MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL HADI AL-IRAQI**	**AE 085** **Defense Motion** to Dismiss The Charges Because Congress Lacks the Constitutional Power to Limit the Jurisdiction of Law-of-War Military Commissions to Non-Citizens **6 June 2017**

1. Timeliness.

This motion is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7(c).

2. Relief Requested.

The Defense respectfully requests that the military commission dismiss all charges with prejudice.

3. Overview.

Mr. al-Tamir is not a United States citizen. If he was, he could not be tried under the Military Commissions Act of 2009 ("MCA"),[1] because only aliens are subject to charges and trial by MCA military commission. The Defense demonstrates herein that because the MCA's jurisdiction is limited to aliens alone, it violates the constitutional limits on Congress's power to authorize the use of law-of-war military commissions.

The constitutional and historical uniqueness of the Military Commissions Act of 2009 (and its predecessor Military Commissions Act of 2006) can hardly be overemphasized. Neither

[1] H.R. 2467, 111th Cong., § 1802 (November 2009), *codified at* 10 U.S.C. § 948a *et seq.*

Congress nor any other American legislature has ever attempted to establish a civilian criminal justice system – much less one that includes the death penalty – that facially discriminates on the basis of nationality. Were it to do so, there is no doubt that the law would be struck down immediately on its face.[2] Nor has Congress ever legislated a separate system of courts-martial for aliens alone. Were it to do so, constitutional considerations aside, it would be discriminating against the non-citizen members of our Armed Forces who fight alongside American service members to defend the Constitution. Nor, most significantly for this motion, has the American military ever convened military commissions to try aliens alone. On the contrary, since before the Founding, the military has consistently tried American enemy combatants alongside non-citizen enemy combatants before the same law-of-war tribunals.

The MCA thus violates an unbroken tradition of United States military practice and doctrine in which non-citizens and Americans stood equal before the law of war. That recognition of equality before the law was once a hallmark that distinguished the United States military from its enemies.[3] Congress's abandonment of that tradition is unfortunate. More important, however, it violates the constitutional limits on Congress's power to authorize the use of law-of-war military commissions.

The argument proceeds as follows: Military tribunals established by the MCA are law-of-war military commissions. (Section 6.A.) As such, they are constitutional only to the extent

[2] *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[3] Thus, in the midst of World War II, while the United States Supreme Court was holding that an American citizen could be tried in the same law-of-war military commission as his German confederates, *see Ex parte Quirin*, 317 U.S. 1, 15-16 (1942), Nazi Germany and Imperial Japan reserved their own law-of-war military tribunals for foreign nationals alone. *See Trial of Wilhelm Von Leeb and Thirteen Others (The German High Command Trial)*, 12 L. RPTS. OF TRIALS OF WAR CRIMINALS 1, 37 (U.N. War Crimes Comm'n 1949) (Night and Fog Decree; limiting jurisdiction of tribunals to "criminal acts committed by non-German civilians"); Military Law of the Japanese Expeditionary Army in China, Art. 1 ("This military law shall apply to all persons other those of Japanese citizenship within the zone of military operation of the Imperial Army.") (attached as Enclosure No. 1 to Statement of Major Itsuro Hata, Prosecution Exh. No. 25, admitted Tr. 190 and attached following, *United States v. Shiguru Sawada, et al.*, Vol. 2 (1946) (military commission convened in Shanghai, China) (Attachment B); *see also id.*, Statement of Major Itsuro Hata, at 1.

that the MCA falls within the bounds of the Article I War Powers that authorize Congress to establish such commissions, including specifically the power to "define and punish . . . Offenses against the Law of Nations,"[4] the Section 8 power that all three Branches of Government have consistently identified as the primary source of that authority. (Section 6.B.) The Define and Punish Clause, however, also incorporates the Law of Nations as a limitation on that authority; accordingly, Congressional legislation establishing law-of-war military commissions must conform to the Law of Nations. (Section 6.C.)

Common Article 3 of the Geneva Conventions, which requires that unprivileged enemy belligerents charged with war crimes be tried by "regularly constituted courts," is part of the Law of Nations. In *Hamdan v. Rumsfeld*, the Supreme Court held that a military commission is "regularly constituted" within the meaning of Common Article 3 only if "some practical need explains [military commission] deviations from court-martial practice.'"[5] Accordingly, because the Constitution incorporates the Law of Nations as a limitation on Congressional power to enact military commissions, a statute establishing law-of-war military commissions is constitutional only to the extent that "some practical need" explains its deviations from regular military justice. (Section 6.D.)

The MCA's jurisdictional limitation to alien enemy belligerents violates this test, because no "practical need" explains this deviation from courts-martial practice under the Uniform Code of Military Justice ("UCMJ"), which makes no jurisdictional distinction between alien and citizen belligerents. (Section 6.E.) Accordingly, because no practical need justifies the MCA's alienage limitation, it violates Common Article 3 and the constitutional requirement that law-of-

[4] Const., Art. I, §8, cl. 10.

[5] *Hamdan v. Rumsfeld*, 548 U.S. 557, 622-623 (2006) (plurality; quoting Kennedy, J., concurring, *id*. at 645); *id*. at 645 (Kennedy, J., concurring).

war military commissions conform to the Law of Nations. The MCA's personal jurisdiction section is therefore unconstitutional on its face; this Commission lacks jurisdiction over Mr. al-Tamir; and the charges against him must be dismissed.[6] (Section 6.F.)

4. Burden of Persuasion.

The Defense bears the burden of persuasion as the moving party on this motion. Rule for Military Commission (RMC) 905(c).

5. Facts.

The motion presents a pure issue of law.

6. Argument.

"Without jurisdiction the court cannot proceed at all in any cause. . . . [W]hen it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[7] Because the MCA violates the enumerated power that grants Congress authority to enact law-of-war military commissions,[8] military commissions convened under the MCA's authority lack jurisdiction *ab initio*. Moreover, because this jurisdictional defect is a matter of exceeding Congress's constitutional power, the case must be dismissed regardless of whether Mr. al-Tamir possesses individual rights under the Due Process Clause.[9]

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[6] *See United States v. Al-Nashiri*, 191 F.Supp.3d 1308, 1320-21 (U.S.C.M.C.R. 2016) (personal jurisdiction must be demonstrated before case can proceed to trial).

[7] *Ex parte McCardle*, 74 U.S. 506, 514 (1868).

[8] *M'Culloch v. Maryland*, 17 U.S. 316, 404 (1819).

[9] Compare AE 72C Ruling - Defense Motion to Recognize That These Proceedings are Governed by the Constitution. The motion rests on the fact that the MCA's jurisdictional discrimination between aliens and citizens violates the enumerated Article I, Section 8 power authorizing the establishment of law of war military commissions in the first instance. Whether Mr. al-Tamir has individual constitutional rights is not at issue here.

A. The military tribunals established under the MCA are law-of-war military commissions.

The tribunals established by the 2009 MCA are law-of-war military commissions. As the Supreme Court explained in *Hamdan*, law-of-war military commissions are "convened as an 'incident to the conduct of war' when there is a need 'to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.'"[10] The military commissions authorized by the original Executive Order that was struck down in *Hamdan* were law-of-war commissions,[11] and Congress enacted the 2006 MCA, which the 2009 MCA amends, for the express purpose of reinstating the President's ability to carry on with statutorily-authorized versions of the Executive military commissions.

Apart from its genesis, the express provisions of the 2009 MCA make it clear that Congress intended to create law-of-war commissions. Its stated purpose is to establish "procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission."[12] Substantively, commissions are given jurisdiction to try "any offense made punishable by this chapter, sections 904 and 906 of this title (articles 104 and 106 of the Uniform Code 3 of Military Justice), or the law of war."[13] Articles 104 and 106 criminalize, respectively, aiding the

[10] *Id*. at 596 (quoting *Quirin*, 317 U.S. at 28-29).

