to the question at hand, which is simply whether the trial judge was required to defer dismissal on jurisdiction grounds until hearing the government's trial evidence. Indeed, with respect to that issue, the service connection cases are particularly telling against the government's position. Evidence adduced at trial of the charges challenged for their service connection would clearly have clarified the connection of the accused's conduct to her military service; nevertheless, when the government lost the pretrial jurisdictional motion in these cases, unless it succeeded on appeal or obtained extraordinary relief, trial of the dismissed charges did not go forward.

[35] *LaBella*, 15 M.J. at 228-29.

receives only one bite at the apple, even where the government's case on the merits would unquestionably have included evidence relevant to the jurisdictional fact (whether the alleged conduct was connected to the accused's membership in the armed services).

On the other hand, even where an accused has failed to contest the facts on the issue of jurisdiction before trial, she is still entitled to hold the government to its burden of proving the facts beyond a reasonable doubt at trial if they are necessary for a conviction.[36] In sum, Judge Spath was plainly within his discretion in ruling on jurisdiction before trial.

The government's arguments to the contrary are, to be generous, less than compelling.[37] Its novel "could provide assistance" test for when a military judge must defer ruling on jurisdiction is drawn from *United States v. Covington*, a case that did not address jurisdiction. The question there was rather whether a federal court had authority to dismiss an indictment where, as a matter of law, the dispositive evidence (the defendant's signature on a tax return required by the Marihuana Tax Act) posed the threat of compelled self-incrimination under the Fifth Amendment.[38] To say the least, that issue and the unique context in which it arose are remote from the ones presented here. The Court itself was careful to limit its holding to the unusual circumstances of the case.[39] *Covington* is thus irrelevant to this appeal.

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[36] *United States v. Hoxsie*, 14 M.J. 713, 716-17 (N.M.C.C.M.R. 1982).

[37] The government devotes a large number of pages to the question of whether the commission should have ruled that it had personal jurisdiction over Mr. Al Nashiri. Because that argument is irrelevant to the actual issue litigated below, decided by the military judge, and raised on this appeal – subject-matter jurisdiction – Mr. Al Nashiri addresses it in a separate section below.

[38] Covington, 395 U.S. at

[39] *Covington*, 395 U.S. at 61 ("[W]e think it 'just under the circumstances' that the case be finally disposed of at this level.").

The government's other arguments are no more apposite. It cites a few military cases (Gov't Br. 29); however, none of them concern jurisdiction. Pretrial motions are the appropriate time to raise and grant motions to dismiss for lack of jurisdiction because, as discussed *supra*, without jurisdiction the court has no authority to proceed with the case at all. The same cannot be said for pretrial resolution of other factual issues, which are the ones addressed by the government's cases.[40]

The government also cites a large number of federal cases for the proposition that "it is 'an 'unusual circumstance' for the [trial] court to resolve the sufficiency of the evidence before trial because the government is usually entitled to present its evidence at trial and have its sufficiency tested by a motion for acquittal' under applicable criminal-procedure rules."[41] The short response to these cases is that military judges presiding over military commissions have far greater power under their "applicable criminal-procedure rules" to make pretrial factual findings, including findings that otherwise constitute elements of crimes, than do federal judges under their own rules. Military judges are authorized by statute to "call the military commission into session without the presence of the members for the purpose of . . . hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, *whether or not the matter is appropriate for later consideration or decision by the members*."[42] Federal judges have no such statutory or rule-based authority. In particular, Federal Rule of Criminal Procedure 12,

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[40] *See United States v. High*, 39 M.J. 82 (C.M.A. 1994) (pretrial determination of lawfulness of punitive restrictions); *United States v. McShane*, 28 M.J. 1036 (A.F.C.M.R. 1989) (pretrial determination of failure of proof of an element of a crime); *United States v. Spencer*, 29 M.J. 740 (A.F.C.M.R. 1989) (pretrial determination of lawfulness of order).

