

**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	AE 502FFFF RULING Mr. al Baluchi’s Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction 3 April 2019
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1. Procedural History.

a. On 7 April 2017, Mr. Hawsawi moved to dismiss all charges based on lack of personal jurisdiction due to the absence of hostilities at the time of the charged offenses.¹ All four of the other Accused initially declined to join Mr. Hawsawi’s motion, seeking leave to raise the matter separately at a later time.² Counsel for Mr. Ali (a.k.a. al Baluchi), however, subsequently caveated his non-joinder, stating that, if the Commission determined the Government was required to prove personal jurisdiction in advance of trial, he “respectfully requests . . . to brief the substantive question of hostilities.”³

b. On 31 May 2017, the Commission ordered an evidentiary hearing regarding personal jurisdiction with regard to Messrs. Hawsawi and Ali.⁴ The Commission permitted the other Accused to abstain from litigation of personal jurisdiction pending receipt of further discovery,

¹ AE 502 (MAH), Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, filed 7 April 2017, paras. 2-3.

² AE 502A (WBA), Defense Motion to Decline Joinder to AE 502 (MAH), Mr. al Hawsawi’s Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, filed 10 April 2017; AE 502B (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 Regarding AE 502 (MAH), filed 14 April 2017; AE 502H (RBS), Defense Notice of Non Joinder to AE 502 (MAH), filed 30 May 2017.

³ AE 488F / AE502D (AAA), Mr. al Baluchi’s Reply to AE 488E/AE 502C (GOV) Government Consolidated Response, filed 24 May 2017, para. 2.

⁴ AE 502I Ruling, Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, dated 31 May 2017, para. 6.a-c.

but cautioned any future motions on the issue would have to “take into consideration any rulings issued by the Commission.”⁵

c. On 18 January 2018, the Commission in AE 502QQQ deferred conducting any personal jurisdiction hearing with regard to Mr. Ali, pending his decision whether to move to suppress certain statements for purposes of both the AE 502 series and the merits.⁶

d. On 25 April 2018, following an extensive hearing, the Commission in AE 502BBBB ruled that all prerequisites for personal jurisdiction over Mr. Hawsawi were met, to include the existence of hostilities.⁷ The Commission noted that further litigation of the AE 502 series with regard Mr. Ali remained deferred pending resolution of AE 502QQQ.⁸

e. On 17 August 2018, in the AE 524 series, the Commission suppressed the evidence at issue in AE 502QQQ.⁹ Arguing the underlying reason for deferral in AE 502QQQ was now gone, Mr. Ali on 14 December 2018 moved the Commission to schedule the evidentiary hearing regarding personal jurisdiction over him.¹⁰

f. The Government responded on 26 December 2018.¹¹ In its response, the Government requested the Commission either (1) find the Commission’s ruling in AE 502BBBB regarding the existence of hostilities extends to all of the Accused as a matter of law, or (2) defer any

⁵ AE 502I, para. 5.a(2).

⁶ AE 502QQQ Trial Conduct Order, Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, dated 18 January 2018.

⁷ Specifically, the Commission determined that “[a] state of hostilities existed between the United States and the transnational terrorist organization known as al Qaeda on, and for an indeterminate time before, September 11, 2001.” AE 502BBBB Ruling, Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, dated 25 April 2018, para. 6.a(3).

⁸ AE 502BBBB, para. 6.d.

⁹ AE 524LL Ruling, Mr. al Baluchi’s Motion to Dismiss, or in the Alternative, to Compel the Government to Produce Witnesses for Interview; Government Notice of Proposed Protective Order, dated 17 August 2018, para. 6.

¹⁰ AE 502CCCC (AAA) (Corrected Copy), Mr. al Baluchi’s Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction, filed 14 December 2018.

¹¹ AE 502DDDD (GOV), Government Response To AE 502 CCCC (AAA), Mr. Ali’s Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction, filed 26 December 2018.

evidentiary hearing pending further litigation of suppression of the statements.¹² Mr. Ali replied to the contrary on 9 January 2019.¹³

g. On 27 March 2019, at the suggestion of counsel for Mr. Ali, the parties argued before the Commission regarding the specific sub-issue of whether the Commission's ruling on the existence of hostilities with regard to Mr. Hawsawi extended as a matter of law to the other Accused.¹⁴

h. On 3 April 2019, in AE 524LLL, the Commission partially granted a Government request to reconsider the suppression order that Mr. Ali claims obviated the AE 502QQQ deferral.¹⁵

2. Analysis.

a. The Commission will not belabor the authorities and issues already discussed in AE 502BBBB. The Commission clarifies, however, that in AE 502BBBB it concluded: (1) that the political branches, in passing the Military Commissions Act, determined over the course of a multi-year dialogue between all three branches of the Federal Government that military commissions were an appropriate vehicle to try violations of the law of war associated with the armed conflict against al Qaeda, to include this case specifically; (2) that this amounted to a determination that hostilities existed at least as of September 11, 2001 and for some time before; and (3) that, in doing so, they did not depart so sharply from earlier standards (assuming they did

¹² AE 502DDDD (GOV), para. 2.

¹³ AE 502EEEE (AAA), Defense Reply to Government Response to Mr. al Baluchi's Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction, filed 9 January 2019.

¹⁴ Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 27 March 2019 from 9:01 A.M. to 10:17 A.M. at p. 22596 (beginning of argument); Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 27 March 2019 from 10:35 A.M. to 11:15 A.M. at p. 22663 (end of argument). Subsequent cites to the Unofficial/Unauthenticated Transcript will be by page number only (e.g., "Transcript p. 5.")