[11] *Id*. at 597.

[12] 10 U.S.C. § 948b(a).

[13] 10 U.S.C. § 948d.

enemy and spying.[14] Aiding the enemy has been traditionally treated as a war crime,[15] and spying has an ancient tradition of being tried in military tribunals under the laws of war.[16]

With regard to the "offenses made punishable by this chapter," the MCA specifies that all such offenses are "offenses that have traditionally been triable under the law of war or otherwise triable by military commission,"[17] and prosecution of the crimes are only permitted if they were "committed in the context of and associated with hostilities."[18] The jurisdiction of the MCA commissions is thus limited to that of traditional law-of-war commission as identified by the Supreme Court.[19]

Finally, the D.C. Circuit has recognized that cases brought under the MCA are tried by law-of-war military commissions.[20]

B. The War Powers, including the Define and Punish Clause, limit Congress's authority to enact law-of-war military commissions.

The Supreme Court in *Hamdan* held that the military commission system implemented under the President's Executive Order[21] was illegal because it violated the statutory requirement that such commissions comply with the Law of Nations.[22] *Hamdan* was thus a statutory decision.[23] At the same time, however, the Court also made clear that the Constitution placed

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[14] *See* 10 U.S.C. §§ 904 and 906.

[15] *See* William Winthrop, MILITARY LAW AND PRECEDENTS 840 (2nd ed.1920)

[16] *See, e.g.*, *Quirin*, 317 U.S. at 27 ("spying" triable by law-of-war military commission); Resolution of the Continental Congress, 1 J, Cont. Cong. 450 (1776) (*reproduced in* Winthrop, at 765).

[17] 10 U.S.C. § 950p(d).

[18] 10 U.S.C. § 950p(c).

[19] *Hamdan*, 548 U.S. at 598. Any remaining doubt about the scope of the MCA's substantive jurisdiction has been put to rest by *Hamdan v. United States*, -- F.3d --, 2012 WL 4874564, slip op. at 8 (D.C. Cir., October 16, 2012) (holding that crimes subject to MCA jurisdiction are international war crimes).

[20] *See e.g. Al Bahlul v. United States*, 767 F.3d 1, 7 (D.C. Cir. 2014) (*en banc*) ("It is undisputed that the commission that tried Bahlul is of the third type: a law-of-war military commission.")

[21] Military Order of November 13, 2001, 66 Fed. Reg. 57833 (2001).

[22] *Hamdan,* 548 U.S. at 613; *see* 10 U.S.C. § 821 (UCMJ Article 21) (2005).

[23] *Id.* at 635.

limits on Congress's power to enact military commission systems as well.[24] As the Court explained, in authorizing military commissions under the Articles of War, "Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions -- with the express condition that the President and those under his command comply with the law of war."[25]

The most fundamental constitutional requirement of any Congressional legislation, including the MCA, is that it fall within the scope of the enumerated Article I powers that authorize Congress to legislate in that subject-matter area. With regard to law-of-war military commissions, those are the so-called War Powers, including most importantly the Define and Punish Clause.[26]

(1) The Define and Punish Clause is the chief Article I, Section 8 power that authorizes, and limits, Congress's authority to enact law-of-war military commissions.

The principle that Congress can "exercise only the powers granted to it" by Article I is the most basic limitation on Congressional power imposed by the Constitution.[27] The principle applies to Congress's war powers generally,[28] and to the establishment of military commissions in particular.[29]

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[24] *Id.* at 637 (Kennedy, J., concurring) (noting that "conformance with the Constitution" required); *id.*, at 653 (Kennedy, J., concurring) (requiring "a new analysis consistent with the Constitution" if Congress changed the law); *see also Quirin*, 317 U.S. at 28 (Congress may establish law-of-war commission jurisdiction "so far as it may constitutionally do so"); *id*. at 30 (same).

[25] *Hamdan*, 548 U.S. at 593.

[26] Const., Art. I, § 8, cl. 10; *see Quirin*, 317 U.S. at 25-26.

[27] *M'Culloch*, 17 U.S. at 404.

[28] *Lichter v. United States*, 334 U.S. 742, 779 (1948); *United States v. Robel*, 389 U.S. 258, 263 (1967) ("[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit").

[29] *Hamdan,* 548 U.S. at 591; *Quirin*, 317 U.S. at 25; *Ex parte Milligan*, 71 U.S. 2, 121 (1866).

With regard to that power, all three Branches of Government have recognized that the Define and Punish Clause is the source of Congress's authority to institute law-of-war military commissions. The Supreme Court[30] and Congress[31] have both explicitly so stated, and the Executive Branch has taken the same position.[32] It was also the view of the leading 19th Century treatise on military law.[33] Accordingly, to be constitutional, the MCA must fall within the scope of authority encompassed by that Clause.

(2) The Define and Punish Clause limits Congress's authority to enact law-of-war commissions.

Congress's power to establish law-of-war commissions is therefore limited to the scope authorized by the Define and Punish Clause.[34] Faced with closely parallel *ultra vires* exercises of Congressional power, the Supreme Court has not hesitated to strike down other statutory

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[30] *See Hamdan*, 548 U.S. at 601; *Quirin*, 317 U.S. at 28; *In re Yamashita*, 327 U.S. 1, 7 (1946).

[31] *See* War Crimes Act of 1996, H.R. Rep. No. 104-698 (1996), at 7 (citing *Yamashita* and *Quirin* for the proposition that "[t]he constitutional authority to enact federal criminal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions [referring to the Define and Punish Clause]").

[32] United States Attorney General James Speed, "Military Commissions," 11 Atty. Gen. Op. 297, 298-9 (1865) (Define and Punish Clause is a power "conferred by the Constitution upon Congress or the military under which such tribunals [for the trial of violations of the law of war] may be created in time of war.").

[33] Winthrop, at 831 ("The Constitution confers upon Congress the power 'to define and punish offences against the law of nations,' and in the instances of the legislation of Congress during the late war by which it was enacted that spies and guerillas should be punishable by sentence of military commission, such commission may be regarded as deriving its authority from this constitutional power.")

[34] *Quirin*, 317 U.S. at 28 ("Congress has explicitly provided, *so far as it may constitutionally do so*, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases . . . [and] has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, *within constitutional limitations*, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.")(emphasis added); *Hamdan*, 548 U.S. at 637 (Kennedy, J., concurring) (noting that "conformance with the Constitution" required); *id.* at 653 (Kennedy, J., concurring) (requiring "a new analysis consistent with the Constitution" if Congress changed the law); *Yamashita*, 327 U.S. at 9 ("[Congress] 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."); *id.* at 25 (concluding that the commission "did not violate any military, statutory *or constitutional command*") (emphasis added); *see also Madsen v. Kinsella*, 343 U.S. 341, 354-6 (1952) (challenge to occupation military commission; sustaining commissions as authorized by law of war and concluding that they "were, at the time of the trial of petitioner's case, tribunals in the nature of military commissions *conforming to the Constitution* and laws of the United States") (emphasis added).

grants of military tribunal jurisdiction when they violated the scope of the Article I war power on which the legislation was based. This Commission should do the same here.

United States ex rel. Quarles v. Toth[35] and *Reid v. Covert*[36] are the leading cases on the Supreme Court's policing of jurisdictional grants to military tribunals. In *Toth*, after Congress extended court-martial jurisdiction to former service members, the Court held that Congress's Article I, § 8 power to "make Rules for the Government and Regulation of the land and naval forces"[37] did not extend to subjecting ex-service members to military jurisdiction.[38] Similarly, in *Reid*, when Congress attempted to bring the spouses of service members within courts-martial jurisdiction, the Court held that the same clause "by its terms, limit[s] military jurisdiction to members of the 'land and naval Forces,'" and overturned the legislation.[39]

As the Court has explained on numerous occasions, it "has been alert to ensure that Congress does not exceed the constitutional bounds and bring within the jurisdiction of the military courts matters beyond that jurisdiction."[40] The Court reserves special heightened scrutiny for assertions of military jurisdiction both because of the stakes involved for the individuals, but also because of the structural concern with separation of powers. As the Court put it in *Quarles*, "[t]here is a compelling reason for construing [the Land and Naval Forces Clause] this way: any expansion of court-martial jurisdiction . . . necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals."[41] Accordingly,

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[35] *United States ex rel. Quarles v. Toth*, 350 U.S. 11 (1955).

