MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 168K/AE 241G** **RULING** **GOVERNMENT MOTION TO RECONSIDER AE 168G/AE 241C AND REOPEN MATTERS FOR AN EVIDENTIARY HEARING ON PERSONAL JURISDICTION** **16 SEPTEMBER 2014**

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009). He was arraigned on 9 November 2011.

2. The Prosecution in AE 168H / AE 241D requested

> the Commission to reconsider its Order [AE 168G/AE 241C]. Upon reconsideration, the Commission should hold an evidentiary hearing on personal jurisdiction. It should also deny the defense motions to dismiss Charges IV (Specification 2), VII, VIII, and IX for lack of subject-matter jurisdiction without prejudice (AE 168 and AE 241); or, in the alternative, it should reopen the evidence on these defense motions, hold an evidentiary hearing on subject-matter jurisdiction for Charges IV (Specification 2) and VII through IX, and then rule on the defense motions. (AE 168H / AE 241D at 2.)

The reason for the requested relief was to "correct what the government respectfully submits is a clear error of law in the Order." (AE 168H / AE 241D at 2.) The Defense in AE 168I / AE 241E opposed the Prosecution's request because "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." *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002); R.M.C. 905(c)(2)(B); *United States v. Morita*, 73 M.J. 548, 554 (A.F. Ct. Crim. App. 2014) (AE 168I / AE 241E at 1) and "the government failed - twice in briefing and twice at a live hearing - to show the jurisdictional 'predicate' over the offense." (AE 168I / AE 241E at 6.) The

Prosecution in its reply (AE 168J / AE 241F) again argued the request should be granted to correct a clear error of law "because the Commission's subject-matter jurisdiction is not capable of determination without the trial on the merits, the government is entitled to present its evidence of subject-matter jurisdiction at trial" and the ruling is in contravention of "binding precedent from the U.S. Court of Appeals for the District of Columbia Circuit" and nine (9) other federal courts of appeal (AE 168J / AE 241F at 2).

3. The Prosecution requested oral argument. The Defense did not request oral argument and did not oppose the Prosecution request. "In accordance with Rule for Military Commission (R.M.C.) 905(h) the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge."[1] In this instance, oral argument is not necessary to the Commission's consideration of the issue before it.

4. 10 U.S.C. § 948d, 2009 M.C.A. sets of out the jurisdiction of a military commission. "A military commission under this chapter [Chapter 47a of title 10] shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, sections 904 and 906 of this title (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war, whether such offense was committed before, on, or after September 11, 2001…" At issue here is the authority of the Commission to adjudicate "any offense made punishable by this chapter…or the law of war whether such offense was committed before, on, or after September 11, 2001."

5. "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." *U.S. v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002). In the context of a civil case, "[i]n considering such a motion, the Court generally must accept the material allegations in the complaint as true. The Court does not, however, draw all reasonable inferences in the plaintiff's favor." *McKevitt v.*

[1] Military Commissions Trial Judiciary Rule of Court 3(5)(m) (May 2014)

Mueller, 689 F. Supp. 2d 661, 667-68 (S.D.N.Y. 2010). R.M.C. 905(b) limits pre-trial motions to "[a]ny defense, objection, or request which is capable of determination without a trial of the general issue of guilt." Federal Rule of Criminal Procedure 12(b)[2] is the same, except for the phrase "of guilt" added at the end of the sentence. Federal case law has added this limiting phrase to Federal Rule of Criminal Procedure 12(b) via judicial defining of the phrase "general issue" as "evidence relevant to the question of guilt or innocence." *U.S. v. Ayarza-Garcia*, 819 F.2d 1043, 1048 (11th Cir. 1987) *citing United States v. Barletta*, 644 F.2d 50, 58 (1st Cir. 1981).

6. The court in *United States v. Yakou*, 428 F.3d 241, 247 (D.C. Cir. 2005), identified disagreement among the circuits as to whether a district court could dismiss an indictment on sufficiency-of-the-evidence grounds.

> Several circuits have upheld, in the absence of a government objection, the district court's pretrial dismissal of an indictment on sufficiency-of-the-evidence grounds where the material facts are undisputed and only an issue of law is presented. *See*

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[2] Federal Rule of Criminal Procedure 12(b) states:

(b) Pretrial Motions.