[41] Gov't Br. 28 (*quoting United States v. Yakou*, 428 F.3d 241, 247 (D.C. Cir. 2005)); Gov't Br. 28-32 (citing other federal cases).

[42] 10 U.S.C. § 949d(a)(1)(B) (emphasis added); *see also* R.M.C. 803(a)(2) (same).

which is relied upon in the federal cases cited by the government, grants no such authority. Thus, in appropriate circumstances – when the matter is one "which may be ruled upon by the military judge under [the MCA]"[43] – military judges, unlike federal judges, have the power to make findings regarding matters that also establish elements of a charged crime. Military judges are therefore far less restricted than their federal counterparts in ruling before trial on jurisdictional facts that correspond to elements.[44]

More broadly, military courts' latitude to entertain pretrial jurisdictional challenges is required by the fact that the "jurisdiction of military tribunals is a very limited and extraordinary jurisdiction."[45] By contrast, the Constitution vests Article III courts with general jurisdiction "extend[ing] to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[46] Because military jurisdiction is the exception, not the rule, in our constitutional structure, the Supreme Court has warned lower courts to be "alert to ensure that Congress does not exceed the constitutional bounds and bring within the jurisdiction of the military courts matters beyond that jurisdiction, and properly within the realm of 'judicial power.'"[47] As noted above, the Supreme Court has exercised special vigilance with respect to military commissions, the jurisdiction of

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[43] 10 U.S.C. § 949d(a)(1)(B).

[44] *See Bailey*, 6 M.J. at 968 (explaining that military judge has sole power to find the same fact for jurisdictional purposes that the members have power to find as elements).

[45] *Reid v. Covert*, 354 U.S. 1, 21 (1957). *Reid* was a case about personal jurisdiction, but the same principle applies to tribunals' subject-matter jurisdiction. *See, e.g., Hamdan*, 548 U.S. at 602 (plurality opinion) (citing *Reid* for proposition that military commissions lacked subject-matter jurisdiction over the crime of conspiracy).

[46] U.S. Const, art. III, § 2, cl. 1.

[47] Northern Pipeline Co. v. Marathon Pipe Line Company, 458 U.S. 50, 66 n.17 (1982).

which is even more extraordinary than the regular military courts, entertaining challenges to, and often overturning, their exercise of jurisdiction in every historical period of their use.[48] Federal cases on judges' power to police the limits of their own presumptive jurisdiction over federal law issues are thus of limited or no relevance here for that reason as well.

In any event, even assuming *arguendo* that federal case law bears on the issues raised here, the cases cited by the government provide it with very little comfort. The government relies primarily on *United States v. Yakou*,[49] a D.C. Circuit case that *upheld* the dismissal of an indictment before trial on (ostensibly) jurisdictional grounds. The court in *Yakou* thus did not erect an absolute bar on pretrial dismissal; instead, canvassing the mixed cases decided by other circuits on the issue, it suggested only that the government is "usually" entitled to make its case at trial, and that trial courts may dismiss indictment in a number of situations, including when "the material facts are undisputed and only an issue of law is presented."[50]

That is the situation here. The government has not "disputed" the commission's subject-matter jurisdiction. Instead, rather than creating a dispute by introducing evidence toward meeting its burden of proof, it has issued a bare promise to adduce such evidence in the indefinite future, until which time Mr. Al Nashiri continues to be subject to a proceeding that is without statutory or constitutional warrant. Whatever the standard of review when an issue is actually joined, where a party refuses to introduce any evidence at all toward meeting its burden

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[48] *See, e.g., Quirin*, *supra*; *Yamashita*, *supra; Hamdan*, *supra* (overturning Executive Order military commissions); *Ex parte Milligan*, 71 U.S. 2 (1866) (military commission without jurisdiction to try United States citizen where not located on United States territory in area of hostilities and the civilian courts are functioning).

[49] 428 F.3d 241 (D.C. Cir. 2005).