[36] *Reid v. Covert*, 354 U.S. 1 (1957).

[37] Art. I, § 8, cl. 14.

[38] *United States ex rel. Quarles v. Toth*, 350 U.S. 11, 14-15 (1955).

[39] *Reid v. Covert*, 354 U.S. 1, 22 (1957) (plurality); *see also id.* at 67 (Harlan, J., concurring).

[40] *Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 66 n.17 (1982).

[41] *Quarles*, 350 U.S. at 16.

the Court concluded that "[d]etermining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed.'"[42]

The enumerated Article I, Section 8 war power at issue here is the Define and Punish Clause, not the Land and Naval Forces Clause as it was in *Quarles* and *Reid*. Nevertheless, the underlying principle – that especially with respect to military tribunal jurisdiction, Congress must be limited to the proper exercise of the power that purports to authorize its legislation – is even more compelling here. As the Court put it in *Hamdan*, "no more robust model of executive power exists" than law-of-war military commissions, and therefore "*Quirin* [which authorized their use] represents the high-water mark of military power to try enemy combatants for war crimes."[43]

As demonstrated below, when Congress enacted the MCA, it indeed "exceed[ed] the constitutional bounds" of the Define and Punish Clause, and thereby brought "within the jurisdiction of the military courts matters beyond that jurisdiction."[44]

C. The War Powers, including the Define and Punish Clause, incorporate the Law of Nations as a limitation on congress's power to enact law-of-war military commissions.[45]

The Law of Nations was universally accepted as legally binding by the Founders,[46] and, in the early Republic, by all three branches of government. It was the basis for Congressional

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[42] *Id.* at 23.

[43] *Hamdan*, 548 U.S. at 597.

[44] *Northern Pipeline*, 458 U.S. at 66 n.17.

[45] To be clear, this argument is strictly constitutional; it is not based on international law (the "Law of Nations") as such. Mr. al-Tamir is not arguing that the Law of Nations binds Congress directly; rather, he is arguing that, as a matter of Congress's Article I powers, the Law of Nations is incorporated in the Define and Punish Clause and binds Congress as a constraint imposed by that clause. Accordingly, cases like *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *cert. denied*, --- U.S. ---, 131 S.Ct. 1814 (2011), which suggest that international law does not by itself bind Congress, are inapposite even if correctly decided.

enactments.[47] It was a source for Executive interpretations of the law.[48] And it provided jurisdiction and rules of decision in Article III courts.[49]

In particular, the law of war, which is a part of the Law of Nations, was viewed as binding on the jurisdiction and procedures of military tribunals. That understanding is reflected in both contemporaneous legislative enactments and the military practice of the period. Indeed, the Law of Nations was understood as a basis for criminal jurisdiction even before the Constitution was adopted. Among the earliest statutes enacted by the Continental Congress was one that authorized trials of spies in courts-martial "according to the law and usage of nations."[50] In Article III courts, the Law of Nations was viewed as sufficiently authoritative to provide an independent jurisdictional basis for criminal prosecutions relating to the conduct of war.[51]

Military practice at the time also looked to the law of war for its procedural rules. General George Washington, for example, viewed the law of war as binding him when he convened a special military board in September 1780 to determine whether Major John André, Benedict Arnold's British contact, was a spy. After the board recommended that André be hung,

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[46] *See* Beth Stephens, "Federalism and Foreign Affairs: Congress's Power to 'Define and Punish . . . Offenses Against the Law of Nations'," 42 Wm. & Mary L. Rev. 447, 463-477 (2000) (discussing acceptance of Law of Nations as binding at time of Founding and adoption of Define and Punish Clause); William Blackstone, 4 COMMENTARIES ON THE LAWS OF ENGLAND *66 (Chapter 5, "Of Offences Against the Law of Nations") ("THE law of nations is a fyftem of rules, deducible by natural reafon, and eftablifhed by univerfal confent among the civilized inhabitants of the world; in order to decide all difputes, to regulate all ceremonies and civilities, and to infure the obfervance frequently occur between two or more independent ftates, and the individuals belonging to each.").

[47] *See, e.g.*, Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (now Alien Tort Claims Act, 28 U.S.C. § 1350).

[48] *See, e.g.*, Edmund Randolph, "Reprisals," 1 U.S. Op. Atty. Gen. 30 (1793); Edmund Randolph, "Seizures in Neutral Waters," 1 U.S. Op. Atty. Gen. 32 (1793).

[49] *See, e.g.*, *The Nereide*, 13 U.S. 388, 423 (1815) (Marshall, C.J.) (absent legislation, "the Court is bound by the law of nations which is a part of the law of the land").

[50] *See, e.g.*, Resolution, 1 J. Cont. Cong. 450 (1776).

[51] *See, e.g.*, *Henfield's Case*, 11 F. Cas. 1099 (C.C. Pa.1793) (grand jury charge given by Chief Justice John Jay); *see also* Edmund Randolph, "Who Privileged From Arrest," 1 U.S. Op. Atty. Gen. 26, 28 (1792) (noting the possibility of prosecutions brought under the Law of Nations).

André wrote to Washington asking to be shot instead.[52] Washington would have preferred to grant his request,[53] but viewed himself as legally bound to reject it because death by hanging was the procedure required by the "practice and usage of War."[54]

In sum, at the Founding of the Republic, United States military law and practice treated the Law of Nations as dictating the process afforded to enemy combatants charged with violations of the law of war.[55]

The same understanding prevailed throughout the 19th Century. During the Mexican War, General Winfield Scott, the originator of the military commission in its modern form,[56] explicitly predicated the jurisdiction of his military commissions and councils of war on the authority of the law of war.[57] Civil War-era authorities also recognized that the common law

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[52] At the time, firing squad was considered the means of executing soldiers; hanging was for common criminals. John Marshall, THE LIFE OF GEORGE WASHINGTON, VOL. I 380 (2nd ed. 1843) ("André wished to die as a soldier, not as a criminal.").

[53] André's honorable conduct after his capture had earned Washington and his officers' respect to the extent that Washington personally wished he could grant André's request. *Id.* ("The general officers lamented the sentence that the usages of war compelled them to pronounce; and never perhaps did the Commander-in-chief obey with more reluctance the stern mandates of duty and policy.").

[54] 20 WRITINGS OF GEORGE WASHINGTON 134 n.16 (J. Fitzpatrick, ed.) (1937) (rejecting André's request to be shot rather than hung because "the practice and usage of War were against his request"); Louis Fisher, MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE PRESENT 12-13 (2005); *Quirin*, 317 U.S. at 31 n.9.

[55] Contemporaneous British military law also treated the Law of Nations as placing limits on its military tribunal practice. In 1800, for example, a British military commander requested the views of the military leadership on the proper procedures for adjudicating whether a captured enemy belligerent had broken his parole, and was thus subject to execution under the laws of war. Responding in a formal letter of advice dated January 24, 1801, the King's Advocate, the Attorney- and Solicitor General, and the Advocate and Counsel for the Admiralty opined in that in order to determine the prisoner's status, "we conceive we ought to be able to refer either to some clear authority in the text writers upon the Law of Nations, or to some more uniform practice in the conduct of nations which would fully justify the proceeding." Charles Clode, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW 366-367 (2nd ed. 1874) (Letter from John Nichol, *et al.* dated January 24, 1801) (Attachment C). Clode's treatise cites the letter as authoritative. *Id.*

[56] *Hamdan*, 548 U.S. at 590.

