

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

<p><b>UNITED STATES OF AMERICA</b></p> <p><b>v.</b></p> <p><b>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</b></p>	<p><b>AE 502GGGG</b></p> <p><b>Mr. al Baluchi’s Updated List of Potential Witness List for Personal Jurisdiction Hearings</b></p> <p>and</p> <p><b>Administrative Ruling Regarding Future Filings in the AE 502 Series</b></p> <p><b>15 April 2019</b></p>
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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.<sup>1</sup> 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.<sup>2</sup> Mr. Ali (a.k.a. al Baluchi) 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.”<sup>3</sup>

b. On 31 May 2017, the Commission ordered an evidentiary hearing regarding personal jurisdiction with regard to Messrs. Hawsawi and Ali.<sup>4</sup> The Commission permitted the other

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<sup>1</sup> 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.

<sup>2</sup> 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.

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

<sup>4</sup> 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.

Accused to abstain from litigation of personal jurisdiction pending receipt of further discovery, but cautioned any future motions on the issue would have to “take into consideration any rulings issued by the Commission.”<sup>5</sup>

c. Over the course of litigation, Mr. Ali gave notice of intent to call a number of witnesses, filing the latest iteration of his witness list on 21 December 2017.<sup>6</sup> Counsel for Mr. Ali indicated that most of his requested witnesses fell into one of two categories: (1) those called to testify regarding existence of hostilities, or (2) those called to testify regarding the voluntariness of certain statements of his.<sup>7</sup>

d. On 10 and 11 January 2018, Counsel for Mr. Ali presented oral argument regarding his requested witnesses.<sup>8</sup>

e. On 18 January 2018, the Commission 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.<sup>9</sup>

f. On 25 April 2018, following an extensive hearing, the Commission ruled that all prerequisites for personal jurisdiction over Mr. Hawsawi were met, to include the existence of

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<sup>5</sup> AE 502I, para. 5.a(2).

<sup>6</sup> Mr. Ali’s overall witness requests are contained in the following filings: AE 502J (AAA), Mr. al Baluchi’s List of Potential Witnesses For Personal Jurisdiction Hearing, filed 26 June 2017; AE 502Y (AAA), Mr. al Baluchi’s Combined Response to AE 502V Trial Conduct Order and Reply to AE 502O Government’s Consolidated Response to AE 502L (MAH) and AE 502J (AAA) Witness List for Personal Jurisdiction Hearings, filed 29 September 2017; and AE 502J (AAA Sup.), Mr. al Baluchi’s Updated List of Potential Witness List for Personal Jurisdiction Hearings, filed 21 December 2017.

<sup>7</sup> AE 502J (AAA), para. 2.; AE 502J (AAA Sup) pp. 10-11.

<sup>8</sup> Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearings Dated 10 January 2018 from 9:41 A.M. to 11:23 A.M. at pp. 18434-94, and 11 January 2018 from 1:59 P.M. to 2:06 P.M. at p. 18793 (closed session).

<sup>9</sup> AE 502QQQ Trial Conduct Order, Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, dated 18 January 2018.

hostilities.<sup>10</sup> The Commission noted that further litigation of the AE 502 series with regard Mr. Ali remained deferred.<sup>11</sup>

g. On 14 December 2018 (citing certain developments not pertinent here), Mr. Ali asserted that deferral was no longer necessary, and moved the Commission to schedule the evidentiary hearing regarding personal jurisdiction over him.<sup>12</sup> During litigation of that motion, the Government argued that the Commission should extend its ruling on existence of hostilities with regard to Mr. Hawsawi to the other four Accused as a matter of law.<sup>13</sup> On 3 April 2019, the Commission so ruled, and maintained its deferral order for Mr. Ali.<sup>14</sup>

h. Further oral argument is unnecessary to resolve this matter.<sup>15</sup>

## 2. Law.

a. **Burden of Proof.** As the moving party, Mr. Ali bears the burden of proving by a preponderance of the evidence any facts prerequisite to the relief he seeks. Rule for Military Commissions (R.M.C.) 905(c)(1)-(2).

b. **Witnesses.** The Military Commissions Act of 2009 provides the accused a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.<sup>16</sup> This includes entitlement to production of available witnesses “whose

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<sup>10</sup> 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).