[50] *Yakou*, 428 F.3d at 247.

on the issue, it has failed as a matter of law.[51] Thus, even assuming *arguendo* that *Yakou* controls here, the military judge's dismissal of the charges before trial was proper.

The remainder of the government's cases are either distinguishable because of their procedural posture[52] or, most frequently, address dismissals for reasons other than jurisdiction.[53] Even many of the cases ostensibly based on jurisdiction are equivocal about whether they address jurisdiction or non-jurisdictional issue, such as a pretrial dismissal for failure to establish an element of the crime.[54]

In sum, the federal cases, to the extent that they apply at all, provide no support for the notion that Judge Spath, presiding over a military commission subject to special statutory rules

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[51] While this principle has been applied most frequently where a civil party seeks summary judgment, *see, e.g.*, *Conner v. Reckitt & Colman, Inc.*, 84 F.3d 1100, (8th Cir. 1996) ("Because Conner has produced no facts establishing an essential element of her claim on which she has the burden of proof, Reckitt & Colman is entitled to judgment as a matter of law."), it is applicable wherever a party faces a burden of proof that it does not even attempt to meet. *See*, *e.g.*, *United States v. Ahrens*, 530 F.2d 781, 787 n.9 (8th Cir. 1976) (where "presumption shifted the burden of going forward with the evidence to the taxpayer [and] the taxpayer produced no evidence rebutting the presumption, the only permissible inference from the circumstances is that the notice of deficiency was valid [and] [w]e hold that the district judge was required to draw that inference as a matter of law ").

[52] In *United States v. Alfonso*, 143 F.3d 772 (2d Cir. 1998) (the government's other primary cite for its position), for example, the district court dismissed the charges for reasons "not advanced by the defendants in their motion to dismiss, and neither briefed nor argued by any of the parties").

[53] *See, e.g.*, *United States v. DeLaurentis*, 230 F.3d 659 (3d Cir. 2000) (pretrial dismissal for failure of proof on an element of the crime); *United States v. Jensen*, 93 F.3d 667 (9th Cir. 1996) (venue).

[54] *See, e.g.*, *United States v. Nukida*, 8 F.3d 665, 669-70 (9th Cir. 1993) (suggesting the "question is one of jurisdiction" but ultimately holding "[i]nasmuch as Nukida's arguments before the district court challenged the government's ability to prove that her actions affected commerce, her motion to dismiss amounted to a premature challenge to the sufficiency of the government's evidence tending to prove a material element of the offense").

enacted by Congress that do not govern federal court practice, abused his discretion in dismissing the charges before trial for lack of jurisdiction.[55]

B. The question of the Commission's personal jurisdiction over Mr. Al Nashiri was not litigated below, is not at issue in this appeal, and sheds no light on the question of whether Judge Spath had discretion to dismiss the Limburg charges before trial after the government failed to demonstrate subject-matter jurisdiction.

Early in the litigation leading to this appeal, the government began taking the peculiar position that what Mr. Al Nashiri *should* have been arguing about was the Commission's personal jurisdiction over him. Despite repeated attempts on the part of the defense and the military judge to dissuade the government from its mischaracterization of the motion, the government persists in that belief before this Court and devotes ten pages of its brief to the proposition that either it had already established personal jurisdiction over him or that the commission should have held an evidentiary hearing at which it would have had the opportunity to establish personal jurisdiction. (Gov't Br. 16-26) That persistence is inexplicable, in that Mr. Al Nashiri has not yet challenged personal jurisdiction; the Commission informed the