[57] *See* General Order No. 287 (issued September 17, 1847) (*reproduced in* William Birkhimer, MILITARY GOVERNMENT AND MARTIAL LAW 581-3 (3rd ed. 1914), at ¶7 (authority for commissions based on "unwritten code" of martial law required to protect civilians and American soldiers from violations of the laws of war); General Order No. 372 (issued December 12, 1847) (*reproduced in* Hearings before the Senate Committee on the Philippines, "Affairs in the Philippine Islands," Senate Sess. 57-1, Doc. 331, Part 3 (1902)), at 2280 (establishing councils of war "for the summary trial of the offenders under the known laws of war applicable to such cases").

jurisdiction of military commissions derived from the laws of war. Francis Lieber, the most influential codifier of military law of the period, was explicit on this point, explaining that "military jurisdiction is of two kinds," court-martial jurisdiction which is conferred by statute, and military commission jurisdiction, "which is derived from the common law of war."[58] Military commissions of the period understood their jurisdiction in the same manner. As one commission sitting as an occupation provost court explained, it "depends for its existence on the law of nations, and on that part of the law of nations relating to war . . . On that law alone must this court rely for the power and jurisdiction it has exercised."[59]

Attorney General James Speed's formal opinion on the legality of employing a military commission to try the Lincoln assassination conspirators identified the Define and Punish Clause as the Article I power authorizing Congress to enact legislation pertaining to law-of-war military commissions.[60] Speed pointed out that, "from the face of the Constitution [i.e., the Define and

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[58] Francis Lieber, INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD 6-7 (Art. 13) (Government Printing Office, 1898) (*originally published as* General Order No. 100 (issued April 24, 1863)). Lieber limited law of war jurisdiction to "military offenses which do not come within the statute." *Id*. In fact, however, military commissions continued to be "common-law war court[s]" based on the law of war through the revision of the Articles of War in 1916. *See* 1 REVISION OF THE ARTICLES OF WAR, S. Rep. No. 130, 64th Cong., 1st Sess., at 40 (1916) (testimony of Brig. Gen. Enoch H. Crowder, Judge Advocate General of the Army) ("A military commission is our common-law war court. It has no statutory existence, although it is recognized by statute law."). Even after the revision and continuing through the passage of the Uniform Code of Military Justice in 1950, until the 2006 MCA, Congress limited its regulation of law-of-war military commissions to general statements requiring compliance with the law of war, *see*, 10 U.S.C. § 821 (UCMJ Art. 21) (2005); *Hamdan*, at 593, with the exception of a requirement of general procedural parity among military commissions, courts-martial, and Article III prosecutions, 10 U.S.C. § 836 (UCMJ Art. 36) (2005). This consistent history of reliance on the law of war to determine the jurisdiction and procedures of military commission is the background against which the scope of the Define and Punish Clause has to be measured.

[59] *United States v. Reiter*, 27 F. Cas. 768, 769 (La. Provisional Ct. 1865). With the exception of MCA military commissions, the same rule prevails today within the United States Armed Forces. Army Field Manual 27-10 ("FM 27-10"), the military's authoritative guide to the law of war, provides that "[a]s the international law of war is part of the law of the land in the United States, enemy personnel charged with war crimes are tried directly under international law without recourse to the statutes of the United States." FM 27-10, at 180-81 ¶ 505(e) (1956).

[60] James Speed, "Military Commissions," 11 Atty. Gen. Op. 297, 298-99 (1865).

Punish Clause],"[61] in acting under the Clause, Congress could not "abrogate [the laws of war] or authorize their infraction."[62] Speed's analysis prevailed into the 20th Century.[63]

Finally, the Supreme Court's leading cases are fully consistent with, even if they do not compel, the conclusion that the Define and Punish Clause requires Congress to conform to the jurisdictional limitations of the Law of Nations when exercising its power to enact law-of-war military commissions. *Hamdan*, *Quirin*, and *Yamashita* all address the jurisdiction and procedural regularity of military commissions, and all hold that the Law of Nations provides the rules of decision for the contested issues. These holdings are based on a statutory interpretation (the incorporation of the law of war by Article of War 15[64] and its successor, UCMJ Article 21), not an interpretation of the Constitution.[65] At the same time, however, the cases also go out of their way to emphasize that Congress's authority to establish law-of-war commission jurisdiction is limited by the Constitutional War Powers that give rise to it, most notably the Define and Punish Clause.[66] Because Article of War 15 and UCMJ Article 21 themselves both expressly

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[61] *Id*. at 299.

[62] *Id*. at 300.

[63] The definitive discussion of the post-World War II commissions' law-of-war jurisdiction (which were the last time law-of-war commissions were employed prior to the Executive Order commissions overturned by *Hamdan*) recognized that that the constitutional source of their power was the Define and Punish Clause, and that the Clause incorporated the common-law limitation on their jurisdiction to the Law of Nations:

> In the exercise of the power conferred upon it by the constitution to "define and punish ... offences against the Law of Nations," of which the law of war is a part, the United States Congress has by a statute, the Articles of War, recognised the "Military Commission" appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offences against the law of war. . . . [Congress] incorporated, by reference, as within the pre-existing jurisdiction of Military Commissions created by appropriate military command, all offences which are defined as such by the law of war, and which may constitutionally be included within the jurisdiction.

"United States Law and Practice Concerning Trials of War Criminals by Military Commissions and Military Government Courts," Annex II to 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 111, 112 (1947).

[64] *Quirin*, 317 U.S. at 28; *Yamashita*, 327 U.S. at 7.

[65] *Hamdan*, 548 U.S. at 628.

[66] *See* Section 6.B.2., *supra*; *Quirin*, 317 U.S. at 28; *Hamdan*, 548 U.S. at 637 (Kennedy, J., concurring); *id.* at 653 (Kennedy, J., concurring); *Yamashita*, 327 U.S. at 9; *see also Madsen*, 343 U.S. at 354-56.

incorporated the law of war as a limitation on the power to convene military commissions, there could be no conflict between Congress's enactments and the Define and Punish Clause, which also incorporated the law of war. With the MCA, by contrast, Congress has for the first time adopted law-of-war tribunal jurisdiction that conflicts with the Supreme Court's binding interpretation of the Law of Nations (described in Section 6.D. below).

In sum, the War Powers were drafted, adopted and then interpreted against the background of an unbroken pre- and post-Founding understanding of the Law of Nations' determining role on the common-law jurisdiction and process of law-of-war military tribunals, an understanding that was expressly incorporated in the Define and Punish Clause. Under that Clause, therefore, Congress cannot establish military commissions and authorize trial of "Offenses against the Law of Nations" through a process that itself violates the Law of Nations.[67] Law-of-war military commission jurisdiction is not "in conformance with the Constitution"[68] unless it complies with the Law of Nations.

[67] The Supreme Court has consistently held that Congress does not have the power to change or modify the Law of Nations, but only "define" it in the sense of specifying particulars where the Law itself is too vague to provide a clear rule of decision. *United States v. Arjona*, 120 U.S. 479, 488 (1887); *United States v. Furlong*, 18 U.S. 184, 198 (1820); *United States v. Smith*, 18 U.S. 153, 158 (1820). *See also* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614-15 (Max Farrand ed., 1937) (Madison's Notes, May 29, 1787) (comments of James Wilson) (objecting to the term "define" in the draft clause offered by Gouvenor Morris because "[t]o pretend to define the law of nations which depended on the authority of all the Civilized nations of the World, would have a look of arrogance[] that would make us ridiculous;" term nevertheless adopted after Morris agreed with Wilson's interpretation); Stephens, *supra*, at 474.

