

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE502EEEE (AAA)

**Defense Reply to Government Response to
Mr. al Baluchi's Motion to Schedule
Evidentiary Hearing Regarding Personal
Jurisdiction**

9 January 2019

1. **Timeliness:** This reply is timely filed, per AE502-20 (RUL)(AAA) Ruling.

2. **Argument:**

The military commission found as a fact that Mr. al Baluchi, like Mr. al Hawsawi, had raised a challenge to the military commission's personal jurisdiction over him sufficient to require the government to prove such personal jurisdiction.¹ The military commission deferred evidence and argument from Mr. al Baluchi,² heard evidence and argument from Mr. al Hawsawi, then ruled against Mr. al Hawsawi on his motion to dismiss in AE502BBBB Ruling.³ The government now attempts to stretch that ruling, limited by its terms to the evidence and argument presented on Mr. al Hawsawi's motion to dismiss, into a ruling on Mr. al Baluchi's motion to dismiss.

The government's primary argument, that AE502BBBB has *res judicata* preclusive effect against Mr. al Baluchi, does not survive the citation of a single case defining the doctrine. Among other flaws in the government's application of issue preclusion, the military commission explicitly

¹ AE502I Ruling at 2.

² AE502KK Ruling.

³ AE502BBBB Ruling.

and purposefully denied Mr. al Baluchi an opportunity to be heard on his motion to dismiss, citing case management considerations.

Personal jurisdiction is a question of fact. The military commission ruled against Mr. al Hawsawi on the basis that the evidence, including Mr. al Hawsawi's statements and Legislative and Executive Branch actions presented to or subject to judicial notice by the military commission, justified a finding of personal jurisdiction under 10 U.S.C. § 948a(7). In order to carry its burden of proof, the government must present evidence of Mr. al Baluchi's actions to prove material support for hostilities or being "part of al Qaeda" by a preponderance of the evidence. Mr. al Baluchi's evidence, in turn, will include additional Legislative and Executive Branch actions that will rebut the government's claim of hostilities arising on or before 11 September 2001.

The government's alternative position, that Mr. al Baluchi has not clearly challenged all aspects of the government's assertion of military commissions' personal jurisdiction, cannot survive exposure to the record. The military commission rejected this claim⁴ when the government first made it,⁵ and it has not improved with time. The government's representations on 21 August 2017⁶ and again on 19 October 2017⁷ manifest clear understanding of its obligation to prove, if it chose, material support and being part of al Qaeda in addition to the existence of hostilities.

However, Mr. al Baluchi does agree with the government that the military commission should not actually hold an evidentiary hearing on personal jurisdiction until the military

⁴ AE502I Ruling at 2.

⁵ AE488E/AE502C (GOV) Government Consolidated Response to Defense Motions to Dismiss at 10 & n.5.

⁶ Unofficial/Unauthenticated Transcript of 21 August 2017 at 16072.

⁷ Unofficial/Unauthenticated Transcript of 19 October 2017 at 16930-31.

commission's order in AE524LL is finally upheld or overturned. The government's restrictions on Mr. al Baluchi's investigation have prohibited much of the investigation he was engaged in and would have pursued absent government interference – investigation that would have contributed further evidence on the admissibility and reliability of the January 2007 statements. The question of whether the government will be allowed to use the January 2007 statements despite restricting defense investigation into their admissibility and reliability is critical to Mr. al Baluchi's position in AE502. Given the comprehensive nature of Mr. al Baluchi's motion to dismiss for lack of personal jurisdiction, the military commission should direct the parties on how to proceed with preparation for the evidentiary hearing.

A. AE502BBBB Ruling does not dispose of Mr. al Baluchi's motion to dismiss for lack of personal jurisdiction because, among other reasons, the military commission did not allow him to participate in the evidence and argument over personal jurisdiction.

The government claims that the military commission ruled on Mr. al Baluchi's motion to dismiss for lack of personal jurisdiction while prohibiting his participation in litigation over that motion. Although Mr. al Baluchi sought to move forward with his personal jurisdiction challenge, the military commission deferred litigation regarding him, initially, pending consideration of his witness list⁸ and, later, pending filing of a motion to suppress.⁹ The military commission was careful to rule only on Mr. al Hawsawi's motion to dismiss,¹⁰ while ruling on both Mr. al Hawsawi's and Mr. al Baluchi's claims regarding the appropriate standard for evaluating 10 U.S.C.

⁸ AE502KK Ruling.

⁹ AE502QQQ Ruling.

¹⁰ AE502BBBB at 19-20.

§ 948(a)(7)(C). By carefully limiting its ruling to the evidence and argument presented, the military commission honored the “‘deep-rooted historic tradition that everyone should have his own day in court.’”¹¹ The military commission should continue to respect the due process right to be heard and set Mr. al Baluchi’s portion of the AE502 series for an evidentiary hearing, once the military commission has ruled on the government’s motion to reconsider AE524LL Ruling.

Res Judicata

The government’s principal claim is that “Judge Pohl’s legal ruling that hostilities existed between the United States and al Qaeda on or before the September 11, 2001 attacks is *res judicata*”¹² *Res judicata* simply has no application to the present circumstances because there has been no final judgment against either the United States or Mr. al Baluchi. “Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.”¹³ *Res judicata* “is often analyzed further to consist of two preclusion concepts: ‘issue preclusion’ and ‘claim preclusion.’”¹⁴

¹¹ *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)).

¹² AE502DDDD (GOV) Government Response to AE502CCCC (AAA) Mr. al Baluchi’s Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction.

¹³ *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

¹⁴ *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 77 n.1 (1984); see also *NextWave Pers. Communications v. FCC*, 254 F.3d 130, 143 (D.C. Cir. 2001). “The doctrines of *res judicata* and issue preclusion are easily confused because the term ‘*res judicata*’ is often used to embrace both doctrines.” *Novak v. World Bank*, 703 F.2d 1305, 1308-09 (D.C. Cir. 1983). “Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.” *Migra*, 465 U.S. at 77 n.1. Claim preclusion has no application in a criminal case.

