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	**AE502HHHH (AAA)** **Mr. al Baluchi’s Motion to Reconsider AE502BBBB Ruling** 24 April 2019

1. **Timeliness:** This motion is timely filed.

2. **Relief Sought:** Mr. al Baluchi respectfully requests that the military commission reconsider its ruling in AE502BBBB Ruling.

3. **Overview:**

The military commission should reconsider its ruling in AE502BBBB in order to correct at least three instances of clear error in that ruling. First, the military commission erred by finding ambiguity in the “laws of war,” as incorporated by § 948a(9) of the 2009 Military Commission Act. For purposes of personal jurisdiction, the military commission erroneously found ambiguity in the “laws of war” despite Congress and the President’s decision to incorporate the laws of war by reference, as well as superior courts’ successful application of the laws of war to limit and define military commissions’ jurisdiction.

The military commission’s erroneous determination of ambiguity in the “laws of war” led it to commit its second clear error. In violation of controlling precedent and unambiguous text, the military commission relied on its reading of the 2009 Military Commission Act’s legislative history to give substantive meaning to the “laws of war.” Since AE502BBBB was issued, the Supreme Court and the Court of Appeals of the Armed Forces have both recognized that

"legislative history is not law" and that it is impermissible to substitute legislative history for the text of a statute. The military commission violated this precept and clearly erred when it determined, effectively, that for purposes of personal jurisdiction the "laws of war" have no content that does not affirm the military commission's jurisdiction over the men charged in the *United States v. Mohammad* military commission.

Finally, the military commission erred by deferring to what it perceived to be the political branches' effective determination of the existence of hostilities when superior courts have already found no such effective determinations exist and by abdicating its responsibility to determine the jurisdictional facts necessary for it to exercise jurisdiction over the defendants in the *United States v. Mohammad* military commission.

4. <u>Burden of Proof</u>: As the moving party, Mr. al Baluchi must demonstrate by a preponderance of the evidence that the requested relief is warranted.[1] The military commission has previously held that, "[g]enerally, reconsideration should be based on a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed. Reconsideration may also be appropriate to correct a clear error or prevent manifest injustice."[2] "Motions for reconsideration are not appropriate to raise arguments that could have been, but were not, raised previously, or arguments the Commission has previously rejected."[3] "Nor are motions

[1] R.M.C. 905(c)(1)-(2).

[2] AE526J (citing *United States v. Libby*, 429 F. Supp. 2d 46 (D.D.C. 2006); *United States v. McCallum*, 885 F. Supp. 2d 105 (D.D.C. 2012)).

[3] AE526J (citing *United States v. Booker*, 613 F. Supp. 2d 32 (D.D.C. 2009); *United States v. Bloch*, 794 F. Supp. 2d 15, 19 (D.D.C. 2011)).

for reconsideration appropriate for the proffer of evidence available when the original motion was filed, but, for unexplained reasons, was not proffered at that time."[4]

5. Facts:

a. On 7 April 2017, Mr. al Hawsawi filed AE502 Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities. Mr. al Hawsawi argued that the military commission lacks personal jurisdiction to try him because the government is unable to demonstrate the existence of hostilities between the United States and al Qaeda on or before 11 September 2001.

b. On 14 April 2017, Mr. al Baluchi stated a separate position as to AE502.[5] In that pleading, Mr. al Baluchi argued that the government must prove personal jurisdiction, including its hostilities aspect, by a preponderance of the evidence before trial, an inquiry separate from the contextual element found in 10 U.S.C. § 950p(c).

c. On 28 April 2017, the government jointly responded to both AE502 and AE502B in AE488E (GOV) / AE502C (GOV) Government Consolidated Response to Defense Motions to Dismiss for Lack of Personal Jurisdiction Due to the Absence of Hostilities and to Mr. al Baluchi's Notice of Declination of Joinder and Motion to Consider Other Arguments or For Other Relief Regarding AE 488 (MAH). Citing the military commission's ruling in the *United States v. al Nashiri* military commission, the government argued that, for personal jurisdiction purposes, the

[4] AE526J (citing *Bloch*, 794 F. Supp. 2d at 19-20).

[5] 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.

existence of hostilities is a matter of law already resolved by Congress and the President in passing the 2009 Military Commissions Act (2009 MCA).[6]

d. On 15 May 2017, the military commission heard oral argument on the issues raised to date in the AE502 motion series. Unsurprisingly, the question of whether the existence of hostilities, for personal jurisdiction purposes, is a matter of law figured prominently.[7] Mr. al Baluchi argued that personal jurisdiction, including the existence of hostilities, is a question of fact and requires pre-trial evidentiary proceedings.[8] The government argued, *inter alia*, that hostilities existed as a matter of law[9] and, even if they did not exist as a matter of law, that the military commission should not make a finding on that point until after the government presents its case-in-chief.[10]

e. On 31 May 2017, the military commission issued AE502I, rejecting the government's positions that the existence of hostilities are either a matter of law already decided by Congress and the President, or that the hostilities question should be reserved for trial. Instead, the military commission ordered an evidentiary hearing to determine whether it has personal jurisdiction over Mr. Hawsawi and Mr. al Baluchi.[11] Specifically, the military commission found that, as a matter of law, "[p]ersonal jurisdiction . . . depends on the factual existence of hostilities,

[6] AE502C at 37.

[7] Unofficial/Unauthenticated Transcript of 15 May 2017 at 15707-15710; *id.* at 15723-27.

[8] *Id.* at 15718-20.

[9] *Id.* at 15727.

[10] *Id.* at 15727-32.

[11] AE502I Ruling.

to the extent they are required to meet the conditions of 10 U.S.C. §§ 948a(7)."[12] The military commission then ordered pre-trial, personal jurisdiction evidentiary hearings for both Mr. al Hawsawi and Mr. al Baluchi, directing each defendant and the government to file lists of requested witness and objections in advance of the August 2017 military commission hearing.[13]

f. On 26 June 2017, in response to the military commission's order in AE502I, Mr. al Baluchi provided a list of witnesses whose testimony would demonstrate the absence of pre-9/11 hostilities between the United States and al Qaeda.[1] [redacted] At that time, Mr. al Balcuhi noted that its witness list was necessarily incomplete "because the government has not yet completed its discovery on the subject matter of the personal jurisdiction hearing."[16]

g. In contrast to Mr. al Baluchi's approach to demonstrating the absence of hostilities, on 21 June 2017, Mr. al Hawsawi requested only one witness, an expert on state practice with respect to the laws of war.[17]

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[12] *Id.* at 4.

[13] *Id.* at 6.

[14] AE502J (AAA) Mr. al Baluchi's List of Potential Witnesses for Personal Jurisdiction Hearing. [redacted]

[17] AE502L (MAH) Mr. al Hawsawi's Witness List for the August 2017 Hearing.

h. In oral argument before the military commission on 21 August 2017, the military judge ratified Mr. al Baluchi and Mr. al Hawsawi's divergent approaches to the question of the existence of hostilities. The military commission both admonished Mr. al Hawsawi's counsel that he spoke for its client and not for Mr. al Baluchi's counsel,[18] reassured Mr. al Baluchi's counsel that Mr. al Hawsawi did not speak for him,[19] and directed the government to respond to Mr. al Hawsawi's position and Mr. al Baluchi's position separately.[20] Unusually, the military commission even separated the arguments, hearing Mr. al Hawsawi's argument, allowing the government to respond, then taking argument from Mr. al Baluchi, before allowing the government to address Mr. al Baluchi's representations. And even the government recognized that Mr. al Baluchi and Mr. al Hawsawi were pursuing two distinct strategies with respect to the existence of hostilities: "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 its 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. Mr. Hawsawi's motion is not truly a personal jurisdiction motion. It's a subject matter jurisdiction motion masquerading as a personal jurisdiction motion."[21]

[18] Unofficial/Unauthenticated Transcript of 21 August 2017 at 16062.

[19] *Id.* at 16083.

[20] *E.g.*, *id.* at 16074 (MJ [COL POHL]: You've notified -- and I am only talking about Mr. Hawsawi now; we will talk about Mr. Aziz Ali in due course.").

[21] *Id.* at 16072.

i. The military commission also offered, during the 21 August 2017 hearing, Mr. al Baluchi alone the opportunity to defer proceeding on the question of hostilities pending resolution of hostilities-related discovery motions.[22] Mr. al Baluchi declined.[23]

j. Finally, the military commission observed in responding to a question concerning suppression from counsel for Mr. Mohammad, "[W]ell, Mr. 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."[24]

k. The bifurcation of Mr. al Hawsawi and Mr. al Baluchi's pre-trial evidentiary proceedings concerning hostilities continued at the October 2017 military commission hearing. Mr. al Baluchi argued, specifically that, "even if [the military commission] rules in favor of Mr. al Hawsawi's position for a fundamentally different type of hearing basically on paper . . . [t]hat doesn't necessarily mean that you should rule against Mr. Al Baluchi because, under [R.M.C.] 811, two parties can enter stipulations and that doesn't mean the other parties have to."[25] The military commission then explained that, while Mr. al Hawsawi's evidentiary hearing would take place in December 2017, Mr. al Baluchi's would take place later.[26]

[22] *Id.* at 16089-90.