[68] *Hamdan*, 548 U.S. at 637 (Kennedy, J., concurring). In this and all other respects pertinent to this motion, the four-judge plurality adopted Justice Kennedy's position. *See id.* at 634 ("We agree with Justice KENNEDY that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any "evident practical need," . . . and for that reason, at least, fail to afford the requisite guarantees [of Common Article 3 which is part of the law of war."). Henceforth when defendant cites Justice Kennedy's concurrence, the plurality's agreement will not be cited separately.

D. Law-of-war military commission procedures that vary from court-martial practice violate the Law of Nations unless some practical need explains the deviations.

In *Hamdan v. Rumsfeld*, the Court held that the original Executive Order ("EO") military commission system was illegal because it was inconsistent with the UCMJ.[69] Nevertheless, in order to decide that the system was illegal under the statute, the Court first had to decide whether the system was legal under the law of war, because the statute at issue, UCMJ Article 21,[70] incorporated the law of war as the substantive limits on military commission practice and procedure. As the Supreme Court explained, "[i]f the military commission at issue is illegal under the law of war, then an offender cannot be tried 'by the law of war' before that commission [under Article 21]."[71]

Accordingly, in striking down the EO commissions, the Court first held that the system violated the law of war.[72] Specifically, the Court found that the system violated Common Article 3 of the Geneva Conventions of 1949, which prohibits, *inter alia*, "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court."[73] Because Common Article 3 was part of the "law of nations,"[74] and because Article 21[75] incorporated the law of war into its limitations on military

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[69] *Id.* at 613.

[70] 10 U.S.C. § 821 (2005) ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.").

[71] *Hamdan*, 548 U.S. at 641 (Kennedy, J., concurring).

[72] *Id.*

[73] Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3320, T.I.A.S. No. 3364.

[74] *Hamdan*, 548 U.S. at 628 (plurality) ("[R]egardless of the nature of the [Geneva Convention] rights conferred on Hamdan, ... they are, as the Government does not dispute, part of the law of war."); *id.*, at 642-3 (Kennedy, J., concurring).

[75] 10 U.S.C. § 821 (2005).

commissions, the Court held that to be legal, the President's EO military commissions must be "regularly constituted courts" within the meaning of Common Article 3.

The Court was therefore compelled to interpret the meaning of "regularly constituted court" as applied to United States military commissions. It held that "a military commission can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations from court-martial practice."[76] That is, under the law of war, enemy belligerents were to be tried under the same rules and procedures as the United States tried its own service members, unless some circumstance made the application of a specific rule "impractical." Applying this standard, the Court held that the EO commission system was illegal because no "practical need" justified its numerous deviations from the procedures followed in court-martial practice.[77] As Justice Kennedy explained, in considering the practical need for deviations from court-martial practice, "Common Article 3 permits broader consideration of matters of structure [and] organization" along with more specific procedural protections. There is no more basic element of military commission "structure" or "organization" than the scope of its personal jurisdiction.[78]

It needs to be stressed that the Court's interpretation of Common Article 3's "regularly constituted court" requirement is definitive and binding as to the requirements of international law, regardless of whether that law applies directly to Executive or Congressional action or is incorporated by statute or constitutional provision into the domestic law of the United States. Accordingly, if, as shown above, the Define and Punish Clause limits Congress to legislating

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[76] *Id*. at 645 (Kennedy, J., concurring); *id.* at 632-3 (plurality; quoting Kennedy, J., concurring, *id*. at 645); *see also id*. at 617-620 (discussing the historical law and practice of military commission procedural uniformity with courts-martial).

[77] *Hamdan*, 548 U.S. at 633-34.

[78] *See generally Al-Nashiri, supra.*

military commissions that are consistent with the law of war, then to be constitutional, the MCA must establish tribunals that are "regularly constituted courts" within the meaning of the Supreme Court's interpretation. That is, military commissions convened under the MCA are constitutional only if there is a "practical need" for any the Act's deviations from court-martial practice.[79] We show below that perhaps the most significant "deviation" from court-martial practice – the limitation of its jurisdiction to non-citizens alone – stems from no such "practical need," and is indeed directly contrary to the Supreme Court's pronouncements and the United States military's own unbroken history of trying citizens alongside aliens in its military commissions.

E. The limitation of MCA law-of-war military commission jurisdiction to non-citizens deviates from court-martial practice without any "practical need" and therefore violates Common Article 3.

The MCA facially violates Common Article 3, and therefore the Law of Nations, under the *Hamdan* standard. The provisions that limit MCA jurisdiction to aliens[80] deviate entirely from the UCMJ, which does not discriminate on the basis of nationality under either its regular

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[79] The most significant flaw in the two Commission decisions denying somewhat similar motions based on the Define and Punish Clause was their failure to look to the Supreme Court's definitive interpretation of "regularly constituted court," and instead relying on language taken out of context from two opinions of Court of Military Commission Review. *See United States v. Mohammad, et al.*, AE 104C Order - Defense Motion to Dismiss The Charges Because The Military Commissions Act of 2009 Exceeds Congress' Power Under the Define and Punish Clause at 3 ¶3.d. (citing *United States v. Al-Bahlul*, 820 F.Supp. 2d 1141, 1253 (U.S.C.M.C.R. 2011) and *United States v. Hamdan*, 801 F.Supp. 2d 1247 (U.S.C.M.C.R. 2011)); *United States v. al-Nashiri*, AE 047B Ruling - Motion To Dismiss For Lack Of Personal Jurisdiction Because Limiting Personal Jurisdiction To Aliens Violates The Define And Punish Clause at 1 ¶ 5, 2 ¶ 6 (same). The passage in the *Al-Bahlul* opinion that mentions "regularly constituted court" neither cites nor quotes *Hamdan*, which is unsurprising because it addresses an entirely different issue having nothing to do with the "regular constitution" of the commissions or the Define and Punish Clause, to wit, the question of whether trial by military commission violates the Bill of Attainder Clause. *Al-Bahlul*, 820 F.Supp. 2d at 1252-53. The citation to *Hamdan* is equally inapposite. Although mentioning the Define and Punish Clause in passing, it neither addressed the argument made in this motion, discussed *Hamdan*, or even mentioned "regularly constituted courts." *Hamdan*, 801 F.Supp. 2d at 1315. In any event, the CMCR's *Hamdan* opinion was subsequently vacated after the Government abandoned its holdings in the D.C. Circuit. *See Hamdan v. United States,* 696 F.3d 1238, 1253 (D.C Cir. 2012) (reversing and vacating the CMCR opinion).

[80] 10 U.S.C. §§ 948b(a) and 948c.

"good order and discipline" jurisdiction or its special law of war jurisdiction.[81] The equal treatment of aliens under the UCMJ is more than formal, moreover. Aliens have long served in the United States Armed Forces and been subject to UCMJ jurisdiction on the same basis as citizen servicemen and women.[82] The MCA's discrimination between aliens and citizens can therefore be justified only if "some practical need explains [this] deviation[] from court-martial practice."[83]

There is no such practical need. The Supreme Court long ago held that citizenship is irrelevant to the exercise of law-of-war military commission jurisdiction.[84] Herbert Haupt, one of the petitioners in *Quirin*, objected to the commission's jurisdiction on the basis that as an American citizen, he was entitled to indictment by grand jury and trial by petit jury. The Supreme Court held that whether he was an American citizen or not, he was equally subject to the military commission's jurisdiction as were his non-citizen co-conspirators. "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."[85] Nor did Haupt's status as a citizen entitle him to procedural rights that were unavailable to the alien accused. "Since the [grand and petit jury clauses of the Fifth and Sixth] Amendments, like § 2 of Article III, do not preclude all trials of offenses against the law of war by military commission without a jury when the offenders are aliens not members of our Armed Forces, it is plain that they present no greater

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[81] *Compare* 10 U.S.C. §§ 948b(a) and 948c *with* 10 U.S.C. §§ 802, 803, and 817-821 (2008).