(1) In General. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made at Any Time. A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) Motions That Must Be Made Before Trial. The following defenses, objections, and requests must be raised by pretrial motion before trial if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) a motion alleging a defect in instituting the prosecution; including:
- (i) improper venue;
- (ii) preindictment delay;
- (iii) a violation of the constitutional right to a speedy trial;
- (iv) selective or vindictive prosecution; and
- (v) an error in the grand-jury proceeding or preliminary hearing:

(B) a motion alleging a defect in the indictment or information, including:
- (i) joining two or more offenses in the same count (duplicity);
- (ii) charging the same offense in more than one count (multiplicity);
- (iii) lack of specificity;
- (iv) improper joinder; and
- (v) failure to state an offense;

(C) a motion to suppression of evidence;

(D) a Rule 14 motion to sever severance of charges or defendants under Rule 14; and

(E) a Rule 16 motion for discovery under Rule 16.

> *United States v. Phillips*, 367 F.3d 846, 855 & n.25 (9th Cir. 2004); *United States v. Hall*, 20 F.3d 1084, 1087-88 (10th Cir. 1994); *United States v. Levin*, 973 F.2d 463, 470 (6th Cir. 1992); *United States v. Risk*, 843 F.2d 1059, 1061 (7th Cir. 1988). Other circuits have recognized that a district court can properly adjudge the sufficiency of the evidence before trial where the government has made a full proffer of evidence or where there is a stipulated record, situations similar to the undisputed facts at issue here. *See [United States v.] DeLaurentis*, 230 F.3d [659] at 660-61 (3d Cir. [2000]); *[United States v.] Alfonso*, 143 F.3d [772] at 776-77 (2d Cir. [1998]); *cf.[United States v.] Nabors*, 45 F.3d [238] at 240 (8th Cir. 1995). Only the Eleventh Circuit has held that even where there are undisputed facts a district court may not engage in a pretrial determination of the sufficiency of the evidence, *see United States v. Salman*, 378 F.3d 1266, 1267-69 (11th Cir. 2004), but there was no indication that the government failed to object in the district court. Although this court has not directly spoken on the issue, it has upheld a pretrial dismissal of counts of an indictment based on a question of law. *See, e.g., United States v. Espy*, 145 F.3d 1369, 1370 (D.C.Cir. 1998); *United States v. Oakar*, 111 F.3d 146, 147-50 (D.C.Cir. 1997).

The Commission views the question as being unsettled in the law and thus the Prosecution assertion of clear error is suspect.

7. Still, the question before the Commission remains whether subject matter jurisdiction is a substantive element of Specification 2 of Charge IV, (Terrorism), Charge VII, (Attacking Civilians), Charge VIII, (Attacking Civilian Objects), and Charge IX, (Hijacking or Hazarding a Vessel or Aircraft).

8. The statutory elements of Terrorism in violation of 10 U.S.C. § 950t(24) are:

> (1) The accused intentionally killed or inflicted great bodily harm on one or more protected persons or engaged in an act that evinced a wanton disregard for human life;
> (2) The accused did so in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct; and,
> (3) The killing, harm or wanton disregard for human life took place in the context of and was associated with hostilities. (M.M.C. at IV-19.).

9. The statutory elements of Attacking Civilians in violation of 10 U.S.C. § 950t(2) are:

> (1) The accused engaged in an attack;
> (2) The object of the attack was a civilian population as such, or individual civilians not taking direct or active part in hostilities;

(3) The accused intended the civilian population as such, or individual civilians not taking direct or active part in hostilities, to be an object of the attack;
(4) The accused knew or should have known of the factual circumstances that established the civilian status; and
(5) The attack took place in the context of and was associated with hostilities. (M.M.C. at IV-4.).

10. The statutory elements of Attacking Civilian Objects in violation of 10 U.S.C. § 950t(3) are:

(1) The accused engaged in an attack;
(2) The object of the attack was civilian property, that is, property that was not a military objective;
(3) The accused intended such civilian property to be an object of the attack;
(4) The accused knew or should have known that such property was not a military objective; and
(5) The attack took place in the context of and was associated with hostilities. (M.M.C. at IV-4.).

