

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

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE 502UUUU RULING Motions to Reconsider AE 502BBBB and AE 502FFFF 25 March 2020
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1. Procedural History.

a. On 25 April 2018, the Commission issued AE 502BBBB, in which it ruled that personal jurisdiction existed over Mr. Hawsawi because, *inter alia*, “hostilities . . . between the United States and al Qaeda . . . existed as of September 11, 2001, and for an indeterminate period before that date.”¹ On 3 April 2019, the Commission issued AE 502FFFF, in which it extended that determination to the other four Accused in this case.²

b. On 24 April 2019, Mr. Ali (a.k.a. al Baluchi) moved the Commission to reconsider AE 502BBBB.³ The Government responded to the contrary on 3 May 2019.⁴ On 6 May 2019, Mr. Hawsawi joined Mr. Ali’s motion.⁵

¹ 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).

² AE 502FFFF RULING, Mr. al Baluchi’s Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction, dated 3 April 2019, para. 3.a.

³ AE 502HHHH (AAA), Mr. al Baluchi’s Motion to Reconsider AE502BBBB Ruling, filed 24 April 2019.

⁴ AE 502III (GOV), Government Response to Mr. Ali’s Motion to Reconsider AE 502BBBB Ruling, filed 3 May 2019.

⁵ AE 502JJJ (MAH), Mr. al Hawsawi’s Notice of Joinder to AE 502HHHH (AAA), filed 6 May 2019.

c. Mr. Ali replied to the Government on 10 May 2019,⁶ and on 13 May 2019 partially declined to join Mr. Hawsawi's position.⁷

d. On 15 May 2019, the Government responded to Mr. Hawsawi's notice of joinder.⁸ On the same date, Mr. Mohammad declined joinder to Mr. Ali's motion to reconsider.⁹

e. On 22 May 2019, Mr. Hawsawi replied to the Government.¹⁰

f. On 13 June 2019, Mr. Ali supplemented his motion to reconsider,¹¹ and the Government responded on 27 June 2019.¹²

g. On 2 July 2019, Mr. Mohammad moved the Commission to reconsider AE 502FFFF in part.¹³ The Government responded on 16 July 2019,¹⁴ and Mr. Mohammad replied on 23 July 2019.¹⁵

h. On 8 August 2019, Mr. Hawsawi filed a supplement to his motion to reconsider AE 502BBBB.¹⁶ The Government responded on 21 August 2019.¹⁷

⁶ AE 502KKKK (AAA), Mr. al Baluchi's Reply to Government's Response to Mr. al Baluchi's Motion to Reconsider AE 502BBBB, filed 10 May 2019.

⁷ AE 502LLLL (AAA), Mr. al Baluchi's Motion to Decline Joinder In Part to AE502JJJJ (MAH) Mr. al Hawsawi's Notice of Joinder to AE502HHHH (AAA), filed 13 May 2019.

⁸ AE 502MMMM (GOV), Government Response To Mr. Hawsawi's Notice of Joinder to AE 502HHHH (AAA), filed 15 May 2019.

⁹ AE 502NNNN (KSM), Notice of Declination of Joinder to AE 502HHHH (AAA), filed 15 May 2019.

¹⁰ AE 502OOOO (MAH), Mr. al Hawsawi's Reply to AE 502MMMM (GOV), filed 22 May 2019.

¹¹ AE 502HHHH (AAA Sup), Mr. al Baluchi's Supplement to Mr. al Baluchi's Motion to Reconsider AE 502BBBB Ruling, filed 13 June 2019.

¹² AE 502PPPP (GOV), Government Response to AE 502HHHH (AAA Sup), Mr. Ali's Supplement to Mr. Ali's Motion to Reconsider AE 502BBBB Ruling, filed 27 June 2019.

¹³ AE 502QQQQ (KSM), Mr. Mohammad's Motion To Reconsider in Part AE 502FFFF Ruling, filed 2 July 2019.

¹⁴ AE 502RRRR (GOV), Government Response To Mr. Mohammad's Motion To Reconsider in Part AE 502FFFF Ruling, filed 16 July 2019.

¹⁵ AE 502SSSS (KSM), Mr. Mohammad's Reply To Government Response To Mr. Mohammad's Motion to Reconsider in Part AE 502FFFF Ruling, filed 23 July 2019.

¹⁶ AE 502HHHH (MAH Sup), Mr. al Hawsawi's Supplement to AE 502HHHH (MAH), Defense Motion to Reconsider Ruling in AE 502BBBB regarding Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, filed 8 August 2019.

¹⁷ AE 502TTTT (GOV), Government Response To Mr. Hawsawi's Supplement to AE 502HHHH (MAH), Defense Motion to Reconsider Ruling in AE 502BBBB Regarding Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, filed 21 August 2019.

2. **Oral Argument.** Having fully considered the detailed and comprehensive briefs filed by the parties, the Commission finds further oral argument in this series unnecessary to resolve these issues.¹⁸

3. **Law.**

a. **Burden of Proof.** As the moving party, the Defense bears the burden of proving any facts prerequisite to the relief sought by a preponderance of the evidence.¹⁹

b. **Reconsideration.** The Commission may reconsider any ruling (except the equivalent of a finding of not guilty) prior to authentication of the record of trial.²⁰ Either party may move for reconsideration, but granting of the request is in the Military Judge's discretion. 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.²¹ Motions for reconsideration are not appropriate to raise arguments that could have been, but were not, raised previously and arguments the Commission has previously rejected.²² Nor are motions for reconsideration appropriate for the proffer of evidence available when the original motion was filed, but, for unexplained reasons, not proffered at that time.²³

4. **Analysis.**

a. Having fully considered the filings of the parties, the Commission declines to reconsider either AE 502BBBB or AE 502FFFF. Given the unique circumstances of this case, for reasons already articulated in its prior rulings, the Commission remains persuaded that: (1)

¹⁸ The opportunity to orally argue pretrial motions is afforded at the discretion of the military judge. Rule for Military Commissions (R.M.C.) 905(h); R.C. 3.5.m.

¹⁹ R.M.C. 905(c)(1)-(2).

²⁰ R.M.C. 905(f).

²¹ See *U.S. v. Libby*, 429 F. Supp. 2d 46 (D.D.C. 2006); *U.S. v. McCallum*, 885 F. Supp. 2d 105 (D.D.C. 2012).

²² See *U.S. v. Booker*, 613 F. Supp. 2d 32 (D.D. C. 2009); *U.S. v. Bloch*, 794 F. Supp. 2d 15, 19 (D.D.C. 2011).

²³ See *Bloch*, 794 F. Supp. 2d at 19-20.

the determination that hostilities existed for purposes of personal jurisdiction here is a nonjusticiable political question; (2) neither international law nor the Constitution impede exercise of personal jurisdiction over the Accused in this case by military commission due to lack of hostilities; (3) the *Bensayah* decision²⁴ offers an appropriate analytical model for determining whether an accused was “part of al Qaeda;” and (4) the parties were sufficiently on notice that rulings made in the course of litigation of this series as to one party might significantly affect them as well. The Commission concludes the Defense has not properly identified any error or inconsistency in the overall conclusions reached in AE 502BBBB or AE 502FFFF that would warrant application of its discretionary reconsideration authority.

b. Based on the foregoing, and on its prior rulings in this and other relevant series, the Commission reaffirms its earlier conclusions that:

(1) Personal jurisdiction exists as to Mr. Hawsawi.

(2) The other Accused remain able to contest any element of personal jurisdiction other than the existence of hostilities at the time of the charged offenses.²⁵

(3) Until the Commission specifies otherwise, that portion of Mr. Ali’s personal jurisdiction challenge that remains unresolved will continue to be **DEFERRED** until his motion to suppress the letterhead memorandum statements is resolved.²⁶

²⁴ See AE 502BBBB, pp. 18-19 (discussing *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010)).

²⁵ Such motions will be filed in accordance with the guidance given in AE 502GGGG, Mr. al Baluchi’s Updated List of Potential Witness List for Personal Jurisdiction Hearings and Administrative Ruling Regarding Future Filings in the AE 502 Series 15 April 2019, paras. 4, 5.b.

²⁶ See AE AE 628 (AAA) UNCLASSIFIED NOTICE Mr. al Baluchi’s Motion to Suppress Alleged Statements as Involuntary and Obtained by Torture, filed 15 May 2019. This is a clarification and extension of the deferral previously articulated in AE 502QQQ Trial Conduct Order, Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, dated 18 January 2018, and continued in AE 502FFFF, para. 3.b and AE 502GGGG, para. 5.a(iii).

(4) At trial, the Government will be obligated to prove beyond reasonable doubt the substantive element that each charged offense occurred “in the context of and associated with hostilities.”²⁷

5. **Ruling.** The Defense motions to reconsider AE 502BBBB and/or AE 502FFFF are **DENIED**.

So **ORDERED** this 25th day of March, 2020.

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W. SHANE COHEN, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

²⁷ 10 U.S.C. 950p(c); *see also* AE 617K RULING, 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, dated 31 March 2019.