[82] *See, e.g.* 8 U.S.C. § 1440 (naturalization for alien military service members). Indeed, beginning in 1947 and continuing until the United States's military base agreement with the Philippines was terminated in 1992, non-resident Philippine nationals were permitted to serve. *See* Bureau of Naval Personnel, "Filipinos in the United States Navy" (October 1976) (Naval Historical Center) (available at www history.navy.mil/library/online/filipinos.htm).

[83] *Hamdan*, 548 U.S. at 632-33 (plurality; quoting Kennedy, J., concurring, *id*., at 645).

[84] *Quirin*, 317 U.S. at 37-38.

[85] *Id.* at 37.

obstacle to the trial in like manner of citizen enemies who have violated the law of war applicable to enemies."[86]

Quirin's holding, moreover, is consistent with the unbroken history of American law-of-war military commissions, which prior to enactment of the MCA – and fully consistent with court-martial practice – have never made a jurisdictional distinction on the basis of national origin, and have in practice always tried American citizens alongside non-citizens as violators of the law of war. Indeed, Americans were tried before the Founding by what we would now call a law-of-war military commission. The American Joshua Hett Smith, for example, was tried in 1780 as a co-conspirator of Major John André in a "special court-martial," that, according to William Winthrop, was in fact a military commission.[87] During the Mexican War, at least one American was tried by General Winfield Scott's "Councils of War"[88] (generally considered to be the first fully-developed law-of-war military commissions).[89] In the next major episode of military commission use, the Philippine insurrection following the Spanish-American War, three

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[86] *Id.* at 44; s*ee also Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant."). United States citizens have proved just as capable of joining al Qaeda as non-citizens, and "if released, would pose the same threat of returning to the front during the ongoing conflict." *Hamdi*, 542 U.S. at 519; *see e.g., United States v. John Walker Lindh*, 227 F.Supp.2d 565 (E.D.Va. 2002) (the so-called "American Taliban" case); *United States v. Jose Padilla*, 2007 WL 1079090 (S.D. Fla. 2007) (the so-called "dirty bomber," tried on unrelated charges); "Long Island Man Helped Qaeda, Then Informed," *The New York Times* (July 23, 2009), at p. A1 (*available at* www nytimes.com/2009/07/23/nyregion/23terror.html?ref=nyregion) (describing federal case against Bryan Neal Vinas, who, along with other alleged assistance to al Qaeda, allegedly "tried to kill American soldiers in a Qaeda rocket attack against a military base").

[87] Winthrop, *supra*, at 832; see also William Birkhimer, MILITARY GOVERNMENT AND MARTIAL LAW 351 (3rd ed. 1914), at ¶333.

[88] David Glazier, "Precedents Lost: the Neglected History of the Military Commission," 46 Va. J. Int'l L. 5, 37 (2005).

[89] *See Hamdan*, 548 U.S. at 590. The Civil War presents a special case because the military commissions employed by the Union included martial law, occupation and law-of-war jurisdiction in one forum, *Hamdan*, 548 U.S. at 590-1, and because, more fundamentally, virtually all of the individuals tried, Confederate or Union, were American citizens. In any event, in Winthrop's list of the crimes subject to the Civil War military commission's specific law-of-war jurisdiction, a significant number apply to activities that involved "aiding the enemy" and similar conduct, which would have been committed by individuals adhering to the Union as well as the Confederacy. Winthrop, *supra*, at 840.

Americans were tried under the Philippine commissions' law of war jurisdiction.[90] And, as *Quirin* demonstrates, the World War II commissions made no distinction between citizens and non-citizens.

Given this precedent, the government cannot claim that any "practical need" explains the deviation between the MCA's discriminatory jurisdiction and the nationality-neutral provisions of the UCMJ. Law-of-war military commissions established under the MCA therefore violate the Law of Nations under the *Hamdan* standard.

F. The MCA is unconstitutional on its face.

The preceding analysis demonstrates the following: Law-of war military commissions created by Congressional legislation – which include MCA military commissions (Section 6.A.) – are enacted under the Art. I, § 8 power to "define and punish . . . Offenses against the Law of Nations." (6.B.) The Define and Punish Clause limits such commissions to tribunals consistent with the Law of Nations. (6.C.) With regard to these limits, *Hamdan* held that Common Article 3 of the Geneva Conventions, including its requirement of trial by "regularly constituted courts," is part of the Law of Nations, and that only military tribunals that deviate from court-martial practice when there is some practical need to do so satisfy this requirement. (6.D.) Finally, insofar as it discriminates between alien and citizen unprivileged enemy belligerents, the MCA fails this constitutional test, because there is and can be no "practical need" that explains this deviation from the non-discriminatory jurisdiction of courts-martial. (6.E.)

It follows that the MCA is *ultra vires* and void on its face under the Define and Punish Clause. Because its jurisdictional provisions are unconstitutional, no person, citizen or non-

[90] Glazier, "Precedents Lost," 46 Va. J. Int'l L. at 52.

citizen, may lawfully be tried under the MCA, and the charges against Mr. al-Tamir must be dismissed with prejudice.

7. Oral Argument:

Oral argument is requested.

8. Witnesses:

None.

9. Conference with Opposing Counsel:

The prosecution opposes the requested relief.

10. List of Attachments:

A. Certificate of Service, dated 6 June 2017.

B. Military Law of the Japanese Expeditionary Army in China, Prosecution Exh. No. 25, *United States v. Shiguru Sawada, et al.*, Vol. 2 (1946).

C. Letter from John Nichol, et al. dated January 24, 1801 (reproduced in Charles Clode, THE ADMINISTRATION OF JUSTICE UNDER MILITARY AND MARTIAL LAW 366-367 (2nd ed. 1874)).

Respectfully Submitted,

//s//
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//s//
JEFFREY A. FISCHER
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//s//
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CDR, JAGC, USN
Detailed Defense Counsel

//s//
ADAM THURSCHWELL
Assistant Defense Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on **6 June 2017**, I caused **AE 085 Defense Motion** to Dismiss the Charges Because Congress Lacks the Constitutional Power to Limit the Jurisdiction of Law-of-War Military Commissions to Non-Citizens to be filed with the Office of the Military Commissions Trial Judiciary, and I served a copy on Government counsel of record.

//s//
Adam Thurschwell
Assistant Defense Counsel

ATTACHMENT B

REPRODUCED AT THE NATIONAL ARCHIVES

EMS/BHK

ALLIED TRANSLATOR AND INTERPRETER SECTION
UNITED STATES ARMY FORCES, PACIFIC

NOTE: Translation requested by Legal Section.

PARTICULARS RELATING TO THE PUNISHMENT OF THE AMERICAN AIRMEN WHO RAIDED THE JAPANESE HOMELAND ON 18 APRIL 1942

by HATA, Itsuro ( )

On 28 August 1942, I was ordered to be the prosecutor in the trial in of Second Lieutenant HORUMARU (?[illegible] Presumably HALLMARK) and seven others at the 13 Army Military Tribunal in the compound of the 13 Army Headquarters stationed in SHANGHAI, CHINA. The following is a detailed account of the nature of my duties at the time of the trial, and my version of my part in this affair. I solemnly swear that this account is absolutely true, so help me God!

In order to understand fully the circumstances of the punishment, it is necessary to present a general outline of the organization and functions of the military tribunal, and its trial procedure.

A. Organization and function of the Military tribunal.

The military tribunal is the Army's legal organ for punishing any individual, other than Japanese nationals, within a military zone of operation of the Japanese Army, who commits any act construed to be a wartime offense, or who commits any act inimical to the safety of the Japanese Army, or who commits any act which hinders military operations.

After the outbreak of the CHINA incident, the Japanese Army established military laws affecting all non-Japanese peoples in the various zones of operations, and established a military tribunal in each army headquarters to punish any individual violating these laws. The military law differs from the criminal and army penal laws in that it is not established with the authorization of the Imperial Diet. It is purely an army order imposed by authority of the respective army headquarters for the purpose of insuring the safety of the army, and for securing the activities of military operations.