[23] *Id.* at 16090.

[24] *Id.* at 16906-07.

[25] Unofficial/Unauthenticated Transcript of 19 October 2017 at 16932.

[26] *Id.* at 17016.

l. On 27 October 2017, the military commission granted Mr. al Hawsawi's witness request, granted the government's witness request, but deferred ruling on Mr. al Baluchi's requested witnesses.[27]

m. The military commission in fact heard evidence and argument pertaining to Mr. Hawsawi's personal jurisdiction challenge during the December 2017 hearings.[28] Mr. al Hawsawi presented one witness, an expert on the laws of war, and the government presented two witnesses, both of whom are or were FBI case agents.

[redacted]

[27] AE502KK Ruling.

[28] AE502QQQ Trial Conduct Order at ¶ 1.b.

[redacted]

o. The military commission took no action on Mr. al Baluchi's proposal to conditionally [redacted]

p. The government took no action with respect to Mr. al Baluchi's proposed stipulation.

q. On 11 January 2018, the military commission heard argument concerning Mr. al Baluchi's personal jurisdiction witnesses. During that argument, Mr. al Baluchi indicated that, separate from the pretrial personal jurisdiction evidentiary proceeding, he anticipated filing a future motion to suppress the January 2007 statements for purposes of the merits phase of the *United States v. Mohammad et al* military commission.[32]

r. On 18 January 2018, the military commission deferred further consideration of AE502 et seq. with respect to Mr. al Baluchi pending Mr. al Baluchi filing a motion to suppress the January 2007 statements or foreswearing such a motion.[33]

s. On 25 April 2018, the military commission issued a ruling on Mr. al Hawsawi's hostilities-based personal jurisdiction challenge. The military judge determined that, for purposes of Mr. al Hawsawi's challenge only, the military commission has personal jurisdiction over Mr. al Hawsawi because hostilities began at an indeterminate point prior to 11 September 2001.[34]

t. [redacted]

[32] *See* AE502QQQ at ¶ 1.c.

[33] AE502QQQ.

[34] AE502BBBB at 19 ("With regard to Mr. Hawsawi, the Commission finds 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.").

[redacted]

u. On 13 December 2018, in light of the military commission's ruling AE524NN, Mr. al Baluchi moved the military commission to schedule its outstanding pre-trial evidentiary hearing on the existence of hostilities.[36] The government opposed Mr. al Baluchi's motion.

v. In the course of the March 2019 military commissions hearing, the military commission raised the issue of whether the military commission's ruling in AE502BBBB on the existence of hostilities, which by its terms applied only to Mr. al Hawsawi, extended to Mr. al Baluchi and the other three defendants in the *United States v. Mohammad* military commission. On 27 March 2019, the military commission heard oral argument on that issue. Among other arguments, counsel for Mr. al Baluchi noted that if AE502BBBB had applied to Mr. al Baluchi, he would have previously moved to reconsider the order.[37]

w. On 3 April 2019, the military commission issued AE502FFFF, ruling that, notwithstanding *inter alia* the text of AE502BBBB, the order directing a pre-trial evidentiary hearing for Mr. al Baluchi on the existence of hostilities for personal jurisdiction purposes in AE502I, or the military commission's prior representations, Mr. al Baluchi was bound to a ruling based on proceedings in which the military commission precluded him from taking part.

[redacted]

[36] AE502CCCC.

[37] Unofficial/Unauthenticated Transcript of 27 March 2019 at 22626.

6. <u>Argument</u>:

The military commission should reconsider its ruling in AE502BBBB in order to correct three instances of clear error in that ruling. First, for purposes of personal jurisdiction, the military commission found ambiguity in the "laws of war" where superior courts and Congress have not. The military commission's erroneous determination of ambiguity in the "laws of war" led it to commit its second clear error: substituting legislative history for the text of a statute in clear violation of controlling precedent in *Epic Systems Corporation v. Lewis*[38] and *United States v. Briggs*.[39] Third, the military commission clearly erred by deferring to what it perceived to be the political branches' effective determination of the existence of hostilities when superior courts have already found no such effective determinations exist and by abdicating its responsibility to determine the jurisdictional facts necessary for it to exercise jurisdiction over the defendants in the *United States v. Mohammad* military commission.

The military commission's reasoning on hostilities in AE502BBBB can be reduced to the following elements: the term "laws of war" is ambiguous; Congress intended the military commission to have jurisdiction over the 9/11 attack, so any construction of "laws of war" which allows a contrary result is impermissible; the Constitution authorizes Congress to define the "laws of war" thus. The military judge should reconsider AE502BBBB because the military commission's reasoning is foreclosed by controlling precedent, including a Supreme Court decision subsequent to the military commission's decision.

[38] 138 S. Ct. 1612 (2018).

[39] 78 M.J. 289 (C.A.A.F. 2019).

Ambiguity

In AE502BBBB, the military commission found ambiguity in the term "laws of war," part of the § 948a(9) definition of "hostilities," sufficient to allow it to rely on legislative history to resolve the ambiguity. This reasoning is foreclosed by controlling precedent and by superior courts' long history of successfully interpreting and applying the "laws of war" in general and with respect to military commissions jurisdiction specifically. The military commission's finding of ambiguity in the "laws of war" is the first clear error in AE502BBBB.

In the AE502 series, Mr. al Hawsawi and Mr. al Baluchi challenged the personal jurisdiction of the military commission over them. The government asserted personal jurisdiction under § 948a(7)(B), which includes hostilities as one component, and § 948a(7)(C), which the military commission ruled did not. Section 948a(9), in turn defines "hostilities" as "any conflict subject to the laws of war."

Rather than analyzing the meaning of "hostilities," the military commission began its inquiry with the meaning of "laws of war." The military commission found ambiguity in the term: "In assessing the meaning of the term 'laws of war' as incorporated by Congress in the M.C.A. 2009, the Commission notes that the term is itself, to an extent, ambiguous."[40] The military commission based its conclusion with respect to ambiguity on the fact that, in the course of reviewing previous military commissions' verdicts, prior courts have debated "whether the term means the law of war as understood only in international law, or as informed by the historical practices and interpretations of the United States (referred in those discussions as the 'domestic

[40] AE502BBBB at 6.

law of war')."[41] Thus, the military commission determined that an entire body of law is ambiguous on the basis that superior courts have debated the proper means by which to determine whether certain conduct is regulated by the laws of war.

Long-standing and controlling authority establishes that the statutory phrase "law of war" or "laws of war" is unambiguous. "From the very beginning of its history [the Supreme] Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."[42] Congress has used this phrase to address questions of military commissions jurisdiction for over one hundred years.

In *Ex parte Quirin*, the Supreme Court rejected the view that the "law of war" was vague or ambiguous as applied to jurisdiction. As a matter of statutory interpretation, it explained that "by the reference in the 15th Article of War to 'offenders or offenses that . . . by the law of war may be triable by such military commissions,' Congress has incorporated by reference, as within jurisdiction of military commissions, all offenses which are defined as such by the law of war, and which constitutionally may be included within that jurisdiction."[43] The Supreme Court held that Congress could permissibly forgo "minute detail" and instead "adopt[] the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts" through the phrase "law of war."[44] This holding precludes the military commission's finding that the statutory phrase "laws of war" is ambiguous as applied to jurisdiction.

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[41] AE502BBBB at 6.

[42] *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942).

[43] 317 U.S. 1, 30 (1942).

[44] *Id.*

Five Justices in *Hamdan v. Rumsfeld* also held that the statutory phase "the law of war" acted as a boundary for military commission jurisdiction. The inquiry of the majority in *Hamdan v. Rumsfeld* was whether Mr. Hamdan's first military commission complied with "the law of war" under Article 21, UCMJ, the successor to Article of War 15.[45] The Stevens plurality used the law of war as a measure of military commission jurisdiction.[46] The Kennedy plurality held that "Congress requires that military commissions like the ones at issue conform to the 'law of war,' 10 U.S.C. § 821."[47]

In fact, the *Hamdan* majority analyzed and specifically determined to apply the law of war to the United States conflict with al Qaeda and the Taliban despite its putatively novel character.[48] The majority rejected the D.C. Circuit's view that the conflict "evade[d] the reach of the Geneva Conventions,"[49] and held that the conflict with al Qaeda, at the time of Mr. Hamdan's trial, satisfied the threshold for armed conflict under Common Article 3.[50] The majority found no ambiguity in law-of-war language of Article 21.

In both *Quirin* and *Hamdan*, the Supreme Court held that the "law of war" is a statutory phrase with an unambiguous meaning, at least as applied to personal and subject matter

[45] *Hamdan*, 548 U.S. at 595 (majority op.).