The aspect of *res judicata* which applies in criminal cases is issue preclusion, also known as collateral estoppel.¹⁵ Collateral estoppel, which in a criminal case arises from the Double Jeopardy Clause, “means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.”¹⁶ “Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.”¹⁷

As the definition of *res judicata* makes plain, “One necessary element of both doctrines is the existence of a prior valid and final judgment resolving a particular issue or claim.”¹⁸ The denial of Mr. al Hawsawi’s motion to dismiss is a classic determination of an interlocutory issue,¹⁹ not a final judgment.²⁰ Where “no final judgment has been entered,” “application of these doctrines must be rejected.”²¹

Furthermore, there is no support in the law for application of collateral estoppel by the government against a defendant. Collateral estoppel in criminal cases is “not a ‘two-edged

¹⁵ *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

¹⁶ *Id.*

¹⁷ *Allen*, 449 U.S. at 101.

¹⁸ *Nattah v. Bush*, 770 F. Supp. 2d 193, 200 (D.D.C. 2011); see also *Turner v. District of Columbia*, 268 F. Supp. 2d 23, 27 (D.D.C. 2003) (“A critical element of *res judicata*—and one that is missing here—is a decision or final judgment on the merits.”).

¹⁹ *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002) (“Jurisdiction is an interlocutory issue, to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence.”).

²⁰ *United States v. Hollywood Motor Car Company*, 458 U.S. 263, 264-65 (1982).

²¹ *Nattah*, 770 F. Supp. 2d at 200.

sword.”²² Because collateral estoppel in criminal cases arises from the Double Jeopardy Clause, it may only be asserted as an affirmative defense by a defendant against a future prosecution.²³

Opportunity to be heard

It is possible that the government meant *res judicata* as a sort of analogy, as opposed to the actual legal doctrine. Even as an analogy, the principles which govern collateral estoppel demonstrate why the government’s claim that the denial of Mr. al Hawsawi’s motion to dismiss “applies to all of the Accused for purposes of any jurisdictional challenge”²⁴ must fail. Collateral estoppel principles enshrine the ““deep-rooted historic tradition that everyone should have his own day in court.””²⁵ Mr. al Baluchi has simply not yet had the opportunity to be heard on the question of whether this military commission has personal jurisdiction over him, including the question of whether he “purposefully and materially supported hostilities against the United States or its coalition partners.”²⁶

Despite his diligent effort, the military commission has never granted Mr. al Baluchi an opportunity to litigate his claim that the military commission lacks personal jurisdiction over him. On the contrary, the military commission explicitly and purposefully excluded Mr. al Baluchi as a

²² *United States v. Smith*, 4 U.S.C.M.A. 369, 372 (C.M.A. 1954).

²³ See *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 357 (2016); *Yeager v. United States*, 557 U.S. 110, 119 (2009); *Ashe*, 397 U.S. at 446; *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916); *United States v. Doughty*, 14 U.S.C.M.A. 540, 543 (C.M.A. 1964); *Smith*, 4 U.S.C.M.A. at 372. Generally, only a former party may assert collateral estoppel against the government. *United States v. Mendoza*, 464 U.S. 154, 162-63 (1984) (declining to extend the abolition of the mutuality doctrine to the government in civil cases).

²⁴ AE502DDDD at 1.

²⁵ *Taylor*, 553 U.S. at 892-93 (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)).

²⁶ 10 U.S.C. § 948a(7)(B)

party to the substantive motion to dismiss litigation, citing case management concerns. To bind Mr. al Baluchi to a decision on which he could not be heard would violate the most basic principle of due process—notice and an opportunity to be heard.²⁷

Indeed, during the course of the litigation concerning jurisdiction and hostilities, broadly, to date, all relevant parties—Mr. al Baluchi, Mr. Hawsawi, the government, and even the military commission—have recognized that Mr. al Baluchi and Mr. Hawsawi’s hostilities-based personal jurisdiction challenges are wholly distinct. That is why the military commission separated Mr. al Baluchi and Mr. Hawsawi’s challenges both procedurally and substantively, requiring the government to respond to their pleadings individually and establishing individualized evidentiary hearings.

On 3 February 2017, Mr. al Hawsawi submitted AE488 (MAH) Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction Due to the Absence of Hostilities. As the name implies, this motion challenged the military commission’s subject matter jurisdiction rather than its personal jurisdiction. At a hearing on 24 March 2017, the military commission separated the procedural question of whether a defendant could challenge jurisdiction pretrial from the other issues raised by the motion.²⁸

²⁷ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n. 7 (1979) (“It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.”); *see also Blonder-Tongue Labs. v. University of Illinois Found.*, 402 U.S. 313, 329 (1971) (“Due process prohibits estopping [a non-party] despite one or more existing adjudications of the identical issue which stand squarely against their position.”).

²⁸ Unofficial/Unauthenticated Transcript of 24 March 2017 at 15521-41.

Mr. al Baluchi diverged from Mr. al Hawsawi's position, and argued based on *United States v. Nashiri*²⁹ that a pretrial challenge to military commissions jurisdiction sounded in personal jurisdiction under § 948a(7) rather than jurisdiction over the offense under § 950p(c).³⁰ At the time, Mr. al Baluchi briefed only the procedural question of the nature of and burden associated with the jurisdictional challenge, but also made clear he challenged all aspects of personal jurisdiction.³¹

Mr. al Hawsawi also filed AE502 (MAH) Defense Motion to Dismiss for Lack of Personal Jurisdiction Due to the Absence of Hostilities. Mr. al Baluchi did not decline joinder, but filed a separate position challenging the personal jurisdiction of the military commission over him and requesting additional relief.³² The government claimed in response that it was not required to prove personal jurisdiction prior to trial because the existence of hostilities was "a matter of law."³³

On 15 May 2017, Mr. al Hawsawi argued both the subject matter and personal jurisdiction challenges,³⁴ but Mr. al Baluchi addressed only the procedural question of whether the military

²⁹ 191 F. Supp. 3d 1308 (C.M.C.R. 2016).