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[55] The government's other arguments are even less persuasive. The commission's ruling does not "compel [the government] to present the same proof necessary to persuade the panel that Al Nashiri [is guilty of the charged crimes" (Gov't Br. 32); the hearing would concern subject-matter jurisdiction only, in particular, the ostensible nexus of the bombing of the *MV Limburg* to United States interests and whether that bombing fell within the scope of "hostilities" against the United States within the meaning of the Military Commissions Act and the law of war. The government itself contended that only 19 discrete facts were required to establish jurisdiction, which the military judge rightly characterized as "easily susceptible of proof." AE 168G/AE 241C at 5 ¶ 9. Nor will dismissal of the charges necessarily prevent the government from introducing evidence regarding the *Limburg* incident; to the extent that the evidence is material and otherwise admissible to prove the charges over which the Commission has legitimate jurisdiction, the government is free to introduce it for these purposes. (Gov't Br. 33-34)

government that the question of personal jurisdiction was not before it;[56] and the government is fully aware of both of these facts.[57] Moreover, the government recognizes that the existence of subject-matter is "properly a separate one" (Gov't Br. 16) from the personal jurisdiction question, as it must, since the "requisites of jurisdiction" in R.M.C. 201 include both personal and subject-matter elements.[58] Nevertheless, from these facts, the government concludes that "the Military Judge erred in the first instance in misconstruing the defense motions, and this Court should reverse the dismissal and remand the case with instructions for the Military Judge to decide the actual question of law the defense presents." (Gov't Br. 16)

Based on this bizarre mischaracterization of the issue before this Court, the government goes on to argue that the motion below actually concerned personal jurisdiction (Gov't Br. 16-17), or, alternatively, that even if the motion did concern subject-matter jurisdiction, it should still have been denied on personal jurisdiction grounds. *Id*. 17-26.

The linchpin of the government's argument is that, after *United States v. Solorio*, "the pretrial inquiry into jurisdiction should focus on the person's status – whether the person [was] subject to the UCMJ, and here the MCA, when the offense was allegedly committed." (Gov't Br. 18) The fatal flaw in this claim is that, whatever its merits with respect to ordinary military justice (UCMJ) jurisdiction, it is patently not the case with respect to MCA jurisdiction.

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[56] After initially entertaining the possibility that the motion also concerned personal jurisdiction, Tr. 3083-83, he later recognized that that was not the subject of the motion. Tr. 3876 (Mr. Al Nashiri's motion "more of a subject matter jurisdiction argument"); Tr. 3902-3 (Judge Pohl: "the personal jurisdiction aspect of it . . . that's not the issue before me.")

[57] Gov't Br. 16 ("The question presented by the defense motions to dismiss was whether Congress exceeded its power (jurisdiction) to criminalize Al Nashiri's alleged conduct."); 18 ("the defense has not challenged Al Nashir's AUEB status").

[58] R.M.C. 201(b)(4) (personal jurisdiction) & (5) (subject-matter jurisdiction).

In overturning the "service connection" requirement imposed by *O'Callahan v. Parker*,[59] *Solorio* indeed returned the focus of court-martial jurisdiction to the accused's status as a service member subject to the UCMJ pursuant to Article 2,[60] but it did so on the basis of constitutional grounds that have no relevance to this case. The Court rejected the service connection requirement because it found, under the plain language of Article I, Section 8, clause 14, that the Constitution grants plenary authority for Congress to make criminal conduct triable by court-martial so long as the accused was a member of "the land [or] naval Forces" at the time of the offense.[61] Given this plenary grant of authority, courts had no basis interjecting additional, unspecified requirements where Congress had included none in its implementing legislation.

The problem with the government's argument is that a military commission subject-matter jurisdiction, unlike court-martial jurisdiction, *is* very significantly limited by constitutional[62] and statutory[63] constraints. Specifically, only conduct that violated the law of war at the time of the offense is triable by military commissions. That is because Congress's

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[59] 395 U.S. 258 (1969).

[60] 10 U.S.C. § 802.

[61] *Solorio*, 483 U.S. at 450-51 (member of the armed forces).

[62] Whether one characterizes the law of war as international or domestic law, *see Al Bahlul v. United States*, --- F.3d ----, 2014 WL 3437485 (D.C. Cir. 2014), there is no dispute that under the Constitution the crimes must be cognizable under the law of war and therefore have a nexus to hostilities.

