

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 502I</p> <p>RULING</p> <p>Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities</p> <p>31 May 2017</p>
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1. Procedural History.

a. On 7 April 2017, Mr. al Hawsawi moved the Commission to dismiss all charges and specifications “because [he] and his co-[A]ccused are not ‘unprivileged enemy belligerents’ over whom this Commission [has] personal jurisdiction.”¹ The Government moved on 25 April 2017 for permission to file a consolidated response in both AE 502 and the related AE 488 series, which was granted.² The Government filed its consolidated response on 28 April 2017.³ Mr. al Hawsawi replied on 28 April 2017.⁴ Mr. Ali (a.k.a. al Baluchi) filed a separate reply to the Government on 24 May 2017.⁵

b. Mr. Bin al Shibh, Mr. bin ‘Attash, Mr. Ali, and Mr. Mohammad moved to unjoin from AE 502.⁶ The latter three expressly based their declination to join on, *inter alia*, the need to delay

¹ AE 502 (MAH), Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, para. 2, filed 7 April 2017 (quoting 10 U.S.C. § 948b(a)).

² AE 488-9 (RUL)(GOV), Ruling: Government Motion For Leave To File Out of Time a Government Consolidated Response to AE 502 (MAH), Defense Motion to Dismiss for Lack of Personal Jurisdiction Due to the Absence of Hostilities, and AE 488D (AAA), Mr. Ali’s Notice of Declination of Joinder and Motion to Consider Other Arguments or For Other Relief Regarding AE 488 (MAH), para. 1, dated 27 April 2017.

³ AE 488E (GOV)/AE 502C (GOV), Government Consolidated Response To Defense Motions To Dismiss For Lack of Personal Jurisdiction Due to the Absence of Hostilities and to Mr. Ali’s Notice of Declination of Joinder and Motion to Consider Other Arguments or For Other Relief Regarding AE 488 (MAH), filed 28 April 2017.

⁴ AE 488G (MAH)/AE 502E (MAH), Defense Reply to Government Consolidated Response to Defense Motions To Dismiss for Lack of Personal Jurisdiction Due to the Absence of Hostilities and to Mr. Ali’s Notice of Declination of Joinder and Motion to Consider Other Arguments or For Other Relief Regarding AE 488 (MAH), filed 5 May 2017.

⁵ AE 488F/AE 502D (AAA), Mr. al Baluchi’s Reply to AE 488E/AE 502C (GOV) Government Consolidated Response, filed 16 May 2017.

AE 502's resolution pending receipt of further discovery from the Government.⁷ Mr. Ali and Mr. Mohammad further moved the Commission to find that, when personal jurisdiction is contested, the Government bears the pretrial burden of proving an adequate factual basis for such jurisdiction by a preponderance of the evidence.⁸ In his separate reply, Mr. Ali indicated that, if the Commission determined to take evidence on the substantive issues raised by Mr. al Hawsawi in AE 502 before trial, he (Mr. Ali) wanted to be heard on the substantive issues at that time as well.⁹

c. On 15 May 2017, the Commission heard argument from Mr. al Hawsawi regarding the substance of AE 488 and AE 502, and from the parties generally regarding the specified procedural question of whether the government could be compelled to prove, before its merits case, that hostilities existed for purposes of establishing jurisdiction.¹⁰

2. Findings of Fact. The Commission finds the Defense has raised a colorable issue as to whether jurisdiction over the Accused has been sufficiently established.

3. Law.

a. **Jurisdiction Generally.** This Commission has been established to try alien unprivileged enemy belligerents for offenses triable by military commission. 10 U.S.C. § 948b. Its personal jurisdiction is limited to individuals subject to the Military Commissions Act of 2009 (M.C.A. 2009). 10 U.S.C. § 948d. Central to the issues here are the precise contours and

⁶ 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; 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 Regarding AE502 (MAH), filed 14 April 2017; AE 502H (RBS), Defense Notice of Non Joinder to AE 502 (MAH), filed 30 May 2017.