³⁰ AE488D (AAA) Mr. al Baluchi's Notice of Declination of Joinder and Motion to Consider Other Arguments or for Other Relief Regarding AE488 (MAH).

³¹ *Id.* at 6. Mr. Mohammad, Mr. bin 'Atash, and Mr. bin al Shibh declined joinder to AE488 altogether. AE488-5 (RUL) (AAA WBA RBS KSM) Ruling.

³² AE502B (KSM, AAA) Mr. al Baluchi and Mr. Mohammad's Joint Notice of Declination of Joinder and Motion to Consider Other Arguments or for Other Relief. Mr. Mohammad initially joined Mr. al Baluchi's pleading, but later declined joinder to AE502. Unofficial/Unauthenticated Transcript of 15 May 2017 [T. 5/15/17] at 15721. Mr. bin 'Atash and Mr. bin al Shibh declined joinder to AE502 as well. AE502A (WBA) Defense Motion to Decline Joinder to AE502 (MAH) Mr. al Hawsawi's Motion to Dismiss for Lack of Personal Jurisdiction Due to the Absence of Hostilities; AE502H (RBS) Defense Notice of Non Joinder to AE502 (MAH).

³³ *E.g.*, AE488E/AE502C (GOV) Government Consolidated Response to Defense Motions to Dismiss at 11.

³⁴ AE502I at 2; *see* T. 5/15/17 at 15649-94.

commission should hear a pretrial challenge to personal jurisdiction.³⁵ The military commission ruled that the defendants could not challenge subject matter jurisdiction pretrial,³⁶ but could challenge personal jurisdiction.³⁷

The military commission found as a fact that “the Defense has raised a colorable issue as to whether jurisdiction over the Accused has been sufficiently established,” but distinguished between the 15 May 2017 substantive argument of Mr. al Hawsawi and the procedural arguments of Mr. al Baluchi.³⁸ Following *Nashiri* and the plain language of the 2009 MCA, the military commission ordered “a pretrial evidentiary hearing to determine whether it may properly exercise personal jurisdiction over” Mr. al Hawsawi and Mr. al Baluchi.³⁹ Rejecting the government’s argument that facts were irrelevant, the military commission held, “In that hearing, the Government will bear the burden of proving any facts prerequisite to the personal jurisdiction of the Commission by a preponderance of the evidence.”⁴⁰

The military commission established procedures for filing witness lists.⁴¹ The government stated its intent to call witnesses regarding alleged statements of the defendants to FBI-DOD interrogation teams in January 2007.⁴²

³⁵ *Id.* at 15695-721.

³⁶ AE488I Ruling.

³⁷ AE502I Ruling.

³⁸ *Id.* at 2.

³⁹ *Id.* at 5.

⁴⁰ *Id.* at 6.

⁴¹ *Id.*

⁴² AE502K (GOV) Government Notice of Witnesses Demonstrating Personal Jurisdiction over the Accused.

Mr. al Baluchi parted company with Mr. al Hawsawi on the evidentiary as well as legal approach to the motion to dismiss for lack of personal jurisdiction. Mr. al Hawsawi proposed only one witness,⁴³ and elected not to challenge the admissibility of the statements the government intended to use to prove personal jurisdiction other than on relevance grounds.⁴⁴

Mr. al Baluchi's challenge to personal jurisdiction is much more comprehensive. Mr. al Baluchi opposed the government's announced intention to admit the result of the January 2007 interrogations,⁴⁵ and noticed a substantial number of witnesses on the questions of the admissibility of Mr. al Baluchi's alleged statements as well as the existence of an armed conflict between al Qaeda and the United States prior to 7 October 2001.⁴⁶

At oral argument, the military commission considered these positions sufficiently distinct that it directed the government to respond separately to each position.⁴⁷ The government also considered the motions to dismiss of Mr. al Hawsawi and Mr. al Baluchi to be distinct. The government on 21 August 2017 argued that "the two different motions" put forward by Mr. al Baluchi and Mr. al Hawsawi were "two different things. Mr. Connell's motion is more of a traditional personal jurisdiction challenge where he's challenging the existence of hostilities as well as the facts that his client was an alien enemy belligerent in that he is arguing that he didn't support the hostilities against the United States" ⁴⁸ The government's position in

⁴³ AE502L (MAH) Mr. al Hawsawi's Witness List for the August 2017 Hearings.

⁴⁴ Unofficial/Unauthenticated Transcript of 21 August 2017 at 16063-71.

⁴⁵ *See, e.g.*, T. 8/21/17 at 16081-84, 16090-93; Unofficial/Unauthenticated Transcript of 10 January 2018 at 18463-94.

⁴⁶ AE502J (AAA) Mr. al Baluchi's List of Potential Witnesses for Personal Jurisdiction Hearing.

⁴⁷ T. 8/21/17 at 16065.

⁴⁸ *Id.* at 16072.

AE502DDDD that the military commission should defer scheduling an evidentiary hearing pending resolution of AE524LL is also a recognition of Mr. al Baluchi's distinct position that AE502 requires adjudication of the admissibility of the January 2007 statements, a position not shared by Mr. al Hawsawi.