[63] *See* 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.").

power to make crimes triable by military commission derives from the Define and Punish Clause,[64] not the Clause 14 power to regulate the armed forces.

Accordingly, when R.M.C. 201(b)(5) states that trial by military commission requires that the "offense must be subject to military commission jurisdiction," that is no *pro forma* requirement that the crime be listed in a statute, but imports the highly contestable question of whether at the time of its commission, the crime had a sufficient nexus to hostilities to bring it within the ambit of the Constitution and the MCA. That nexus is what Mr. Al Nashiri's motion below was about. The fact that Mr. Al Nashiri has not yet challenged his status as an alien unlawful enemy combatant ("AUEB"), which the government makes so much of, only underscores that this appeal is about this substantial subject-matter question and not about the separate question of personal jurisdiction.

Against this background understanding of the actual issue raised here, the remainder of the government's arguments under the personal jurisdiction heading are clearly irrelevant. It does not matter whether Mr. Al Nashiri qualifies as an alien unlawful enemy combatant one way, three ways, or no ways (Gov't Br. 19-20), because whether he qualifies or not – an issue that he will raise in due course, but has not raised here – the government was still required to meet its burden of proof demonstrating that the conduct underlying the *Limburg* charges had a nexus to "hostilities" within the meaning of the MCA and the law of war, a burden that it failed to carry. Similarly, the government's bizarre claim that the Commission erred in requiring proof before trial of subject-matter jurisdiction because Mr. Al Nashiri failed to challenge personal jurisdiction (Gov't Br. 20), whatever its merits under the UCMJ and *Solorio*, simply

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[64] Constitution, Article I, section 8, clause 10 (empowering Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations").

misunderstands the additional jurisdictional burden on the government presented here, beyond demonstration of personal jurisdiction, to show subject-matter jurisdiction before the military commission can proceed on the challenged charges. Finally, for all of these reasons, the government's third argument – that Judge Spath "erred in focusing on the nature of the offense, rather than the accused's unchallenged status" (Gov't Br. 24) – is patently incorrect. Again, Mr. Al Nashiri may well challenge his characterization as an AUEB, but that is not the motion he filed below, not the issue the military judge addressed in his rulings, and not an issue that the Court need or should address in this appeal.

II. THE COMMISSION DID NOT ABUSE ITS DISCRETION IN DENYING THE GOVERNMENT'S BELATED REQUEST FOR AN EVIDENTIARY HEARING ON SUBJECT-MATTER JURISDICTION.

Until its motion to reconsider,[65] the government declined to introduce evidence supporting its claim that the commission had subject-matter jurisdiction to proceed to trial. Instead, it "consistently maintained"[66] throughout the litigation that it need not establish subject-matter jurisdiction before trial, and/or that it should be determined on the face of the pleadings. That remains its position on this appeal.

In these circumstances, the government has waived any right it may have had to argue in this appeal that the military judge erred in denying its last minute request for an evidentiary hearing on subject-matter jurisdiction. In the alternative, by virtue of its positions below, it has forfeited the right. Finally, even if the issue remains for decision here, where the government

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[65] AE 168 H/AE 241D Government Motion To Reconsider AE 168G/AE 241C And Reopen Matters For An Evidentiary Hearing On Personal Jurisdiction.

[66] AE 168H/AE 241D at 18.

deliberately and repeatedly declined the military commission's repeated suggestions that it request an evidentiary hearing, Judge Spath's denial of its last-minute request was clearly not an abuse of discretion.

A. The government has waived, or, in the alternative, forfeited the issue of whether the military judge should have granted its request for an evidentiary hearing on subject-matter jurisdiction.