Since the military law is based essentially on the requirements of military operations, the military tribunal which tries all violators of this law falls into the same category. On this point, the real nature of the military tribunal differs from that of the court martial, which is based on the army court-martial law. However, aside from a few exceptions, the organization and procedure of the military tribunal are, as a rule, patterned after army court-martial law. I will herein explain it by using, as an example, the military regulations and the military trial regulations under the military law of the Japanese Expeditionary Army in China, which was established by authority of the Supreme Headquarters of the Japanese Expeditionary Army in China. Those established in territories other than China differ only slightly.

According to these, the military law of the Expeditionary Army in China applies to people other than Japanese nationals within the zone of military operation of the said Expeditionary Army (Art. 1). Any person who engages in conspiracies, or espionage activities against the Japanese Army, or who willfully and knowingly endangers the safety of the Japanese Army, or who commits any act which interferes with military activities is liable to military punishment (Art.2). Such punishment is divided into five classes: death, imprisonment, banishment, fine and confiscation (Art.5).

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organization and functions of the military tribunal are
d in the military trial regulation of the Expeditionary
China. They prescribe that the military tribunal is under
the jurisdiction of the Expeditionary Army in China, or a subordinate army thereof (Art.2), and stipulate that the presiding officer shall be the supreme commander of the Expeditionary Army or the commanding general of the subordinate army thereof (Art.5).

The general military tribunal consists of the presiding officer, the judges, the law member, the clerk of court, and the sergeant-at-arms. Further, the legal section is established to assist the commanding general who is the presiding officer, and the chief of the legal section directly assists the commanding general. In addition, the chief of staff and his subordinate staff officers assist the commanding general, insofar as requirements of military operations are involved.

A summary military tribunal, on the other hand, is merely an agency appointed to pass judgment on specific cases, and is limited in its jurisdiction. The tribunal in this case is composed of three judges, two of whom are combatant officers, and the third a law member.

When these requirements are fulfilled, the presiding officer takes charge (Art.6). The trial convenes with the judges, the prosecutor and the clerk of court in attendance (Art.7). However, in trying foreigners other than Chinese, the military tribunal must obtain sanction of the supreme commander of the Expeditionary Army in China (Art.8). The ranking officer among the judges is the presiding officer.

As a general rule, the military tribunal tolerates no interference in conducting its trial. However, as has been mentioned previously, inasmuch as the military tribunal is set up by authority of the commanding general of the army in accordance with the requirements of military operations and placed under his jurisdiction rather than being granted absolute judicial power, it is operated by the virtue of the prerogative of the supreme command. Hence, it is probable that, within the bounds of the requirements of military operations, a certain degree of latitude is permitted in the trial proceedings.

On the other hand, the prosecutor can exercise no initiative in discharging his duties, and is merely a tool discharging the duties of his office in complete compliance with the orders of his superiors.

The foregoing is a general outline of the organization and function of a military tribunal. Perhaps additional data may be presented verbally. For reference purposes, there are attached hereto supplementary inclosures presenting the rules and regulations of military law of the Expeditionary Army in China and the rules and regulations for trial procedure of the said Army. (See inclosures 1 and 2).

b. MILITARY TRIBUNAL PROCEDURE.

As a rule the military police investigate all violations of the military law. When sufficient evidence confirming the violation is assembled, a report of the investigation, together with all documentary and material evidence is transmitted to the presiding officer of the military tribunal. When this report is received, the prosecutor of the military tribunal, upon receipt of orders from the presiding officer, carefully examines all the documents, etc., and if necessary, submits his opinion to the presiding officer as to the advisability of prosecuting the case. This the presiding officer takes under consideration by consulting the chief of the legal section, the chief of staff and his subordinate staff officers; and after arriving at a decision, issues his instructions to the prosecutor.

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he basi of this order, the prosecu or makes appropriate on of the case. In a case where the prosecutor draws t, a summary tribunal passes judgment. In such a case, the prosecutor is present at the trial, and carries out his duties in compliance with the orders of his superiors.

In this connection, the prosecutor conducts the trial on the basis of the defendant's testimony. If the trial establishes the guilt of the defendant, the term of imprisonment is based on the recommendation of the prosecutor. However, in imposing a death sentence, the order of the presiding officer is required.

C. PARTICULARS RELATIVE TO THE PUNISHMENT METED OUT IN THIS INCIDENT.

1. On or about 16 April 1942, I was on duty with the legal section of the Central Army at OSAKA. Shortly thereafter I was transferred to the legal section of the 13 Army as a staffmember, and reported to duty at SHANGHAI, 13 May 1942. Until 1 March 1943, when orders for my transfer to HIROSHIMA ( ) came through, I was on duty for approximately 10 months at Shanghai.

2. At the Tokyo Military Police Headquarters, Lieutenant HORUMIKU and the seven others were examined by First Lieutenant HARA, Kiyoju ( ) Military Police, and others. Toward the end of July 1942, Major OGATA Izumi [ ], of the Shanghai Military Police Headquarters, came to the 13 Army Hq with the documents of the investigation in his possession. He explained in detail the full particulars of the case to Colonel ITO, Okinobu ( ], who is the chief of the 13 Army Legal Section and the prosecutor of the military tribunal, and others, and demanded that the airman be tried by the military tribunal.

It was at this point that I first became aware that this case was being investigated by the Military Police, and that Lieutenant HORUMIKU* and his men were in the custody of the Shanghai Military Police Headquarters. Colonel Ito called attention to the fact that the findings of the investigation were limited to the testimonies of the defendants, and did not reveal such information as damages and losses sustained in the bombing and strafing. He gave instructions for the preparation of a document covering all aspects of the case, and for its dispatch to the military tribunal. Accordingly Major OGATA and his colleagues made inquiries at the Tokyo Military Police Headquarters as to the extent of the damages and losses, the findings of which were appended to the investigation report.

The case was referred to the 13 Army Military Tribunal early in August 1942. As prosecutor for the 13 Army Military Tribunal, Colonel Ito carefully examined the papers relating to the case, following which he submitted his recommendations to Lieutenant General SHARA ( ), Commanding General of the 13 Army, Major General KUBOTA [ ], chief of staff, and others. Upon orders from the commanding general of the 13 Army, approved by the supreme commander of the Expeditionary Army in China, Lieutenant HORUMIKU* and the seven were indicted, and committed to trial by the 13 Army Military Tribunal. To facilitate disposition of the case, in compliance with orders from the Grand Imperial Headquarters and the Ministry of War, the "Military Law concerning Punishment of Enemy Airmen" was established by the supreme commander of the Expeditionary Army in China. Lieutenant General SHARA, Colonel ITO, et al, committed Lieutenant HORUMIKU* and his men to trial by the military tribunal for violation of this regulation. For reference purposes, this law is appended hereto. (See Supp.3)

3. Lieutenant Colonel NAKAJO, Toyoma ( ), chief judge, First Lieutenant KAITSU, Yusei ( ), and Second Lieutenant OKADA, Ryuichi ( ), judges, were designated judges of the trial. On 28 August 1942, before the court convened, Colonel Ito designated me prosecutor of the case, and specifically instructed me to demand the death penalty. For reasons elaborated in the

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Post Script

As of March 1945, I have been afflicted with stomach ulcers, and am still under treatment. I am the sole support of my family consisting of my wife, my aged father, who is 71 years of age, and my infirm mother, age 69, who has been an invalid for more than three years because of rheumatism. If there is any probability of my being taken into custody, I would like to be exonerated of any charges immediately so that I may be able to attend to my personal affairs with peace of mind.

In March 1932 I was graduated from the Law School of the Tokyo Imperial University. I had planned originally to become a judicial officer, but in that same year I was called to active service with the Army. Then and there I decided to become a general court official. At that time, a general court official was a civil official, but in March 1942, by a revision of the system, this position was placed on military status.