Following the government's argument about the distinctions between the two motions, the military commission explained that it would not hold other defendants responsible for the litigation position of Mr. al Hawsawi. The military commission said, "with five accused, [we are] always going to come to the issue, does it apply to all five or only one. These are personal jurisdiction issues Mr. al Hawsawi's taken a position that's different from Mr. Connell's position, so I'm not imputing that to anybody else's position, if that's kind of what you're asking me."⁴⁹

Mr. al Baluchi's exclusion from the personal jurisdiction litigation was imposed on him, not invited. Although Mr. al Baluchi did not choose the timing of the personal jurisdiction litigation, and initially opposed it,⁵⁰ by August 2017 he made clear that he was ready to proceed with his personal jurisdiction challenge.⁵¹ The government opposed some of Mr. al Baluchi's

⁴⁹ *Id.* at 16096-97.

⁵⁰ AE488-1 (MFL)(AAA) Mr. al Baluchi's Motion to Extend Time to File Joinder to AE488 (MAH).

⁵¹ T. 8/21/17 at 16084-09, 16106-07; Unofficial/Unauthenticated Transcript of 19 October 2017 at 16932 ("We say that we should have the hearing, we are prepared to do it in December."). The government claims that Mr. al Baluchi "spent most of 2017 and 2018 attempting to delay trying the issue [of personal jurisdiction] as long as possible." AE502DDDD at 10. The record rebuts this claim. Although Mr. al Baluchi initially opposed litigating personal jurisdiction while hostilities discovery issues were still pending, as early as August 2017, he informed the military commission that he was ready to proceed. T. 8/21/17 at 16084-89.

witnesses,⁵² and Mr. al Baluchi laid out his theory of defense and support for his witness list in considerable detail.⁵³

After the parties argued their witness lists,⁵⁴ the military commission granted the witness lists of the government and Mr. al Hawsawi, but deferred decision on Mr. al Baluchi's witness list.⁵⁵ As the military commission found in AE502BBBB, this action "deferred litigation regarding Mr. Ali pending consideration of his requested witnesses."⁵⁶ From 27 October 2017 forward, Mr. al Baluchi no longer had the opportunity to be heard on the substance of his challenge to the military commission's personal jurisdiction.

Mr. al Baluchi also did not have the opportunity to be heard at the evidentiary hearing on the military commission's personal jurisdiction over Mr. al Hawsawi. As the military commission later found, "Evidence and argument *pertaining to Mr. al Hawsawi* were presented during the Commission hearings in December 2017."⁵⁷ The government did not put on evidence with respect

⁵² AE502O (GOV) Government Consolidated Response to AE502L (MAH) and AE502J (AAA). The military commission ordered the parties to produce additional information relating to their witness lists. AE502V Trial Conduct Order.

⁵³ AE502Y (AAA) Mr. al Baluchi's Combined Response to AE502V Trial Conduct Order and Reply to AE502O Government's Consolidated Response to AE502L (MAH) and AE502J (AAA) Witness List for Personal Jurisdiction Hearings.

⁵⁴ T. 10/19/17 at 16908-7023; Official/Unauthenticated Transcript of 20 October 2017 at 16828-44.

⁵⁵ AE502KK Ruling; *see also* T. 10/19/17 at 17016.

⁵⁶ AE502BBBB at 2.

⁵⁷ *Id.* (emphasis added); *see* Unofficial/Unauthenticated Transcript of 5 December 2017 at 17352-502; Unofficial/Unauthenticated Transcript of 6 December 2017 at 17533-744; Unofficial/Unauthenticated Transcript of 7 December 2017 at 17786-8035; Official/Unauthenticated Transcript of 7 December 2017 at 17662-75; Unofficial/Unauthenticated Transcript of 8 December 2017 at 18141-280; Official/Unauthenticated Transcript of 8 December 2017 at 17889-95.

to Mr. al Baluchi, and Mr. al Baluchi did not have the opportunity to participate in the hearing, with the exception of examining Dr. Watts so he did not have to return for cross-examination.⁵⁸ Mr. al Baluchi did not present evidence, and did not argue on the issue of whether the military commission possessed personal jurisdiction over any defendant.

As a scheduling matter at the al Hawsawi personal jurisdiction hearing, the military commission directed the government and Mr. al Baluchi to file supplemental briefs on his witness list, with the intention of beginning to take witness testimony in March 2018.⁵⁹ The military commission made clear that it intended to begin with witnesses regarding the January 2007 statements before proceeding to witnesses regarding hostilities.⁶⁰

Other than examining Professor Watts as a matter of convenience, the only remaining part of the AE502 litigation Mr. al Baluchi participated in was responding to the government's AE502JJJ (GOV) Government Motion to Adopt a Legal Standard to Determine What Constitutes "Part of al Qaeda" for Purposes of Establishing Jurisdiction.⁶¹ This motion addressed only the procedural question of the application of § 948a(7)(C), not the substance of whether the military commission possessed personal jurisdiction over any defendant.

⁵⁸ T. 12/7/17 at 17981-83.

⁵⁹ T. 12/8/17 at 18226-34. The parties filed additional briefs as directed. AE502J (AAA Sup.) Mr. al Baluchi's Updated List of Potential Witness List for Personal Jurisdiction Hearings; AE502NNN (GOV) Government Response to Mr. al Baluchi's Updated List of Potential Witness List for Personal Jurisdiction Hearings.

⁶⁰ T. 12/8/17 at 18232-33.

⁶¹ See AE502OOOO (AAA) Mr. al Baluchi's Response to Government Motion to Adopt a Legal Standard to Determine What Constitutes "Part of al Qaeda" for Purposes of Establishing Jurisdiction.

In January 2018, Mr. al Baluchi and the government again argued his witness list, including Mr. al Baluchi's proposed compromise.⁶² A substantial focus of the argument was the government's claim that the military commission should hear objections to admissibility of statements separately from and prior to the personal jurisdiction hearing.⁶³ The military commission accepted this argument, and deferred litigation on Mr. al Baluchi's personal jurisdiction challenge pending the filing of a motion to suppress his statements.⁶⁴ This indefinite deferral was the state of affairs when the military commission issued AE524LL, suppressing the defendants' statements.