To be clear: the government does not want an evidentiary hearing on subject-matter jurisdiction. There is no dispute that up to its motion to reconsider,[67] the government declined to introduce evidence supporting its claim that the commission had subject-matter jurisdiction to proceed to trial. In its own words, it "consistently maintained" throughout the litigation that it need not establish jurisdiction before trial.[68] Even in the motion for reconsideration, its request for relief was to hold an evidentiary hearing on *personal jurisdiction*, and continued to insist that *subject-matter jurisdiction* – the actual grounds upon which the Commission had dismissed the charges – should be decided on the basis of the pleadings then before the Commission. Indeed, its sole reference to an evidentiary hearing on subject-matter jurisdiction was in the "Relief Section" of its motion,[69] and it nowhere argued or even suggested in the "Argument" that a hearing on subject-matter jurisdiction was its desired form of relief. It did not even mention it as alternative relief its "Conclusion."[70] And in its Reply – despite the defense's reminder, yet

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[67] AE 168 H/AE 241D Government Motion To Reconsider AE 168G/AE 241C And Reopen Matters For An Evidentiary Hearing On Personal Jurisdiction.

[68] AE 168H/AE 241D at 18.

[69] AE 168H/AE 241D at 2 ("Relief Sought").

[70] AE 168H/AE 241D at 24 ("The Commission should grant the Motion To Reconsider to correct a clear error in law demonstrated by case law not previously briefed (because of the emergent nature of the issue at bar). It should also grant the government's request for an

again, that it had consistently declined to request such a hearing[71] – the government's only mention of that alternative relief appears in passing in a footnote.[72] Nor did it request a hearing to address subject-matter jurisdiction before the Commission, despite the numerous times that the issue was broached.[73]

Consistent with its position below, in this appeal the government has not requested an evidentiary hearing on that issue, and continues to abjure the need for one.[74] One searches the government's Brief on the Merits in vain for any mention of a hearing on subject-matter jurisdiction, much less a request for a remand for such a hearing. Instead, consistent with its (mistaken) position that the real issue below was personal jurisdiction, the only evidentiary hearing the government actually requests is one to establish personal jurisdiction. Thus, the government argues, that "[t]o enable the Commission to consider the government's evidence, the Court should remand the case with instructions for the Military Judge to hold an evidentiary hearing and afford the government the opportunity to present *evidence establishing the AUEB status of the Accused*."[75] And in its Conclusion – where one would expect the clearest statement

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evidentiary hearing on the matter of personal jurisdiction, 10 U.S.C. § 948c (2009), and deny without prejudice the defense motion to dismiss for lack of subject-matter jurisdiction.").

[71] AE 168I/AE 241E Defense Response To Government Motion To Reconsider AE 168G/Ae 241C And Reopen Matters For An Evidentiary Hearing On Personal Jurisdiction at 7-8.

[72] AE 168J/AE 241F at 7 n.2.

[73] Tr. 3070, 3071, 3076, 3096, 3878, 3882, 3883, 3887, 3888, 3889, 3890, 3897, 3899, and 3903.

[74] *See e.g.* Gov't Br. 16 ("Because . . . the question presented by the defense [subject matter jurisdiction] is a purely legal question of whether Congress exceeded its constitutional authority in criminalizing the conduct as alleged, the government need not present any evidence to enable judicial decision as an interlocutory matter.").

[75] App. Br. 39 (emphasis added). The government goes on to suggest that such a hearing will "provid[] appropriate assistance to the Military Judge at this pretrial stage on questions he has

of its request for relief – it states only that "the Court should reverse the dismissal and remand for further proceedings, including an evidentiary hearing on the Accused's status as an AUEB."[76]

In these circumstances, in which the government has repeatedly declined the opportunity to participate in an evidentiary hearing on subject matter jurisdiction, the government has waived any argument that the military judge erred by not holding one.

Finally, even if its Brief on the Merits is construed to argue for such a hearing, that argument comes too late because it has forfeited the issue. The passing references in its briefs below are too slender a reed to hang an argument that the issued was preserved.[77]

Accordingly, the government has waived the issue of error with respect to an evidentiary hearing on subject-matter jurisdiction, or, in the alternative, the issue has been forfeited.