The period of my student days at middle and higher schools, and my undergraduate years at the Tokyo Imperial University was the heyday for the fostering of democratic doctrines. I became thoroughly inculcated with democratic concepts. Should it be my good fortune to be released and exonerated of all charges arising from this affair, it is my express intention to become a farmer, and at the same time devote my energy to the furthering of the ideals of democracy.

For your reference and information, I have appended hereto, a summary of the various materials related to this case. (See inclosures 4 to 9)

H.T., Itsuro [ ]

October 1945.

Inclosure No. 1

Military Law of the Japanese Expeditionary Army in China

Art. 1. This military law shall apply to all persons other than those of Japanese citizenship within the zone of military operation of the Imperial Army.

Art. 2. Any person who commits any or all of the following acts shall be liable to military punishment:

Sec. 1. Any act of conspiracy against the Imperial Army.

Sec. 2. Any espionage activity.

Sec. 3. Any act not covered by Sec. 1 and 2, which shall be construed as jeopardising the safety, or hampering the military activity of the Imperial Army.

Art. 3. Any instigating, abetting, promoting, plotting, or miscarriage of any or all of the acts hereinbefore mentioned in Art. 2, shall be subject to punishment, provided, however, that punishment shall be mitigated or restrained in accordance with the merits of the case.

Art. 4. Any individual who commits any or all of the acts mentioned under Art. 2, and who confesses of his own volition before any discovery of such act or acts is made, shall have his punishment mitigated or shall be spared.

Art. 5. Military punishment shall be in the following classes.

Sec. 1. Death

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Sec. 2. Imprisonment

Sec. 3. Punishment

Sec. 4. Fine

Sec. 5. Confiscation

The degree of punishment shall be noted in the order of the preceding paragraphs.

Art. 6. etc. (omitted).

Inclosure No. 2.

Military Trial Regulations under the Military Law of the Japanese Expeditionary Army in China.

Art. 1. Any individual violating the provisions of the Military Law of the Japanese Expeditionary Army in China shall be tried by the military tribunal.

Art. 2. The military tribunal shall be established by the Expeditionary Army in China or by a subordinate army thereof.

Art. 3. The military tribunal of the Expeditionary Army in China shall be vested with authority of jurisdiction over any affair designated by the supreme commander.

Art. 4. The military tribunal of the various subordinate armies thereof shall be vested with authority of jurisdiction over any affair involving violations of the military law within the spheres of operation of their respective armies, provided, however, that they do not conflict with the provisions of Article 3.

The supreme commander shall be invested with the authority to designate the military tribunal, which shall have jurisdiction over a special case, regardless of the provisions of the preceeding paragraphs.

Art. 5. The presiding officer of the military tribunal shall be the supreme commander of the Expeditionary Army, of the commanding general of the subordinate army thereof.

Art. 6. The military tribunal shall be composed of three judges.

The judges shall consist of two officers and one law member, all of whom shall be under the orders of the presiding officer.

Art. 7. The military tribunal shall convene with the judges the prosecutor, and the clerk of court in attendance.

Art. 8. The military tribunal shall first obtain the authorization of the supreme commander before proceeding with the trial of a foreigner other than a Chinese.

Art. 9. The laws and regulations governing the special court martial under the army court martial law shall apply to all other items not covered by this law, as the situation permits.

By-laws

This law shall be effective as of 1 October 1939.

Inclosure No. 3

Expeditionary Army in China Military Order No. 4

Military Law concerning the Punishment of Enemy Airmen.

ATTACHMENT C

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THE

ADMINISTRATION OF JUSTICE

UNDER

MILITARY AND MARTIAL LAW,

AS APPLICABLE TO

The Army, Navy, Marines, and Auxiliary Forces.

BY CHARLES M. CLODE,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

"Justice ought to bear rule everywhere, and especially in armies: it is the only means to settle order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience."—*The Art of War*, by LOUIS DE GAYA, in 1678.

[*Recommended to the Army, by General Orders 97 of 1872 and 32 of 1873.*]

SECOND EDITION, REVISED AND ENLARGED.

LONDON:
JOHN MURRAY, ALBEMARLE STREET.
1874.

The right of Translation is reserved.

Filed with TJ
6 June 2017

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APPENDIX K.—CHAP. XI. PAR. 7.

AS TO THE POWER OF INFLICTING CAPITAL PUNISHMENT UPON PRISONERS OF WAR BREAKING THEIR PAROLE.[1]

A French prisoner of war having had leave to return to France upon his declaring that he would "not serve against Great Britain, nor any of the Powers in alliance with that kingdom, until a British prisoner of war of equal rank detained in France was liberated and permitted to return to England in exchange for him, and upon his also engaging that should he not be able to effect such exchange before the expiration of a reasonable time from that date, he should immediately thereafter return to England and surrender himself a prisoner of war." The King's Advocate, Attorney- and Solicitor-General, and the Advocate and Counsel for the Admiralty were consulted: "Whether, in point of law, immediate Military execution would be justifiable on the Declarant (his person being identified to the satisfaction of the Commanding Officer or person taking him prisoner) in case he should again be found in arms against His Majesty or any of his Allies, or whether it is necessary that any and what form of proceeding should take place to authorize such execution." Whereupon their opinion was written in these words: "Assuming that by the Law of Nations immediate Military execution would be justifiable upon a person who after having been liberated upon parole was found in arms against the Power which had released him, yet it is obvious that in this case more would be requisite than the mere ascertainment of his identity before the person in question could be justifiably executed. By the condition of his parole he is authorized to serve against Great Britain or her Allies upon the event of any British prisoner of war of equal rank who was at that time in France being liberated or permitted to return to England in exchange for him, and therefore before his execution could on any principle be justified, it would be necessary to give him the opportunity of being heard as to the fact whether any such British prisoner had been so liberated or permitted to return to England, or whether such orders had been given, or such things had passed that he had fair ground to presume that the condition of his parole had been fulfilled. We therefore are clearly of opinion that immediate Military execution would

[1] Taken from Vol. ii. Adm. Op., pp. 86-8.

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not be justifiable upon the person on the mere proof of his identity, and that the other fact necessary to be ascertained would require a more extensive inquiry than could under such circumstances be instituted. We have been unable to discover any trace of the form of proceeding in the nature of a trial for the purpose of ascertaining the facts on which the forfeiture of this man's life must depend, which at any interval from his capture could be instituted, to justify the execution within this country at a time when the authority of the Civil Magistrate is not superseded by Martial Law, and we cannot therefore point out the form of any such proceeding.

"Upon the general question we feel it necessary to give our opinion with great caution. We are aware, indeed, that the execution of a person taken in arms after having been liberated on his parole has been countenanced by the practice and justified afterwards by the authority of persons whose opinion and authority carry with them the greatest weight. But we apprehend those have been cases of Military execution *flagrante bello*, and at the moment when the exigency of circumstances may have compelled extraordinary proceedings. But we are called upon to give advice beforehand with respect to orders directing such execution to be issued deliberately by the Government of the country. To warrant us in giving such advice, we conceive we ought to be able to refer either to some clear authority in the text writers upon the Law of Nations, or to some more uniform practice in the conduct of nations which would fully justify the proceeding; and we have not been able to find either. On the contrary, it seems to us that the latest writers of authority on this subject have gone no further than to state the importance of the rigid observance of such engagements, and the high obligation imposed on the country of the released prisoner to compel its observance; and we are induced to conclude that those writers could find no uniform practice or clear authority on the subject, and that they rather considered the performance of the parole as a matter of good faith to be observed in the conduct of war, and which the country who had released the prisoner had a right to demand as such from the Government of the enemy.

"JOHN NICHOL,
"JOHN MITFORD,
"W. GRANT,
"WM. BATTINE,
"SP. PERCEVAL."

"*Lincoln's Inn, January 24th*, 1801."

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