In AE502BBBB, the military commission was precise: it ruled on Mr. al Hawsawi's motion to dismiss, and both Mr. al Hawsawi's and Mr. al Baluchi's position on the appropriate standard under 10 U.S.C. § 948a(7)(c). On the substance of personal jurisdiction, the military commission made clear it was addressing only whether "Mr. al Hawsawi . . . fell into one or more of the categories enumerated in 10 U.S.C. § 948a(7)(A)-(C)."⁶⁵ The military commission addressed only Mr. al Hawsawi's arguments on the existence of personal jurisdiction.⁶⁶ The military commission limited its finding on hostilities to "purposes of its personal jurisdiction over Mr. al Hawsawi," and addressed material support only with respect to Mr. al Hawsawi.⁶⁷

⁶² Unofficial/Unauthenticated Transcript of 10 January 2018 at 18434-

⁶³ T. 1/10/18 at 18463-94.

⁶⁴ AE502QQQ.

⁶⁵ AE502BBBB at 4.

⁶⁶ *Id.* at 4-12.

⁶⁷ *Id.* at 12-13.

The military commission's reasoning with respect to being "part of al Qaeda" was different, and highlights the distinction between ruling with respect to Mr. al Hawsawi and with respect to both defendants. Mr. al Baluchi did participate in briefing the procedural question of the appropriate standard under § 948a(7)(C), and so the military commission addressed, and denied, his arguments.⁶⁸ The military commission explained that it addressed Mr. al Baluchi's argument as to the standard because "the question was fully argued as part of Mr. Ali's response to AE502JJJ (GOV)."⁶⁹ In contrast, the military commission only made findings as to whether Mr. al Hawsawi was factually "part of al Qaeda" because Mr. al Baluchi was not a part of the substantive litigation.⁷⁰

The military commission denied AE502 "as to Mr. al Hawsawi."⁷¹ On the other hand, the military commission ordered that "further consideration of AE502 and all motions in that series regarding Mr. Ali remains **DEFERRED** unless and until the conditions specified in [AE502QQQ] are fulfilled."⁷²

Thus, the military commission in AE502BBBB expressed its full understanding that Mr. al Baluchi did not have the opportunity to be heard on the military commission's personal jurisdiction over him. Functionally, Mr. al Baluchi was temporarily excluded as a party on the motion to dismiss after October 2017, except for its procedural aspects. The government's analogy, if any, to *res judicata* fails, and it would violate the basic requirements of due process to

⁶⁸ *Id.* at 14-18.

⁶⁹ *Id.* at 14 n.42.

⁷⁰ *Id.* at 18-19.

⁷¹ *Id.* at 19.

⁷² *Id.* at 20.

adopt the government's argument that AE502BBB "applies to all of the Accused for purposes of any jurisdictional challenge."⁷³

B. Mr. al Baluchi is entitled to an evidentiary hearing at which the government bears the burden of proof on any aspect of personal jurisdiction under § 948a(7) that it chooses to assert.

It is the rule in both federal criminal court⁷⁴ and in courts martial⁷⁵ that personal jurisdiction raises a factual question which must be resolved through evidence adduced to the court. "Jurisdiction, of course, being a fact, raises a question of fact. Consequently, the fact thereof must be determined from the evidence adduced."⁷⁶

To resolve the factual question of jurisdiction, the military commission "ordered an evidentiary hearing as to whether personal jurisdiction existed over" Mr. al Baluchi.⁷⁷ Nor was it at liberty to do otherwise: in *United States v. al Nashiri*, the C.M.C.R. held that, "Should [a defendant] challenge his status as an AUEB, it would be appropriate for the military judge to hold

⁷³ AE502DDDD at 1.

⁷⁴ Cf. *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998) (analogizing the nexus requirement found in Maritime Drug Law Enforcement Act jurisprudence to personal jurisdiction); see also *United States v. Angula-Hernandez*, 576 F.3d 59, 61-62 (1st Cir. 2009) (linking personal jurisdiction to due process principles and establishing a fact-based minimum contacts inquiry for personal jurisdiction of foreign nationals in criminal cases); *United States v. Mohammad-Omar*, 323 Fed. Appx. 259, *261 (4th Cir. 2009) (undertaking a fact-based, minimum-contacts-like analysis of a defendant in a Maritime Drug Law Enforcement Act case to satisfy due-process concerns, analogizing that analysis to personal jurisdiction).

⁷⁵ *Givens v. Zerbst*, 255 U.S. 11, 19-20 (1921); *United States v. Jackson*, 18 M.J. 403, 406-407; 405 n.2 (Mil. App. Ct. 1984) (Cook, J. concurring); *United States v. Sexton*, 48 C.M.R. 428, 429 (N-M Ct. Crim. App. 1973); *United States v. Rubenstein*, 19 C.M.R. 709, 768 (A.F. Ct. Crim. App. 1955).

⁷⁶ *Rubenstein*, 19 C.M.R. at 768.

⁷⁷ AE502BBBB at 1 (citing AE502I at 6).

an evidentiary hearing on this issue.”⁷⁸ The military commission held that, in such a hearing, “the burden is on the Government to prove by a preponderance of the evidence any facts required to establish that the Commission does, in fact, have authority to proceed.”⁷⁹ This requirement that the party invoking the tribunal’s authority prove its jurisdiction springs from the limited powers of federal tribunals.⁸⁰

Under § 948a(7)(B), the government is required to prove that Mr. al Baluchi “has purposefully and materially supported hostilities against the United States or its coalition partners.”⁸¹ The military commission has ruled that the government need not prove the existence of hostilities under § 950p(c) to prove that Mr. al Baluchi “was a part of al Qaeda at the time of the alleged offense under this chapter.”⁸² “Personal jurisdiction therefore depends in part on the factual existence of hostilities, to the extent they are required to meet the conditions 10 U.S.C. § 948a(7).”⁸³

The military commission followed the principles it set forth in AE502I with respect to Mr. al Hawsawi. The military commission held an evidentiary hearing at which the government introduced evidence of hostilities, Mr. al Hawsawi’s support for those hostilities, and Mr. al Hawsawi’s status as part of al Qaeda. Mr. al Hawsawi had the right to challenge the government’s

⁷⁸ *United States v. al Nashiri*, 191 F. Supp. 3d 1308, 1316 n.8 (C.M.C.R. 2016) (citing *United States v. Khadr*, 717 F. Supp. 2d 1215 (C.M.C.R. 2007)).

