UNITED STATES COURT OF MILITARY COMMISSION REVIEW

UNITED STATES, *Appellant*, v. ABD AL-RAHIM HUSSEIN AL-NASHIRI , *Appellee*.	)	Case No. 14-001 **SUBMISSION OF SUPPLEMENTAL AUTHORITY** Date: 1 June 2016

On 18 May 2016, Appellant filed a twenty-two page supplemental brief, rearguing the merits of its case on the basis of ostensibly new authority. Appellee asked for additional time in which to respond, which was denied. Appellee therefore files this brief response with the limited time and resources he has available.

Most of government's supplemental pleading is a lengthy re-imagination of the D.C. Circuit's opinion in *United States v. Miranda*, 780 F.3d 1185 (D.C. Cir. 2015), which it uses as a fig leaf to claim "strong and binding new authority supporting Appellant's position." *Miranda*, however, dealt with an appeal from a guilty plea under the Maritime Drug Law Enforcement Act ("MDLEA"). The defendant had waived his appeal and the question was whether the "subject-matter jurisdiction exception" afforded the Appellant relief from the "the waiver rule for unconditional guilty pleas," insofar as he challenged the MDLEA's extraterritorial application. *Morrison*, 780 F.3d at 1191.

To qualify for that exception, the Court ruled, that an appellant must clear a high bar, insofar as "Article III vests federal courts with authority to decide cases 'arising under ... the Laws of the United States,' U.S. Const. art. III, § 2, cl. 1, and Congress has granted the district courts general subject-matter jurisdiction over 'all offenses against the laws of the United States' under 18 U.S.C. § 3231." *Morrison*, 780 F.3d at 1189. Relying on *Morrison v. National Australia Bank*

Ltd., 561 U.S. 247 (2010), the Circuit reasoned that objections to the extraterritorial application of a statute did not qualify for that exception because of the Constitutional foundation of district courts' jurisdiction over all laws of the United States and, as a consequence, the "district court in *Morrison* thus had subject-matter jurisdiction 'to adjudicate the question whether § 10(b) applies to [the defendant's] conduct.'" *Morrison*, 780 F.3d at 1191 *quoting Morrison*, 561 U.S. at 254.

As an initial matter, such a presumption does not apply to a military commission, which is a creature of statute, for which no jurisdiction is presumed. The government already bears the burden of "affirmatively and unequivocally" showing that the commission had jurisdiction over the charges, with nothing presumed in its favor. *Runkle v. United States*, 122 U.S. 543, 556 (1887). It must also show that it was "restricted to the narrowest jurisdiction deemed absolutely essential" to its constitutionally permissible purposes. *Kinsella v. U.S. ex rel. Singleton*, 361 U.S. 234, 240 (1960).

More pertinent to the question here, however and contrary to the government's strained misrepresentation of the language of the case, *Miranda* neither holds nor implies that a trial court is barred from dismissing a charge on the ground that the application of a statute violates the presumption against extraterritorially. The *only* question in *Miranda* was whether such claims fell within the subject-matter jurisdiction exception to appellate waivers. Indeed, in *Morrison* itself, the Supreme Court characterized any confusion over the nature this objection as being over applying the "Rule 12(b)(6) label for the same Rule 12(b)(1) conclusion." *Morrison*, 561 U.S. at 254. In the pre-trial context, there can be no doubt, as the Supreme Court ultimately concluded in *Morrison*, a district court must dismiss the extraterritorial application of any statute because "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 255. And this Court, like the Supreme Court, should "affirm the dismissal of [the charges] on this ground." *Id.* at 273.

Indeed, to the extent any D.C. Circuit case law applies to the question now before this Court it is *United States v. Ali*, 718 F.3d 929 (D.C. Cir. 2013), on which Appellee principally relied below. In that case, the district court dismissed the extraterritorial application of various federal statutes on the ground that the principle against extraterritoriality bars the application of criminal statutes against foreigners who victimize foreigners on foreign territory. The D.C. Circuit unanimously affirmed the dismissal of certain charges on this ground because:

> In most cases, the criminal law of the United States does not reach crimes committed by foreign nationals in foreign **285 *935 locations against foreign interests. Two judicial presumptions promote this outcome. The first is the presumption against the extraterritorial effect of statutes: "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). The second is the judicial presumption that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804)—the so-called *Charming Betsy* canon. Because international law itself limits a state's authority to apply its laws beyond its borders, *see* Restatement (Third) of Foreign Relations Law §§ 402–03, *Charming Betsy* operates alongside the presumption against extraterritorial effect to check the exercise of U.S. criminal jurisdiction. Neither presumption imposes a substantive limit on Congress's legislative authority, but they do constrain judicial inquiry into a statute's scope.

Ali, 718 F.3d at 934-35.

Accordingly, the military commission was both permitted and correct in dismissing charges that alleged the bombing of a French oil tanker that was carrying Iranian oil to Malaysia in Yemeni waters, when the government refused to come forward with evidence demonstrating any U.S.

interest to overcome the long-standing "check [on] the exercise of U.S. criminal jurisdiction." Appellant's contrary arguments are frivolous.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 1 June 2016, I caused copies of the foregoing to be served on the counsel for Appellant via e-mail.

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