<sup>11</sup> AE 502BBBB, para. 6.d.

<sup>12</sup> AE 502CCCC (AAA) (Corrected Copy), Mr. al Baluchi’s Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction, filed 14 December 2018.

<sup>13</sup> AE 502DDDD (GOV), para. 2.

<sup>14</sup> AE 502FFFF Ruling, Mr. al Baluchi’s Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction, dated 3 April 2019, para. 3.

<sup>15</sup> The opportunity to orally argue in support of pretrial motions is afforded at the discretion of the military judge.

<sup>16</sup> See 10 U.S.C. § 949j. R.M.C. 905(h); R.C. 3.5.m.

testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.”<sup>17</sup>

3. **Analysis.** Given that (a) Mr. Ali has acknowledged that a significant number of his witnesses would testify solely as to the existence of hostilities for purposes of personal jurisdiction, and (b) the Commission has ruled that issue foreclosed, it follows those witnesses are not relevant to any matter at issue before the Commission. Accordingly, those witnesses are denied. (To avoid any potential classification issues, most of these witnesses will be identified by reference to an unclassified index of Defense witnesses previously filed by the Government.)<sup>18</sup>

4. **Future Filings in AE 502 Series.** For reasons of clarity, administrative convenience for all parties, and judicial economy, further exhibit numbers will be issued in the 502 series only by exception, and will generally be limited to filings (a) specifically concerning personal jurisdiction over Mr. Hawsawi, or (b) addressing matters within the AE 502 series that substantially affect all of the Accused. Future litigation of any personal jurisdiction challenges with regard to the other Accused will be in one or more new, separate motion series specific to them.<sup>19</sup>

## 5. **Ruling.**

a. Mr. Ali’s various personal jurisdiction hearing witness requests are **DENIED IN PART** as follows:

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<sup>17</sup> R.M.C. 703(b)(1).

<sup>18</sup> AE 502O (GOV), Government Consolidated Response To AE 502L (MAH), Mr. Hawsawi’s Witness List for the August 2017 Hearings, and AE 502J (AAA), Mr. Ali’s List of Potential Witnesses for Personal Jurisdiction Hearing, filed 10 July 2017, Attach. B.

<sup>19</sup> This includes Mr. Ali’s personal jurisdiction challenge. Mr. Ali’s pending requests for relief in the AE 502 series, and any relief already granted therein, will be incorporated and addressed within the new series pertinent to him (once established).

(i) The following witnesses listed in AE 502O (GOV), Attachment B, are **DENIED**: witnesses 2-4, 6, 10-11, 13, 15-16, 18, 21, 23, 25, 28, 30, 34-35, 39-40, 47-48, 51-53, 55-59, 62-72, 73-75, 77-78, and 81;<sup>20</sup> and

(ii) The two additional witnesses requested in AE 502Y (AAA Sup)<sup>21</sup> are **DENIED**.

(iii) Ruling on the remaining witnesses requested by Mr. Ali remains **DEFERRED** in accordance with the Commission's order in AE 502QQQ.

b. Future issuance of exhibit numbers in the AE 502 series will be limited as described in paragraph 4, above.

So **ORDERED** this 15th day of April, 2019.

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

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<sup>20</sup> The Commission notes that the Government did not object to the appearance of witnesses 2, 23, and 47 while the hostilities question remained contested. AE 502J (AAA Sup), fn 5. However, given the resolution of the issue, any such consent given is now moot. *See* Military Commission Rules of Evidence 401-402.

<sup>21</sup> AE 502J (AAA Sup), pp. 7-8.