⁷⁹ AE502I at 3.

⁸⁰ *Center for Constitutional Rights v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013).

⁸¹ § 948a(7)(B).

⁸² AE502I at 4 n.12. Mr. al Baluchi argued otherwise, and maintains his position for purposes of the record. AE488F/AE502D (AAA) Mr. al Baluchi’s Reply to AE488E/AE502C (GOV) Government’s Consolidated Response.

⁸³ *Id.* at 4.

assertions of personal jurisdiction as he chose. At the hearing, both the government and the military judge elicited evidence from Professor Sean Watts regarding some United States actions in relation to hostilities against al Qaeda.⁸⁴

The government claims that the military commission in AE502BBBB established hostilities “as a matter of law.”⁸⁵ The military commission itself made no such claim.

The military commission had rejected the government’s claim of hostilities as a matter of law relatively early in the litigation. The government initially argued that it did not have to prove at least the hostilities aspect of personal jurisdiction because § 948d meant that “Congress has already determined that hostilities existed between al Qaeda and the United States before, on, and after September 11, 2001.”⁸⁶ In holding that the government bore the burden to prove “the factual

⁸⁴ T. 12/8/17 at 18221-22 (discussing Congress’ intent in enacting the 2009 MCA); *id.* at 18219-20 (discussing the effect of the phrase “before, on, or after” in § 948d); *id.* at 18217-219 (discussing the purpose of including “hostilities” in § 948a(7)); *id.* at 18210-14 (discussing the Supreme Court’s decision in *Hamdan v. Rumsfeld* and the D.C. Circuit’s decisions in *Bahlul v. United States*); *id.* at 18191-93 (explaining the insufficiency of violent activity between the United States and al Qaeda prior to 9/11 for the existence of hostilities); *id.* at 18189-90 (explaining the insufficiency of violent activity between the United States and al Qaeda prior to 9/11 for the existence of hostilities); *id.* at 18186-88 (explaining that U.S. use of force in self-defense under Art. 51 of the UN Charter did not necessarily bring into being a non-international armed conflict with al Qaeda); *id.* at 18152-53 (describing the absence of an armed conflict between the United States and al Qaeda prior to 9/11, noting the existence of terrorism and U.S. law enforcement operations); *id.* at 18152 (concluding that a non-international armed conflict between the United States and al Qaeda began in October 2001); *id.* at 18149-52 (responding to the government’s hypothetical concerning a missile strike targeting bin Laden in a full stadium outside of an armed conflict); T. 12/7/17 at 18033-34 (discussing legal effect versus speculative intent of the 2009 MCA); *id.* at 18023-24 (distinguishing between pre-9/11 absence of commitment of U.S. armed force and the period following 7 October 2001 with “introduction into Afghanistan of large formations of United States Armed Forces.”).

⁸⁵ AE502DDDD at 5.

⁸⁶ AE488E/AE502C at 6.

existence of hostilities,”⁸⁷ the military commission necessarily rejected the government’s argument that § 948d established hostilities as a matter of law.

In AE502BBBB, the military commission relied on § 948d for a different proposition. It reasoned that Congress could not have intended “laws of war” as defined in § 948a(9) to apply the *Tadic* standard advocated by Mr. al Hawsawi because, in the military commission’s view, the *Tadic* standard would “foreclose” military commissions jurisdiction over alleged 9/11 conspirators.⁸⁸

The military commission could not adopt an interpretation of § 948a(9) to establish hostilities as a matter of law because such a reading would ultimately take an element of proof away from the panel. The word “hostilities” appears not only in § 948a(7)(A)-(B) regarding personal jurisdiction, but also in § 950p(c), which establishes an element of the crimes.⁸⁹ Establishing hostilities, which has the same § 948a(9) definition in both provisions, as a matter of law would violate the fundamental principle that the panel must find all elements of the offense beyond a reasonable doubt.⁹⁰

⁸⁷ AE502I at 4.

⁸⁸ See AE502BBBB at 4 (“Whether Mr. al Hawsawi’s argument is correct largely depends on the meaning of the term ‘laws of war’ as used by Congress in the cited M.C.A. 2009 provision.”); *id.* at 7 (“In short, the Commission concludes that, whatever Congress may have had in mind when they employed the term ‘laws of war’ in the M.C.A. 2009 jurisdictional provisions, they manifestly did not intend a formulation which would foreclose military commission jurisdiction for offenses occurring on, and at least some time before, September 11, 2001.”).

⁸⁹ *Nashiri*, 191 F. Supp. 3d at 1322.

⁹⁰ *United States v. Gaudin*, 515 U.S. 506, 511 (1995). Furthermore, prohibiting Mr. al Baluchi’s challenge to the hostilities aspect of § 948a(7)(B) as a matter of law would “prevent him from fully litigating his jurisdictional defense.” *In re al Nashiri*, 835 F.3d 110, 130 (D.C. Cir. 2016).

