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	**AE502KKKK (AAA)** **Mr. al Baluchi's Reply to** Government's Response to Mr. al Baluchi's Motion to Reconsider AE 502BBBB 10 May 2019

1. Timeliness: This Reply is timely filed.[1]

2. Law and Argument:

The military commission should grant Mr. al Baluchi's Motion to Reconsider AE 502BBBB Ruling for the reasons stated in his initial brief.[2] Namely, that the military commission committed three clear errors in reaching its conclusion that hostilities between the United States and al Qaeda pre-dated the 11 September 2001 attacks. Those errors are, first, the military commission erred by finding ambiguity in the "laws of war," as incorporated by § 948a(9) of the 2009 Military Commission. Second, the military commission erred by impermissibly replacing the text of § 948a(9) with the MCA's legislative history—a mode of statutory interpretation subsequently proscribed by the Supreme Court. Third, 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

[1] R.C. 3.7.e.(2).

[2] AE502HHHH (AAA) Mr. al Baluchi's Motion to Reconsider AE502BBBB Ruling at 11.

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 government responds to Mr. al Baluchi's motion by arguing that the military commission need not reconsider AE502BBBB because: the military commission's manner of statutory interpretation in AE502BBBB was already prohibited before the military commission issued its ruling; the military commission already reconsidered AE502BBBB *sotto voce*; and the laws of war in the 2009 MCA are different than the laws of war otherwise or they are ambiguous because the D.C. Circuit may be uncertain whether the laws of war are co-extensive with international law.[3]

None of the points the government raises in response to AE502HHHH suggest that AE502BBBB should not be reconsidered. Nevertheless, Mr. al Baluchi addresses them in turn. First, the Supreme Court's intervening decision in *Epic Systems* did significantly change the landscape of permissible statutory interpretation in a manner that undermines the validity of the military commission's decision in AE502BBBB. This point is obvious in light of the Court of Appeals for the Armed Forces' reaction to *Epic Systems*. Second, AE502HHHH is not a second motion by Mr. al Baluchi for reconsideration of AE502BBBB. AE502BBBB did not even apply to Mr. al Baluchi until 3 April 2019 when the military commission extended it to him in the very ruling that the government now recasts as a decision on reconsideration. Finally, the government's efforts to save the military commission's clear error in AE502BBBB by obfuscating the "laws of

[3] AE502IIII (GOV) Government Response to Mr. al Baluchi's Motion to Reconsider AE 502BBBB, Ruling.

war" are unsupported by the text of the 2009 Military Commissions Act, its legislative history, or judicial interpretations.

A. *Mr. al Baluchi's Motion to Reconsider AE 502BBBB satisfies the military commission's standard for reconsideration.*

The government asserts that Mr. al Baluchi has failed to demonstrate a change in law or facts that would justify the military commission reconsidering AE502BBBB.[4] Putting aside that Mr. al Baluchi moved for reconsideration of AE502BBBB on the basis of clear error,[5] the government simply misunderstands the significance of *Epic Systems* and of *Briggs*.[6] Contrary to the government's assertion, these cases do not merely recite a "standard canon of interpretation that has been in place for at least 100 years."[7] Indeed, if *Epic Systems*' proscription on replacing the text of the statute with judicial inference of legislative intent were as well trod as the

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[4] AE502IIII at 5.

[5] AE502HHHH at 11; *see also* 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)) ("Generally, 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.").

[6] The government's shallow understanding of *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and *United States v. Briggs*, 78 M.J. 289 (C.A.A.F. 2019), is made plain by its effort to paint Mr. al Baluchi's use of legislative history as inconsistent. AE502IIII at 11 n.14. The government claims that Mr. al Baluchi, by pointing out the history of caselaw analyzing the "laws of war," engages in "a legislative history type argument the type of which the Defense claims is prohibited by *Epic Systems*." *Id.* Notably, Mr. al Baluchi did not attempt replace any portion of the statute with some meaning divined from legislative history—the practice that the Court in fact barred in *Epic Systems*. Instead, Mr. al Baluchi employed the well accepted canons of construction that words should be given their ordinary meaning; that Congress is presumed to use the same term consistently across statutes; and that Congress is presumed to be aware of and adopt prior judicial interpretations of the language it uses. *See, e.g.*, *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 563 (2017) (defining the prior construction canon); *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1386 (2015) (same).

[7] AE502IIII at 6.

government would have the military commission believe, then the Court of Appeals for the Armed Forces would not have raised *Epic Systems* in *United States v. Briggs*.

It bears repeating[8] that in *Briggs*, the CAAF faced a question of statutory interpretation it previously answered 11 years earlier in *United States v. Lopez de Victoria*.[9] However, because the CAAF's earlier answer relied in part on legislative history and the Supreme Court decided *Epic Systems* in the intervening period, the CAAF felt compelled to both acknowledge that infirmity of its precedent and reiterate the non-legislative history bases for that precedent. The CAAF noted its previous reliance on legislative history with skepticism: "To the extent that legislative history might be relevant. . . ."[10] It then emphasized that "in the matter before us, however, no party has asked us to reconsider the approach of *Lopez de Victoria*" in light of *Epic Systems*.[11] Consequently, it reserved the question of "whether relying on legislative history is appropriate when determining whether statutory amendments apply retroactively."[12] None of the CAAF's analysis, including its acknowledgement that its precedent may be defective, would be necessary or make any sense if *Epic Systems* were so banal as the government treats it.

Moreover, the CAAF's treatment of *Epic Systems* in *Briggs* is particularly significant with respect to the military commission's decision in AE502BBBB and Mr. al Baluchi's motion for reconsideration. In AE502BBBB, in contrast to *Musacchio v. United States*,[13] the military

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[8] AE502HHHH at 17-20.

[9] 66 M.J. 67, 73-74 (C.A.A.F. 2008).

[10] *Briggs*, 78 M.J. at 293.

[11] *Id.* at n.5.

[12] *Id.*

[13] 136 S. Ct. 709, 716-718 (2016).

commission did not merely use legislative history as an interpretive guide. In *Musacchio*, the Court analyzed whether the statute of limitations in 18 U.S.C. § 3282(a) is jurisdictional. In determining that § 3282(a) is not jurisdictional, the Court began its analysis with the text of the statute, noting that "a time bar [is] jurisdictional only if Congress has 'clearly stated' that it is."[14] The Court quoted the statutory text and emphasized that "[a]lthough §3282(a) uses mandatory language, it does not expressly refer to subject-matter jurisdiction or speak in jurisdictional terms. The text of §3282(a) does not, therefore, provide a 'clear indication that Congress wanted that provision to be treated as having jurisdictional attributes.'"[15] The Court then looked to context, comparing § 3282(a) to 18 U.S.C. § 3231, the statute granting federal courts general subject-matter jurisdiction and emphasizing "Section 3231 speaks squarely to federal courts' 'jurisdiction,' in marked contrast to §3282(a), which does not mention "jurisdiction" or a variant of that term."[16] Only then did the Court look to the legislative history of § 3282(a) to confirm what the text and the context of the statute make clear.[17]

In this case, Congress specifically directed the military commission to utilize the laws of war to determine the existence of hostilities in 10 U.S.C. § 948a(9). Congress further specifically instructed the military commission to determine whether it possesses personal jurisdiction over charged defendants on the basis of the existence of hostilities in 10 U.S.C. §§ 948a(7)(A) and (B). Nevertheless, in AE502BBBB the military commission refused to determine its jurisdiction under §§ 948a(7)(A) and (B) by reference to the laws of war. Instead, in direct opposition to the Supreme

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[14] *Id.* at 717.

[15] *Id.*

[16] *Id.*

[17] *Id.*

Court's statement in *Epic Systems*, the military commission substituted a principle it derived from the statute's legislative history—that the "primary purpose" of the 2009 MCA is the trial of the men charged in the *United States v. Mohammad* military commission—for the text of the statute itself.

In contrast to the *Musacchio* decision upon which the government relies, in AE502BBBB, the military commission did not analyze the meaning of the text of 10 U.S.C. § 948a(9). Instead of examining whether the laws of war provide a standard for determining the existence of hostilities, the military commission asserted that the "laws of war" in their entirety are ambiguous. The military commission did not examine the context of the statute. It failed to compare Congress' incorporation of the laws of war in the 2009 MCA to any other provision of law in which Congress has invoked the laws of war. The military commission instead relied on legislative history alone to give meaning to § 948a(9)'s definition of hostilities.[18] The military commission made a finding that the "primary purpose" of the 2009 MCA is to facilitate trial of the men charged in the *United States v. Mohammad* military commission. Based on that finding, the military commission ignored the definition of hostilities—a "conflict subject to the laws of war"—and reasoned that whatever the substance of the laws of war that may not include any principle or proscription that would prevent the military commission from achieving the 2009 MCA's goal of trying the defendants in this case. In so doing, the military commission replaced a substantive body of law incorporated by the statute with a principle based on legislative history. That is, the military commission failed to "ask only what the statute means," and instead inquired exclusively as to "what the legislature

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[18] *Epic Sys.*, 138 S. Ct. at 1631 (admonishing the dissent for "rest[ing] on its interpretation of legislative history.").

meant."[19] Thus, even if the government were correct in its characterization of *Epic Systems* and *Briggs* as banal, the military commission clearly erred by divorcing its construction of § 948a(9) from the text of the statute.

Under the Supreme Court's intervening decision in *Epic Systems* and the CAAF's intervening warning in *Briggs*, the military commission's replacement of the text of § 948a(9) with its legislative-history-based principle is impermissible. The military commission's decision in AE502BBBB must therefore be reconsidered.

B. AE502HHHH is not a second motion to reconsider the military commission's erroneous determination in AE502BBBB.

Notwithstanding the government's effort to restyle the military commission's ruling in AE502FFFF as reconsideration of AE502BBBB, AE502FFFF is not a decision on a motion to reconsider. As an initial matter, AE502BBBB by its terms did not apply to Mr. al Baluchi[20] until the military commission extended it to him and the defendants other than Mr. al Hawsawi in AE502FFFF.[21] Indeed, the only reference to reconsideration in AE502FFFF concerned AE524LL, the suppression order giving rise to Mr. al Baluchi's motion for his promised pre-trial evidentiary hearing on personal jurisdiction—an order reconsidered by the military commission upon the government's motion.[22] Neither Mr. al Baluchi nor the government asked the military commission

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[19] *Id.*

[20] AE502BBBB at 19-20.

[21] AE502FFFF Ruling at 3 ("On 27 March 2019, at the suggestion of counsel for Mr. [al Baluchi], 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.").

[22] *Id.* at 5 ("[T]he Commission has reconsidered the suppression order that prompted Mr. [al Baluchi] to request a hearing in this series, negating the basis he asserted for setting aside the

to reconsider AE502BBBB. Instead, the question before the military commission was merely whether its ruling in AE502BBBB applied, "as a matter of law," to Mr. al Baluchi. And the military commission simply

> clarifie[d] . . . 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 so at all) as to offend the Constitution.[23]

Consequently, the military commission determined that "further litigation cannot reasonably shift this disposition with regard to the other four [defendants]. 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 [defendants]."[24] In reaching its conclusion in AE502FFFF, the military commission did not reconsider AE502BBBB but instead merely recapitulated its determination in AE502BBBB with respect to Mr. al Hawsawi and extended that decision to Mr. al Baluchi.

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deferral in AE 502QQQ. Accordingly, AE 502QQQ will remain undisturbed until its conditions are fulfilled.").

[23] *Id.* at 3-4.

[24] *Id.* at 4.

C. The laws of war are not ambiguous for purposes of determining the military commission's jurisdiction and the military commission's contrary ruling AE502BBBB represents clear error.

The "laws of war" are not ambiguous for purposes of defining the military commission's jurisdiction.[25] Moreover whatever uncertainty there may be as to the sources of persuasive authority for interpreting the laws of war,[26] that uncertainty is irrelevant here because there is no debate that law-of-war military commissions have jurisdiction over offenses against the laws of war and courts have in fact utilized the laws of war to resolve jurisdictional questions.

Congress neither wrote on a clean slate[27] nor wiped the slate clean when it enacted the 2009 Military Commissions Act. As Mr. al Baluchi previously briefed, long-standing and controlling authority establishes that the statutory phrase "law of war" or "laws of war" is unambiguous for at least purposes of defining the jurisdiction of law-of-war military commissions. "From the very beginning of its history [the Supreme] Court has recognized and applied the law

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[25] It is worth pointing out that the phrases "the laws of war" or "the law of war" appears throughout both the 2009 Military Commission Act and its predecessor statute. Rendering the "laws of war" ambiguous does substantial violence to the statute as a whole, making even certain offenses ambiguous and possibly unenforceable. *See, e.g.*, 10 U.S.C. §§ 948b(a) (defining the purpose of the military commissions by reference to the law of war); 948d (defining the jurisdiction of the military commissions by reference to the law of war); 950p(a)(3) (defining "protected property" for purposes of codified offenses as "any property specifically protected by the law of war"); 950t(13)(A) (defining the offense of intentionally causing serious bodily injury); 950t(15) (defining the offense murder in violation of the law of war); 950t(16) (defining the offense destruction of property in violation of the law of war); 950t(16) (defining the offense of perfidy).

[26] AE502IIII at 11-13; *see also Al Bahlul v. United States*, 767 F.3d 1, 22-23 (D.C. Cir. 2014) ("Bahlul contends that 'law of war' means the international law of war, full stop. The government contends that we must look not only to international precedent but also 'the common law of war developed in U.S. military tribunals.'").

[27] *Cf. Al Bahlul v. United States*, 767 F.3d 1, 22 (D.C. Cir. 2014) (Opinion for the Court).

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."[28] Congress has used this phrase to address questions of military commissions jurisdiction for over one hundred years.

In its response brief, the government strains to avoid Congress' and the courts' precedents of using and interpreting the "laws of war" by claiming that the 2009 Military Commission Act adopts a distinct but undefined meaning of that phrase.[29] As a result, according to the government, the military commission need not look at the Supreme Court's reliance on the laws of war in its *Quirin* and *Hamdan* decisions because those courts interpreted the UCMJ's invocation of the "laws of war,"[30] which is somehow different than the 2009 MCA's invocation of the "laws of war."[31]

There is no basis for the government's assertion that the "laws of war" incorporated by the 2009 MCA refer to a body of law different than that referenced by the UCMJ among other statutes. The government cites no textual support for its position. There is nothing in the 2009 MCA itself that suggests a novel meaning for the "laws of war." Indeed, Congress specifically endorsed a stable and historically-based meaning for the "laws of war" in the statute itself.[32] Moreover, Congress presumptively use terms consistently across statutes and when it invokes language in a new statute that was previously subject to judicial interpretation, that interpretation is carried

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

[29] AE502IIII at 11.

[30] Notably, *Quirin* preceded the promulgation of the Uniformed Code of Military Justice by eight years. Whatever supposedly distinct laws of war the Supreme Court analyzed in that case they were not the UCMJ's.

[31] *Id.*

[32] 10 U.S.C. § 950p(d) ("[T]he provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission.").

forward in the new statute.[33] And nothing in the text of the 2009 MCA hints at a rebuttal of that presumption.

The legislative history[34] of the 2009 MCA confirms that the Congress understood the "laws of war" in the statute to have the same meaning as that used by the Supreme Court in *Hamdan* and other decisions. For example, in the Conference Report for the fiscal year 2010 National Defense Authorization Act, the Senate Armed Services Committee recommended adoption of the 2009 Military Commissions Act and specifically cited the Supreme Court's interpretation of the law of war in *Hamdan*.[35] The 2009 MCA's legislative history also confirms that, across the evolution of the military commission system from the 2001 military order to the 2009 Military Commissions Act, an effort to bring the military commissions into greater conformity with the UCMJ in part to cure law-of-war defects.[36]

There is also no judicial support for the government's assertion that the "laws of war" incorporated by the 2009 MCA are somehow distinct from the "laws of war" referenced elsewhere by Congress. In fact, the D.C. Circuit's interpretation of the 2009 MCA's predecessor statute, the 2006 Military Commission Act, imbues the "law of war" with a meaning—at least for jurisdictional purposes—identical to that used by the Court in *Hamdan*:

> There are three traditional bases for military commission jurisdiction: military government, martial law and the law of war. *See Hamdan*, 548 U.S. at 595-98

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[33] *Armstrong*, 135 S. Ct. at 1386.

[34] Under *Epic Systems*, it appears that legislative history may remain a useful interpretive guide so long as legislative history is not used in place of the text itself.

[35] S. Rep. No. 111-35, at 175-176 (2009) (Conf. Rep.).

[36] *E.g.*, *id.*

> (plurality opinion); see also id. at 683 (Thomas, J., dissenting). . . . Third, and "utterly different" from the first two categories, military commissions may try *offenses against the law of war*. *Hamdan*, 548 U.S. at 596 (plurality opinion) (citation omitted). It is undisputed that the commission that tried Bahlul is of the third type: a law-of-war military commission.[37]

The D.C. Circuit reviewed the judicial authorities that supported the competing propositions that the "laws of war" are limited to international precedents or include domestic precedents, as well.[38] And common throughout its recitation of those authorities is the fact that the "laws of war" provide the jurisdictional limit of military commissions.[39]

Finally, the government's assertion that ambiguity in the "laws of war" springs from uncertainty over whether it is co-extensive with "'international law'"[40] is a red herring. First, the laws of war are a subset of international law; they are of course not co-extensive with international law. Second, it bears pointing out that the government has not previously identified this supposed ambiguity nor has this supposed ambiguity prevented the government from analyzing, interpreting, and advocating for law-of-war based positions in previous briefing.[41] Moreover, there is no

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[37] *Al Bahlul*, 767 F.3d at 7 (Opinion for the Court) (emphasis added).

[38] *Id.* at 23-24 (Opinion for the Court).

[39] *Id.* (Opinion for the Court).

[40] AE502IIII at 11 ("Likewise, the language in *Quirin* did not definitively equate the 'law of war' with 'international law.'").

[41] *E.g.*, AE488 (GOV) Government Response to Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction Due to the Absence of Hostilities at 7-8; AE488 (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 AE488 (MAH) at 15-18; AE494C (GOV) Government Response to Mr. al Baluchi's Notice of Declination of

question that the laws of war apply only to hostilities or armed conflict, which function as a limit on MCA military commission jurisdiction.[42] Indeed, the government has repeatedly argued that the laws of war, as summarized in member instructions, provide a standard to assess hostilities,[43] and even—in its view—limit the government's discovery responsibilities.[44] The government fails to cite any decision suggesting that the laws of war lack a judicially manageable standard for determining the existence of hostilities. Indeed, as Mr. al Baluchi points out in his motion to reconsider, the opposite is true.[45]

Most importantly, the government's recitation of the judicial debate over applicable precedent in determining the content of the laws of war does not assist its position because Mr. al Baluchi is not moving to reconsider AE502BBBB on the grounds that the military commission was bound to follow only international precedent. Mr. al Baluchi moved to reconsider AE502BBBB, in part, on the grounds that the military commission did not analyze the laws of war

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Joinder and Motion to Consider Other Arguments or For Relief Regarding AE494 (WBA) at 4-6; AE502O (GOV) Government Consolidated Response to AE 502L (MAH), Mr. Hawsawi's Witness List for the August 2017 Hearings, and AE 502J (AAA), Mr. al Baluchi's List of Potential Witnesses for Personal Jurisdiction Hearing at 4; Official/Unauthenticated Transcript of 25 March 2019 at 21794 (government representing that, under the 2006 Military Commissions Act it interpreted "armed conflict" as being defined by *Prosecutor v. Tadic*).

[42] *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1188-90 (C.M.C.R. 2011), *vacated*, 767 F.3d 1 (D.C. Cir. 2014) (*en banc*).

[43] *See, e.g.*, AE617E (GOV) / AE620D (GOV) Government Brief in Response to AE 617D/AE 620C, Order at 8-11.

[44] AE617A (GOV) Government Response to Mr. al Baluchi's Motion to Compel Communications from the International Committee for the Red Cross Concerning the Existence of an Armed Conflict 1996-2002; AE620A (GOV) Government's Response to Mr. al Baluchi's Motion to Compel Documents and Information Concerning United States Pre-9/11 Law-of-War Detainees Associated with al Qaeda.

[45] AE502HHHH.

in resolving that hostilities between the United States and al Qaeda pre-dated 9/11. Instead of analyzing the laws of war, the military commission selected and drew inferences from certain political acts in order to conclude that the political branches have made a finding that hostilities between the United States and al Qaeda existed sometime before 11 September 2001 when superior courts have already found that the political branches have made no such finding. It then impermissibly replaced the substantive content of the laws of war with a principle that whatever the laws of war may say, they cannot foreclose the military commission's jurisdiction over the men on trial in the *United States v. Mohammad* military commission.

As Mr. al Baluchi briefed in his initial motion, the military commission must reconsider its ruling in AE502BBBB because its ruling entailed three clear errors. First, the military commission erred by finding ambiguity in the "laws of war," as incorporated by § 948a(9) of the 2009 Military Commission. Second, the military commission erred by impermissibly replacing the text of § 948a(9) with the MCA's legislative history—a mode of statutory interpretation subsequently proscribed by the Supreme Court. Third, 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.

3. **<u>Attachments</u>:**

A. Certificate of Service

Very respectfully,

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

//s//
STERLING R. THOMAS
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Attachment A

CERTIFICATE OF SERVICE

I certify that on the 10th day of May, 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