[46] *Id.* at 597-600 & n.31 (Stevens, J., plurality op.).

[47] *Id.* at 637 (Kennedy, J., plurality op.).

[48] *Cf.* AE502BBBB at 8 ("The overall armed conflict against al Qaeda—a transnational terrorist organization operating primarily outside the United States—might itself be viewed as an anomaly under pre-September 11, 2001 law of war standards . . . .").

[49] *Hamdan*, 548 U.S. at 628 (majority op.).

[50] *Id.* at 630-31 (majority op.).

jurisdiction.[51] The requirement, common to all legal inquiries, to determine the content of the "law of war" does not render it ambiguous any more than the First Congress' use of the phrase "law of nations" renders the Alien Tort Statute ambiguous. Congress used the *Quirin* and *Hamdan* holdings to fashion first the personal jurisdiction provisions of the 2006 and 2009 MCAs, then the contextual element of the 2009 MCA.

Congress defined an "alien unlawful enemy combatant" in the 2006 MCA to include "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States . . . ."[52] The Court of Military Commission Review considered the term AUEC to be "fundamental to determining both persons subject to trial by military commission, and the subject matter jurisdiction of military commissions convened under the 2006 M.C.A."[53]

Furthermore, like the 2009 MCA, the 2006 MCA, "as implemented in the 2007 M.M.C., require[d] a nexus between the charged conduct and an armed conflict to be punishable."[54] "This nexus performs an important narrowing function in determining which charged acts of terrorism constitute conduct punishable by such a law of war military commission, while effectively excluding from their jurisdiction *isolated and sporadic acts of violence not within the context of an armed conflict*."[55]

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[51] The vagueness of "the law of war" as an element of an offense is at issue in the AE492 series.

[52] 2006 MCA § 948(a)(1).

[53] *United States v. Bahlul*, 820 F. Supp. 2d 1141, 1182 (C.M.C.R. 2011), *vacated*, 767 F.3d 1 (D.C. Cir. 2014) (*en banc*).

[54] *Id.* at 1188-89.

[55] *Id.* at 1188-89 (emphasis added).

The term "hostilities" in both the 2006 and 2009 MCAs is populated by the law of war—implicitly in the 2006 MCA and explicitly in the 2009 MCA. In explaining the personal and subject matter jurisdiction of a military commission under the 2006 MCA, the Court of Military Commission Review drew extensively on the law of war.[56]

The CMCR's use of the phrase "isolated and sporadic acts of violence" indicates that the contextual element distinguishes between hostilities and sub-armed conflict violence. This phrase is the classic description of violence below the threshold for "armed conflict" found in Additional Protocol II, Article 1.2, which also governs the application of Common Article 3.[57] In other words, it is the heart of the international law of war regime for determining the existence of and regulating non-international armed conflicts.

The CMCR made the international law-of-war provenance of the hostilities inquiry crystal clear through its citations in footnote 66 of its decision reviewing the conviction and sentence in *United States v. Bahlul*. First, footnote 66 cites the test for the existence of armed conflict in AP II 1.2: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[58] Second, the CMCR cited the jurisdictional element of charges in the International Criminal Court, which is textually similar to § 950p(c), limiting ICC charges to "protracted armed

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[56] *Id.* at 1171-90 & n. 38.

[57] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (Geneva, June 8, 1977); Geneva Conventions Commentary of 2017 ¶, *available at* https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=D84E8D5C5EB782FAC1258115003CEBE5#_Toc481072363.

[58] *Bahlul*, 820 F. Supp. 2d at 1189 n.66.

conflict between governmental authorities and organized armed groups or between such groups,"[59] which itself derives from the armed conflict standard in *Tadic*.

Rather than finding ambiguity in the law of war, the CMCR relied upon it to narrow and clarify military commissions jurisdiction. The CMCR also had no issue in drawing on both domestic and international authorities on the law of war. This reasoning, which the government has called binding in the member-instruction context, precludes the ambiguity finding of the military commission in AE502BBBB. The finding of ambiguity represents the first clear error in AE502BBBB.

Legislative intent

Having erroneously found ambiguity in the "laws of war," the military commission committed its second clear error by substituting its view of legislative history for the text of 10 U.S.C. §§ 948a(7) & (9). As the Supreme Court explained in *Epic Systems Corporation v. Lewis* on 21 May 2018, "legislative history is not law. 'It is the business of Congress to sum up its own debates in legislation,' and once it enacts a statute '"we do not inquire what the legislature meant; only what the statute means."'"[60]

The Supreme Court's prohibition of judicial reliance on legislative history is so noteworthy in the law on statutory construction that the Court of Appeals for the Armed Forces found itself compelled to address *Epic Systems* in its recent decision in *United States v. Briggs*.[61] In that case,

[59] *Id.*

[60] 138 S. Ct. 1612, 1631 (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J. concurring) (quoting Holmes, J.)).

[61] 78 M.J. 289 (C.A.A.F. 2019).

the CAAF considered whether Congressional alterations to the statute of limitations for rape applied to previous, uncharged conduct that would have been time-barred from prosecution but for the alteration. Although the CAAF's prior decision in *United States v. Lopez de Victoria*[62] seemingly answered the question presented in *Briggs*, the CAAF had relied on legislative history in reaching its *Lopez de Victoria* decision. Citing *Epic Systems*, the CAAF recapitulated the textual, non-legislative history basis for its decision[63] in *Lopez de Victoria* and it then suggested that had either party asked it to reconsider the outcome of *Lopez de Victoria* on the basis of *Epic Systems* it would have:

> We considered legislative history in *Lopez de Victoria*, 66 M.J. at 73. Since that decision, the Supreme Court has explained that "legislative history is not the law" and that courts "do not inquire what the legislature meant" but instead "ask only what the statute means." *Epic Systems Corp. v. Lewis* . . . . In the matter before us, however, no party has asked us to reconsider the approach of *Lopez de Victoria* and whether relying on legislative history is appropriate when determining whether statutory amendments apply retroactively. We therefore leave that question for another case.[64]

Consequently, the CAAF itself recognized the vulnerability of its otherwise controlling precedent on the retroactive effect of changes to the statute-of-limitations on rape in light of the Supreme

[62] 66 M.J. 67 (C.A.A.F. 2008).

[63] *Briggs*, 78 M.J. at 292-93 (identifying nothing to overcome the presumption against retroactive application of congressional enactments).

[64] *Id.* at 294 n.5.

Court's decision in *Epic Systems* barring judicial substitution of legislative history for statutory text.

But in AE502BBBB the military commission engaged in exactly the type of statutory construction prohibited by the Supreme Court in *Epic Systems* and cautioned against by the CAAF in *Briggs*. The military commission impermissibly substituted its reading of legislative history for the text of the statute. Specifically, instead of resolving the meaning of "hostilities" under the 2009 MCA based on the text itself—that is, by looking to the "laws of war" for the definition of hostilities for purposes of personal jurisdiction—the military commission undertook an examination of legislative history to divine the "primary purpose" of the 2009 MCA. According to the military commission, "Clear legislative history indicates . . . the primary purpose for which Congress enacted the statute in the first place . . . was to 'authorize trial by military commission of the 9/11 conspirators.'"[65] Having found, based on legislative history, that Congress intended the military commissions to have jurisdiction over the *United States v. Mohammad* military commission, the military commission reasoned that it must have personal jurisdiction over the defendants and, whatever the substance of the laws of war, such substance cannot include any rules, principles, or proscriptions that would deprive the military commission of personal jurisdiction over the men on trial in *United States v. Mohammad*.[66] The military commission thus substituted the Act's definition of hostilities—one based on incorporating the "laws of war"—

[65] AE502BBBB at 6 (quoting *Bahlul v. United States*, 757 F.3d 1, 14 n.8 (D.C. Cir. 2014) (*en banc*)).

[66] AE502BBBB at 7 ("In short, the Commission concludes that, whatever Congress may have had in mind in [sic] 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.").

with a general principle that, based on its identification of the statute's "primary purpose," hostilities must exist if the men charged in the *United States v. Mohammad* are on trial. Consequently, the military commission impermissibly substituted legislative history for substantive law in clear contradiction of the Supreme Court's subsequent decision in *Epic Systems* and the CAAF's warning in *Briggs*. This reasoning represents the second clear error in AE502BBBB.

Role of political branches

Finally, the reasoning of the military commission that the effective determinations of the political branches control the personal jurisdiction inquiry, without much evidence of what those determinations were, contradicts the controlling authority in *In re Al-Nashiri.*[67]

In *In re Al-Nashiri,* the Court of Appeals for the D.C. Circuit rejected exactly the military commission's view articulated in AE502BBBB that the political branches had arrived at some sort of consensus about the scope of hostilities, if any, between the United States and al Qaeda that existed prior to 11 September 2001. Mr. Al-Nashiri asked the D.C. Circuit for *mandamus* relief from his military commission trial, arguing that the military commission lacked jurisdiction over him as a matter of law. According to Mr. Al-Nashiri, the contemporaneous public acts of the United States establish the absence of hostilities at the time of the U.S.S. *Cole* bombing.[68] The D.C. Circuit rejected Mr. Al-Nashiri's request, finding that he had no "clear and indisputable" right to relief because it was not "clear and indisputable" that his alleged conduct took place outside of the context of hostilities.

[67] 835 F.3d 110 (D.C. Cir. 2016).

[68] *Id.* at 136.

The D.C. Circuit surveyed the Supreme Court's decision in *Hamdan v. Rumselfd*,[69] and noted that, while the four-Justice plurality suggested hostilities between the United States and al Qaeda began only after the 9/11 attacks and the 2001 Authorization for the Use of Military Force,[70] Justice Thomas argued that "the Executive[] determin[ed] that the present conflict dates at least to 1996."[71] The D.C. Circuit attributed the *Hamdan* plurality's view to an analysis of public acts contemporaneous with the conduct, whereas it characterized Justice Thomas' contrary position as turning on both *ex post* public acts and contemporaneous evidence, "cit[ing] much of the same evidence that the government relie[d] upon" in attempting to demonstrate the existence of hostilities.[72] Based on this debate among the Justices as to when hostilities between the United States and al Qaeda began, the D.C. Circuit determined that "whether hostilities against al Qaeda existed at the time of Al-Nashiri's alleged [pre-11 September 2001] offenses, and whether Al-Nashiri's conduct in Yemen took place in the context of those hostilities, are *open questions*."[73]

Notwithstanding the D.C. Circuit's controlling determination that public acts leave whether and when hostilities between the United States and al Qaeda arose under the 2009 MCA "open questions," this military commission found, in direct contradiction of controlling precedent, that the political branches resolved the question of the onset of hostilities between the United States and al Qaeda.

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[69] 548 U.S. 557 (2006).

[70] *In re Al-Nashiri*, 835 F.3d at 137 (D.C. Cir. 2016) (citing and quoting *Hamdan*, 548 U.S. at 598-600 (plurality op.)).

[71] *Id.* at 137 (citing and quoting *Hamdan*, 548 U.S. at 685-88 (Thomas, J. dissenting)).

[72] *Id.*

[73] *Id.* (emphasis added).

Moreover, at least as far back as its decision in *United States v. Khadr*, the CMCR determined that the military commission possessed authority to determine its personal jurisdiction over the defendants before it.[74] And, the CMCR explained that personal jurisdiction is normally resolved "only after presentation of evidence supporting jurisdiction and entry of corresponding findings of fact."[75] "Congress, clearly aware of historical court-martial practice, and desiring that military commissions mirror this firmly rooted practice to the maximum extent practicable, would not have deprived military commissions of the ability to independently decide personal jurisdiction absent an express statement of such intent."[76]

Thus, in AE502BBBB, the military commission both clearly erred by adopting a ruling contrary to a superseding, superior precedent and it abdicated its responsibility to apply law to facts in determining its own jurisdiction. "[W]ar is not a game of 'Simon Says,' and the President's position, while relevant, is not the only evidence that matters" to a determination of hostilities.[77] The courts have repeatedly affirmed their role in the assessment of the armed conflict underlying this prosecution and others.[78]

In *Hamdan v. Rumsfeld*, for example, the five Justices who made up the majority rejected the Executive Branch's asserted authority to solely define the existence, character, and legal

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[74] *United States v. Khadr*, 717 F. Supp. 2d 1216, 1234 (C.M.C.R. 2007) (citing and quoting *United States v. Ruiz*, 536 U.S. 622, 627 (2002)).

[75] *Id.* at 126.

[76] *Id.*

[77] *Al Warafi*, 2015 U.S. Dist. LEXIS at *15.

[78] *See, e.g.*, *Desmare v. United States*, 93 U.S. 605, 611 (1877) (Civil War); *Bancroft*, 3 C.M.A. at 5 (Korean War); *Hamilton v. McClaughtry*, 136 F. 445, 448 (Cir. Ct., D. Kan. 1905) (Boxer Rebellion).

regulation of an armed conflict.[79] Significantly, the four Justice plurality noted that the temporal mismatch between Hamdan's charged overt acts, the 2001 AUMF, and ensuing hostilities, concluding that mismatch "cast doubt on the legality of the charge."[80] Only the dissent adopted a solicitous position with respect to the Executive Branch's claimed authority.[81]

As described above, the D.C. Circuit similarly rejected pure deference to the political branches in refusing to entertain Al-Nashiri's petition for *mandamus* relief. Likewise, the Court of Military Commission Review approval of military commission's fact-based and international-law-grounded approach to determining the existence of hostilities for purposes of trial implies that the military commission should embrace a similar approach in determining the existence of hostilities for purposes of personal jurisdiction.[82]

Thus, Congress entrusted military commissions to make fact-based determinations as to whether a "conflict subject to the laws of war" existed in order to both resolve whether the military commission has jurisdiction to try an accused and to determine whether an accused's conduct constituted an offense under 10 U.S.C. § 950p. Prior military commissions, like earlier courts martial and civilian courts, had in fact resolved questions of the existence of an armed conflict based on evidence presented during trial—as had earlier international war crimes tribunals.

These earlier tribunals looked to a similar set of factors that, in sum, describe hostilities in fact to determine the existence of an armed conflict. For example, the *Hamdan* and *Bahlul* military

[79] *Hamdan*, 548 U.S. at 630 (majority op.).

[80] *Hamdan*, 548 U.S. at 598-600 (plurality op.).

[81] *Id.* at 684-87 (Thomas, J., dissenting).

[82] *E.g.*, *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1278 n.53 (C.M.C.R. 2011), *rev'd on other grounds* 696 F.3d 1238 (D.C. Cir. 2012). *See also Bahlul*, 820 F. Supp. 2d 1141.

commissions considered, *inter alia*, "the length, duration, and intensity of hostilities . . . whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaeda threat, the number of persons killed or wounded on each side, the amount of property damage on each side. . . ."[83] Likewise, courts martial have looked to battlefield conditions like the deployment of large numbers of U.S. forces to a battlefield, the number of casualties, national emergency legislation, executive orders, and the amount of money spent in prosecuting a conflict to determine the existence of an armed conflict.[84]

Additionally, the military commission's deference-based approach to determining the existence of hostilities is clearly erroneous because it relies on an interpretation of caselaw the D.C. Circuit has already explicitly rejected. According to the military commission,[85] the Supreme Court's decision in *Ludecke v. Watkins*[86] commands "great deference" for "[t]he decisions made by the Legislative and Executive branches regarding whether and when an armed conflict exists." The military commission characterized *Ludecke* as implying that the beginning of an armed conflict is a "political act."[87] But the D.C. Circuit already rejected this interpretation of *Ludecke* in *in re Al-Nashiri*.[88] According to the D.C. Circuit, *Ludecke* is a "case[] emphasizing that the

[83] *Hamdan*, 801 F. Supp. 2d at 1278 n.53. *See also Bahlul*, 820 F. Supp. 2d at 1181.

[84] *E.g.*, *United States v. Reyes*, 48 C.M.R. 832 (Army Ct. Crim. App. 1974); *United States v. Shell*, 7 U.S.C.M.A. 646 (C.M.A. 1957); *United States v. Bancroft*, 3 U.S.C.M.A. 3, 5 (C.M.A. 1953).

[85] AE502BBBB at 9 n.28.

[86] 335 U.S. 160 (1948).

[87] AE502BBBB at 9 n.28 ("noting with regard to a 'state of war' that 'whatever its modes, its termination'—and, by implication, its beginning—'is a political act.'").

[88] 835 F.3d at 365-66.

determination of when hostilities end is left to the political branches."[89] According to the D.C. Circuit, *Ludecke* does not "speak directly to when hostilities *begin*."[90] Moreover, according to the D.C. Circuit, *Ludecke* does not resolve the debate between the four-Justice plurality and Justice Thomas in *Hamdan v. Rumsfeld* over whether the existence of hostilities is determined by "a 'public act' such as a proclamation or report to Congress."[91]

The military commission's deference to the political branches' supposed determination that hostilities pre-dated the 11 September 2001 attacks is the military commission's third clear error in AE502BBBB.

7. Oral Argument: Mr. al Baluchi respectfully requests oral argument.

8. Certificate of Conference: The government opposes Mr. al Baluchi's motion requesting reconsideration of the military commission's ruling in AE502BBBB.

[89] *Id.* at 365.

[90] *Id.* at 366 (emphasis in the original).

[91] *Id.*

9. <u>Attachments</u>:

A. Certificate of Service

Very respectfully,

//s//
JAMES G. CONNELL, III
Learned Counsel

//s//
STERLING R. THOMAS
Lt Col, USAF
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//s//
ALKA PRADHAN
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//s//
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Capt, USAF
Defense Counsel

Counsel for Mr. al Baluchi

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 24th day of April 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