In an attempt to characterize AE502BBBB as a ruling as a matter of law, the government claims that the military commission “relied on no evidence presented by the Prosecution or the Defense in the December 2017 jurisdictional hearing for Mr. al Hawsawi.”⁹¹ This claim is not accurate. In characterizing the charges as “a violent, large-scale attack against the United States,” the military commission cited thirty-two pages of testimony by Special Agent James Fitzgerald.⁹² In describing actions of the Legislative and Executive Branches, the military commission cited the testimony of Professor Watts.⁹³ And several of the public acts the military commission relied upon were discussed in Professor Watts’ testimony.⁹⁴

Rather than declare the existence of hostilities as an incontrovertible matter of law, the military commission relied on various Executive, Legislative, and Judicial Branch actions to establish what it called “effective determinations of the political branches.”⁹⁵ In other words, the military commission relied on evidence of government actions—some of which the parties introduced, and some of which the military commission could judicially notice—to establish its

⁹¹ AE502DDDD at 6; *see also id.* at 6 n.2.

⁹² AE502BBBB at 10 n. 31 (“*See, e.g.,* Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Dated 5 December 2017 from 10:16 A.M. to 11:45 A.M., at pp. 17388-17420 (testimony of FBI Special Agent who was member of the FBI team investigating the attacks of September 11, 2001, describing the attacks and noting that over 2,900 people were killed).”).

⁹³ *See id.* at 5 n.15 (“Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 8 December 2017 from 1:18 P.M. to 2:25 P.M., at p. 18210-11 (Defense expert on the law of war, when asked if the Supreme Court in *Hamdan* ‘clearly believed there was an armed conflict between al Qaeda and the United States,’ responded, ‘They concluded that there was, yes.’ *Id.*”).

⁹⁴ *E.g., id.* (noting the Supreme Court’s decision in *Hamdan v. Rumsfeld* and citing Professor Watt’s testimony before the military commission); *id.* at 6 (discussing Congress’ primary purpose in enacting the 2009 MCA); *id.* at 10-11.

⁹⁵ AE502BBBB at 11.

understanding of the political branches' view of the onset of an armed conflict with al Qaeda at an undisclosed time prior to 11 September 2001. Likewise, at an evidentiary hearing, Mr. al Baluchi will introduce evidence of government actions to establish the political branches' view that armed conflict with al Qaeda began on 7 October 2001. If, as the military commission stated, it is "appropriate to defer to the effective determinations of the political branches," it is all the more important to reliably establish through evidence what those determinations were.

The Authorization for Use of Military Force provides a good example. The military commission relied on the AUMF, passed on 15 September 2001, as evidence of a Legislative Branch determination that a state of armed conflict existed before 11 September 2001.⁹⁶ Mr. al Baluchi intends to introduce evidence that contests the conclusion that the passage of the AUMF supports a finding of pre-AUMF hostilities. At the evidentiary hearing, Mr. al Baluchi intends to introduce evidence that the AUMF allowed the President to initiate hostilities, but the President in his discretion chose to pursue strategies other than hostilities until 7 October 2001. Viewed in the light of additional evidence, the AUMF will serve to prove the effective determination of the political branches that hostilities did not exist prior to 11 September 2001.

The *Nashiri* case provides an even more powerful example. In *Nashiri*, the positions of the parties here are reversed: the defendant is arguing that the military commission must defer to the effective determinations of the political branches.⁹⁷ The government, in contrast, argues "that the existence of hostilities is established by looking not merely to the contemporaneous acts of the

⁹⁶ AE502DDDD at 10.

⁹⁷ *Al-Nashiri*, 835 F.3d at 136 ("In fact, Al-Nashiri asserts, public acts at the time of his offenses suggested that America was at peace.").

political branches, but to a totality of the circumstances, including al Qaeda's conduct."⁹⁸ "Al-Nashiri and *amici* believe the judgments of the political branches at the time are what matters; the government takes a broader view."⁹⁹

Both the positions of the defendant and the government in *al-Nashiri*, however, demonstrate the importance of evidence about the acts of public actors. The defendant in *al-Nashiri* points to public acts of the President and other Executive Branch actors to disprove hostilities in 2000, which Mr. al Baluchi will also introduce at the evidentiary hearing. The government in *al-Nashiri* points to attacks by al Qaeda, which the government in this case has also given notice of. Without an evidentiary hearing on the question of hostilities, among others, neither party can develop a record of the actions of the political branches and other public actors.

The military commission should decline the government's invitation to adopt a position that hostilities before 11 September 2001 is an incontrovertible matter of law, and implement its undisturbed ruling requiring an evidentiary hearing at which the government bears the burden of proof on any aspect of personal jurisdiction it chooses to assert.

C. Mr. al Baluchi has clearly and consistently challenged the personal jurisdiction of the military commission on any basis the government elects to pursue.

The government's claim that Mr. al Baluchi's challenge to the military commission's assertion of personal jurisdiction is incomplete or unclear founders on the record.¹⁰⁰ Mr. al Baluchi

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ AE502DDDD at 8-9.

has consistently challenged the military commission's personal jurisdiction, on whatever grounds the government may claim, as the military commission has already ruled.

In AE502, Mr. al Hawsawi sought "dismissal of this case for lack of personal jurisdiction under the Military Commissions Act of 2009 because Mr. al Hawsawi and his co-accused are not 'unprivileged enemy belligerents' over whom this Commission would have personal jurisdiction."¹⁰¹ Mr. al Baluchi joined this request for relief by operation of Rule of Court 3.5.i, and sought additional relief in his supplemental pleading.¹⁰² Mr. al Baluchi observed that the government bears the burden of proof because he has already produced evidence disputing the jurisdiction of the military commission.¹⁰³ Mr. al Baluchi also incorporated his explanation from AE488D that, "For purposes of the record, Mr. al Baluchi's substantive position is that at no time did he engage in or purposefully and materially support hostilities against the United States or its coalition partners, and was not a part of al Qaeda at the time of the alleged offenses."¹⁰⁴ This pleading alone dispels the government's claim that Mr. al Baluchi "challenged personal jurisdiction based solely on a lack of hostilities."¹⁰⁵

In reply on the procedural questions, Mr. al Baluchi argued that he had "carried any initial burden he might have to raise the issue of personal jurisdiction. He has clearly placed on the record his position that the military commission lacks personal jurisdiction over him."¹⁰⁶

¹⁰¹ AE502 at 1.