B. Assuming that the issue has been preserved, the military judge did not abuse his discretion in denying the government's last-ditch request for an evidentiary hearing on subject-matter jurisdiction.

The government had repeated opportunities to request an evidentiary hearing on subject-matter jurisdiction, including several promptings before two different judges and colloquies between the Commission and defense in which they agreed that an evidentiary hearing would be appropriate. Nevertheless, the government did not request such a hearing until its motion for reconsideration, and even there, as explained in the previous subsection, barely mentioned it.

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signaled he is entertaining *sua sponte* regarding subject-matter jurisdiction," *id*., but it is clear from the language quited *infra*, and in the context of the rest of the brief (in which the government argues consistently that it need not introduce evidence of subject-matter jurisdiction and that any hearing should be on personal jurisdiction only), that the only evidence to be received at such a hearing would go to personal jurisdiction.

[76] App. Br. 40.

[77] *See Hutchins v. District of Columbia*, 188 F.3d 531, 539 n. 3 (D.C.Cir.1999) (en banc) ("We need not consider cursory arguments made only in a footnote").

Given this procedural background, the government cannot seriously contend that Judge Spath abused his discretion in denying its extremely belated and, at best, highly-equivocal request.

The government's arguments in support of this contention are so contradicted by the record described above and in the military judge's two orders as not to be credible. Its primary argument is that it was unfairly surprised (a) when the military judge required that it put on evidence before trial, and (b) that the judge would rule on the basis of 10 U.S.C. § 948d. (Gov't Br. 37) Yet, again, as Judge Spath pointed out in his initial dismissal order, the question of whether the jurisdictional issue was an evidentiary one was discussed throughout the proceedings.[78] As for § 948d, it was cited in Mr. Al Nashiri's initial motion.[79] More importantly, all parties, including the government, were well aware early in the proceedings that Mr. Al Nashiri's motion concerned subject-matter jurisdiction, and § 948d is the provision setting out military commissions' subject-matter jurisdiction under the MCA. It is hardly a difficult inference that the military judge might cite that section in his ruling.

Finally, the government's desperate plea that dismissing these charges will harm "the United States and its people" by depriving the fact-finder of relevant testimony and do further harm to "the legitimacy of the military commission" is beneath it. Appeals to emotion and "legitimacy" have no place in an appellate brief. This Court will do more for the legitimacy of the military commissions by sustaining Judge Spath's entirely appropriate and prudent ruling below than by taking the government's invitation to rule on the basis of such tactics.[80]

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[78] AE 168G/AE 241C at 3 & n.4.

[79] AE 168 at 2.

[80] The government also makes the statement that "when one reads the transcripts carefully, involved no small amount of steering by the Military Judge of defense counsel toward a theory

CONCLUSION

For the foregoing reasons, the military commission's final order dismissing the charges relating to the M/V Limburg for the government's failure to establish subject-matter jurisdiction should be AFFIRMED.

Respectfully submitted,

/s/ Richard Kammen

Richard Kammen
Kammen & Moudy
135 N. Pennsylvania St., Suite 1175
Indianapolis, IN 46204

Brian Mizer
CDR, JAGC, USN
U.S. Department of Defense
Office of the Chief Defense Counsel
1620 Defense Pentagon
Washington, DC 20301

Counsel for Appellee

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that, to the very end, defense counsel never really shared." (Gov't Br. 37) Suffice it to say that, in this instance, the government's telepathic powers have failed it.

CERTIFICATE OF SERVICE

I hereby certify that on 14 October 2014, I caused copies of the foregoing to be served on the counsel for Appellant via email

Respectfully submitted,

/s/ Richard Kammen
Richard Kammen
Kammen & Moudy
135 N. Pennsylvania St., Suite 1175
Indianapolis, IN 46204

Counsel for Appellee