⁷ AE 502A, para. 3.b, AE 502B, para. 2.

⁸ AE 502B, pp 1, 4.

⁹ AE 488F / AE 502D, p. 1 ("If the military commission rules that the government does have [the burden of proving personal jurisdiction before trial], Mr. al Baluchi respectfully requests a schedule to brief the substantive question of hostilities, notwithstanding his position that the government has not yet completed discovery on hostilities." *Id.*)

¹⁰ Unofficial/Unauthenticated Transcript of the US v. Khalid Shaikh Mohammad, et al., Motions Hearing Dated 15 May 2017 from 3:13 P.M. to 4:27 PM at pp. 15648–15748.

implications of the Commission’s personal jurisdiction. These will be discussed in greater detail below.

b. Burden of Persuasion Generally. Ordinarily, before the Commission, a movant bears the burden of proving by a preponderance of the evidence any factual question prerequisite to the relief he seeks. R.M.C. 905(c)(1)-(2). In a motion contesting the Commission’s jurisdiction, however, the burden is on the Government to prove by a preponderance any facts required to establish that the Commission does, in fact, have authority to proceed. R.M.C. 905(c)(2)(B).

c. Personal Jurisdiction of Military Commissions. The personal jurisdiction of military commissions is set forth in 10 U.S.C. § 948d, which in pertinent part states simply that “military commission[s] . . . shall have jurisdiction . . . to try persons subject to [the M.C.A. 2009].” 10 U.S.C. § 948d; *see also U.S. v. Nashiri*, 191 F.Supp.3d 1308, 1316 (C.M.C.R. 2016) (“For military commissions, Congress has provided a clear statement of jurisdiction in [10 U.S.C. § 948d,] a section dedicated solely to that topic.”) The M.C.A 2009 defines persons subject to its terms as “[a]ny alien unprivileged enemy belligerent” (a status commonly referred to as “AUEB.”) 10 U.S.C. § 948c. This status is more fully elucidated in pertinent sections of the M.C.A. 2009’s definitions section:

(1) ALIEN.—The term “alien” means an individual who is not a citizen of the United States.

...

(7) UNPRIVILEGED ENEMY BELLIGERENT.—The term “unprivileged enemy belligerent” means an individual (other than a privileged belligerent)¹¹ who—

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

¹¹ “Privileged belligerents” are defined by the statute as “individual[s] belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.” 10 U.S.C. § 948a(6).

(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.

...

(9) HOSTILITIES.—The term “hostilities” means any conflict subject to the laws of war.

10 U.S.C. § 948a(1), (7). Accordingly, in order for a person to be subject to military commission jurisdiction, he must be (a) a non-U.S. citizen who (b) is *not* a privileged belligerent, and (c) falls in one or more of the categories enumerated in 10 U.S.C. § 948a(7)(A) – (C). Personal jurisdiction therefore depends in part on the factual existence of hostilities, to the extent they are required to meet the conditions of 10 U.S.C. §§ 948a(7).¹²

d. Proof of Facts Supporting Personal Jurisdiction. A military commission has authority to make any findings of fact necessary to determine jurisdiction in a case before it. *U.S. v. Khadr*, 717 F.Supp.2d 1215 (C.M.C.R. 2007) (finding a military commission judge “had the power and authority . . . to hear evidence concerning, and ultimately decide, [an accused’s AUEB] status.” *Id.* at 1238). This includes authority to hold pretrial evidentiary hearings, when a facial issue regarding jurisdiction has been raised. *Id.*; *Nashiri*, 191 F.Supp.3d at fn 8 (“Should [an accused] challenge his status as an AUEB, it would be appropriate for the military judge to hold an evidentiary hearing on this issue.” *Id.*) Such hearings are not an uncommon practice in