¹⁵ AE 524LLL Ruling, Government Motion to Reconsider and Clarify AE 524LL, Ruling, dated 3 April 2019.

so at all) as to offend the Constitution.¹⁶ In so concluding, the Commission relied on a number of relevant principles, to include the great deference it owes the concerted decisions of the political branches (particularly with regard to foreign policy and national security matters), and the inadvisability of judicially second-guessing decisions committed to their discretion.¹⁷ Given the bases for the Commission's decision, further litigation cannot reasonably shift this disposition with regard to the other four Accused. Accordingly, for purposes of personal jurisdiction, these considerations are sufficient to resolve the question of existence of hostilities (whether it sounds in law, fact, or both) with regard to all five Accused.

b. The Government argued that (1) if the Commission determined AE 502BBBB's ruling regarding existence of hostilities extended to Mr. Ali, then (2) it should entirely deny his personal jurisdiction challenge, because it was based solely on non-existence of hostilities. The Commission declines to so find, however. Mr. Ali's requested witnesses include several intended to attack statements he apparently anticipates the Government would offer to establish other

¹⁶ AE 502BBBB, pp 4-12. In oral argument, Counsel for Mr. Ali cited recent appellate authority holding, in his words, that "legislative history is not the law and it is not appropriate as the starting point for analysis," and asserted the Commission's ruling in AE 502BBBB was inconsistent with that principle. Transcript p. 22627 (counsel for Mr. Ali discussing *Epic Systems Co. v. Lewis*, __ U.S. __, 138 S.Ct. 1612 (2018) and *U.S. v. Briggs*, __ M.J. __, C.A.A.F. No. 16-0711 (2019). The Commission has reviewed and fully considered these cases, and agrees with Mr. Ali's summation of them. However, the Commission employed legislative history in AE 502BBBB, not as a starting point, or as substantive law, but as an interpretive tool and to explain why deference to the political branches is appropriate here. The cases Mr. Ali cited do not foreclose this use. Furthermore, they are of limited relevance, as no basis for the principles of deference applicable here is asserted or evident in those cases.

¹⁷ AE 502BBBB, fn 27-28. The Commission owes substantial deference in the spheres of foreign policy and national security. *See, e.g., Dep't of Navy v. Egan*, 484 U.S. 518 (1988). Moreover, where the political branches act in concert, "[i]f [that] act is held unconstitutional . . . it usually means that the Federal Government as an undivided whole lacks power." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)(Jackson, J., concurring). The Commission has determined that, under the specific circumstances prevailing here, the political branches did not lack Constitutional authority to act as they did. AE 502BBBB, pp. 11-12. Any broader challenge implicates questions of foreign policy and the conduct of war, which are textually committed by the Constitution to the political branches. *See Baker v. Carr*, 369 U.S. 186 (1962); *Al Magaleh v. Hagel*, 738 F.3d 312 (D.C. Cir. 2013). In addition to the political branches, the Commission notes superior appellate authorities have had little difficulty concluding hostilities between al Qaeda and the United States existed at least as of September 11, 2001. *See, e.g., U.S. v. al Bahlul*, 820 F.Supp.2d 1141, 1190-91 (U.S.C.M.C.R. 2011), *vacated in part on other grounds, Al Bahlul v. U.S.*, 792 F.3d 1 (D.C.Cir. 2015)(finding "[a]fter consideration of the record . . . we conclude that hostilities rising to the level of armed conflict existed on or before February 1999." *Id.* at 1190).

elements of personal jurisdiction.¹⁸ The Commission therefore concludes Mr. Ali was prepared to litigate other personal jurisdiction requirements,¹⁹ not just the existence of hostilities.

Accordingly, the overall motion regarding Mr. Ali will not be denied.

c. However, the Commission has reconsidered the suppression order that prompted Mr. Ali to request a hearing in this series, negating the basis he asserted for setting aside the deferral in AE 502QQQ. Accordingly, AE 502QQQ will remain undisturbed until its conditions are fulfilled.

d. Further oral argument is unnecessary to resolve this matter.²⁰

3. **Ruling.** Based on the foregoing:

a. To the extent it is based on a claim hostilities did not exist at the time of the charged offenses, Mr. Ali's challenge to personal jurisdiction in this series is **DENIED**. This ruling extends to any future challenge to personal jurisdiction by Messrs. Mohammad, bin 'Attash, and/or bin al Shibh. All Accused may challenge any other prerequisite to personal jurisdiction (save for Mr. Hawsawi, whose personal jurisdiction challenge was wholly resolved in AE 502BBBB).

b. Given that its express underlying justification no longer exists, Mr. Ali's motion to schedule an evidentiary hearing in this series is **MOOT**. Further litigation of his personal jurisdiction challenge remains **DEFERRED** as specified in AE 502QQQ. When the conditions

¹⁸ See, e.g., Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 10 January 2018 from 9:41 A.M. to 11:23 A.M. at pp. 18440-43.

¹⁹ Specifically, alienage; privilege; and whether Mr. Ali falls into a category of enemy belligerent as defined by the Military Commissions Act (*i.e.*, was a member of al Qaeda, or engaged in or materially supported al Qaeda's hostilities against the United States or its coalition partners). 10 U.S.C. §§ 948a(1), (6), (7); 948c. With regard to enemy belligerent status, the Commission notes the Government's stated intent to rely on the material support and al Qaeda membership categories. Transcript pp. 16930-31.

²⁰ The opportunity to present oral argument regarding pretrial motions is afforded at the discretion of the Military Judge. R.M.C. 905(h); R.C. 3.5.m.

specified in that order are fulfilled, the Commission will schedule an evidentiary hearing with regard to those prerequisites to personal jurisdiction that remain unresolved as to Mr. Ali.

So **ORDERED** this 3rd day of April, 2019.

//s//
K. A. PARRELLA
Colonel, U. S. Marine Corps
Military Judge