¹⁰² AE502B at 1.

¹⁰³ AE488D at 1-2.

¹⁰⁴ AE488D at 6 (incorporated by reference at AE502B at 2).

¹⁰⁵ AE502DDDD at 8-9.

¹⁰⁶ AE488F/AE502D (AAA) Mr. al Baluchi's Reply to AE488E/AE502C (GOV) Government Consolidated Response at 2-3.

The military commission has already ruled against the government's argument that Mr. al Baluchi has not properly moved to dismiss the charges on the basis of personal jurisdiction. The government made exactly the same argument in its original response to AE502.¹⁰⁷ In ruling on the parties' pleadings, the military commission found as a fact that "the Defense has raised a colorable issue as to whether jurisdiction over the Accused has been sufficiently established."¹⁰⁸

On 21 August 2017, the government clearly understood Mr. al Baluchi's challenge to personal jurisdiction was not limited to the issue of hostilities alone. The government argued:¹⁰⁹

I want to first start a comparison between the two different motions, because they're two different things. Mr. Connell's motion is more of a traditional personal jurisdiction challenge where he's challenging both the existence of hostilities as well as the facts that his client was an alien unlawful enemy belligerent in that he is arguing that he didn't support the hostilities against the United States, didn't materially support the hostilities against the United States.

On 19 October 2017, the government not only understood but affirmatively argued that it was obligated to prove material support and being part of al Qaeda in addition to hostilities. The government began, "I'm often confused about exactly what it is I have the burden of proving regarding personal jurisdiction over Mr. al Hawsawi. I'm quite clear I understand what Mr.

¹⁰⁷ Compare AE502DDDD at 9 &n.4 with AE488E/AE502C at 10 & n.5.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ T. 8/21/17 at 16072.

Connell wants me to prove.”¹¹⁰ The government continued, “I intend to prove that Mr. al Hawsawi was an alien, that he materially supported the 9/11 attacks, and that he was a member of al Qaeda at the time.”¹¹¹ The government complained that Mr. al Hawsawi “continue[s] to focus solely on the hostilities aspect of it So unless they stipulate that he’s an alien and that he materially supported the 9/11 attacks and all we’re fighting is hostilities, I intend to prove it all. So I just wanted to make that very clear to the court, that that’s the obligation I see that I have”¹¹²

To avoid any misunderstanding on the part of the government or defense as to what was at issue in AE502, the military commission addressed the same issue with respect to Mr. al Baluchi.¹¹³

MJ [COL POHL]: Let me just stop you for a second here, Mr. Connell, just to put it in context to make sure that the same rules are going to -- the government is taking the same approach with your client as they're taking with Mr. Hawsawi.

LDC [MR. CONNELL]: And if we could have the next --

MJ [COL POHL]: Mr. Trivett, just so I'm clear, you indicated that you were going to use two of the three prongs for Hawsawi. Is that your position for Mr. Ali also?

MTC [MR. TRIVETT]: The evidence will certainly establish

¹¹⁰ T. 10/19/17 at 16919-20.

¹¹¹ *Id.* at 16920.

¹¹² *Id.* at 16920-21.

¹¹³ *Id.* at 16930-31.

both prongs. Yes, sir.

MJ [COL POHL]: Okay. Thank you. Go ahead.

LDC [MR. CONNELL]: Thank you. I just put up the slide so we can have a little context to that.

I understand the government to be seeking to prove the prongs in 10 U.S.C. 948a(7)(B), material support commonly called; and (C) part of Al Qaeda, sometimes referred to as membership. But yes. Okay.

During this exchange, counsel for Mr. al Baluchi even put up a PowerPoint slide to illustrate the elements that the government must prove in a personal jurisdiction hearing:¹¹⁴


MCA personal jurisdiction

(7) UNPRIVILEGED ENEMY BELLIGERENT.—The term “unprivileged enemy belligerent” means an individual (other than a privileged belligerent) who—

(A) has engaged in hostilities against the United States or its coalition partners;

(B) has purposefully and materially supported hostilities against the United States or its coalition partners; or

(C) was a part of al Qaeda at the time of the alleged offense under this chapter.



10 U.S.C. 948(a)(7)

¹¹⁴ AE502FF (AAA) AE502J Slides at 3.

In response to questions, Mr. al Baluchi went on to explain at some length the government's responsibility to prove the "material support" aspect of § 948a(7)(B) separate from its responsibility to prove hostilities.¹¹⁵ He concluded, "the material support part is definitely an element of personal jurisdiction that has to be proved that is not an element of what has to be proved at trial," *i.e.*, hostilities.¹¹⁶ Subsequently, the military commission summarized Mr. al Hawsawi's position as "challenging every aspect of personal jurisdiction, and so it's not limited to hostilities."¹¹⁷

Mr. al Baluchi's request to the military commission to dismiss the charges against him for lack of personal jurisdiction, and his challenge to all aspects of the government's assertion of personal jurisdiction, have been clear and consistent since April 2017. The government must prove whatever elements of personal jurisdiction it chooses to assert by a preponderance of the evidence, and Mr. al Baluchi will introduce relevant evidence to disprove the government claims.

¹¹⁵ T. 10/19/17 at 16932-35.

¹¹⁶ *Id.* at 16935.

¹¹⁷ *Id.* at 17020.

3. Attachments:

A. Certificate of Service.

Very respectfully,

//s//

JAMES G. CONNELL, III
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//s//

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Attachment A

CERTIFICATE OF SERVICE

I certify that on the 9th day of January, 2019, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III

Learned Counsel