¹² Note that the M.C.A. 2009, in a subchapter entitled “Punitive Matters,” specifies the following “common circumstance” to all military commission offenses: “An offense specified in [10 U.S.C. § 950p-950t] is triable by military commission . . . only if the offense is committed *in the context of and associated with hostilities.*” 10 U.S.C. § 950p(c) (emphasis added). Tone notwithstanding, this language is not jurisdictional in nature: rather, it states a substantive element common to all offenses specified in the M.C.A. 2009. *See Nashiri*, 191 F.Supp.3d at 1314-15, 1318, 1328 (C.M.C.R. 2016) (cautioning against finding statutory language jurisdictional in the absence of clear intent; holding that appellee’s having “raised an issue about . . . sufficient nexus to hostilities [under] 10 U.S.C. § 950p(c)” did not amount to an attack on subject matter jurisdiction; and treating 10 U.S.C. § 950p(c) standing alone as a substantive element that ordinarily did not have to be proven before trial). The Defense avers such an interpretation of 10 U.S.C. § 950p(c) would offend both traditional formulation of military commission authority and the *ex post facto* clause. The Commission, however, finds such concerns overstated in light of the fact that Congress, through 10 U.S.C. § 950p(c), retained this proof requirement in the M.C.A. 2009 as a universal substantive element requiring proof beyond reasonable doubt.

courts martial. *Id.* at 1320-21. In such pretrial hearings at court martial, the Government bears the burden of proving facts required for personal jurisdiction by a preponderance of the evidence—a practice reflected in the Rules for Military Commissions. *Id.*; Rule for Courts-Martial 905(c)(2)(B); R.M.C. 905(c)(2)(B).

4. **Analysis.** Based on the findings and authorities referenced above, the Commission finds it appropriate to hold a pretrial evidentiary hearing to determine whether it may properly exercise personal jurisdiction over the affected Accused.

5. **Ruling.**

a. Adopting the analysis set forth in its related order in the AE 488 series,¹³ the Commission:

(1) Acknowledges that Mr. bin ‘Attash and Mr. Bin al Shibh have declined joinder with AE 502 (MAH), and that Mr. Mohammad has declined joinder with regard to the substantive issues raised in AE 502 (MAH).

(2) Determines that, to the extent Messrs. bin ‘Attash, Ali and/or Mohammad (whether expressly or by reference to and/or incorporation of their related motions in the AE 488 series) move the Commission for leave and/or delay to file separate positions regarding AE 502 (MAH), these motions are **DENIED**. The parties may file additional motions regarding the issues raised in AE 502 (MAH) upon receipt of discovery. Any such motions must take into consideration any rulings issued by the Commission with regard to AE 502 (MAH).

b. The motion of Messrs. Ali and Mohammad for a finding as to the Government’s pretrial burden (if any) to prove the factual basis for personal jurisdiction is **GRANTED** as set forth in the Order below.

¹³ AE 488-5 (RUL)(AAA, WBA, RBS, KSM), RULING, Defense Motion for Leave to File Motion to Decline Joinder Out of Time to AE 488 (MAH), dated 24 April 2017.

c. Mr. al Hawsawi's Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities is **DEFERRED** pending completion of the evidentiary hearing ordered below.

6. Order.

a. During the upcoming August 2017 hearing dates, the Commission will receive evidence and further argument on the question of whether the personal jurisdiction requirements of the M.C.A. 2009 are met as to Mr. al Hawsawi and Mr. Ali (hereinafter, the "affected Accused.") 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.

b. The following filing deadlines are established in support of the hearing referenced in subparagraph a, above:

(1) No later than **21 June 2017**, the Government and each of the affected Accused will file a list of witnesses the party intends to call, if any, during the August 2017 hearing.

(2) No later than **30 June 2017**, the Government and each of the affected Accused will file any objections to witnesses requested by another party.

c. Any issues to be resolved regarding witnesses and evidence for the August 2017 hearing regarding personal jurisdiction will be litigated during the July 2017 hearings.

d. Going forward, all AE 488 and 502 series filings will no longer be consolidated; rather, they will be filed separately in their individual series.

So **ORDERED** this 31st day of May, 2017.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge