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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD;** **WALID MUHAMMAD SALIH** **MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED ADAM** **AL HAWSAWI**	**(U) AE 617E (GOV)/AE 620D (GOV)** **(U) Government Brief** In Response To AE 617D/AE 620C, Order 19 April 2019

1. (U) Timeliness

(U) The Prosecution timely files this Government Brief in response to AE 617D/AE 620C, Order.

2. (U) Overview

(U) For the reasons described below, as with any jury instructions, the Commission may modify the *Hamdan* and *Al Bahlul* hostilities instructions, and it may do so by (1) tailoring its instructions to the facts of this case and (2) instructing the panel members that the Commission has taken judicial notice of the existence of *de jure* hostilities between the United States and al Qaeda. The Commission should allow the panel members, through appropriately tailored instructions, to determine whether hostilities existed, and whether a sufficient nexus exists between the Accused's charged conduct and the hostilities between the United States and al Qaeda.

(U) Overview of Prosecution Response to Specified Issue No. 1(a): Yes. The existence of hostilities is a component of the common substantive element. *See infra* Subsection 4.I.A.

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~~(U)~~ Overview of Prosecution Response to Specified Issue No. 1(b): No. The Commission is not bound to use the same member instruction, verbatim, that was used in the *Hamdan* and *Al Bahlul* commissions and may properly tailor the instructions for this particular case. The United States Court of Military Commission Review ("U.S.C.M.C.R.") described the standards informing the *Al Bahlul* instruction as "illustrative" and "consistent with the law of armed conflict and the 2006 M.C.A.,"[1] and in *Hamdan* the U.S.C.M.C.R. concluded that "[t]he military commission judge properly instructed, and the military commission found beyond a reasonable doubt that this [hostilities] requirement was met."[2] The U.S.C.M.C.R. did not, however, foreclose tailoring an instruction to the facts presented in a subsequent case (especially one for which charges include the September 11, 2001 attacks themselves); clarifying aspects of the terms in the instruction; or the use of judicial notice. *See infra* Subsection 4.I.B.

~~(U)~~ Overview of Prosecution Response to Specified Issue No. 2: Yes. The Military Judge may take judicial notice of the existence and duration of *de jure* hostilities for purposes of 10 U.S.C. § 950p(c). However, the Military Judge should, after finalizing the instructions with the parties at trial, instruct the members "that they may, but are not required to, accept as conclusive" the Military Judge's determination on the common circumstances element. Military Commission Rule of Evidence ("M.C.R.E.") 201(g). *See infra* Subsection 4.II.

~~(U)~~ Overview of Prosecution Response to Specified Issue No. 3: Based on the historical treatment of questions related to the existence of hostilities in other circumstances, the existence of *de jure* hostilities for purposes of 10 U.S.C. § 950p(c) is a question for the political branches,

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[1] ~~(U)~~ *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1189-90 (U.S.C.M.C.R. 2011) (en banc), *rev'd in part on other grounds*, *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc).

[2] ~~(U)~~ *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1278-79 & n.54 (U.S.C.M.C.R. 2011) (en banc) (per curiam), *rev'd on other grounds*, *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).

which is entitled to wide deference and may be a non-justiciable political question. *See infra* Subsection 4.III.

~~(U)~~ Overview of Prosecution Response to Specified Issue No. 4: Yes. The existence of *de jure* hostilities for purposes of 10 U.S.C. § 950p(c) is subject to judicial notice as a legislative fact—or, alternatively, judicial notice of law. However, the Prosecution does not at this time anticipate requesting the Military Judge give that fact full legal effect as such. The uncertainty surrounding the doctrine of legislative facts counsels in favor of instructing the members "that they may, but are not required to, accept as conclusive" the Military Judge's determination on the common circumstances element. M.C.R.E. 201(g). *See infra* Subsection 4.IV.

3. ~~(U)~~ Facts

~~(U)~~ On 17 January 2019, Mr. Ali filed AE 617 (AAA), moving the Commission to compel the production of certain International Committee of the Red Cross ("ICRC") communications to the U.S. Government between 23 August 1996 and 31 December 2002. *See* AE 617D/AE 620C at 1. On 25 February 2019, Mr. Ali filed AE 620 (AAA), moving the Commission to compel discovery of all information regarding law-of-war detention operations and U.S. Government forum determinations for the prosecution of certain persons charged with crimes regarding the 7 August 1998 attacks on U.S. embassies in East Africa. *Id.* at 2. The Prosecution responded to both motions to compel by asserting that, *inter alia*, it had complied with its discovery obligations regarding "hostilities" information and that the Defense could not demonstrate the relevance and materiality of the requested information. *Id.*

~~(U)~~ On 4 April 2019, the Commission issued AE 617D/AE 620C, Order (hereinafter, the "Order"), which noted that the Commission had already determined that "hostilities existed at the time of the charged offenses for purposes of personal jurisdiction over all five Accused." *Id.* at 4 (citing AE 502BBBB ¶ 6.a.(3); AE 502FFFF ¶ 3.a.). However, the Commission observed that

10 U.S.C. § 950p(c) also "potentially place[s]" the existence of hostilities at issue. *Id.*; *see also id.* (observing further that the U.S.C.M.C.R. has found that 10 U.S.C. § 950p(c) "establish[es] an element common to all offenses tried by Military Commission"). The Commission also noted that the "precise contours of the proof requirements associated with 10 U.S.C. § 950p(c) will drive resolution of the various pretrial discovery motions . . . as well as significant procedural questions at trial." *Id.* Accordingly, the Commission ordered the parties to brief four specified issues regarding the "precise contours of the proof requirements" of hostilities. *Id.* at 4-5.

4. ~~(U)~~ Law and Argument

I. ~~(U)~~ Prosecution Response to Specified Issue No. 1(a): Yes. Proof of Existence of Hostilities (as Opposed to Nexus to Hostilities) Is a Component of the Common Substantive Element Established by 10 U.S.C. § 950p(c); Prosecution Response to Specified Issue No. 1(b): No. This Commission Is Not Bound To Use the Same Member Instruction, Verbatim, Used in *United States v. Hamdan* and *United States v. Al Bahlul*, But It Must Instruct on the Underlying Legal Standards and Guidelines Set Forth in Those Cases

A. ~~(U)~~ Prosecution Response to Specified Issue No. 1(a): Yes. Proof of Existence of Hostilities (as Opposed to Nexus to Hostilities) Is a Component of the Common Substantive Element Established by 10 U.S.C. § 950p(c)

~~(U)~~ The Military Commissions Act of 2009 ("2009 M.C.A.") authorizes the President of the United States to establish military commissions "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a)-(b). The 2009 M.C.A. provides that military commissions "shall have jurisdiction to try persons subject to this chapter," i.e., "[a]ny alien unprivileged enemy belligerent." *Id.* § 948c; *id.* § 948a(7) (defining "unprivileged enemy belligerent"). Such persons may be tried for "for any offense made punishable" by the 2009 M.C.A., "whether such offense was committed *before*, *on*, or *after* September 11, 2001." *Id.* § 948d (emphases added).

~~(U)~~ Subchapter VIII of the 2009 M.C.A., titled "Punitive Matters," enumerates the offenses "triable by military commission" that the 2009 M.C.A. codifies. *Id.* §§ 950t, 950p(d). Subsection 950p(c) of Subchapter VIII, titled "Common Circumstances," provides that "[a]n offense . . . is triable by military commission . . . only if the offense is committed in the context of and associated with hostilities." *Id.* § 950p(c). The 2009 M.C.A. defines "hostilities" as "any conflict subject to the laws of war." *Id.* § 948a(9).

~~(U)~~ Subsection 950p(c)'s text (and title), the context of its placement in Subchapter VIII, and its legislative history,[3] *see Musacchio v. United States*, 136 S. Ct. 709, 717 (2016), all indicate that Congress established the "hostilities" requirement as a "common" element of 2009 M.C.A. offenses. As such, the Manual for Military Commissions (2016 rev. ed.) ("M.M.C.") explicitly requires, as an element of most offenses,[4] that the Prosecution prove beyond a reasonable doubt that the conduct took place "in the context of" and was "associated with" hostilities.

~~(U)~~ Under the 2009 M.C.A. and the M.M.C., whether the charged conduct occurred "in the context of and associated with hostilities," 10 U.S.C. § 950p(c), is a mixed question of fact

[3] ~~(U)~~ On 6 September 2006, President George W. Bush "transmit[ted] for the consideration of the Congress draft legislation entitled the 'Military Commissions Act of 2006.'" PROPOSED LEGISLATION: MILITARY COMMISSIONS ACT OF 2006, H.R. DOC. NO. 109-133, at 1 (2006). The draft legislation contained a provision, § 950v(b), which made enumerated offenses triable by military commission "when committed in the context of and associated with armed conflict." *Id.* at 79. The 2006 M.C.A., as ultimately enacted into law, did not contain that provision. The 2007 M.M.C., however, required, as an element of most offenses, that the offense took place "in the context of and was associated with armed conflict." MANUAL FOR MILITARY COMMISSIONS, UNITED STATES, pt. IV (Crimes and Elements) at 3-20 (2007 ed.). The 2009 M.C.A. codified this element. *See* 10 U.S.C. § 950p(c) (2009) ("An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities.").

[4] ~~(U)~~ *See* M.M.C., pt. IV (Crimes and Elements) at 2-22 (2016 rev. ed.). *See also* 10 U.S.C. § 949a(a) (authorizing the Secretary of Defense to prescribe "[p]retrial, trial, and post-trial procedures, *including elements and modes of proof*" that are not "contrary to or inconsistent with" the 2009 M.C.A.) (emphasis added).

and law. The 2009 M.C.A.'s hostilities element requires the government to prove a "nexus between the charged conduct and an armed conflict." *Al Bahlul*, 820 F. Supp. 2d at 1188-89. The hostilities element "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." *Id.* at 1189.[5]

~~(U)~~ In considering whether the hostilities element has been satisfied, the military commission members must find, beyond a reasonable doubt, that hostilities of a sufficiently

[5] ~~(U)~~ In this regard, evidence at trial going to the "common circumstances" element of hostilities can serve to confirm the Commission's subject matter jurisdiction. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 837 (rev. 2d ed. 1920) ("[A] military commission cannot, (in the absence of specific statutory authority,) legally assume jurisdiction of, or impose a punishment for, an offence committed either before or after the war or other exigency authorizing the exercise of military power."). To the extent that "hostilities" therefore contributes to both personal and subject matter jurisdiction for military commissions, the alien unprivileged enemy belligerent ("A.U.E.B.") status of the accused parallels the military status of the accused in courts-martial. *See United States v. Al-Nashiri*, 191 F. Supp. 3d 1308, 1321 (U.S.C.M.C.R. 2016) (No. 14-001) (looking to how military courts have treated "status" post-*United States v. Solorio* to inform the U.S.C.M.C.R.'s understanding of "hostilities" and A.U.E.B. status in military commissions). In *United States v. Solorio*, 438 U.S. 435 (1987), the Supreme Court held that subject matter jurisdiction for a court-martial is satisfied when the accused "was a member of the Armed Services at the time of the offense charged," such that the prosecution need not establish a specific "service connection" of the offense charged. *Id.* at 450. *Solorio* thus instructs that "an inquiry into court-martial jurisdiction focuses on the person's status." *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012) (referencing *Solorio*). However, while the prosecution in most courts-martial need prove status only to the military judge and only by a preponderance of the evidence, *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002), the prosecution in military commissions must prove a nexus between the hostilities and the charged offenses as an element of the offense. *See, e.g.*, M.M.C., pt. IV (Crimes and Elements) ¶ 5(2)(b)(5). Accordingly, courts-martial in which the charged offense is a "purely military" offense serves as a more apt analogy, as in those cases the "status" of the accused is implicitly an element of the offense. *United States v. McDonagh*, 14 M.J. 415, 422 (C.M.A. 1983). In such cases, the prosecution must prove beyond a reasonable doubt the status of the accused at the time of the offense to the panel regardless of whether the military judge previously considered a challenge to jurisdiction on the same grounds. Here, likewise, the Prosecution must prove nexus to the panel beyond a reasonable doubt regardless of the Military Judge's ruling on the overlapping issue of hostilities in the context of a jurisdictional challenge. *See infra* Subsection 4.III.B.

intense and organized character existed, as opposed to armed violence that was too "isolated and sporadic" to constitute armed conflict. *Id.* The military commission may consider factors that relate to the "intensity and duration" of the armed violent acts between the United States and al Qaeda, including, for example, the number of casualties, the amount of property damage, whether there was "protracted" armed violence, the use of military weapons and tactics, the extent of al Qaeda's organization as an armed group, the extent to which the United States "employ[ed] the combat capabilities of its armed forces" against al Qaeda, and the statements of the United States and al Qaeda regarding the existence of an armed conflict. *Id.* at 1190. Although the members may consider the intentions of the United States and al Qaeda, as expressed by the leaders of the two parties to the conflict, the test for the existence of *de facto* hostilities is ultimately an "objective" one. *Id.* at 1189-90. Finally, the government must prove a sufficient "nexus [exists] between the charged conduct" and hostilities. *Id.* at 1188-89.[6]

~~(U)~~ Proof of the existence of hostilities is also a component of the common substantive element established by 10 U.S.C. § 950p(c). This is because the element requiring proof of a "nexus to" hostilities implicitly requires finding the "existence of" hostilities. Put another way, without "hostilities," an offense cannot occur "in the context of" or be "associated with"

[6] ~~(U)~~ The approach to the "hostilities" requirement reflected in the 2009 M.C.A., the Rules for Military Commissions ("R.M.C."), and the case law of the U.S.C.M.C.R. is also consistent with the practice of contemporary international war crimes tribunals. Those tribunals generally consider similar factors, including the "intensity" of the violence and the relative "organization" of the parties, in distinguishing between armed conflicts and internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, or other acts of a similar nature to which the law of war does not apply. *See, e.g.*, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment ¶¶ 559-62 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (requiring a showing that an armed conflict existed and that the acts of the accused were committed "within the context" of the armed conflict, and focusing on the "intensity of the conflict" and the "organization of the parties" to distinguish armed conflict from more sporadic violence that did not amount to armed conflict); *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), *reprinted in* 35 I.L.M. 32, 54-55 (1996) (same).

hostilities. Prior military commission practice in *Hamdan* and *Al Bahlul* concluded it was appropriate for the members to determine existence of *and* nexus to hostilities. Notably the U.S.C.M.C.R., sitting *en banc*, twice held that the military judges' instructions in those cases properly described the legal guidelines for the members' determination whether an "armed conflict" existed between the United States and al Qaeda.[7]

B. ~~(U)~~ Prosecution Response to Specified Issue No. 1(b): No. This Commission Is Not Bound To Use the Same Member Instruction, Verbatim, Used in *United States v. Hamdan* and *United States v. Al Bahlul*, But It Must Instruct on the Underlying Legal Standards and Guidelines Set Forth in Those Cases

~~(U)~~ The 2009 M.C.A., like the Uniform Code of Military Justice ("U.C.M.J."), requires that a military judge rule on all questions of law, including interlocutory questions. 10 U.S.C. § 949*l*(b)(1); *id.* § 851(b). The R.M.C., like the Rules for Courts-Martial ("R.C.M."), charge a military judge with giving "the members appropriate instructions on findings." R.M.C. 920(a); R.C.M. 920(a); *see also United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) ("The military judge must bear the primary responsibility for assuring that the jury properly is instructed on the elements of the offenses raised by the evidence as well as potential defenses and other questions of law."); *United States v. Killion*, 75 M.J. 209, 213 (C.A.A.F. 2016); *United States v. Wolford*, 62 M.J. 418, 420-21 (C.A.A.F. 2006) (observing that a military judge has a "duty to 'provide appropriate legal guidelines to assist the jury in its deliberations.'" (quoting *United States v. McGee*, 1 M.J. 193, 195 (C.M.A. 1975))); *United States v. Graves*, 1 M.J. 50, 53 (C.M.A. 1975) ("Irrespective of the desires of counsel, the military judge must bear the primary responsibility

[7] ~~(U)~~ *See Hamdan*, 801 F. Supp. 2d at 1278-79 & n.54 (quoting the military judge's hostilities instruction approvingly and concluding that "[t]he military commission judge properly instructed, and the military commission found beyond a reasonable doubt that this requirement was met"); *Al Bahlul*, 820 F. Supp. 2d at 1190 (quoting the military judge's hostilities instruction approvingly and concluding that "the requirement that the charged conduct occur 'in the context of and associated with an armed conflict,' as defined in the [2007] M.M.C. and by the military commission judge at trial are consistent with the law of armed conflict and the 2006 M.C.A.").

for assuring that the jury properly is instructed. . . . [C]ounsel do not frame issues for the jury; that is the duty of the military judge based upon his evaluation of the testimony related by the witnesses during the trial.").

(U) Military judges commonly rely upon the Benchbook,[8] but there is no statutory or regulatory requirement to do so.[9] Appellate courts have found it helpful when military judges explain any deviation from standard instructions. *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013); *United States v. Rush*, 54 M.J. 313, 315 (C.A.A.F. 2001); *United States v. Rush*, 51 M.J. 605, 609 (A. Ct. Crim. App. 1999) ("Because the standard Benchbook instructions are based on a careful analysis of current case law and statute, an individual military judge should not deviate significantly from these instructions without explaining his or her reasons on the record.").[10] Ultimately, the question is whether, "in the context of the entire charge . . . the

[8] (U) *See* U.S. DEP'T OF THE ARMY, PAMPHLET 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (Unofficial Version 18-0, Feb. 14, 2018) (hereinafter, the "BENCHBOOK"); *see also United States v. Newlan*, No. 201400409, 2016 CCA LEXIS 540, at *22 (N-M. Ct. Crim. App. Sept. 13, 2016) ("While military judges are encouraged to adhere to the Benchbook under normal circumstances, their obligation to tailor the instructions to the particular facts and issues in a case is paramount. Strict adherence to the Benchbook must give way to 'lucid guideposts' when required.").

[9] (U) *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013) ("While we agree that the Benchbook is not binding as it is not a primary source of law, the Benchbook is intended to ensure compliance with existing law."). By its own terms, the Benchbook "should be regarded as a supplement to the Uniform Code of Military Justice, as amended; the Manual for Courts-Martial, 2008 Edition; opinions of appellate courts; other departmental publications dealing primarily with trial procedure; and similar legal reference material. Statutes, Executive Orders, and appellate decisions are the principal sources for this Benchbook, and such publications, rather than this Benchbook, should be cited as legal authority." BENCHBOOK at Foreword.

[10] (U) *See also United States v. Williams*, 20 F.3d 125, 132 (5th Cir. 1994) ("Although the Pattern Jury Instructions provide a useful guide for the district courts, we have never required the trial courts in this Circuit to use any particular language in a jury charge."); *United States v. Masat*, 948 F.2d 923, 928 (5th Cir. 1991) ("Trial judges have substantial latitude in tailoring their instructions if they fairly and adequately cover the issues presented in the case."); *United States v. Dohan*, 508 F.3d 989, 994 (11th Cir. 2007) ("Although generally considered 'a valuable resource, reflecting the collective research of a panel of distinguished judges,' [Pattern Jury Instructions] are not binding[.]"); *United States v. Gonzalez*, 570 F.3d 16, 28-29 (1st Cir. 2009) (same); *United States v. Ridinger*, 805 F.2d 818, 821 (8th Cir. 1986) (same).

instruction completed its purpose." *United States v. Behenna*, 71 M.J. 228, 232 (C.A.A.F. 2012) (citing *Jones v. United States*, 527 U.S. 373, 391 (1999)).

~~(U)~~ Military commission practice has not yet resulted in a benchbook of common instructions upon which military commission judges may rely, but the U.S.C.M.C.R. has endorsed and approved the instructions provided in *Hamdan* and *Al Bahlul*. *See Hamdan*, 801 F. Supp. 2d at 1278 n.54; *Al Bahlul*, 820 F. Supp. 2d at 1189-90. In addition, in *United States v. Al-Nashiri*, the U.S.C.M.C.R. held that "the military judge erred when he required [the government] to offer evidence in a pretrial session on whether the offense was 'committed in the context of and associated with hostilities' under 10 U.S.C. § 950p(c)." *Al-Nashiri*, 191 F. Supp. 3d at 1328. The *Al-Nashiri* Court reasoned that it was inappropriate for the military judge to require the government to "offer pretrial evidence to establish that the offenses were committed in the context of and associated with hostilities, and thus erred when he dismissed the affected charges." *Id.* at 1311. Although the issue addressed in *Al-Nashiri* was jurisdiction, the court's reasoning is instructive because it ultimately concluded that the jurisdictional question "raises factual questions that are interwoven with the issues on the merits" whose resolution "must be deferred until trial." *Id.* at 1327-28.

~~(U)~~ Here, the Commission must appropriately instruct the members. R.M.C. 920(a). The Commission may also "summarize and comment upon evidence *in the case* in instructions." R.M.C. 920(e)(7), Discussion (emphasis added). The duty of a military judge to provide appropriate instructions, and broad discretion under the R.M.C. to craft them, is contrary to confining a military judge to the same instructions, verbatim, that were provided in a case involving different evidence.

~~(U)~~ The Commission may, for instance, supplement or clarify its hostilities instruction with definitions provided by other authoritative sources. *See, e.g.*, U.S. Dep't of Defense, Mil.

Comm'n Instruction No. 2 ¶ 5.C (Apr. 30, 2003) (defining "in the context of and was associated with armed conflict"). The U.S.C.M.C.R.'s opinions are not to the contrary. For example, the U.S.C.M.C.R. described the *Al Bahlul* instruction as "illustrative" and "consistent with the law of armed conflict and the 2006 M.C.A.,"[11] and in *Hamdan* the U.S.C.M.C.R. concluded that "[t]he military commission judge properly instructed, and the military commission found beyond a reasonable doubt that this [hostilities] requirement was met."[12] The U.S.C.M.C.R., however, did not foreclose tailoring the instruction to the facts presented in a subsequent case; clarifying aspects of the terms in the instruction; or the use of judicial notice. This is especially true in light of the fact that neither Mr. Hamdan nor Mr. Al Bahlul were (as the five Accused in this case are) charged as principals in the same September 11, 2001 attacks that Congress statutorily recognized in conferring jurisdiction to this Commission. 10 U.S.C. § 948d. Thus, although the Commission is not bound to use the instructions from *Hamdan* or *Al Bahlul*, *verbatim*, the Commission *is* bound by the underlying legal standards, or guidelines, as articulated in the *Hamdan* and *Al Bahlul* instructions, in drafting its eventual instructions in this case.

~~(U)~~ The Prosecution has already produced a substantial amount of hostilities-related discovery to the Defense,[13] and the Defense can challenge the Prosecution's sufficiency of evidence in establishing the existence of hostilities and the nexus of the Accused's charged conduct to the hostilities. The Defense cannot, however, create its own legal standard for hostilities by arguing irrelevant non-kinetic actions of other federal agencies to prove the non-existence of hostilities. Nor is it entitled to discovery in order to do so. That said, at the conclusion of trial on the merits, and before closing arguments, both parties will be in a position

[11] ~~(U)~~ *Al Bahlul*, 820 F. Supp. 2d at 1189-90.

[12] ~~(U)~~ *Hamdan*, 801 F. Supp. 2d at 1278-79 & n.54.

[13] ~~(U)~~ To date, the Prosecution has produced to the Defense 197 documents totaling approximately 1878 pages regarding this category of information.

to provide input to the Commission on tailoring proposed instructions, in accordance with R.M.C. 920(c), based on the admissible evidence before the members at that time.[14]

II. ~~(U)~~ Prosecution Response to Specified Issue No. 2: Yes. The Military Judge May Take Judicial Notice of the Existence and Duration of *De Jure* Hostilities for Purposes of 10 U.S.C. § 950p(c), While Reserving the Question of Nexus to Hostilities to the Panel and Instructing the Members They Are Not Required To Accept His Finding on the Common Circumstances Element

~~(U)~~ The Military Judge may take judicial notice of the existence and duration of *de jure* hostilities for purposes of 10 U.S.C. § 950p(c), while reserving the question of nexus to hostilities to the panel and instructing the members that they are not required to accept the Military Judge's factual determination on the common circumstances element as conclusive. In the 2009 M.C.A. (and its 2006 predecessor), Congress and the President determined that hostilities existed between the United States and al Qaeda, for purposes of the 2009 M.C.A., "before," "on," and "after" September 11, 2001. 10 U.S.C. § 948d. The 2009 M.C.A., however, did not specify precisely *when* "before" September 11, 2001 hostilities began. As discussed further in Subsection 4.IV below, the Military Judge may take judicial notice of, and instruct the panel on, the law; namely, that Congress and the President have determined that hostilities have existed from *at least* some time before September 11, 2001.[15] Although not as significant in this

[14] ~~(U)~~ The Defense has also sought to justify otherwise immaterial and unbounded discovery of hostilities-related information. *Compare* AE 620 (AAA) at 15, *with* AE 620A (GOV) at 6-11 (arguing that the information sought is not a prerequisite to the establishment of armed conflict and it may only serve to mislead the ultimate factfinder).

[15] ~~(U)~~ The Prosecution previously articulated this point to the Commission during oral argument on 27 March 2019. *See* Unofficial/Unauthenticated Transcript at 22645, *United States v. Mohammad* (Mil. Comm'n Mar. 27, 2019) (argument of Managing Trial Counsel) ("So our position all along was, Judge, just decide this legally. Decide the issue of hostilities legally. The nexus to hostilities is a different issue, and I will accept the fact that it is a different issue. But the existence of hostilities now has been decided as a matter of law for everyone . . . ."); *id.* at 22648 ("So there is some conflation of the *Hamdan* standard, and you have to understand what the government's position all along was. The government's position all along is just decide [the existence of hostilities] as a matter of law.").

case, which charges the Accused as principals in the September 11, 2001 attacks themselves, the Military Judge should still reserve for the panel the question of *when* before September 11, 2001 *de facto* hostilities began, which may be relevant to whether charged conduct has a nexus to the *de jure* hostilities between United States and al Qaeda that the political branches have recognized.

(U) The Military Judge should "instruct the members on questions of law and procedure which may arise." R.M.C. 801(a)(5); R.C.M. 801(a)(5) (same); *see also* 10 U.S.C. § 949*l*(b)(1) ("The military judge in a military commission under this chapter shall rule upon all questions of law[.]"); *id.* § 851(b) ("The military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings[.]"). However, in instructing the panel on questions of law, the Military Judge should not remove the statutory duty of the members to determine whether the Prosecution has met its burden to establish each element of the offenses beyond a reasonable doubt. *See id.* § 949*l*(c) (requiring the military judge to instruct members on the elements of the offense and specifying that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States); *id.* § 851(c) (same); *United States v. New*, 55 M.J. 95, 210 (C.A.A.F. 2001) (holding that the military judge may determine the lawfulness of an order in a U.C.M.J. Article 92 case because the issue of "lawfulness" was a question of law and not an element of the offense); *see also United States v. Gaudin*, 515 U.S. 506, 522-23 (1995) (holding that the Sixth Amendment guarantees a defendant the right to have a jury determine guilt beyond a reasonable doubt, so the judge may not withhold the determination of "materiality" of a false official statement from the members, assuming "materiality" is an element of the offense); *United States v. Jones*, 480 F.2d 1135, 1139 (2d Cir. 1973) ("Here, the court's instruction correctly left the factual element—the locus of the crime—

to the jury, while reserving the question of law—whether the federal government had accepted jurisdiction—to itself.").

(c) In cases in which questions of law inherently encompass an element of the offense, judges resolve these competing duties by instructing panel members on the law *and* informing the members that they must still determine whether the government has proven the element beyond a reasonable doubt. *See, e.g.*, BENCHBOOK § 3-37-1 n.9 ("When judicial notice that the alleged substance is a scheduled controlled substance under the laws of the United States is taken an instruction substantially as follows should be given: (_____) is a controlled substance under the laws of the United States." (citing *United States v. Gould*, 536 F.2d 216 (8th Cir. 1976))); *see also United States v. Mead*, 16 M.J. 270, 277 (C.M.A. 1987) (holding that the military judge may take judicial notice of a fact even if the fact is an element of the offense, but the judicial notice and accompanying instruction do not remove the duty of the panel to determine whether that element has been established).

(d) In *Gould*, the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") upheld an instruction that cocaine hydrochloride was a schedule II-controlled substance, and explained that the trial court must continue to instruct the panel on the law, even if that instruction essentially establishes an element of the offense:

> It is undisputed that the trial judge is required to fully and accurately instruct the jury as to the law to be applied in a case. . . . The District Court was not obligated to inform the jury that it could disregard the judicially noticed fact. In fact, to do so would be preposterous, thus permitting juries to make conflicting findings on what constitutes controlled substances under federal law.

536 F.2d at 220. In *New*, the Court of Appeals for the Armed Forces ("C.A.A.F.") likewise reasoned that the lawfulness of an order was a question of law, in part, because "if the issue of lawfulness were treated as an element that must be proved in each case beyond a reasonable doubt, the validity of regulations and orders of critical import to the national security would be

subject to unreviewable and potentially inconsistent treatment by different court-martial panels." 55 M.J. at 105. The same concerns exist here where the *de jure* existence of hostilities between the United States and al Qaeda, which has been determined by two Congresses and two Presidents, should not be inconsistent amongst the various commission cases referred against al Qaeda members.

(U) As stated in Subsection 4.I.A above, proof of the existence of hostilities is implicitly a component of the common substantive element established by 10 U.S.C. § 950p(c) for most offenses under the M.C.A. Therefore, the members, not the Military Judge, must determine whether the Prosecution has met its burden to establish existence of hostilities beyond a reasonable doubt. However, the Military Judge may still instruct the panel on the existence of *de jure* hostilities. Similar to the reasoning by the Eighth Circuit and C.A.A.F., instructing the panel on the law regarding the existence of hostilities would ensure uniform understanding and application of an important legal issue: whether and (generally) when hostilities between the United States and al Qaeda began.

(U) Rather than leave such a question to separate panels that may issue contradictory verdicts, the Constitution places the general duty of determining the existence of hostilities in the political branches and, as described in Subsections 4.III and 4.IV below, they have done so in, among other places, the 2006 M.C.A. and the 2009 M.C.A. The Military Judge should instruct the panel on that resulting law—i.e., hostilities existed before, on, and after September 11, 2001—and the panel should evaluate the evidence and determine whether the offense took place within the context of and was associated with those hostilities.

(U) This treatment of mixed questions of law and fact is consistent with the practice in Article III courts. For example, in *United States v. Jones*, the United States Court of Appeals for the Second Circuit ("Second Circuit") considered the trial judge's instruction in a case in which

an element of the offense was whether the offense occurred on land within the special territorial jurisdiction of the United States. 480 F.2d at 1137-38. The trial judge instructed the panel on that element and further instructed the panel that, as a matter of law, the locale in which the witnesses testified the offense occurred, a Veterans Administration Hospital, was within the special territorial jurisdiction of the United States. The Second Circuit upheld the conviction and endorsed the trial judge's instruction, reasoning that "the court's instruction correctly left the factual element—the locus of the crime—to the jury, while reserving the question of law—whether the federal government had accepted jurisdiction—to itself." *Id.* at 1139. Here, judicial notice of *de jure* hostilities would correctly leave the question of fact—*de facto* hostilities and the overarching element of nexus—to the panel, while reserving the question of law—*de jure* hostilities—for the Military Judge.

III. ~~(U)~~ Prosecution Response to Specified Issue No. 3: Based on the Historical Treatment of Questions Related to the Existence of Hostilities in Other Circumstances, the Existence of *De Jure* Hostilities for Purposes of 10 U.S.C. § 950p(c) in this Case Is a Question for the Political Branches, Which Is Entitled to Wide Deference and May Be a Non-Justiciable Political Question

~~(U)~~ Whether the existence of hostilities for the purpose of instructing members (or a jury) on a common element is a non-justiciable political question is an issue of first impression, as there appear to be no historical instances where the existence of hostilities was specifically made an element of a criminal offense, and the 2006 M.C.A. was the first codification by Congress of the elements of the various offenses under the law of war. However, courts have consistently considered the "existence and duration" of hostilities to be a question for the political branches of government, finding the question falls either within the ambit of the political question doctrine or, if not strictly analyzed under the political question doctrine, is a matter in which the political branches are entitled to wide deference.

~~(U)~~ In either case, courts will accept and defer to political branch determinations on the existence of hostilities whenever possible. This fact, in addition to the prior practice of military commissions convened under the 2006 M.C.A.[16] of instructing members to find both the "existence of" hostilities and the "nexus to" hostilities for most charged offenses, suggests this Commission should leave the factual determination of the existence of hostilities to the members.[17] Thus, the Commission should continue to treat the *de jure* existence of hostilities some time before, on, and after September 11, 2001 as having been determined by the political branches, irrespective of whether it does so as a result of the wide deference traditionally afforded to the political branches or because it regards the question to be a non-justiciable political one.

A. ~~(U)~~ The History of the Legal Determination of the Existence of Hostilities Shows that Such a Determination When Applied to Jurisdiction Is Either Entitled to Wide Deference or Is Treated as a Non-Justiciable Political Question

~~(U)~~ In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court reviewed and catalogued the historical treatment of certain issues as "non-justiciable" due to the political nature or characteristics of the issue. In so doing, the Court articulated the existence of the "political question doctrine," and it described several factors to determine whether an issue falls within the doctrine's ambit.[18] Each *Baker* factor is independent, meaning only one of the factors must be

[16] ~~(U)~~ *See* PUB. L. NO. 109-366, § 3(a), 120 Stat. 2600, 2603 (codified at 10 U.S.C. § 948d (2006 & Supp. II 2008)).

[17] ~~(U)~~ As explained in Subsection 4.IV, *infra*, the Commission should provide the members with a tailored instruction on the elements, including an instruction on the finding that *de jure* hostilities existed with al Qaeda before, on, and after September 11, 2001.

[18] ~~(U)~~ These factors include: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially manageable standards for resolving the issue; (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of the government; (5) an unusual need for unquestioning adherence to a political decision already

"inextricably present" to make an issue a non-justiciable political question. *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1362 (D.C. Cir. 2004).

~~(U)~~ One of the principal political acts or statements regarding the existence of hostilities in this case is the provision of the 2009 M.C.A., in which Congress granted military commissions jurisdiction to try offenses against the law of war "whether such offense was committed before, on, or after September 11, 2001." 10 U.S.C. § 948d. This statement is in addition to (1) Congress's determination in the 2009 M.C.A. that any individual who "was a part of al Qaeda at the time of the alleged offense" is an "unprivileged enemy belligerent," *id.* § 948a(7)(C), subject to trial by military commission; and (2) Congress's prior statement in the 2006 M.C.A. that military commission jurisdiction embraces any offense committed by an "alien unlawful enemy combatant before, on, or after September 11, 2001." *See* PUB. L. NO. 109-366, § 3(a), 120 Stat. 2600, 2603. All of these provisions were approved by two Presidents when they signed the 2006 M.C.A. and the 2009 M.C.A. into law, and thus these provisions constitute a determination by the "undivided whole" of the federal government that hostilities existed *before* September 11, 2001. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

~~(U)~~ As "military commissions are a part of the war effort," *Al Maqaleh v. Hagel*, 738 F.3d 312, 330 (D.C. Cir. 2013) (citing *In re Yamashita*, 327 U.S. 1, 11-12 (1946)), the decision by the "undivided whole" of the political branches of government to employ them in the 2006 M.C.A. and the 2009 M.C.A. to try offenses that occurred "before, on, or after September 11, 2001," is perhaps one of the strongest public acts determining the existence of hostilities for

made; and (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker*, 369 U.S. at 217.

purposes of military commission jurisdiction in the long history of such determinations observed in American courts.[19]

(U) Throughout our nation's history, courts, including the Supreme Court, have consistently held that the absence or existence of hostilities is a question for the political branches. *See, e.g.*, *The Tropic Wind*, 28 F. Cas. 218, 219 (C.C.D.D.C. 1861) (No. 16,541a) ("Whether a war exists or not is a political question which is to be answered exclusively and conclusively, as to the courts of the United States, by the executive government of the United States, and not by the opinion of the court or bar, or that of all the foreign nations.") (citations omitted); *see also Baker*, 369 U.S. at 213 (listing as a category of "representative cases" of the "political question doctrine" those that raise the issue of the "[d]ates of duration of hostilities"); *Al-Alwi v. Trump*, 901 F.3d 294, 299 (D.C. Cir. 2018) (stating that the existence and termination of hostilities "is 'a political act'" to be determined by the political branches) (quoting *Ludecke v. Watkins*, 335 U.S. 160, 168-69 (1948)).

(U) Because courts have so consistently noted the political nature of the question of the existence of hostilities, courts have generally only described the individual distinguishing features amongst all duration-of-hostilities cases in terms of the context in which they arose, or in the varied content of declarations or acts by the political branches. For example, in the early part of the Civil War, the Supreme Court looked to the actions and statements of President Abraham Lincoln before Congress enacted appropriate legislation. *See The Prize Cases*, 67 U.S.

[19] (U) The determinations by two Congresses and two Presidents to employ law-of-war military commissions via the 2006 M.C.A. and the 2009 M.C.A. followed the President's 2001 determination to employ law-of-war military commissions. *See* Mil. Order § 1(a), 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001) (referencing the East Africa embassies attacks of August 1998, the U.S.S. COLE attack of October 2000, and the attacks of September 11, 2001 in finding that attacks by "al Qaida . . . on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict").

(2 Black) 635, 670 (1863) (stating that whether hostilities exist such that the persons involved obtain the "character of belligerents, is a question to be decided by [the President], and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted"). After the Civil War, the Court was compelled to determine certain dates for the beginning and end of hostilities in order to adjudicate claims under statutes that were only in effect for specific time periods after "the suppression of the rebellion," *see United States v. Anderson*, 76 U.S. (9 Wall.) 56 (1870), or to determine the effect of statutes of limitations that were tolled during wartime, *see, e.g.*, *The Protector*, 79 U.S. (12 Wall.) 700 (1871). However, in these cases, the Supreme Court held that it must look to the political branches for the determination of the beginning or end of hostilities. *See Anderson*, 76 U.S. at 71 ("As Congress, in its legislation for the army, has determined that the rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question . . . . That day will, therefore, be accepted as the day when the rebellion was suppressed."); *The Protector*, 79 U.S. (12 Wall.) at 701-02 (finding that "it would be difficult, if not impossible, to say on what precise day" hostilities began or ended, making it "necessary, therefore, to refer to some public act of the political departments of the government to fix the dates").

~~(U)~~ During World War I, the Supreme Court addressed the existence of hostilities in various contexts, including the operative time period for statutes based on the existence of a "war emergency," *see Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146 (1919), and a habeas petition challenging a court-martial conviction for an offense that would be invalid if committed "in time of peace" under Article 92 of the 1916 Articles of War, *see Kahn v. Anderson*, 255 U.S. 1 (1920). In these cases, the Court looked to congressional intent as to the application of the statutes tied to the existence of a "war emergency" or the existence of a time of

war. *See Hamilton*, 251 U.S. at 163 (upholding the War-Time Prohibition Act and stating "that to Congress in the exercise of its powers, not least the war power, upon which the very life of the nation depends, a wide latitude of discretion must be accorded"); *Kahn*, 255 U.S. at 9-10 (upholding court-martial conviction obtained after the 11 November 1918 Armistice but before "complete peace, in the legal sense, had [] come to pass," and holding that the words "in time of peace" in Article 92 of the 1916 Articles of War "signifies peace in the complete sense, officially declared" (citing *McElrath v. United States*, 102 U.S. 426, 438 (1880))).

~~(U)~~ During and after World War II, the Supreme Court again was confronted with questions surrounding the existence of hostilities, and the Court removed any doubt that such questions were questions for the political branches. In *In re Yamashita*, perhaps the most well-known military commission case to confront the question of the existence of hostilities, the Supreme Court confirmed the military commission's jurisdiction to try a Japanese general accused of war crimes during World War II, even though the trial took place after the Japanese had surrendered and active fighting had ceased. In finding that hostilities still existed for purposes of exercising "the war power" that provided the "authority to convene the commission," the Court explained that it "cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government." *Yamashita*, 327 U.S. at 12 (citation omitted). The Court concluded that, as peace had not been proclaimed by the political branch, the existence of hostilities for the purposes of convening the commission had been determined in that the "conduct of the trial by the military commission has been authorized by the political branch of the Government, by military command, by international law and usage, and by the terms of the surrender of the Japanese government." *Id.* at 13.

(U) Two years later, in *Ludecke v. Watkins*, the Court held that the existence of hostilities for purposes of the President's power to deport aliens under the Alien Enemy Act was a question for the political branches. The Court upheld the President's authority to remove Mr. Ludecke, a German alien living in the United States, to Germany in 1948, nearly three years after Germany had surrendered, explaining that the "political branch of the Government has not brought the war with Germany to an end. On the contrary, it has proclaimed that a 'state of war still exists.'"[20] *Ludecke*, 355 U.S. at 170. The Court explained that it "would be assuming the functions of the political agencies of the Government to yield to the suggestion that the unconditional surrender of Germany and the disintegration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace." *Id.* The Court concluded, "[t]hese are matters of political judgment for which judges have neither technical competence nor official responsibility." *Id.* Finally, the Court again confirmed the nature of the existence of hostilities as a political question when, after noting that the President had declared that a state of war still existed on 31 December 1946, the Court found that it was not until Congress passed a joint resolution terminating the state of war between the United States and Germany on 19 October 1951 that the existence of hostilities legally ended for purposes of war-time statutes like the Alien Enemy Act. *See United States ex rel. Jaegeler v. Carusi*, 342 U.S. 347, 348 (1952).

(U) Finally, courts confronted with similar questions about the existence of hostilities during the current conflict with al Qaeda have continued to follow the long history of recognizing that the determination of the existence of hostilities is a question for the political branches. *See, e.g.*, *Al-Alwi*, 901 F.3d at 299-300 (finding that, "in the absence of a contrary

[20] (U) The Proclamation by President Harry S. Truman, signed on 31 December 1946, stated, in part, that "[a]lthough a state of war still exists, it is at this time possible to declare, and I find it in the public interest to declare, that hostilities have terminated." President Harry S. Truman, Proclamation No. 2714, 12 Fed. Reg. 1 (Dec. 31, 1946) (published Jan. 1, 1947).

Congressional command," the Executive Branch's determination that hostilities in Afghanistan still exists "controls"); *Al Maqaleh*, 738 F.3d at 330 ("Whether an armed conflict has ended is a question left exclusively to the political branches.") (citations omitted), *vacated as moot by Al-Najar v. Carter*, 135 S. Ct. 1581 (2015); *Al-Bihani v. Obama*, 590 F.3d 866, 874-75 (D.C. Cir. 2010) ("The determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration . . . ." (citing *Ludecke*, 335 U.S. at 168-70)).

~~(U)~~ Military courts have similarly long understood that the existence of hostilities is a determination to be made by the political branches. Military tribunals, have also had to determine the existence of hostilities, or lack thereof, for purposes of the tribunal's jurisdiction over an offense. In such cases, military courts look to the political branches for determination whether an offense was committed in time of peace or in time of war. *See, e.g.*, Review from G. N. Lieber, J. Advoc. Gen., to the Secretary of War at 2-4 (July 13, 1899) (Gen. Courts-Martial Records No. 11648) ("The Peace Proclamation of the President relating to the Spanish-American War having been issued on April 11th, 1899, and the trial of Private Bobo having been begun on May 12th, 1899, it follows that this soldier was tried in time of peace for a crime committed in time of war. . . . As punishment can only be imposed under the 58th Article of War 'in time of war', and as it was not time of war when the sentence in this case was imposed, the court-martial was without jurisdiction in its proceedings and the sentence is illegal and should be set aside, and it is so recommended.") (recommendation approved July 28, 1899 by G. D. Meiklejohn, Acting Sec'y of War)[21]; *see also Yamashita*, 327 U.S. at 13 ("The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government").

[21] ~~(U)~~ *See* Rev. Stat. § 1342 (2d ed. 1878) (Art. 58 of 1874 Articles of War).

~~(U)~~ Thus, courts have consistently treated the existence and duration of hostilities as a question for the political branches to decide—either through wide deference to such determinations or by considering the issue a non-justiciable political question. This history makes it clear that, regardless of how the issue is characterized, the Commission should continue to recognize the *de jure* existence of hostilities as previously determined by the political branches. However, as explained below, the *de jure* existence of hostilities should not completely remove the determination of the existence of hostilities from the members.

B. ~~(U)~~ The Determination of the "Existence of" Hostilities Made by the Political Branches Is Tied to the Commission's Jurisdiction, Which Does Not Preclude the Members from Finding the "Existence of" Hostilities as a Common Element to the Extent Necessary To Find the Charged Conduct Has a "Nexus to" Hostilities

~~(U)~~ The unbroken history of courts' wide deference to the political branches on the determination of the existence of hostilities has been in situations generally tied to the availability of the exercise of the war powers or, in the criminal context, to the jurisdiction of the tribunal. However, in this case, the Commission has already correctly determined that it has jurisdiction over pre-September 11, 2001 conduct in accordance with the determination of the political branches. *See* AE 502FFFF at 4; AE 502BBBB at 7-9.

~~(U)~~ In addition to making the clear statements in the 2009 M.C.A. that hostilities existed, for the purposes of military commission jurisdiction, "before, on, [and] after September 11, 2001," Congress also included a reference to "hostilities" as a common element to the offenses triable by 2009 M.C.A. commissions. *See* 10 U.S.C. § 950p(c); M.M.C., pt. IV (Crimes and Elements). In AE 617D/AE 620C, the Commission ordered briefing on whether 10 U.S.C. § 950p(c) means only the "nexus" of the alleged conduct to a previously established period of hostilities. This is a logical interpretation of 10 U.S.C. § 950p(c). However, prior military commissions convened under the 2006 M.C.A. left the question of whether hostilities existed as

an aspect of the nexus question for the members to decide. *See Hamdan*, 801 F. Supp. 2d at 1278 n.54; *Al Bahlul*, 820 F. Supp. 2d at 1188-90. The legal standards informing these instructions were subsequently upheld as "proper" by the U.S.C.M.C.R. *See id.* Under these circumstances, the Prosecution believes the existence of hostilities should go to the members as an aspect of their overall nexus determination of "in the context of and associated with hostilities." However, as explained below, the Military Judge can and should (1) take judicial notice of the existence of *de jure* hostilities between the United States and al Qaeda, (2) instruct the members of that fact, (3) instruct them "that they may, but are not required to, accept as conclusive" the Military Judge's determination on the common circumstances element, and (4) permit the Defense the opportunity to rebut that determination before the members with the relevant information in the completed discovery the Prosecution has provided.

~~(U)~~ Meanwhile, although the Defense purports to ground its claims to vast discovery regarding pre-9/11 law-of-war detention operations and forum determinations upon a so-called jurisdictional challenge, *see* AE 620 (AAA) at 7 & n.15, the Commission should here approach hostilities for jurisdictional purposes as guided by the U.S.C.M.C.R. in its 2016 decision in *Al-Nashiri*[22] and as implemented by the Military Judge during the *Al Bahlul* trial. Whether this Commission has jurisdiction to proceed to trial on the merits is a straightforward matter. Section 948d of the 2009 M.C.A. is controlling. The structure, location, and text of Section 948d reveal that the jurisdictional test is whether the Accused had A.U.E.B. status when he committed these properly pleaded and referred offenses under the 2009 M.C.A. It is well-established that trial courts may rely on allegations in the charge sheet for the purpose of determining the offense prong of subject matter jurisdiction. *United States v. Vitillo*, 490 F. 3d 314, 320 (3d Cir. 2007).

[22] ~~(U)~~ *See Al-Nashiri*, 191 F. Supp. 2d at 1327-28; *Al Bahlul v. United States*, 767 F.3d 1, 11 n.6 (D.C. Cir. 2014) (en banc); *see also supra* note 5.

Because the straightforward jurisdictional test is met—with hostilities between the United States and al Qaeda a question to be determined by the political branches and no prejudice to the Accused in doing so—the Commission *has jurisdiction to proceed to trial* in this case, even as the Military Judge can continue to re-assess within his lawful role as he hears trial evidence and while appropriately relying upon the referral process and respecting the province of the panel on the general issue of guilt or innocence, including on the nexus element. *See* Tr. at 309-10, *United States v. Al Bahlul* (Mil. Comm'n Oct. 28, 2008); *id.* at 836-37 (Oct. 31, 2008).

IV. (U) Prosecution Response to Specified Issue No. 4: Yes. The Existence of *De Jure* Hostilities for Purposes of 10 U.S.C. § 950p(c) in this Case Is Subject to Judicial Notice as a Matter of Legislative Fact

(U) The existence of hostilities some time "before, "on," and "after" September 11, 2001,[23] between the United States and al Qaeda, for purposes of 10 U.S.C. § 950p(c)'s element requiring proof of nexus, is subject to judicial notice as a legislative fact by reference to the public acts of the political branches.[24]

A. (U) Legislative Facts

(U) Military Rule of Evidence ("M.R.E.") 201, the rule governing judicial notice of facts for courts-martial under the U.C.M.J., distinguishes between "legislative facts" and "adjudicative facts," excluding the former from the rule. M.R.E. 201(a) ("This rule governs judicial notice of

[23] (U) As the U.S.C.M.C.R. has recognized, "[c]onduct of the accused that occurs . . . prior to the start of the conflict can still be in the context of and associated with armed conflict as long as it was closely and substantially related to the hostilities that comprised the conflict." *Al Bahlul*, 820 F. Supp. 2d at 1190; *see generally* Br. for the United States 18, 34-35, *In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016) (No. 15-1023).

[24] (U) The Prosecution does not concede that the existence of hostilities on and after the date of al Qaeda's armed attacks on two U.S. embassies in East Africa (i.e., 7 August 1998), for purposes of the 2009 M.C.A., is not also subject to judicial notice by reference to the public acts of the political branches specifically identifying the attack as punishable by military commission.

an adjudicative fact only, not a legislative fact."). Like M.R.E. 201, M.C.R.E. 201 "governs only judicial notice of adjudicative facts." M.C.R.E. 201(a).

(U) Neither M.C.R.E. 201 nor M.R.E. 201 supply a definition of "legislative facts." However, the Manual for Courts-Martial (2016 ed.) ("M.C.M.") describes such facts as "those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." M.C.M., Analysis of the Military Rules of Evidence app. 22 at A22-4 (quoting STEPHEN A. SALTZBURG & KENNETH R. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 63 (2d ed. 1977)). Federal courts applying Federal Rule of Evidence 201, which also excludes legislative facts from the scope of the rule, have explained that legislative facts are "established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case." *Gould*, 536 F.2d at 220. *See also United States v. Bowers*, 660 F.2d 527, 530-31 (5th Cir. 1981) (observing that a legislative fact "does not change from case to case but, instead, remains fixed"). Thus, unlike "[a]djudicative facts," which "usually answer the questions of who did what, where, when, how, why, with what motive or intent, . . . [l]egislative facts do not usually concern the immediate parties . . . ." *Indep. Bankers Assoc. v. Bd. of Governors of Fed. Reserve Sys.*, 516 F.2d 1206, 1215 n.26 (D.C. Cir. 1975) (quoting 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW § 7.02 at 413 (1958)). *See also Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161 (D.C. Cir. 1979) ("[T]he nature of legislative fact is ordinarily general, without reference to specific parties.").

(U) The M.C.M. recognizes that domestic law itself can be a legislative fact. M.C.M., Analysis of the Military Rules of Evidence app. 22 at A22-5 ("When domestic law constitutes only a legislative fact . . . the procedural requirements of Rule 201 may be utilized as a matter of discretion."). Thus, domestic law can be the subject of "judicial notice of legislative fact" and

"judicial notice of domestic law" under M.C.R.E. 201A(a), if the content of the law is a "fact that is of consequence . . . ." *See also* M.R.E. 202(a) ("The military judge may take judicial notice of domestic law . . . [i]f a domestic law is a fact that is of consequence to the determination of the action . . . .").

B. (U) Examples of Legislative Facts

(U) Military courts, which have explicit authority to take judicial notice of domestic law, have yet to develop an extensive body of case law distinguishing legislative facts from adjudicative facts. However, Article III courts, which lack a rule governing judicial notice of law (like M.C.R.E. 201A and M.R.E. 202), have classified several matters as legislative facts, including the following:

(1) (U) Whether the location of an offense was within a particular judicial district.[25]

(2) (U) Whether the location of an offense falls within the jurisdiction of the United States.[26]

(3) (U) Whether an accused's prior conviction qualifies as a felony.[27]

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[25] (U) *See, e.g.*, *United States v. Lopez*, 880 F.3d 974, 982 (8th Cir. 2018) ("The district court took judicial notice of a legislative fact—that Sioux City lies within the geographic bounds of the Northern District of Iowa . . . . [W]e find no abuse of discretion and hold that venue as a jurisdictional fact is a proper subject for judicial notice.") (citations and internal quotations marks omitted); *United States v. Chapman*, 692 F. App'x 583, 584 (11th Cir. 2017) ("[T]he location of Bartow County and Cartersville within the Northern District of Georgia falls under this definition of legislative facts.").

[26] (U) *United States v. Davis*, 726 F.3d 357, 367 (2d Cir. 2013) ("[W]hether a particular plot of land falls within the special maritime and territorial jurisdiction of the United States is a 'legislative fact' that may be judicially noticed without being subject to the strictures of Rule 201."); *United States v. Styles*, 75 F. App'x 934, 935 (5th Cir. 2003) ("A district court may take judicial notice of the legislative fact that a federal installation is under federal jurisdiction."); *United States v. Hernandez-Fundora*, 58 F.3d 802, 810-11 (2d Cir. 1995) (finding that whether locus of crime "falls within the territorial jurisdiction of the United States" is a "legislative fact").

[27] (U) *United States v. Saylor*, 626 F. App'x 802, 805 (11th Cir. 2015) ("[T]he felony nature of a state-law offense is a legislative fact subject to judicial notice.").

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(4) ~~(U)~~ Whether a particular substance is a scheduled, controlled substance under federal law.[28]

C. ~~(U)~~ The Existence of Hostilities Some Time "before," "on" and "after" September 11, 2001

~~(U)~~ The existence of hostilities some time "before," "on," and "after" September 11, 2001, between the United States and al Qaeda, is subject to judicial notice as a legislative fact—or, alternatively, as a matter of domestic law subject to judicial notice.[29]

1. ~~(U)~~ Relevance

~~(U)~~ As an initial matter, the *de jure* existence of hostilities is a relevant "fact that is of consequence" in this case because the existence of hostilities is a common element of most of the charged offenses. M.C.R.E. 201A(a); *see also* 10 U.S.C. § 950p(c). Additionally, the charged offenses against the Accused in this case are solely founded upon the September 11, 2001 attacks.

2. ~~(U)~~ Not subject to reasonable dispute

~~(U)~~ The *de jure* existence of hostilities between the United States and al Qaeda some time "before," "on," and "after" September 11, 2001 is "not subject to reasonable dispute" and is "capable of accurate and ready determination by resort to sources whose accuracy cannot

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[28] ~~(U)~~ *See, e.g.*, *United States v. Arroyo*, 310 F. App'x 928, 929-30 (7th Cir. 2009) (finding no error where trial court took judicial notice that methamphetamine is a schedule II controlled substance and boundaries of judicial district and characterizing both as legislative facts); *United States v. Coffman*, 638 F.2d 192, 194-95 (10th Cir. 1980) (finding no error in trial court "instructing that LSD is a Schedule I controlled substance" and characterizing matter as "legislative fact").

[29] ~~(U)~~ For purposes of this analysis, the Prosecution will address the procedural requirements of M.C.R.E. 201, but it does not concede they apply. *See* M.C.M., Analysis of the Military Rules of Evidence app. 22 at A22-5 ("When domestic law constitutes only a legislative fact . . . the procedural requirements of Rule 201 may be utilized *as a matter of discretion*.") (emphasis added); M.C.R.E. 201A(a) ("Insofar as a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Mil. Comm. R. Evid. 201—except Mil. Comm. R. Evid. 201(g)—apply.").

reasonably be questioned." M.C.R.E. 201(b). As explained below, Congress and the President have identified some time *before* September 11, 2001 as a *de jure* period of hostilities between the United States and al Qaeda, through public acts.

(U) On 7 August 1998, "al Qaeda, carried out near-simultaneous truck bomb attacks on the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. The attacks killed 224 people, including 12 Americans, and wounded thousands more." NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: EXECUTIVE SUMMARY 3 (2004).

(U) On 20 August 1998, the United States launched missile strikes "on al Qaeda targets in Afghanistan and Sudan," *id.* at 12, in response to the embassy bombings, *see id.* at 4.[30]

[30] (U) President William J. Clinton, Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1460, 1461 (Aug. 20, 1998) ("Two weeks ago, 12 Americans and nearly 300 Kenyans and Tanzanians lost their lives, and another 5,000 were wounded, when our Embassies in Nairobi and Dar es Salaam were bombed. There is convincing information from our intelligence community that the bin Ladin terrorist network was responsible for these bombings. . . . Earlier today the United States carried out simultaneous strikes against terrorist facilities and infrastructure in Afghanistan. . . . Our forces also attacked a factory in Sudan associated with the bin Ladin network."); President William J. Clinton, Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1464 (Aug. 21, 1998) (informing Congress that the U.S. military conducted military strikes against al Qaeda training camps and installations in Afghanistan, in exercise of right of self-defense recognized by Article 51 of the U.N. Charter). *See also* Permanent Rep. of the United States to the U.N., Letter dated 20 August 1998 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council at 1, U.N. Doc. S/1998/780 (Aug. 20, 1998) ("In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America has exercised its right of self-defence in responding to a series of armed attacks against United States embassies and United States nationals."). The President considered and prepared to launch additional military operations against al Qaeda. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 120-21, 126-43 (2004). In doing so, the President determined that such operations, including the United States' participation in efforts to kill Usama bin Laden, were lawful under the law of armed conflict. *Id.* at 132, 485 n.123.

~~(U)~~ On 12 October 2000, "an al Qaeda team in Aden, Yemen, used a motorboat filled with explosives to blow a hole in the side of a destroyer, the USS *Cole*, almost sinking the vessel and killing 17 American sailors." *Id.* at 3.

~~(U)~~ On 11 September 2001, members of al Qaeda "hijacked . . . four planes and turned them into deadly missiles," *id.* at 2, ultimately, killing "[m]ore than 2,500 people . . . at the World Trade Center," "125 . . . at the Pentagon," and "256 on the four planes," surpassing "[t]he death toll . . . at Pearl Harbor in December 1941." *Id.* at 1-2.

~~(U)~~ On 18 September 2001, Congress passed and President George W. Bush signed into law the "Authorization for Use of Military Force," which authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . ." PUB. L. NO. 107-40, § 2(a), 115 Stat. 224, 224 (2001) ("AUMF"). The AUMF provided the President with "specific statutory authorization," *id.* § 2(b), under the War Powers Resolution, for the "use of United States Armed Forces" against such nations, organizations, and persons. *See* 50 U.S.C. § 1544(b) (authorizing the President to continue to use United States Armed Forces after 60 days of reporting such use to Congress where Congress "has declared war or has enacted a specific authorization for such use of United States Armed Forces").

~~(U)~~ On 7 October 2001, the President announced that "the United States military ha[d] begun strikes against Al Qaida terrorist training camps and military installations of the Taliban regime in Afghanistan."[31] The President explained that these strikes were in "respon[se] to the

[31] ~~(U)~~ President George W. Bush, Address to the Nation Announcing Strikes Against Al Qaida Training Camps and Taliban Military Installations in Afghanistan, 2 PUB. PAPERS 1201, 1201 (Oct. 7, 2001). *See also* Permanent Rep. of the United States to the U.N., Letter dated 7 October 2001 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) ("In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated

brutal September 11 attacks on our territory, our citizens, and our way of life, and to the continuing threat of terrorist acts against the United States and our friends and allies."[32]

(U) On 13 November 2001, the President issued a Military Order authorizing the use of military commissions to try, *inter alia*, any alien who "is or was a member of the organization known as al Qaida . . . ." Mil. Order § 4(a), 66 Fed. Reg. 57,833, 57,834-35 (Nov. 13, 2001) (hereinafter, "Military Order"). In the Military Order, the President found that "members of al Qaida have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict . . . ." *Id.* § 1(a), 66 Fed. Reg. at 57,833. Additionally, the President found that "the terrorist attacks on September 11, 2001" were a "grave act[] of terrorism . . . on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania . . . ." *Id.* § 1(b), 66 Fed. Reg. at 57,833.[33]

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actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.").

[32] (U) President George W. Bush, Letter to Congressional Leaders Reporting on Combat Action in Afghanistan Against Al Qaida Terrorists and Their Taliban Supporters, 2 PUB. PAPERS 1211, 1211-12 (Oct. 9, 2001).

[33] (U) The President's inclusion of pre-September 11, 2001 events is supported by the advice he received from the U.S. Department of Justice's Office of Legal Counsel ("OLC"). Before issuing the Military Order, OLC was asked "whether terrorists captured in connection with the attacks of September 11 or in connection with ongoing U.S. operations in response to those attacks could be subject to trial before a military court." *See generally* Legality of the Use of Military Commissions To Try Terrorists, 25 Op. O.L.C. 238 (2001). In answering that question, OLC observed that the "if one looks beyond September 11, the attacks appear to be the culmination of a lengthy and sustained campaign that also includes the bombings of the World Trade Center in 1993, the Khobar Towers in Saudi Arabia in 1996, the U.S. embassies in Kenya and Tanzania in 1998, and the U.S.S. Cole in 2000," *id.* at 268, and that "[e]specially when viewed as part of that continuing series of attacks, the most recent events plainly rise to the level of a systematic campaign of hostilities that justifies application of the laws of armed conflict," *id.* (footnote omitted).

(U) On 22 March 2002, the Secretary of Defense issued Military Commission Order No. 1, establishing a framework for military commissions under the Military Order. *See* U.S. Dep't of Defense, Mil. Comm'n Order No. 1 (Mar. 22, 2002) (hereinafter, "Military Commission Order No. 1").

(U) On 30 April 2003, the General Counsel of the U.S. Department of Defense promulgated Military Commission Instruction No. 2 under the authority of the Military Order and Military Commission Order No. 1. *See* U.S. Dep't of Defense, Mil. Comm'n Instruction No. 2 (Apr. 30, 2003) (hereinafter, "M.C.I. No. 2"); Mil. Comm'n Order No. 1 ¶ 7.A ("The General Counsel shall issue such instructions consistent with the President's Military Ord er and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions[.]"). M.C.I. No. 2 included the following definition:

> *In the context of and was associated with armed conflict.* Elements containing this language require a nexus between the conduct and armed hostilities. Such nexus could involve, but is not limited to, time, location, or purpose of the conduct in relation to the armed hostilities. The existence of such factors, however, may not satisfy the necessary nexus (*e.g.*, murder committed between members of the same armed force for reasons of personal gain unrelated to the conflict, even if temporally and geographically associated with armed conflict, is not "in the context of" the armed conflict). The focus of this element is not the nature or characterization of the conflict, but the nexus to it. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war," or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.

Instruction No. 2 ¶ 5.C. *See also* H. COMM. ON ARMED SERVICES, MILITARY COMMISSIONS ACT OF 2006, H.R. REP. NO. 109-664, pt. 1, at 24 (2006) ("The list of offenses tracks those provided for under Department of Defense Military Commission Instruction No. 2, April 30, 2003, which is based upon international treaties and U.S. criminal law.").

~~(U)~~ On 6 September 2006, President Bush "transmit[ted] for the consideration of the Congress draft legislation entitled the 'Military Commissions Act of 2006.'" PROPOSED LEGISLATION: MILITARY COMMISSIONS ACT OF 2006, H.R. DOC. NO. 109-133, at 1 (2006) (hereinafter, "Draft Legislation"). The Draft Legislation included, in part, the following Congressional findings:

> (1) For more than 10 years, the al Qaeda terrorist organization has waged an unlawful war of violence and terror against the United States and its allies. Al Qaeda was involved in the bombing of the World Trade Center in New York City in 1993, the bombing of the United States Embassies in Kenya and Tanzania in 1998, and the attack on the U.S.S. *Cole* in Yemen in 2000. On September 11, 2001, al Qaeda launched the most deadly foreign attack on United States soil in history. Nineteen al Qaeda operatives hijacked four commercial aircraft and piloted them into the World Trade Center Towers in New York City and the headquarters of the United States Department of Defense at the Pentagon, and downed United Airlines Flight 93. The attack destroyed the Towers, severely damaged the Pentagon, and resulted in the deaths of approximately 3,000 innocent people.
>
> (2) Following the attacks on the United States on September 11th, Congress recognized the existing hostilities with al Qaeda and affiliated terrorist organizations and, by the Authorization for the Use of Military Force Joint Resolution (Public Law 107-40), recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States" and authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

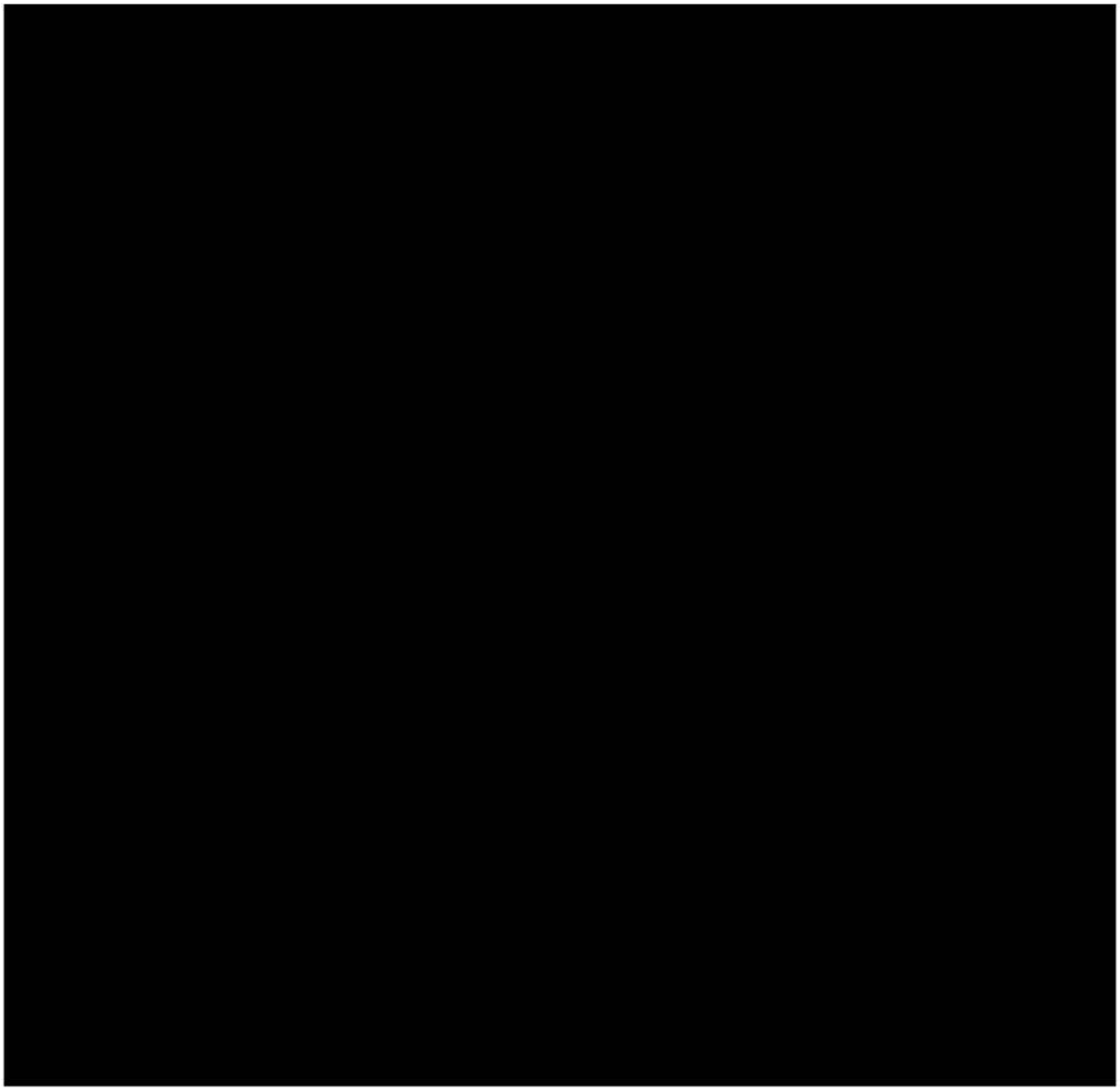
Id. at 16-18.

~~(U)~~ On 6 September 2006, the President provided public remarks on the Draft Legislation, which would authorize the President to establish military commissions. *See* President George W. Bush, Remarks on the War on Terror, 2 PUB. PAPERS 1612, 1617 (Sept. 6, 2006). In those remarks, the President stated:

> As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice. We'll also seek to prosecute those believed to be responsible for the attack on the USS *Cole* and an operative believed to be involved in the bombings of the American Embassies in Kenya and Tanzania.

Id. at 1617-18.[34]

(U) On 17 October 2006, Congress passed and the President signed into law the 2006 M.C.A. PUB. L. NO. 109-366, 120 Stat. 2600 (2006). The 2006 M.C.A. provided military commissions with jurisdiction to "to try any offense made punishable by this chapter or the law



of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001." *Id.* § 948(d), 120 Stat. 2603.[35]

(U) On 17 October 2006, the President, before signing the 2006 M.C.A. into law, stated, in part, as follows:

> When I sign this bill into law, we will use these commissions to bring justice to the men believed to have planned the attacks of September the 11th, 2001. We'll also seek to prosecute those believed responsible for the attack on the USS *Cole*, which killed American sailors 6 years ago last week. We will seek to prosecute an operative believed to have been involved in the bombings of the American Embassies in Kenya and Tanzania, which killed more than 200 innocent people and wounded 5,000 more.

President George W. Bush, Remarks on Signing the Military Commissions Act of 2006, 2 PUB. PAPERS 1857, 1859 (Oct. 17, 2006).

(U) On 28 October 2009, Congress passed and President Barack H. Obama signed into law the 2009 M.C.A., thereby superseding the 2006 M.C.A. *See* PUB. L. NO. 111-84, div. A, tit. XVIII, 123 Stat. 2574. The 2009 M.C.A. again provided military commissions with jurisdiction to try alien unprivileged enemy belligerents for any offense made punishable by the M.C.A. "whether such offense was committed before, on, or after September 11, 2001." 10 U.S.C. §

[35] (U) *See also* 152 Cong. Rec. 20,097 (2006) (Sept. 27, 2006 statement of Rep. Saxton, Chairman, Subcomm. on Terrorism, Unconventional Threats and Capabilities, H. Comm. on Armed Services) ("Mr. Speaker, I rise in strong support of H.R. 6166 [the Military Commissions Act of 2006]. Ladies and gentleman, this is not an ordinary bill. This is an urgently needed measure to fill a gaping hole in our legal system, both in our ability to bring criminals of 9/11 to justice, the bombings of the USS *Cole* and the American embassies in Kenya and Tanzania to justice, and to protect our American troops and agents from frivolous prosecutions and lawsuits. It is no exaggeration to say that this is the most important measure to come before this body in this Congress. . . . We have carefully narrowed and crafted the provisions of this bill to enable the United States to prosecute the perpetrators of the 1998 bombings of the American embassies in Kenya and Tanzania, the 2000 attack on the USS *Cole*, and other crimes that have been committed. Yes, these were suicide attacks and the men who delivered the explosives were killed, along with innocent victims, but the planner, logisticians, and financiers of those operations remain at large. Importantly, this bill allows, as all Americans believe it should, the criminal prosecutions of those who purposefully and materially supported these criminal activities. And, of course, the measure covers those responsible for 9/11 as well.").

948d (2009).[36] The 2009 M.C.A. also defined individuals who were "part of al Qaeda at the time of the alleged offense" as alien unprivileged belligerents even apart from whether such individuals "engaged in hostilities against the United States or its coalition partners" or whether they "purposefully and materially supported hostilities against the United States or its coalition partners." *Id.* § 948a(7).

~~(U)~~ On 31 December 2011, "Congress affirm[ed] that the authority of the President to use all necessary and appropriate force pursuant to the [AUMF] includes the authority" to prosecute "person[s] who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks" and "person[s] who was a part of or substantially supported al-Qaeda, the Taliban" by military commissions convened "under chapter 47A of title 10, United States Code . . . ." National Defense Authorization Act for Fiscal Year 2012, PUB. L. NO. 112-81, § 1021(a), (b), (c)(2), 125 Stat. 1298, 1562 (2011).

[36] ~~(U)~~ Notably, § 948d of the Senate bill that first proposed the 2009 M.C.A. did not include the phrase "before, on, or after September 11, 2001." *See* National Defense Authorization Act for Fiscal Year 2010, S. 1390, § 1031, 111th Cong. (2009) (as reported by S. Comm. on Armed Services, July 2, 2009); National Defense Authorization Act for Fiscal Year 2010, S. 1390, § 1031, 111th Cong. (2009) (as passed by Senate, July 23, 2009). In response to a written question posed by Sen. John McCain during July 2009, both the General Counsel of the U.S. Department of Defense and the Assistant Attorney General, National Security Division, U.S. Department of Justice provided the Senate Committee on Armed Services with a written "modification[]" that the Obama Administration "would like to see to the Senate bill" (S. 1390, 111th Cong. (2009)) regarding § 1031 of the Military Commissions Act of 2009. Specifically, the modification pertained to "[j]urisdiction over pre-9/11 conduct." Because the Senate bill did "not contain" the language "before, on, or after September 11, 2001," as did § 948d of the 2006 M.C.A., the Administration "recommend[ed] that this language be retained from the current law by inserting it into" § 948d of the Senate bill. *Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Hearing Before the S. Comm. on Armed Services*, 111th Cong. 87, 94 (2009) (S. Hearing No. 111-190). *See also* 155 Cong. Rec. 25,416 (2009) (Oct. 22, 2009 statement of Sen. Graham) ("Further, we understand that there will always be a debate about when the war with al-Qaida and violent extremists first began. Osama bin Laden formally declared war against the United States in a fatwa in 1996, but, of course, the first World Trade Center bombing was in February of 1993. Understanding the ambiguity of this issue, Congress has deliberately stated that the military commissions may exercise jurisdiction over offenses that occurred before the date of enactment.").

(U) On 30 January 2018, President Donald J. Trump issued an executive order finding "the United States remains engaged in an armed conflict with al-Qa'ida, the Taliban, and associated forces." Exec. Order No. 13,823, § 1(b), 83 Fed. Reg. 4831, 4831 (Jan. 30, 2018).[37]

(U) These public acts of the political branches, as informed and contextualized by President Bush's public remarks, and the legislative history of the 2006 M.C.A. and the 2009 M.C.A., make clear that two Congresses and two Presidents determined that *de jure* hostilities have existed between the United States and al Qaeda from some date before September 11, 2001 until the present time. *See, e.g.*, Mil. Order § 1(a) (recognizing pre-September 11, 2001 "attacks on United States diplomatic and military personnel and facilities abroad" as contributing to state of armed conflict).

(U) The *de jure* commencement of hostilities has historically been tied to "some public act of the political departments of the [U.S.] government." *Burke v. Miltenberger*, 86 U.S. (19

[37] (U) *See* President Donald J. Trump, Letter to Congressional Leaders on the Global Deployment of United States Combat-Equipped Armed Forces, 2018 DAILY COMP. PRES. DOC. 838, at 1 (Dec. 7, 2018) ("Since October 7, 2001, United States Armed Forces, including Special Operations Forces, have conducted counterterrorism combat operations against al-Qa'ida, the Taliban, and associated forces."); *id.* at 1-3 (summarizing global "military operations against al-Qa'ida, the Taliban, and associated forces and in support of related United States counterterrorism objectives") (capitalization altered). *See also* The WHITE HOUSE REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS at 5 (Dec. 5, 2016) ("[T]he U.S. military is currently taking direct action against solely the following individuals and groups under the authority of the 2001 AUMF: al-Qa'ida; the Taliban; certain other terrorist or insurgent groups affiliated with al-Qa'ida or the Taliban in Afghanistan; AQAP; al-Shabaab; individuals who are part of al-Qa'ida in Libya; al-Qa'ida in Syria; and ISIL.") (footnotes omitted). On 12 March 2018, President Trump provided an update to this report. The President adopted the original report, except where otherwise specified, thereby leaving intact President Obama's assessment of the legal authority for combating al Qaeda. *See* THE WHITE HOUSE REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS at 1 (Mar. 12, 2018) (adopting original report except where otherwise specified).

Wall.) 519, 525 (1873). *See also The Protector*, 79 U.S. (12 Wall.) at 701-02 ("It is necessary . . . to refer to some public act of the political departments of the government to fix the dates [of the commencement and close of the Civil War]"); *Adger v. Alston*, 82 U.S. (15 Wall.) 555, 560-61 (1872) (concluding that United States Court of Claims erred by treating "the ordinance of secession of Louisiana" as the date of commencement of the war rather than the President's proclamation of blockade embracing Louisiana). Here, the political branches have spoken with one voice, and that voice is conclusive: *de jure* hostilities between the United States and al Qaeda, for purposes of the 2009 M.C.A., have existed from *at least* September 11, 2001 until the present time.

(U) The Prosecution's position does not mean that the absence of a clarion "public act" before September 11, 2001 would preclude a finding that hostilities exist. *See The Prize Cases*, 67 U.S. (2 Black) at 667 ("When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war."); *id.* at 668 ("And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral.'"). In 2016, the United States Court of Appeals for the District of Columbia Circuit made clear that the Supreme Court's Civil War precedents "did not purport to lay down a rule to govern future conflicts," such that the absence of some *contemporaneous* public act would preclude finding the United States was in a state of war, armed conflict, or hostilities. *See In re Al-Nashiri*, 835 F.3d at 136-38. Thus, there is no support for the contention that the political branches may not "retroactively" recognize an armed conflict that already existed as a matter of fact. Likewise, military appellate courts have recognized "there have been only five declared wars since the founding of the Republic and none since the adoption of the

U.C.M.J." The courts have therefore conducted a fact-based analysis to determine if the United States is in a *de facto* "time of war" under the U.C.M.J.[38] In short, while the existence of hostilities may be established as a matter of law by reference to a public act of the political branches, in the absence of such a public act, hostilities may be established as a matter of fact.

3. ~~(U)~~ *Sources whose accuracy cannot reasonably be questioned*

~~(U)~~ Each of these public acts identified above is a source of domestic law "whose accuracy cannot reasonably be questioned." M.C.R.E. 201A(a). A court can take judicial notice of relevant statutes and Executive Orders to find facts. *See Dennis v. United States*, 339 U.S. 162, 169 (1950) (explaining that the Court could "[o]f course" take notice of a relevant Executive Order). Indeed, in *The Protector*, the Supreme Court took judicial notice of two "proclamation[s] of intended blockade" issued by President Lincoln to determine the date of the commencement of the Civil War. 79 U.S. (12 Wall.) at 701-02. Many of the orders and proclamations cited above can be found in the Federal Register, which is also a source of law that, by statute, can be judicially noticed. *See* 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed . . . ."); *United States v. Coffman*, 638 F.2d 192, 194 (10th Cir. 1980) ("That the courts are allowed to take judicial notice of statutes is unquestionable. Furthermore the statute allows the taking of judicial notice of the regulations." (citing 44 U.S.C.

[38] ~~(U)~~ *See, e.g.*, *United States v. Bancroft*, 11 C.M.R. 3, 6 (C.M.A. 1953) (concluding that the Korean conflict qualified as a "time of war" for the purposes of U.C.M.J. Article 113); *United States v. Castillo*, 34 M.J. 1160, 1163 (N-M. Ct. Mil. Rev.) (concluding that the Persian Gulf conflict qualified as a "time of war" for the purposes of U.C.M.J. Article 90); *United States v. Rivaschivas*, 74 M.J. 758, 761 (A. Ct. Crim. App. 2015) (concluding that the Afghanistan and Iraq conflicts qualified as a "time of war" for the purposes U.C.M.J. Article 43). Similarly, the International Criminal Tribunal for the Former Yugoslavia conducted fact-based analyses in determining whether a non-international armed conflict existed for the purposes of its jurisdiction. *See, e.g.*, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction ¶¶ 65-70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), *reprinted in* 35 I.L.M. 32, 53-55 (1996); *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment ¶¶ 49, 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

§ 1507)). Finally, legislative histories are a proper subject of judicial notice. *See Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226-27 (1959) (taking judicial notice of legislative history of bill); *Chaker v. Crogan*, 428 F.3d 1215, 1223 n.8 (9th Cir. 2005) (taking judicial notice of legislative history and public support for bill); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168 n.12 (10th Cir. 2000) (taking judicial notice of "the content of hearings and testimony before the congressional committees and subcommittees").

4. (~~U~~) *Opportunity to be heard*

(~~U~~) Whether the Accused "dispute" or "contest" the *de jure* existence of hostilities some time "before," "on" and "after" September 11, 2001 is irrelevant to whether the matter is capable of judicial notice. Mere disagreement by the party opposing judicial notice is not relevant to M.C.R.E. 201 or M.C.R.E. 201A, nor is it sufficient to thwart an appropriate request for judicial notice. The question is an objective one: whether the fact at issue is subject to reasonable dispute. The rule affords an opponent an "opportunity to be heard," M.C.R.E. 201(e), not a veto. The Commission has provided such an opportunity to be heard by hearing the evidence and argument put forth in Mr. Hawsawi's jurisdictional challenge, myriad motions filed by multiple Accused related thereto, and by ordering this briefing. M.C.R.E. 201(e), to the extent it may apply, requires no more.

(~~U~~) In sum, because the *de jure* existence of hostilities some time "before," "on," and "after" September 11, 2001, between the United States and al Qaeda, for purposes of the 2009 M.C.A., is (1) a relevant legislative fact (or, alternatively, a relevant matter of domestic law), (2) not subject to *reasonable* dispute, (3) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, and (4) the Accused have been provided a timely opportunity to be heard, the Commission can and should take judicial notice of the *de jure* existence of hostilities some time "before," "on," and "after" September 11, 2001.

D. ~~(U)~~ The Legal Effect of Taking Judicial Notice of the Existence of Hostilities as a Legislative Fact

~~(U)~~ There are three main effects of taking judicial notice. First, the judge "can consult materials not otherwise admissible in order to take judicial notice." *United States v. Bello*, 194 F.3d 18, 24 n.8 (1st Cir. 1999) (quoting 21 CHARLES A. WRIGHT AND KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5102, at 465 (1977)).

~~(U)~~ Second, if a fact is found by judicial notice, it relieves the party with the burden of offering formal proof of that fact "of the need to produce evidence" on the element. *Id.* at 24.[39]

~~(U)~~ Third, in the case of legislative facts, the military judge can instruct the members that he has found those facts without instructing them that they are "not required to accept as conclusive [the] factual matter judicially noticed." M.C.R.E. 201(g); *see also id.* 201A(a) ("Insofar as a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Mil. Comm. R. Evid. 201—except Mil. Comm. R. Evid. 201(g)—apply."). *See also United States v. Iverson*, 818 F.3d 1015, 1031 (10th Cir. 2016) (observing that Federal Rule of Evidence 201(f)'s "proscription against taking conclusive judicial notice in a criminal case does not apply to legislative facts"); *Saylor*, 626 F. App'x at 805 ("When the district court judicially notices a legislative fact, it need not instruct the jury that it may decline to accept the noticed fact."); *Bowers*, 660 F.2d at 530-31 ("The fact that Fort Benning is under federal jurisdiction is a well-established fact appropriate for judicial notice. . . . Consequently, the court committed no error in failing to instruct the jury it could disregard the judicially noticed fact.") (internal citation omitted); *Hernandez-Fundora*, 58 F.3d at 810-11 ("We conclude, however, that resolution of the jurisdictional issue in this case requires the determination of

[39] ~~(U)~~ In many ways, the proof of the conspiracy charge establishes the existence of hostilities as early as 1996, and certainly no later than August 1998, such that the Prosecution intends to prove the existence of hostilities regardless of whether the Military Judge gives such a binding instruction.

legislative facts, rather than 'adjudicative facts' within the meaning of [Federal] Rule [of Evidence] 201(a), with the result that Rule 201(g) is inapplicable."). The military judge does not direct the fact-finder to enter a particular finding contrary to their ultimate prerogative. However, the members need not be instructed that they may supplant the military judge's finding with their own.

~~(U)~~ Despite potentially having the authority to decline to provide such an instruction, the Prosecution does not at this time anticipate requesting the Commission omit such an instruction. The distinction between legislative and adjudicative facts is not always clear. *Compare, e.g.*, *Davis*, 726 F.3d at 367 ("[W]hether a particular plot of land falls within the special maritime and territorial jurisdiction of the United States is a "legislative fact" that may be judicially noticed without being subject to the strictures of Rule 201."), *with Bello*, 194 F.3d at 22-23 ("By its terms, Rule 201 applies only to adjudicative facts, and the parties and the court assumed that the jurisdictional element at issue here involved an adjudicative rather than a legislative fact. They assumed correctly. . . . Where the prison sits is an element of the offense and unquestionably an adjudicative fact . . . ."). *See also United States v. Deckard*, 816 F.2d 426, 428-29 (8th Cir. 1987) (approving trial court taking judicial notice of interstate character of telephone lines, characterizing fact as adjudicative, and approving trial court instructing jury they "are not required to [accept the Court's declaration as evidence, and regard fact as proved] since [they] are the sole judge of the facts"). Additionally, some courts have determined that treating judicial notice as "conclusive" in a criminal case can constitute error. *See, e.g.*, *Bello*, 194 F.3d at 24-26. Because our superior courts have not yet directly spoken on the issue, prudence is appropriate at this time.[40] Thus, the Commission should instruct the members that they must still find the

[40] ~~(U)~~ Panel findings on the existence of hostilities may assist appellate courts in their analysis, if necessary. *See, e.g.*, *Al Bahlul v. United States*, 840 F.3d 757, 797-98 (D.C. Cir. 2016) (en banc) (Wilkins, J., concurring) (relying on panel findings). The Prosecution is confident that the panel will be sufficiently instructed on this specific question by using the

existence of hostilities—insofar as it is implicitly an element of the offenses—beyond a reasonable doubt, consistent with the *Hamdan* and *Al Bahlul* instructions, with appropriate tailoring to the facts of this case and the judicial notice of legislative facts described above.

~~(U)~~ By its very nature, the Prosecution's case establishing the existence of the charged conspiracy also tends to prove the existence of a state of hostilities between the United States and al Qaeda. As such, the Prosecution's case-in-chief would likely not change at all, regardless of whether the Military Judge takes judicial notice of a legislative fact or continues to recognize the existence of *de jure* hostilities. That said, and as the Military Judge recognized in directing this briefing, the decision to take judicial notice of a legislative fact or to find the existence of *de jure* hostilities (whether through wide deference to the political branches or as a non-justiciable political question) would have legal significance in the litigation, as it should largely preclude all outstanding discovery requests by the Defense for additional hostilities-related documents.

~~(U)~~ While the Defense has been provided all discoverable information regarding Operation INFINITE REACH (August 1998), Operation INFINITE RESOLVE (August 1998-September 2001), and the relevant statements of President Clinton and President Bush regarding their perceptions of the existence of armed conflict from 1998 to 2001, the Defense would not be entitled to any additional information it seeks in discovery, such as the ICRC's view of the existence of hostilities (or the absence of such ICRC documents), or what other agencies of the executive branch may have been doing other than engaging in kinetic action against al Qaeda, to try to prove that the Legislative and Executive branches "got it wrong" regarding hostilities.

~~(U)~~ As has been long argued by the Prosecution in this case, such information is both irrelevant to the hostilities standard articulated in *Hamdan* and *Al Bahlul* and does nothing to

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instruction used in *Hamdan*, as modified by the Commission and through the use of judicial notice regarding *de jure* hostilities.

rebut the Congressional and Presidential constitutional determinations set forth in the 2006 M.C.A. and the 2009 M.C.A. that hostilities existed with al Qaeda before the September 11, 2001 attacks that the Accused stand trial for committing. As discussed in the case law above, such an argument would be akin to allowing a defense counsel to argue to a jury in federal court that a Congressionally-determined Schedule I controlled substance should have been a Schedule III controlled substance. Allowing such arguments invite inconsistent verdicts amongst the various cases and are not in the interests of justice.

~~(U)~~ The Military Judge should (1) instruct the members of the legislative fact that two Congresses and two Presidents have found that hostilities existed between the United States and al Qaeda as a matter of law; (2) let the members decide whether the Prosecution has proven beyond a reasonable doubt the hostilities element with its evidence and that legislative fact; and (3) deny all other hostilities-related discovery requests by the Defense for documents that do not actually rebut the Prosecution's evidence establishing hostilities, or which have no legal relevance to the hostility standard set forth in *Hamdan* and *Al Bahlul*.

5. ~~(U)~~ Conclusion

~~(U)~~ For the reasons described above, as with any jury instructions, the Commission may modify the *Hamdan* and *Al Bahlul* hostilities instructions, and it may do so by (1) tailoring its instructions to the facts of this case and (2) instructing the panel members that the Commission has taken judicial notice of the existence of *de jure* hostilities between the United States and al Qaeda. The Commission should allow the panel members, through appropriately tailored instructions, to determine whether hostilities existed, and whether a sufficient nexus exists between the Accused's charged conduct and the hostilities between the United States and al Qaeda. Finally, the Military Judge should deny all other hostilities-related discovery requests by

the Defense for documents that do not actually rebut the Prosecution's evidence establishing hostilities, or which have no legal relevance to the standards set forth in *Hamdan* and *Al Bahlul*.

6. ~~(U)~~ Oral Argument

~~(U)~~ Per the Commission's Order in AE 617D/AE 620C, the parties will present oral argument in support of their briefs at the 29 April-3 May 2019 session.

7. ~~(U)~~ Attachments

A. ~~(U)~~ Certificate of Service, dated 19 April 2019.

B. ~~(U)~~ BATES MEA-BKG-00004891 through BATES MEA-BKG-00004892. ~~(U//FOUO)~~

Respectfully submitted,

//s//
Clay Trivett
Managing Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

(~~U~~) ATTACHMENT A

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(U) CERTIFICATE OF SERVICE

(U) I certify that on the 19th day of April 2019, I filed AE 617E (GOV)/AE 620D (GOV), Government Brief In Response To AE 617D/AE 620C, Order, with the Office of Military Commissions Trial Judiciary, and I served a copy on counsel of record.

//s//
Christopher Dykstra
Major, USAF
Assistant Trial Counsel

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~~UNCLASSIFIED//FOR OFFICIAL USE ONLY~~

~~(U)~~ ATTACHMENT B

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