11. The statutory elements of Hijacking or Hazarding a Vessel or Aircraft in violation of 10 U.S.C. § 950t(23) are:

(1) The accused seized, exercised control over, or endangered the safe navigation of a vessel, or an aircraft;
(2) The accused intended to seize, exercise control over, or endanger the safe navigation of such vessel or aircraft;
(3) The vessel or aircraft was not a legitimate military objective; and
(4) The conduct took place in the context of and was associated with hostilities. (M.M.C. at IV-18.).

12. In order to establish subject matter jurisdiction as to the charged offenses subject to the Defense's motion in AE 168 and AE 241, the Commission finds 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."

13. The Prosecution was given multiple opportunities with the filing of two sets of pleadings[3] and during two separate oral arguments[4] to provide a factual basis for the Government's

[3] AE 168C, Government Response To Defense Motion to Dismiss Charges IX-XI [sic VII-IX] For Lack of Jurisdiction Under International Law, filed 9 September 2014 and AE 241A, Government Response To Defense Motion to Dismiss Charges VII-IX For Lack of Jurisdiction Under International Law, filed 19 March 2014.

assertion of subject matter jurisdiction over the charged offenses. The Prosecution continually declined the opportunity, instead informing the Commission it would provide the factual basis in its presentation of evidence to the panel on the merits.[5] These decisions were fatal as to the charged offenses, which are the subject of AE 168 and AE 241.

14. The Prosecution's request for oral argument is **DENIED**. The Prosecution's request for reconsideration of the Commission's order in AE 168G / AE 241C is **GRANTED**. Upon reconsideration, the Prosecution's request to conduct an evidentiary hearing for the purpose of establishing subject matter and personal jurisdiction over the Accused as to Specification 2 of

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[4] AE 168 was argued on 24 February 2014. *See* Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 24 February 2014, from 9:11 A.M. to 10:33 A.M. at 3068 to 3101. AE 241 was argued on 24 April 2014. *See* Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 24 April 2014, from 2:59 P.M. to 4:54 P.M. at 3874 to 3905.

[5] *See* Unofficial/Unauthenticated Transcript of the 24 February 2014 argument where the Prosecution at page 3076 stated: "And the government sees the procedural posture of this, Your Honor, as a jurisdictional challenge which gives us the obligation to establish by a preponderance that the commission does have jurisdiction, but 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."

A further discussion between the Prosecution ad Military Judge at page 3077:

MJ [COL POHL]: Is the status of the Limburg as a coalition partner an element of the offense?

CP [BG MARTINS]: Your Honor, I wouldn't put it as an element of the offense. Jurisdictional in the sense that we have -- we are alleging that a part of al Qaeda and, in fact, the accused was participating centrally in a course of conduct in a series of attacks that shared a methodology, the means of doing it, the boats, large boats, small boats, suicide attackers, a whole methodology that was directed at targets.

See Unofficial/Unauthenticated Transcript of the 24 April 2014 discussion between the Prosecution and Military Judge at pages 3889-91:

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

ATC [MAJ SEAMONE]: 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 [COL POHL]: 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]: 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. … So one of the things mentioned, though, was that, you know, the defense has cited a few random dates after the Limburg bombing to say that there was no impact on the financial markets. The government stands fast in its earlier commentary that in fact there would be such evidence presented, and it would be up to the panel members, after hearing that evidence, to determine whether or not it was supported. But the government stands by its assertion that it would in fact demonstrate both an effect on the oil prices as well as insurance rates, which implicated a financial interest.

Charge IV, (Terrorism), Charge VII, (Attacking Civilians), Charge VIII, (Attacking Civilian Objects), and Charge IX, (Hijacking or Hazarding a Vessel or Aircraft) is **DENIED**.

15. Accordingly, the portion of AE 168H / AE 241D requesting reconsideration is **GRANTED**. The portion of AE 168H / AE 241D seeking the reversal of the order is **DENIED**. Specification 2 of Charge IV, (Terrorism), Charge VII, (Attacking Civilians), Charge VIII, (Attacking Civilian Objects), and Charge IX, (Hijacking or Hazarding a Vessel or Aircraft) remain dismissed. The Commission clarifies its order in AE 168G / AE 241C by stating the charges are dismissed without prejudice.

So **ORDERED** this 16th day of September, 2014.

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VANCE H. SPATH, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary