

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
‘ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE617F/AE620E (AAA)

**Mr. al Baluchi’s Response to
AE617D/AE620C Order
(Briefing on Specified Issues)**

19 April 2019

1. **Timeliness**: This pleading is timely filed, per AE617D/AE617C Order.

2. **Overview**:

1(a): The statutory requirement that the government prove Mr. al Baluchi’s conduct “took place in the context of and associated with hostilities” is an element of all of the remaining offenses, with components that include the fact that hostilities at some point existed between the United States and al Qaeda. The Court of Military Commission Review has specifically explained that this contextual element serves the function of distinguishing between true armed conflict and isolated and sporadic violence. The lack of hostilities with a sufficient nexus to the defendant’s conduct is a viable defense, as both the military commissions and CMCR have recognized.

1(b): The military commission is bound by its superior court to instruct the members in the language approved in *United States v. Hamdan*.

2: Because the contextual element, including its existence component, is an element of the offense, the military commission may not use an instruction or any other device to reduce the burden on the government to prove it beyond a reasonable doubt. In *United States v. Al-Nashiri*, the military commission held that the government must prove all facts necessary to a finding of hostilities to the members at trial even though it was willing to defer to perceived political branch determinations with respect to jurisdiction.

3: The determination of hostilities in a military commission is not a non-justiciable political question because it is not a value judgment about the wisdom of hostilities, but rather a statutory duty assigned to the military commission by the political branches. The Supreme Court, D.C. Circuit, CMCR, and military commission have all rejected the claim that the determination of hostilities is a non-justiciable political question.

4: The only hostilities-related legislative facts authorized and appropriate for judicial notice are the various legal actions taken under U.S. and international law.

3. Burden of Proof:

The legal questions identified for briefing in AE617D/AE620C Order arise in three contexts: (1) Mr. al Baluchi's challenge to the military commission's personal jurisdiction over him; (2) potential jury instructions; and (3) seven of Mr. al Baluchi's pending motions to compel discovery.

The government bears the burden of proof pre-trial by a preponderance of the evidence¹ that Mr. al Baluchi "purposefully and materially supported,"² or was "a part of al Qaeda at the time of,"³ "hostilities."⁴ The government bears the burden of proving beyond a reasonable doubt at trial that charged conduct "took place in the context of and associated with hostilities."⁵ The

¹ R.M.C. 905(c)(1) & (c)(2)(B); *see also United States v. Nashiri*, 191 F. Supp. 3d 1308, 1314 n.5 (C.M.C.R. 2016); *United States v. Khadr*, 717 F. Supp. 2d 1215, 1238 (C.M.C.R. 2007).

² § 948a(7)(B).

³ §§ 948a(7)(C), 950p(c).

⁴ § 948a(7)(A)-(B).

⁵ § 950p(c).

government, the proponent of the jury instruction at issue here, bears the burden to persuade the military commission it should provide the instruction. Mr. al Baluchi bears the burden of persuasion on the underlying motions to compel discovery.

4. Facts: The history of Mr. al Baluchi’s personal jurisdiction challenge is complex, and much of it is not pertinent to the issues addressed here. In summary, the military commission has made the following rulings which affect the issues specified for briefing:

Subject matter jurisdiction

a. Following the 2016 CMCR decision in *United States v. Al-Nashiri*,⁶ “the question of whether hostilities existed at the time of an offense does not sound in subject matter jurisdiction.”⁷

Procedure for determining personal jurisdiction

b. “[T]he Defense has raised a colorable issue as to whether jurisdiction over the Accused has been sufficiently established.”⁸

c. “Personal jurisdiction . . . depends in part on the factual existence of hostilities, to the extent they are required to meet the conditions of 10 U.S.C. § 948(a)(7).”⁹

d. It is “appropriate to hold a pretrial evidentiary hearing to determine whether it may properly exercise personal jurisdiction over the affected Accused. . . . In that hearing, the Government will bear the burden of proving any facts prerequisite to the personal jurisdiction of

⁶ 191 F. Supp. 2d 3d 1308 (C.M.C.R. 2016).

⁷ AE488I Ruling at 2.

⁸ AE502I Ruling at 2.

⁹ *Id.* at 4.

the Commission by a preponderance of the evidence.”¹⁰

Principles governing personal jurisdiction determination

e. At some point, a state of hostilities arose between the United States and al Qaeda. “The question presented here is not *whether* the United States is or was engaged with hostilities with al Qaeda, but *when* such hostilities began.”¹¹

f. “Congress intended in the M.C.A. 2009 a formulation of the term “laws of war” recognizing that the armed conflict between the United States and al Qaeda existed on (and for some time before) September 11, 2001”¹²

g. “The decisions made by the Executive and Legislative branches regarding whether and when an armed conflict exist . . . are owed great deference by the Commission.”¹³

h. There are “effective determinations of the political branches that hostilities existed as of September 11, 2001 and for at least some period before” In the context of Mr. al Hawsawi’s challenge to personal jurisdiction, the military commission “finds it unnecessary to decide a date certain for the commencement of hostilities.”¹⁴

¹⁰ *Id.* at 5-6.

¹¹ AE502BBBB at 5. Mr. al Baluchi does not contest this statement. He has consistently maintained that a state of hostilities arose between the United States and al Qaeda on 7 October 2001 with the beginning of Operation ENDURING FREEDOM.

¹² AE502BBBB Ruling at 7.

¹³ *Id.* at 9.

¹⁴ *Id.* at 11. As noted later in the text, on 3 April 2019, the military commission extended this ruling to Mr. al Baluchi, AE502FFFF Ruling at 4, despite the military commission’s refusal to allow Mr. al Baluchi to participate in the litigation on personal jurisdiction over Mr. al Hawsawi. *See, e.g.*, AE502EEEE (AAA) Reply to Government Response to Mr. al Baluchi’s Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction. Mr. al Baluchi will move the military commission to reconsider this conclusion in the near future, given that such

i. “[F]or purposes of its personal jurisdiction of Mr. Hawsawi, hostilities—specifically armed conflict between the United States and al Qaeda—existed as of September 11, 2001, and for an indeterminate period before that date.”¹⁵

j. As of 3 April 2019: “Given the bases for the Commission’s decision, further litigation cannot reasonably shift this disposition with regard to the other four Accused. Accordingly, for purposes of personal jurisdiction, these considerations are sufficient to resolve the question of existence of hostilities (whether it sounds in law, fact, or both) with regard to all five Accused.”¹⁶

5. Law and Argument:

Mr. al Baluchi has challenged the personal jurisdiction of the military commission over him, has explained his intent to rely on a hostilities-based defense at trial, and has moved for discovery of the evidence necessary for him to present that defense. In AE617D/AE620C Order, the military commission ordered briefing on five issues relating to the procedure for addressing various questions relating to the requirements that the government prove a connection between Mr. al Baluchi and hostilities between al Qaeda and the United States.¹⁷

Personal jurisdiction for the purposes of trial by military commission under the MCA

reconsideration is the first opportunity Mr. al Baluchi will have to address the issue. For the purposes of this brief, however, Mr. al Baluchi will assume *arguendo* that the ruling remains intact.

¹⁵ *Id.* at 12; *see also id.* at 19. Mr. al Baluchi will move the military commission to reconsider this conclusion, insofar as it affects Mr. al Baluchi, but will assume *arguendo* that the ruling remains intact.

¹⁶ AE502FFFF at 5. Mr. al Baluchi will also move the military commission to reconsider this conclusion, but will also assume *arguendo* that the ruling remains intact.

¹⁷ AE617D/AE620C Order at 4-5.

relates to whether a defendant “is an Alien Unprivileged Enemy Combatant (“AUEB”).”¹⁸ The two applicable prongs for AUEBs are that they have 2. “purposefully and materially supported hostilities against the United States or its coalition partners; or [3. were] a part of al Qaeda at the time of the alleged offense under this chapter.”¹⁹

Separately, the government must prove at trial beyond a reasonable doubt that the defendants committed the alleged offenses “in the context of and associated with hostilities” as an element of the offenses.²⁰ The CMCR calls this second aspect the “contextual element,” and Mr. al Baluchi will adopt this nomenclature to avoid confusion with its construction of subject matter jurisdiction.²¹

The military commission has ruled that “hostilities—specifically armed conflict between the United States and al Qaeda—existed as of September 11, 2001, and for an indeterminate period before that date.”²² The existence of hostilities is one component of a judicial finding of personal jurisdiction under § 948a(7)(B), and will ultimately be a component of the contextual element the government must prove to the members. Mr. al Baluchi has never contested the existence of

¹⁸ *Al Nashiri*, 191 F.3d at 1311. Section 948c provides that “Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.”

¹⁹ § 948a(7). The government does not assert personal jurisdiction over Mr. al Baluchi under the “direct participation” prong

²⁰ § 950p(c).

²¹ *Bahlul*, 820 F. Supp. 2d at 1189. The phrase “‘jurisdictional element’ is a ‘colloquialism’ used by ‘[l]awyers and judges.’ Statutes that establish ‘jurisdictional elements’ not only contain use of the term ‘jurisdiction,’ but, consistent with the description ‘jurisdictional element,’ treat the relevant condition as an element of the offense to be found by a jury.” *United States v. Miranda*, 780 F.3d 1185, 1195 (D.C. Cir. 2015).

²² AE502BBBB at 12; *see also id.* at 19.

hostilities between the United States and al Qaeda; indeed, he has consistently maintained the onset of hostilities on 7 October 2001 with the beginning of Operation ENDURING FREEDOM.

Although frequently used as a shorthand reference, the existence of hostilities—whether at some point violence crossed the threshold of armed conflict—is only one component in the assessment of whether Mr. al Baluchi “has purposefully and materially supported hostilities against the United States or its coalition partners” or whether “the offense is committed in the context of and associated with hostilities.” The CMCR calls this inquiry “intensity” rather than “existence,”²³ but the import is the same.

Because the jurisdiction of a military commission is “limited to offenses cognizable during time of war,”²⁴ another of the components of both inquiries is temporal.²⁵ The military commission has recognized this component in addressing questions of the onset and duration of hostilities, including in one of the issues specified for briefing.²⁶ Like the military commission, the CMCR calls this issue “duration.”²⁷

With these principles in mind, Mr. al Baluchi addresses the issues specified for briefing in AE617D/AE620:

²³ *Bahlul*, 820 F. Supp. 2d at 1189.

²⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557, 596 (2006) (plurality op.).

²⁵ *Hamdan*, 548 U.S. at 599-600. The *Hamdan* “plurality suggested that the conflict against al Qaeda began only after September 11, 2001, and the enactment of the AUMF.” *In re Al-Nashiri*, 835 F.3d 110, 137 (D.C. Cir. 2016).

²⁶ AE617D/AE620C at 5 (“Whether the Military Judge may determine the existence and duration of hostilities . . .”).

²⁷ *Bahlul*, 820 F. Supp. 2d at 1189. An assessment of hostilities also contains a geographical component. *Hamdan*, 548 U.S. at 597-98 (plurality op.); *Bahlul*, 820 F. Supp. 2d at 1190.

(1) Whether (a) 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)?

Yes. Each of the five remaining charged offenses contains as an element that specified conduct “took place in the context of and was associated with hostilities.”²⁸ In Part IV of the Manual for Military Commissions, denominated “Crimes and Elements,” the Secretary of Defense prescribed this element for each offense in the 2009 MCA.²⁹ The military commission’s framing of “the common substantive element established by 10 U.S.C. § 950p(c)” correctly recognizes that § 950p(c) establishes a single element, albeit one with components.

Proof of the contextual element

The CMCR decision in *United States v. Al-Nashiri*³⁰ established that the government must prove that conduct “took place in the context of and associated with hostilities” as an element of each offense at trial. Under fundamental tenets of American law, the government must prove each fact necessary to conviction (or increased punishment), which includes in this case the existence of hostilities.

Over the course of his hostilities litigation, Mr. Al-Nashiri advanced two separate arguments: first, that the United States and al Qaeda were not engaged in an armed conflict in Yemen in 2000 because President Clinton determined that the United States was at peace; and second, that an alleged al Qaeda attack on the French vessel *MV Limburg* was not in the context

²⁸ § 950p(c).

²⁹ See, e.g., MMC IV(5)(1)(b)(3) (“The killing took place in the context of and was associated with hostilities.”); IV(5)(2)(b)(5) (“The attack took place in the context of and was associated with hostilities.”).

³⁰ 191 F. Supp. 3d 1308 (C.M.C.R. 2016).

of and was associated with any purported armed conflict between the United States and al Qaeda. In 2016, the CMCR addressed the second of Mr. Al-Nashiri's two hostilities challenges, and authoritatively established that the government must prove the contextual element established by § 950p(c) at trial.³¹

The CMCR in *Al-Nashiri* reversed the military commission because Mr. Al-Nashiri and the military commission, it held, incorrectly addressed the question of “whether there is sufficient nexus to United States hostilities” “in jurisdictional terms.”³² Under the CMCR's reading of the 2009 MCA, subject matter jurisdiction does not have anything to do with whether the charged conduct takes place in the context of and associated with hostilities.³³ In the CMCR's view, the

³¹ Specifically, Mr. Al-Nashiri argued that the military commission lacks jurisdiction over the charge alleging an attack on the *MV Limburg*, a French-flagged vessel with little or no connection to the United States. AE168 Defense Motion to Dismiss Charges 9-11 for Lack of Jurisdiction Under International Law, *United States v. Al-Nashiri* (Attachment B). The government responded that the military commission could assert jurisdiction under the protective principle of international law, a form of universal jurisdiction. AE168C Government Response to Defense Motion to Dismiss Charges 9-11 for Lack of Jurisdiction Under International Law, *United States v. Al-Nashiri* (Attachment C). Treating the question as a matter of subject matter jurisdiction, the military commission determined that the government has not carried a burden to prove “the last statutory element for each offense, which is whether ‘the conduct took place in the context of and was associated with hostilities.’” AE168G/AE241C Order, *United States v. Al-Nashiri* (Attachment D); see also *Al-Nashiri*, 191 F. Supp. 3d at 1313 (summarizing military commission rulings).

³² *Id.* at 1316; see also AE488I (following this reasoning). The CMCR cleanly differentiated between personal and subject matter jurisdiction, something neither the government nor Mr. Al-Nashiri had accomplished in the military commission. “Military commission jurisdiction has two components: personal and subject matter. Personal jurisdiction relates to whether an accused is an alien unprivileged enemy belligerent (AUEB) and therefore a person subject to the Military Commissions Act (MCA) who may be prosecuted by a military commission; whereas subject-matter jurisdiction relates to whether the charged offenses are made punishable in MCA Subchapter VIII.” *Al-Nashiri*, 191 F. Supp. 3d at 1311.

³³ The flaw in the CMCR's statutory analysis is the phrase “triable by military commission,” which appears to implicate subject matter jurisdiction in § 950p(c) in the same way the same word does

question for subject matter jurisdiction is only whether, “The offenses, as charged, are . . . made punishable under ‘Chapter 47A—Military Commissions’³⁴ or the “law of war.”³⁵

Once the CMCR had stripped it of jurisdictional overtones, the remaining issue in *Al-Nashiri* was simply whether the government had to prove the contextual element required by § 950p(c) prior to trial.³⁶ The CMCR confirmed what is plain enough from the statute: that the contextual element “*is an element of the charges.*”³⁷ And elements, of course, “must be submitted *to a jury*, and proved beyond a reasonable doubt.”³⁸ Given this basic proposition of criminal law, the CMCR held that the military commission erred in requiring the prosecution to prove the contextual element in a pretrial session.³⁹

Once the contextual element is understood as an element, it is fundamental that the government must prove the existence of hostilities, among other components, to the members beyond a reasonable doubt. “[T]he Due Process Clause protects the accused against conviction

in § 950t. But the D.C. Circuit has rejected this textual argument. *Al-Nashiri*, 835 F.3d at 131-32.

³⁴ *Al-Nashiri*, 191 F. Supp. 3d at 1316.

³⁵ § 948d; *see also* AE488I at 3-4 (adopting this reading of *Al-Nashiri*).

³⁶ “Subchapter VIII, ‘Punitive Matters,’ 10 U.S.C. § 950p(c), provides that a nexus to ‘hostilities’ is one of the ‘common circumstances’ for all offenses triable by military commissions under Chapter 47A, Military Commissions.” *Nashiri*, 191 F. Supp. 3d at 1317.

³⁷ *Id.* at 1322.

³⁸ *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000) (emphasis added).

³⁹ *Al-Nashiri*, 191 F. Supp. 3d at 1328.

except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”⁴⁰

It makes no difference to this basic principle that the element involves the application of law to facts. Indeed, “the application-of-legal-standard-to-fact sort of question has typically been resolved by juries.”⁴¹ U.S. law recognizes “the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to facts.”⁴²

The existence of hostilities is one component of the contextual element, and the government must prove it beyond a reasonable doubt at trial like every other fact necessary to a finding of guilt.

Existence of hostilities as a component of the contextual element

More specifically, the CMCR in *United States v. Bahlul*⁴³ explained the relationship of the nature of the alleged hostilities to the contextual element itself. In an extensive discussion

⁴⁰ *In re Winship*, 397 U.S. 358, 364 (1970).

⁴¹ *United States v. Gaudin*, 515 U.S. 506, 512 (1995).

⁴² *Id.* at 513. The trial of Aaron Burr, which the Supreme Court has used as an example of jury determination of mixed questions of law and fact, actually involved the question of hostilities. See *Gaudin*, 515 U.S. at 514; *Sparf v. United States*, 156 U.S. 51, 64-68 (1895). After killing Alexander Hamilton in a duel, Mr. Burr assembled an army at Blennerhassett Island, intending to attack either Spanish possessions in North America or his political opponent President Jefferson’s newly acquired Louisiana Territory—historians debate the question. Presiding over Mr. Burr’s trial for treason, Chief Justice John Marshall instructed the jury, “Levying of war is a fact which must be decided by the jury. The court may give general instructions on this as on every other question brought before them, but the jury must decide upon it as compounded of fact and law.” *Sparf*, 156 U.S. at 66. The law on this point has not changed in the last 200 years.

⁴³ 820 F. Supp. 2d 1141 (C.M.C.R. 2011), *vacated*, 767 F.3d 1 (D.C. Cir. 2014) (*en banc*).

necessary to its holding that the government had proved hostilities beyond a reasonable doubt at trial, the CMCR indicated that proof of the contextual element necessarily includes an inquiry into the nature of the alleged armed conflict. In other words, the question of the existence of hostilities is not severable from the other components of the contextual element.

The CMCR explained:

The 2006 M.C.A., as implemented in the 2007 M.M.C., requires a nexus between the charged conduct and an armed conflict to be punishable. This nexus performs an important narrowing function in determining which charged acts of terrorism constitute conduct punishable by such a law of war military commission, while effectively excluding from their jurisdiction *isolated and sporadic acts of violence not within the context of an armed conflict*. The 2007 M.M.C. includes this nexus as an element, requiring proof beyond a reasonable doubt that the offense occurred in the context of an armed conflict.⁴⁴

Notably, the CMCR used the word “nexus” more broadly than the military commission did in framing this question. The military commission’s specified issue uses the word “nexus” to refer to the words “in the context of and associated with” as opposed to “hostilities.”⁴⁵ The CMCR, in contrast, described the entire element as requiring a nexus.

The CMCR’s use of the phrase “isolated and sporadic acts of violence” indicates that the contextual element distinguishes between hostilities and sub-armed conflict violence as well as requiring proof of the defendant’s connection to that violence. This phrase is the classic

⁴⁴ *Id.* at 1188-89 (emphasis added).

⁴⁵ AE617D/AE620C at 4 n.18.

description of violence below the threshold for “armed conflict” found in Additional Protocol II, Article 1.2, which also governs the application of Common Article 3.⁴⁶ In other words, it is the heart of the international law of war regime for determining the existence of regulating non-international armed conflicts.

The CMCR made clear that the contextual element includes an examination of the nature of the armed conflict. The CMCR explained that the “contextual” element “is central to determining whether conduct is punishable by a law of war tribunal. Consistent with treaty law, custom, and practice, the determination whether the hostilities in issue satisfy this element is *objective in nature* and generally relate to the *intensity and duration* of those hostilities.”⁴⁷ The CMCR separately held that the jurisdictional requirement is one of the “objective elements.”⁴⁸

The CMCR made the international law-of-war provenance of the hostilities inquiry crystal clear through the citations in footnote 66 to this explanation. First, footnote 66 cited the test for the existence of armed conflict in AP II 1.2: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”⁴⁹ Second, the CMCR cited the jurisdictional element

⁴⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (Geneva, June 8, 1977); Geneva Conventions Commentary of 2017 ¶, available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=D84E8D5C5EB782FAC1258115003CEBE5#_Toc481072363.

⁴⁷ *Id.* at 1189 (emphasis added); *see also id.* at 1225 (stressing the significance of armed conflict to Congress’ authority to define war crimes).

⁴⁸ *Id.* at 1226.

⁴⁹ *Id.* at 1189 n.66.

of charges in the International Criminal Court, which is textually similar to § 950p(c), limiting ICC charges to “protracted armed conflict between governmental authorities and organized armed groups or between such groups,”⁵⁰ which itself derives from the armed conflict standard in *Tadic*. The CMCR concluded that “the requirement that the charged conduct occur ‘in the context of an associated with and armed conflict,’ as defined in the M.M.C. and by the military commission judge at trial [is] consistent with the law of armed conflict and the 2006 M.C.A. This element is fundamental to the military commission’s proper exercise of jurisdiction over any charged offense.”

The CMCR also made clear that the inquiry into the existence of hostilities is evidentiary in nature. Even though Mr. Bahlul did not dispute the existence of hostilities, the CMCR independently made a “consideration of the record in this case [to] conclude that hostilities rising to the level of armed conflict existed on or before February 1999—the beginning of the charged timeframe.”⁵¹ The CMCR reached this conclusion only “after weighing all the evidence in the record and recognizing that [it] did not see or hear the witnesses.”⁵²

The CMCR’s explanation of the functioning of the contextual element was necessary to its conclusion that the government had proved the contextual element beyond a reasonable doubt,⁵³ and is binding on this court. The CMCR provided a comprehensive and detailed explanation of its view that the contextual element included the nature of the alleged violence as armed conflict

⁵⁰ *Id.*

⁵¹ *Id.* at 1190.

⁵² *Id.*

⁵³ *Id.*

or not as a screening tool for confining the exercise of a military commissions powers to matters governed by the law of armed conflict. The contextual element also plays a role in the effort to confine military commission subject matter jurisdiction to constitutionally permissible limits.

Lack of hostilities during the overt acts as a defense

The 2008 *Hamdan* military commission trial, which provides the instruction on hostilities, demonstrates that the accused may defend against the government's proof of the contextual element by presenting evidence that hostilities did not exist at the relevant time. Thus, not only must the government present evidence of the existence of hostilities, but the members will also evaluate the onset and scope of those hostilities in determining whether conduct, including overt acts, "took place in the context of and associated with hostilities."

In his trial under the 2006 MCA, Mr. Hamdan argued that at least with respect to himself, "a plurality of the Supreme Court reached a final decision that a state of armed conflict did not exist prior to September 11, 2001."⁵⁴ The government acknowledged that the Supreme Court plurality indicated that a conspiracy charge could not be supported using pre-hostilities overt acts, but argued that this reasoning was not preclusive.⁵⁵

During oral argument on Mr. Hamdan's motion, the military commission invited the parties to brief the question of the beginning of hostilities.⁵⁶ The military commission asked whether the

⁵⁴ AE092 Defense Motion to Dismiss Specification 1 of Charge 1 and Specifications 1, 2, 5, 6, 7 and 8 of Charge 2 for Lack of Subject Matter Jurisdiction as a Matter of *Res Judicata*, *United States v. Hamdan*, at 5 (Attachment E).

⁵⁵ AE097 Government's Response to Motion to Dismiss Specification 1 of Charge 1 and Specifications 1, 2, 5, 6, 7 and 8 of Charge 2 for Lack of Subject Matter Jurisdiction as a Matter of *Res Judicata*, *United States v. Hamdan*, at 8 (Attachment F).

⁵⁶ Transcript of 7 February 2008, *United States v. Hamdan*, at 584-88 (Attachment S).

existence of hostilities was an element on which it would instruct the members, and Mr. Hamdan took the position that “it is a subject matter jurisdictional question which doesn’t go to the jury.”⁵⁷

Mr. Hamdan submitted a supplemental brief, which adhered to his position that the existence of hostilities is a question of law for the military judge.⁵⁸ Mr. Hamdan argued that a military commission had authority to assess the positions of the political branches and determine the beginning and end of an armed conflict.⁵⁹ The military commission ruled that the “before, on, or after” language of the 2006 MCA expanded the scope of chargeable offense conduct to include conduct before 11 September 2001 as long as it was related to hostilities.⁶⁰

The debate continued. In its own supplemental brief, the government responded that the “armed conflict” requirement (the 2006 MCA precursor to the 2009 MCA hostilities requirement) “is an element of certain substantive offenses, and must, in accordance with the MCA and MMC, be proved to the members of the Military Commission beyond a reasonable doubt.”⁶¹ Mr. Hamdan sought to exclude certain charged pre-9/11 conduct on the basis that it was not related to

⁵⁷ *Id.* at 588.

⁵⁸ AE123 Defense Supplemental Submission in Support of Defense Motion to Dismiss Specification 1 of Charge 1 and Specifications 1, 2, 5, 6, 7 and 8 of Charge 2 for Lack of Subject Matter Jurisdiction as a Matter of *Res Judicata*, *United States v. Hamdan*, at 4-5 (Attachment G).

⁵⁹ *Id.* at 5-10.

⁶⁰ AE150 Ruling on Motion to Dismiss (*Res Judicata*), *United States v. Hamdan*, at 5-6 (Attachment H).

⁶¹ AE151 Prosecution Response to the Defense Supplemental Submission in Support of Defense Motion to Dismiss Certain Specifications for Lack of Subject Matter Jurisdiction as a Matter of *Res Judicata*, *United States v. Hamdan*, at 4 (Attachment I); *see also* AE152 Defense Second Supplemental Brief in Support of Defense Motion to Dismiss Specification 1 of Charge 1 and Specifications 1, 2, 5, 6, 7 and 8 of Charge 2 for Lack of Subject Matter Jurisdiction as a Matter of *Res Judicata*, *United States v. Hamdan*, at 4-5 (Attachment J).

hostilities.⁶²

Addressing Mr. Hamdan's motion to exclude evidence, the military commission reasoned that the nexus to armed conflict and the armed conflict itself were inextricably intertwined. The military commission held that "whether the accused's conduct 'took place in the context of and was associated with an armed conflict' is an element of each of the offenses"⁶³ After explaining its ruling on the nexus requirement, the military commission continued, "Thus, the existence o[f] a state [of] armed conflict before 2001 is clearly a question of fact for the members to decide. Evidence bearing upon the issue may be offered by either side, and the Commission will instruct the members appropriately before they retire to deliberate."⁶⁴

With respect to the "start of hostilities" issue, the military commission reasoned that evidence of lack of hostilities would negate the element of armed conflict that the government had to prove. The military commission noted the briefing on the political question doctrine, but explained that the government "will have to prove at trial that each of the charged offenses was substantially related to a period of armed conflict. The Defense, as part of the trial of the case,

⁶² See AE166 Defense Motion *in Limine* to Exclude Evidence Regarding Transportation Services Not Constituting Direct Involvement in Hostilities, *United States v. Hamdan* (Attachment K); AE170 Prosecution Response to the Defense Motion *in Limine* to Exclude Evidence Regarding Transportation Services Not Constituting Direct Involvement in Hostilities, *United States v. Hamdan* (Attachment L); AE180 Defense Reply to Government Response to Defense Motion *in Limine* to Exclude Evidence Regarding Transportation Services Not Constituting Direct Involvement in Hostilities, *United States v. Hamdan* (Attachment M).

⁶³ AE190 Ruling on Motion *in Limine* (Transportation Services) and Start of Hostilities at 1 (Attachment N).

⁶⁴ *Id.* at 2.

will offer its evidence that there was no period of armed conflict prior to September 11, 2001.”⁶⁵

The military commission concluded that because armed conflict was an element, the military commission would not determine the start of hostilities, and “the members should hear and decide the matter.”⁶⁶

Mr. Hamdan went on to actually present a defense that no armed conflict existed between the United States and al Qaeda prior to 11 September 2001, just as Mr. al Baluchi will. Mr. Hamdan presented public documents and rules of engagement using an intelligence analyst as a testimonial sponsor.⁶⁷ Mr. Hamdan called law-of-war expert Professor Geoff Corn to discuss the significance of rules of engagement to the advent of hostilities.⁶⁸ The government, for its part, paid Evan Kohlmann to produce a video called the “Al Qaeda Plan” for use in proving hostilities between the United States and al Qaeda.⁶⁹

The military commission clearly understood the importance of evidence about the existence or not of armed conflict as important to the trial. In ruling on an objection, the military commission explained, “the members will be called upon to decide when and whether a period of

⁶⁵ *Id.*

⁶⁶ *Id.* The government relied on the *Hamdan* military commission’s holding that proof of existence of hostilities is an element of the offenses in its later brief in *United States v. Al-Nashiri*. AE104A Government Response to Defense Motion to Dismiss Because the Convening Authority Exceeded His Power in Referring This Case to a Military Commission, *United States v. Al-Nashiri*, at 7-8 (Attachment O).

⁶⁷ Transcript of 1 August 2008, *United States v. Hamdan*, at 3656-77 (Attachment P).

⁶⁸ Transcript of 28 July 2008, *United States v. Hamdan*, at 2796-873 (Attachment Q).

⁶⁹ This video, which the government has given notice that it will introduce in this trial, went on to form the basis for the CMCR’s statements of fact in both *Hamdan* and *Bahlul*. See *Hamdan*, 801 F. Supp. 2d at 1255 n.5; *Bahlul*, 820 F. Supp. 2d at 1159-61 & n.12.

armed conflict began. So let's ask the witness questions about facts that they can testify to, and let the members make that conclusion.”⁷⁰

In its review of Hamdan's conviction, the CMCR relied upon the actual evidence presented at trial regarding armed conflict for its discussion of hostilities. It explained, “The quotations in the Statement of Facts regarding the conflict between al Qaeda and the United States are from the video ‘The Al-Qaida Plan,’ which detailed the origins and goals of al Qaeda and Usama bin Laden to the military commission to support a determination that appellant's conduct occurred during hostilities.”⁷¹

The CMCR read the armed conflict element to be critical to the overall statutory scheme. According to the CMCR, it is “the specific context of conflict triggering application of U.S. treaty obligations per Common Article 3[] which make[s] it cognizable under the 2006 M.C.A.”⁷² The CMCR explained that, “The Supreme Court emphasized the importance of this requirement,” citing the plurality's conclusion that “the law of war permits trial only of offenses “committed within the period of the war.””⁷³

As has often been noted, the CMCR stated that, “The military commission judge properly instructed the military commission on this element,” referring to the element “in the context of and

⁷⁰ Attachment P at 3673.

⁷¹ *Hamdan*, 801 F. Supp. 2d at 1255 n.5. The CMCR also noted the passage of the Authorization for Use of Military Force, and that “[s]ubsequently” the United States engaged in military operations in Afghanistan. *Id.* at 1257-58.

⁷² *Id.* at 1276.

⁷³ *Id.* at 1277 & n.53 (quoting *Hamdan*, 548 U.S. at 599 n.31 (plurality op.)).

. . . associated with an armed conflict.”⁷⁴ The CMCR did not merely approve an instruction on what the military commission has called the nexus element. Rather, footnote 54 of *Hamdan* approved both the instructions about the jury’s role in determining whether violence reached the threshold of armed conflict, and the defendant’s connection to that armed conflict, as a single paragraph. No aspect of the *Hamdan* case, including its jury instructions, offers any support for the idea that the military commission could remove the existence of hostilities from the members’ consideration.

In summary, every military commission or appellate court to address the issue has concluded that the existence of hostilities, separate from, and in addition to the defendant’s connection to the hostilities, is a component to the requirement that charged conduct “took place in the context of and in association with hostilities.”

(1) (b) If so, whether this Commission is bound to use the same member instruction used in *United States v. Hamdan* and *United States v. Bahlul*?

Yes. As the government has consistently argued, the hostilities instruction approved by the CMCR in *United States v. Hamdan*⁷⁵ binds the military commission. The rule in the D.C. Circuit⁷⁶ is that holdings of vacated opinions remain precedential where the higher court expresses no opinion on the merit of the holding.⁷⁷ In reversing *Hamdan*, the D.C. Circuit expressed no

⁷⁴ *Id.* at 1275 & n.45.

⁷⁵ 801 F. Supp. 2d at 1278 n.54.

⁷⁶ In 2016, the CMCR adopted D.C. Circuit law as binding authority. *Al-Nashiri*, 191 F. Supp. 3d at 1323 n.21.

⁷⁷ *See, e.g., Action Alliance of Senior Citizens v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991).

opinion on the contextual element or the instructions, leaving its decision on the instruction intact. As Mr. al Baluchi explained in AE494D, although the *Hamdan* instruction does not textually require independent findings of both intensity and organization, it otherwise “closely track[s] the indicia of armed conflict identified by the ICTY and other international bodies.”⁷⁸

(2) Whether the Military Judge may determine the existence and duration of hostilities for purposes of 10 U.S.C. § 950p(c) as an instructional matter, while reserving the question of nexus to hostilities to the panel?

No. The military commission may not use any instruction or other device which would lessen the government’s burden to prove all facts necessary to conviction beyond a reasonable doubt. Determining the existence and duration of hostilities as an instructional matter would violate “the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to facts.”⁷⁹

Member determination of elements

It is axiomatic that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”⁸⁰ This fundamental protection prevents the military commission from using any instruction which relieves the government of part of that burden.⁸¹ “[I]n criminal cases, the

⁷⁸ Laurie R. Blank & Benjamin R. Farley, *Identifying the Start of Conflict: Conflict Recognition, Operational realities and Accountability in the Post-9/11 World*, 36 Mich. J. Int’l L. 467, 498 (2015); see AE494D at 8.

⁷⁹ *Gaudin*, 515 U.S. at 513.

⁸⁰ *Winship*, 397 U.S. at 364.

⁸¹ See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000); *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *United States v. United States Gypsum Co.*, 438 U.S. 422, 430 (1978); *Morrisette v. United States*, 342 U.S. 246, 274-75 (1952).

ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the *ultimate* facts beyond a reasonable doubt."⁸²

In *United States v. Gaudin*, the Supreme Court held that a court could not relieve the government of the burden of proving an element by instruction, even if that element was primarily legal in nature. In a prosecution for making false statements under 18 U.S.C. § 1001, the District Court had instructed the jury that the statements charged in the indictment were "material" because it concluded materiality was a legal issue for the court to decide. The Supreme Court held that "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."⁸³

Presumably, the issue specified sounds in AE502BBBB, which concludes that deference to the political branches allows the military commission to conclude that hostilities existed on 11 September 2001, and AE502FFFF, which extends that conclusion to Mr. al Baluchi without allowing evidence or argument. *Gaudin* explained how even a classically legal question like materiality is actually composed of law applied to composite historical facts.⁸⁴ Similarly, deference to the "effective determinations of the political branches" requires application of a legal standard to the historical facts of what the political branches did and the inference of what those actions meant.

⁸² *Court of Ulster City v. Allen*, 442 U.S. 140, 156 (1979).

⁸³ *Gaudin*, 515 U.S. at 514.

⁸⁴ *Id.* at 512.

Al-Nashiri's distinction between judge and members

Military Judge Pohl's reasoning in AE502BBBB, in the end, was similar to his reasoning in *Al-Nashiri*. In *Al-Nashiri*, the military commission concluded that, for purposes of personal jurisdiction, the military commission could defer to the determinations of hostilities by the Executive and Legislature as a legal question. It further concluded, however, that the existence of hostilities was a question of fact for the members at trial.

In the first of his hostilities claims in the military commission, Mr. Al-Nashiri moved to dismiss the charges against him, arguing that the existence and duration of hostilities was a matter of law determined by judicial notice of a public act of the Executive or Legislature. For example,⁸⁵

The recognition of hostilities, such that the law of war applies to a particular time and place, is a political act that must be decided by the political branches. *Baker v. Carr*, 369 U.S. 186, 213 (1962) (citing *The Protector*, 12 Wall. 700 (1871)); *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948); *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010). It is not a question of fact. When called to adjudicate legal questions that turn on the existence of hostilities, courts must take judicial notice of "some public act of the political departments of the government to fix the dates [on which hostilities began and ended]." *The Protector*, 12 Wall. at 702.

Thus, Al-Nashiri claimed that the existence, duration, and scope of hostilities is a political question subject to judicial notice rather than a factual element to be proved beyond a reasonable doubt at trial.

In a responsive brief signed by the Chief Prosecutor in this case, the government argued

⁸⁵ AE104 Defense Motion to Dismiss Because the Convening Authority Exceeded His Power in Referring This Case to a Military Commission, *United States v. Al-Nashiri*. This document is found in the record at AE488F/AE502D (AAA) Mr. al Baluchi's Reply to AE488E/AE502C (GOV) Government Consolidated Response, Attachment B.

repeatedly that existence, duration, and scope of hostilities is an objective factual determination to be made by the members at trial. First, the government argued that “whether the offense was committed in the context of and associated with hostilities is a common element of fact the government must prove at trial.”⁸⁶ The government reasoned that, “By placing the hostilities requirement in the punitive matters section, which lists the offenses and their elements, Congress intended to make the hostilities requirement a common element of fact for all the triable offenses.”⁸⁷ The government concluded that, “the hostilities requirement is an element of the crime.”⁸⁸

The government won its argument that the existence, scope, and duration of hostilities is a factual element, to be proven by the government beyond a reasonable doubt at trial rather than a political question requiring deference to the political branches. In denying Al-Nashiri’s motion to dismiss, the military commission (Colonel Pohl, presiding) drew a distinction between the existence of hostilities as an aspect of jurisdiction and as an element of proof.⁸⁹ The military commission reasoned that the statement “before, on, or after September 11, 2001,”⁹⁰ combined

⁸⁶ AE104A Government Response to Defense Motion to Dismiss Because the Convening Authority Exceeded His Power in Referring This Case to a Military Commission, *United States v. Al-Nashiri*, at 1, 6 (Attachment R).

⁸⁷ *Id.* at 7.

⁸⁸ *Id.* at 8.

⁸⁹ AE104F Order, *United States v. Al-Nashiri*, at 5. This document is found in the record at AE488F/AE502D, Attachment C.

⁹⁰ 10 U.S.C. § 948d. The military commission did not distinguish between personal and subject matter distinction, a difference which accounts for the contrary ruling in this military commission. See AE488F/AE502D (AAA) (explaining *Al-Nashiri* AE104F Order in light of the subsequent CMCR distinction between personal and subject matter jurisdiction); AE488I (denying Mr. al Hawsawi’s subject matter jurisdiction challenge); AE502I (granting an evidentiary hearing on Mr.

with the Executive allegations in the charge sheet, created a determination of hostilities sufficient to sustain a finding of jurisdiction and worthy of deference.⁹¹

With respect to proof of offenses, however, the military commission determined that the existence of hostilities is a question of fact. It found that, “Whether hostilities existed between Al Qaeda and the United States on the dates of the accused’s alleged acts is a question of fact and an element of proof, which must be carried by the government.”⁹² The military commission held:⁹³

a. Existence of Hostilities as a Question of Fact. Whether hostilities existed on the date of the acts alleged to have been committed by the accused is as much a function of the nature of hostilities as any particular legally significant act by either the legislative or executive branches of government. Whether hostilities existed on the dates of the charged offenses necessarily is a fact-bound determination; moreover, whether a state of hostilities existed is as much a function of the will of the organization to which the accused is alleged to belong to as the U.S. government. In determining whether hostilities exist or do not exist, the enemy gets a vote.¹ Whether Al Qaeda, the organization of unprivileged enemy belligerents to which the accused is alleged to be a member, considered itself to be at war with the United States on the date of the alleged law of war violations is a factor among many to be considered by the trier of fact and is as relevant as any judgments made or withheld by the President or the Congress.

Accordingly, the military commission determined that, with respect of offenses, the

al Hawsawi’s and Mr. al Baluchi’s personal jurisdiction challenges).

⁹¹ AE104F Order, *United States v. Al-Nashiri*, at 2-6. To be clear, Mr. al Baluchi does not endorse this reasoning.

⁹² AE104F, *Al-Nashiri*, at 5.

⁹³ *Id.* at 2.

existence of hostilities is a factual element the government must prove beyond a reasonable doubt at trial even though the Military Judge could defer to effective political determinations as a legal matter.

(3) Whether existence of hostilities for purposes of 10 U.S.C. § 950p(c) in this case is to any extent a non-justiciable political question?

No. The legal evaluation of the existence and scope of hostilities is not a non-justiciable political question because it evaluates the legal significance of political actions rather than their wisdom. The Supreme Court, D.C. Circuit, CMCR, and military commission have all rejected the claim that determination of hostilities in the context of law-of-war prosecution is a non-justiciable political question. In fact, the most forceful arguments against the application of the political question doctrine were made by the government.

Value judgments as political questions

Primarily, the political question doctrine arises in civil cases, when a plaintiff asks a federal court to adjudicate a matter “where judicial intervention is deemed inappropriate.”⁹⁴ Courts review claims for non-justiciability under the six-factor test in *Baker v. Carr*.⁹⁵ The political

⁹⁴ *United States v. New*, 55 M.J. 95, 108 (C.A.A.F. 2001).

⁹⁵ *Al-Tamimi v. Adelson*, 916 F.3d 1, 5 (D.C. Cir. 2019). The *Baker* standard precludes judicial review of a claim where one of the following is true:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

question doctrine overlaps with court-martial cases, however, when a defendant seeks to contest the decision to deploy military force.⁹⁶

Courts, courts-martial, and military commissions “cannot avoid their responsibility merely ‘because the issues have political implications.’”⁹⁷ “[T]he Judiciary plays a critical role in enforcing constitutional and statutory limits in justiciable wartime cases, and [a court] must not hesitate (and has not hesitated) in doing so, when the consequences are significant.”⁹⁸ At its core, the justiciability of a claim turns on the distinction between questioning whether a political decision was wise or whether it was legal.⁹⁹ For example, the value judgment who should control Palestine is political, but whether Israeli settlers are committing genocide against Palestinians is the application of legal standards to factual circumstances.¹⁰⁰

The inquiry into the nature of alleged hostilities in a military commission imposes a legal description on a set of facts rather than a value judgment. Evaluating hostilities does not require the military commission to evaluate whether the United States should have entered an armed conflict with al Qaeda, either when it did or at any earlier time. Rather, the issue requires the military commission to evaluate the legal significance of the actions of the Legislature and

Baker v. Carr, 369 U.S. 186, 217 (1968).

⁹⁶ *New*, 55 M.J. at 108; *United States v. Huet-Vaughn*, 43 M.J. 105, 115 (C.A.A.F. 1995); *United States v. Webster*, 65 M.J. 936, 953 n.5 (A.C.C.A. 2008); *United States v. Rockwood*, 48 M.J. 501, 507 (A.C.C.A. 1998).

⁹⁷ *Zitovsky v. Clinton*, 566 U.S. 189, 196 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)).

⁹⁸ *Al Bahlul*, 840 F.3d at 773 (Kavanaugh, J. concurring) (citing *Al Bahlul*, 767 F.3d 1 (D.C. Cir. 2014) (*en banc*) and *Hamdan*, 696 F.3d 1238 (D.C. Cir. 2012) as examples).

⁹⁹ *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. 2010) (*en banc*).

¹⁰⁰ *Al-Tamimi*, 916 F.3d at 13.

Executive, as well as—the government argues¹⁰¹—decidedly non-political actors like al Qaeda.

“[W]ar is not a game of ‘Simon Says,’ and the President’s position, while relevant, is not the only evidence that matters” to a determination of hostilities.¹⁰² The courts have repeatedly affirmed their role in the assessment of the armed conflict underlying this prosecution and others.¹⁰³ The CMCR, D.C. Circuit, and Supreme Court have all expressed views on the nature of the conflict other than deference to the political branches.

Hamdan

The position that Executive views should control the evaluation of hostilities—expressed in the underlying D.C. Circuit opinion—lost in *Hamdan*, and is found only in the dissent. Shortly after Hamdan’s first military commission trial began, he challenged its procedures in D.C. Court.¹⁰⁴ The D.C. District rejected the government’s claim that Mr. Hamdan fell under military commission jurisdiction because the President had determined Hamdan had been captured in a conflict with al Qaeda proper rather than a conflict with Afghanistan.¹⁰⁵ On appeal, the D.C.

¹⁰¹ *Al-Nashiri*, 835 F.3d at 136 (“The government responds that the existence of hostilities is established by looking not merely to the contemporaneous acts of the political branches, but to a totality of the circumstances, including al Qaeda’s conduct.”).

¹⁰² *Al Warafi*, 2015 U.S. Dist. LEXIS at *15.

¹⁰³ *See, e.g., Desmare v. United States*, 93 U.S. 605, 611 (1877) (Civil War); *Bancroft*, 3 C.M.A. at 5 (Korean War); *Hamilton v. McClaghtry*, 136 F. 445, 448 (Cir. Ct., D. Kan. 1905) (Boxer Rebellion).

¹⁰⁴ *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev’d*, 415 F.3d 33 (D.C. Cir. 2005), *rev’d*, 548 U.S. 557 (2006).

¹⁰⁵ *Id.* at 160-61.

Circuit determined that it should allow Hamdan's military commission to go forward out of deference to the President's view of the scope and duration of the conflict with al Qaeda.¹⁰⁶

None of the five judges comprising the majority agreed that the Executive could determine the nature and scope of the armed conflict. In the five-Justice Opinion of the Court, the Supreme Court rejected the Executive's claim, promulgated in President Bush's famous memorandum, that the hostilities did not qualify as a conflict not of an international character.¹⁰⁷ This true holding reversed the decision of the D.C. Circuit that the President had unilateral authority to determine the nature of the conflict. A majority of the Court thus believed it need not defer to the Executive's characterization of hostilities.

Similarly, the *Hamdan* "plurality suggested that the conflict against al Qaeda began only after September 11, 2001, and the enactment of the AUMF."¹⁰⁸ The plurality noted that the temporal mismatch between the overt acts alleged against Mr. Hamdan and AUMF and ensuing hostilities "cast doubt on the legality of the charge."¹⁰⁹ The plurality certainly did not believe that the temporal scope of hostilities was a non-justiciable political question; only the dissent did.¹¹⁰

Al-Nashiri

In both the military commission and the D.C. Circuit, the government has argued

¹⁰⁶ *Hamdan v. Rumsfeld*, 415 F.3d 33, 41-42 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006).

¹⁰⁷ *Hamdan*, 548 U.S. at 629.

¹⁰⁸ *In re Al-Nashiri*, 835 F.3d at 137.

¹⁰⁹ *Hamdan*, 548 U.S. at 598-600 (plurality op.).

¹¹⁰ *Id.* at 684-87 (Thomas, J., dissenting).

extensively that inquiry into the nature of the conflict does not present a political question. It won. The D.C. Circuit rejected Al-Nashiri's argument that the determination of hostilities is a political question, and expressed its full confidence that he would be able to present his defense at trial.

In the *Al-Nashiri* military commission, the government contended that "the existence of hostilities is an objective question of fact."¹¹¹ The government criticized Al-Nashiri's argument that "the recognition of hostilities is a 'political question'" on the basis that it would "be decided by the Military Judge on an incomplete record consisting only of selected contemporaneous statements made by political figures."¹¹² The government explained that treating hostilities as a political question "fundamentally misunderstands the 2009 M.C.A. and ignores binding U.S.C.M.C.R. precedent."¹¹³ Citing the CMCR decisions in *Hamdan* and *Bahlul*, the government pronounced, "Under the statute and the caselaw, the duration and scope of the hostilities between the United States and al Qaeda is an objective factual element that the members must resolve at trial after receiving an instruction on the proper legal standard."¹¹⁴

The government continued by that arguing that *Prosecutor v. Tadic* and other international authority support its view, and what it described as CMCR "holdings," that hostilities does not present a political question:¹¹⁵

¹¹¹ Attachment R at 1, 6.

¹¹² *Id.* at 12.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 13 & n.3 (citing, *inter alia*, *Prosecutor v. Tadic*, No. IT-94-1-1, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction ¶ 65 (ICTY 1995)).

Although not binding on this Commission, these international cases lend support to the U.S.C.M.C.R.'s holdings in *Hamdan* and *Al Bahlul* that the existence of hostilities is not a political question in the context of a military-commission trial, but a question of fact for the members to determine. In this case, the members will decide at trial, upon consideration of the totality of the circumstances, whether these offenses were committed in the context of and associated with hostilities between the United States and al Qaeda.

The government went on to explain why the cases *Al-Nashiri* cited, including *Al-Bihani v. Obama*,¹¹⁶ “do not concern how a member’s panel, in a military commission, should determine whether a given offense was committed in the context of and associated with some pending or historical hostilities”¹¹⁷ The government specifically distinguished *Al-Bihani*:¹¹⁸

Similarly, in *Al-Bihani*, the D.C. Circuit affirmed the denial of the petitioner’s habeas petition and deferred to the executive’s determination that the war against the Taliban and al Qaeda was ongoing. An actual declaration of war or hostilities, however, is not at issue in this Commission. At issue here is whether the members may decide whether certain offenses were committed in the context of and associated with hostilities, prior to a formal authorization of military force. Nothing in either *Ludecke* or *Al-Bihani* supports the defense argument that this role of the members, as created by the 2009 M.C.A., should be displaced by the cherry-picked statements offered by the defense.

The government concluded its brief on the role of hostilities under the 2009 MCA:¹¹⁹

¹¹⁶ 590 F.3d 866 (D.C. Cir. 2010).

¹¹⁷ Attachment R at 14.

¹¹⁸ *Id.* at 15.

¹¹⁹ *Id.*

The defense provides no legal support for its argument that the existence of hostilities is a political question in the context of a military commission. The 2009 M.C.A. and binding U.S.C.M.C.R. precedent establish that the existence of hostilities is an objective question of fact for the members to decide.

As explained in the previous section, the government won this argument. On later review in the D.C. Circuit, Al-Nashiri advanced both theories he had argued in the military commission: his political question theory and his lack of nexus theory.¹²⁰ “For its part, the government contend[ed] that the hostilities requirement is a ‘necessary element of the offense with which he has been charged’ that the government must prove at trial.”¹²¹

The D.C. Circuit held that *Councilman* abstention barred it from resolving his *habeas* challenge. Critical to this conclusion was the repeatedly-articulated assumption that Mr. Al-Nashiri would have a full opportunity to present his hostilities defense to both a military commission and, later, an Article III court.¹²²

The D.C. Circuit also addressed Mr. Al-Nashiri’s request for *mandamus* by comparing the arguments of the parties. The government argued “that the existence of hostilities is established by looking not merely to the contemporaneous acts of the political branches, but to a totality of the circumstances”¹²³ The court found “[i]mplicit in this argument . . . the notion that the

¹²⁰ *Al-Nashiri*, 835 F.3d at 116 (describing procedural history of AE104 rather than AE168/AE241).

¹²¹ *Id.* at 118 n.3.

¹²² *Id.* at 117, 121 n.4, 123, 129, 130,

¹²³ *Id.* at 136.

existence of hostilities can be assessed after the fact, at trial.”¹²⁴ The court explained that “Al-Nashiri and *amici* believe the judgments of the political branches at the time are what matters; the government takes a broader view.”¹²⁵

Finally, the D.C. Circuit stressed that “whether hostilities against al Qaeda existed at the time of Al-Nashiri’s alleged offenses, and whether Al-Nashiri’s conduct in Yemen took place in the context of those hostilities, are open questions.”¹²⁶ It explained that the cases suggested the end of hostilities is a political question do not “speak directly to when hostilities *begin*.”¹²⁷ According, the D.C. Circuit found *mandamus* relief inappropriate, and left the CMCR decision in place.

Although the D.C. Circuit did not specifically hold that evaluation of hostilities does not present a political question, it certainly refused every invitation to hold that hostilities does present a political question. In fact, the D.C. Circuit based its *Councilman* ruling on the view that Mr. Al-Nashiri would be able to present his hostilities defense, including its political aspects, to the members at trial. The *Al-Nashiri* decision is thus substantial precedent that the determination of hostilities in a military commission prosecution is not a non-justiciable political question.

2009 MCA

The Executive and Legislative branches have in fact spoken on who should determine the

¹²⁴ *Id.*

¹²⁵ *Id.* at 137.

¹²⁶ *Id.*

¹²⁷ *Id.* at 138.

existence and other aspects of hostilities, and delegated the duty to the Military Judge and members in the personal jurisdiction and contextual element provisions of the 2009 MCA. This statutory duty combines with the Constitutional right to have every element of an offense proven beyond a reasonable doubt to remove the determination of hostilities from the realm of non-justiciable political questions.

Even if a question is otherwise committed to the Executive or Legislature, a recognized role for the judiciary or a quasi-judicial body means that the issue is justiciable. Sitting *en banc* in a case involving Operation INFINITE REACH, the D.C. Circuit distinguished the political question of whether the United States was justified in using cruise missiles to attack Sudan from evaluating the status of Guantanamo detainees seized under the law of war.¹²⁸ Under D.C. Circuit law, “the political question doctrine does not preclude judicial review of prolonged Executive detention predicated on an enemy combatant determination because the Constitution specifically contemplates a judicial role in this area.”¹²⁹ The Supreme Court made the same point in *Hamdi v. Rumsfeld*:¹³⁰ “While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.”

In addition, evaluation of hostilities does not infringe the political prerogatives of the

¹²⁸ *El-Shifa*, 607 F.2d at 848-49.

¹²⁹ *Id.*

¹³⁰ 542 U.S. 507, 535 (2004).

Executive and Legislature because they have assigned that duty to the Military Judge and members in the 2009 MCA. Justice Breyer's four-Justice concurrence in *Hamdan* explained how statutory requirements represent the judgment of the political branches, the exact point the military commission made in AE502BBBB: "Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches."¹³¹ Here, Congress, at the request of President Bush, has assigned to the military judge and members the responsibility to assess, among other things, the existence of hostilities. That responsibility is best served by carrying it out, rather than attempting to defer it back to the political branches who delegated it in the first place.

The government advanced this exact position in *Al-Nashiri*. It argued specifically that the existence of hostilities is not a political question triggering separation of powers concerns under *Baker v. Carr* because the political branches had empowered the military commission to make the determination.¹³²

¹³¹ *Hamdan*, 548 U.S. at 637 (Breyer, J. concurring).

¹³² *Id.*

In this case, there is no separation-of-powers concern. Congress and the President, through the 2009 M.C.A., created a system of military commissions to try violations of the law of war and expressly made the nexus to hostilities an element of each offense. In so doing, far from removing the determination of the existence of hostilities from the purview of the Commission, Congress and the President actually empowered the members to decide whether the government has proven the hostilities element beyond a reasonable doubt in each case. As in any criminal trial, the members will be asked to weigh the evidence against the legal standards on which they are instructed, and to make a determination as to guilt or innocence. Therefore, *Baker* actually cuts against the defense argument that the political branches must decide the existence of hostilities, and instead supports the government's position that the existence of hostilities is an objective, fact-based inquiry, best left to members.

Finally, the CMCR endorsed this view precisely by approving the instructions on the existence of and nexus to armed conflict the government claims are binding, notwithstanding traditional deference to the Executive and Legislature. In footnote 45 of *Hamdan*, the CMCR acknowledged Justice Thomas' position in dissent that the court should "defer[] to the Executive Branch's determination that the period of the conflict for military commission purposes began on or before August 1996 when bin Laden declared jihad against the Americans."¹³³ But the CMCR held that the military commission properly instructed the members that they should determine hostilities, and relied on the evidence at trial to reach its own assessment of the sufficiency of proof on that element.

In fact, in addressing the capacity of the judiciary to review Executive decisions, the D.C.

¹³³ *Hamdan*, 801 F. Supp. at 1275 n.45. In *Hamdan*, the CMCR raised the issue of deference to political branches not as an issue of non-justiciability, but rather as part of its review of Congress' authority to define war crimes. *Id.* at 1266-68.

District has relied on the CMCR decision in *Bahlul* as authority that, “The Executive Branch has elsewhere recognized that the existence of armed conflict cannot be taken for granted in detainee cases.”¹³⁴ The court viewed *Bahlul*’s requirement of proof that an offense occurred in the context of an armed conflict as an example of situation in which the duration of hostilities is not a political question requiring deference.¹³⁵

Except for the *Hamdan* dissent, the authorities are unanimous in their view that the evaluation of hostilities falls outside the political doctrine, and is fully justiciable in a military commission.

(4) Whether existence of hostilities for purposes of 10 U.S.C. § 950p(c) in this case is to any extent subject to judicial notice as a matter of legislative fact?

No. While existence of hostilities is not subject to judicial notice, some of the legal and political actions relevant to a determination of hostilities are, and both sides will probably ask for judicial notice of individual legal actions as appropriate.

Judicial notice is a useful substitute for proof of indisputable facts. MCRE 201 explains, “A judicially noticed fact must be one not subject to reasonable dispute” MCRE 201(a) only authorizes judicial notice of adjudicative facts.

“In contrast, ‘legislative facts’ are those that are ‘related to questions of law, policy or legal reasoning’ and ‘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

¹³⁴ *Al Warafi*, 2015 U.S. Dist LEXIS 99781 at *10.

¹³⁵ *Id.* at *10-11.

body.”¹³⁶ “‘Legislative facts’ are not appropriate for presentation to and consideration by a panel that is deliberating on an accused’s guilt or sentence as, by definition, they are relevant to legal reasoning or lawmaking, not to the facts that occurred in a particular case.”¹³⁷ The only form of legislative fact made admissible by the MCRE is domestic or international law.¹³⁸

Although individual legal actions like the AUMF, promulgation of rules of engagement, or notice of use of force to the United Nations may be subject to judicial notice, the legal conclusions from those legal acts are not. A host of factors, some U.S. legal, some U.S. military, and some al Qaeda will inform the hotly-disputed issue of the onset and scope of hostilities. Other than domestic and international law, these facts and conclusions are not subject to judicial notice.

The existence or other aspects of hostilities in particular are also not subject to judicial notice because it would relieve the government of the burden of proving an offense.¹³⁹ After all, judicial notice is simply a specialized form of member instruction. Judicial notice, like other evidentiary devices, is subject to “the ultimate test of any device’s constitutional validity . . . : the device must not undermine the factfinder’s responsibility at trial, based on evidence adduced by the State, to find the *ultimate* facts beyond a reasonable doubt.”¹⁴⁰

None of the questions posed by the military commission represent an obstacle to Mr. al

¹³⁶ *United States v. Lutes*, 72 M.J. 530, 534 (A.F.C.C.A. 2013).

¹³⁷ *Id.*

¹³⁸ MCRE 201A.

¹³⁹ See *United States v. Paul*, 73 M.J. 274, 280 (C.A.A>F. 2014); *United States v. Williams*, 3 M.J. 155, 156 (C.M.A. 1977).

¹⁴⁰ *Allen*, 442 U.S. at 156.

Baluchi's defense against the government's claim of personal jurisdiction and alleged conduct that took place in the context of and in association with hostilities. The military commission should compel the government to produce the required discovery, then authorize the parties to go forward with the personal jurisdiction hearing.

6. **Request for Oral Argument:** The defense requests oral argument.

7. **Conference with Opposing Counsel:** Not required.

8. **Attachments:**

- A. Certificate of Service
- B. Al Nashiri II (AE168)
- C. Al Nashiri II (AE168C)
- D. Al Nashiri II (AE168G/AE241C)
- E. Hamdan (AE092)
- F. Hamdan (AE097)
- G. Hamdan (AE123)
- H. Hamdan (AE150)
- I. Hamdan (AE151)
- J. Hamdan (AE152)
- K. Hamdan (AE166)
- L. Hamdan (AE170)
- M. Hamdan (AE180)
- N. Hamdan (AE190)
- O. Al Nashiri II (AE104A)
- P. Hamdan Transcript 1 August 2008
- Q. Hamdan Transcript 28 July 2008
- R. Al Nashiri II (AE104A)
- S. Hamdan Transcript 7 February 2008

Very respectfully,

//s//

JAMES G. CONNELL, III
Learned Counsel

//s//

STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

//s//

ALKA PRADHAN
Defense Counsel

//s//

BENJAMIN R. FARLEY
Defense Counsel

//s//

MARK E. ANDREU
Capt, USAF
Defense Counsel

Counsel for Mr. al Baluchi

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 19th day of April, 2019, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III

Learned Counsel

Attachment B

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL NASHIRI

AE 168

**UNCLASSIFIED NOTICE OF
DEFENSE CLASSIFIED FILING**

**DEFENSE MOTION TO DISMISS
CHARGES 9-11 FOR LACK OF
JURISDICTION UNDER
INTERNATIONAL LAW**

26 August 2013

In accordance with the Military Commission Trial Judiciary Rules, the defense provides this unclassified notice that it has filed a classified motion with the Trial Judiciary. The classified motion (AE 168) has been filed by electronic delivery via SIPR to the Clerk of Court and to the prosecution.

//s// Brian Mizer
BRIAN L. MIZER
CDR, JAGC, USN
Assistant Detailed Defense Counsel

//s// Allison Danels
ALLISON C. DANELS, Maj, USAF
Assistant Detailed Defense Counsel

//s// Daphne Jackson
DAPHNE L. JACKSON, Capt, USAF
Assistant Detailed Defense Counsel

//s// Richard Kammen
RICHARD KAMMEN
Civilian Learned Counsel

Filed with TJ
27 August 2013

Appellate Exhibit 168 (Al-Nashiri)
Page 1 of 10

Filed with TJ
19 April 2019

Appellate Exhibit 617F (AAA)
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CERTIFICATE OF SERVICE

I certify that on 26 August 2013, I electronically filed the forgoing document with the Clerk of the Court and served the forgoing on all counsel of record by e-mail.

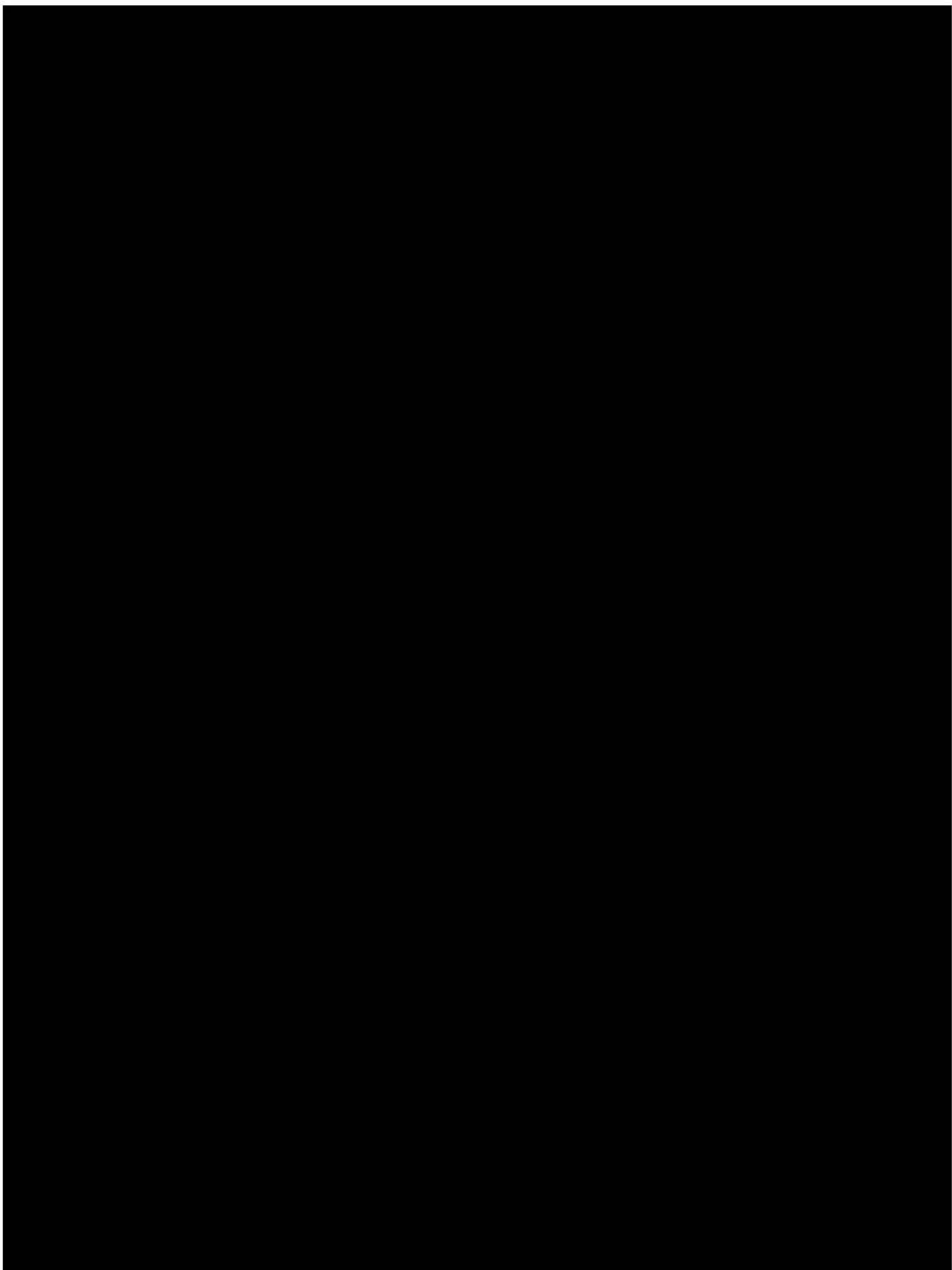
//s// Daphne Jackson
DAPHNE L. JACKSON, Capt, USAF
Assistant Detailed Defense Counsel

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27 August 2013

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MILITARY COMMISSIONS TRIAL JUDICIARY

GUANTANAMO BAY

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

AE 168

**DEFENSE MOTION TO DISMISS
CHARGES IX-XI FOR LACK OF
JURISDICTION UNDER
INTERNATIONAL LAW**

August 26, 2013

1. **Timeliness:** This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.b.(1).

2. **Relief Requested:** The Defense respectfully requests the dismissal of all charges related to the *MV Limburg*, specifically Charges IX-XI.

3. **Overview:**

“The Due Process Clause requires that a defendant prosecuted in the United States ‘should reasonably anticipate being haled into court in this country.’” *United States v. Lei Shi*, 525 F. 3d 709, 722 (9th Cir. 2008) (citing *United States v. Moreno-Morillo*, 334 F. 3d 819, 827 (9th Cir. 2003)). Accordingly, in order to be prosecuted by the United States there must be a “sufficient nexus between the defendant and the United States...” *United States v. Davis*, 905 F. 2d 245, 248-49 (9th Cir. 1990); *See also United States v. Brehm*, 691 F. 3d 547, 552 (4th Cir. 2012). This is consistent with international law, which authorizes a state to exercise criminal jurisdiction for conduct occurring within its territory (territorial principle) or conduct by its own nationals (nationality principle). *United States v. Hasan*, 747 F. Supp. 599, 606-07 (E.D. Va. 2010). A state may also proscribe criminal conduct that has a substantial effect within its

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territory (effects principle) or if the conduct has a substantial effect within its territory (protective principle). *Id.* Because international law provides no basis for the assertion of military jurisdiction over Mr. Al-Nashiri for the alleged attack on the *MV Limburg*, and because the expansive jurisdictional provisions found in 10 U.S.C. §§ 948c and 948d must be construed so as not to conflict with international law, this Commission lacks jurisdiction to try Mr. Al-Nashiri for crimes related to the *MV Limburg*.

4. **■ Burden of Proof and Persuasion:** Because this motion challenges the jurisdiction of the Commission, the government bears the burden of demonstrating that jurisdiction over the accused is lawful by a preponderance of the evidence. R.M.C. 905(c)(2)(B).

5. **■ Statement of Facts:**

a. ■ In October 2006, the Malaysian firm Petronas contracted the French-flagged vessel *MV Limburg* to deliver a shipment of crude oil from Iran to Malaysia.

b. ■ On October 6, 2002, the *Limburg* was approaching a mooring in Yemeni waters off the coast of Yemen, where she was to take on additional oil.

c. ■ As she approached the mooring, she was allegedly struck by an explosive-laden boat on her starboard side.





f. [REDACTED] When American investigators arrived on the *Limburg* four days later, they were met by agents of the French Accident Investigations Bureau.

f. [REDACTED] The French investigators informed their American counterparts that they were on French sovereign territory, and all evidence would be the property of France.

g. [REDACTED] The *Limburg* remains in service.

h. [REDACTED] She has been renamed the *Maritime Jewel*, and is registered in Liberia.

6. [REDACTED] **Argument:**

A) [REDACTED] **Norms of International Law Limit this Commission's Jurisdiction.**

"The sources of military jurisdiction include the Constitution and international law." *Hamdan II v. United States*, 696 F. 3d 1238, 1249 n.18 (D.C. Cir. 2012) (quoting MANUAL FOR COURTS-MARTIAL UNITED STATES, at I-1 (2012)). With respect to military commissions, Congress explicitly referred to international law and explicitly incorporated international norms into U.S. domestic law. *Id.* When Congress incorporates international law into a statute, a court must determine both whether the conduct at issue violates a norm of international law that is well-established and universally recognized, and whether customary international law provides some basis for the exercise of jurisdiction over the conduct. *United States v. Bellaizac-Hurtado*, 700 F. 3d 1245, 1259 (11th Cir. 2012) (Barkett, J., concurring). "Only conduct that violates a



norm of customary international law and is subject to United States jurisdiction under customary international law principles may be prosecuted in United States courts as an ‘Offence against the Law of Nations.’” *Id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401-16. “Thus, in the absence of an explicit Congressional directive, courts do not give extraterritorial effect to any statute that violates principles of international law.” *United States v. Vasquez-Velasco*, 15 F. 3d 833, 839 (9th Cir. 1994); *see also United States v. Martinez*, 599 F. Supp. 2d 784, 799 (W.D. Tex. 2009).

B) ~~██████████~~ The Charming Betsy Canon Requires that the MCA be Construed in Conformity with International Law.

This Commission must presume that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804). While the so-called *Charming Betsy* canon imposes no substantive limit on Congress’s legislative authority, it does constrain this Commission’s inquiry into a statute’s scope. *United States v. Ali*, 718 F. 3d 929, 935 (D.C. Cir. 2013). Absent contrary indication, Congress intends its enactments to comport with international law. *Id.* But there can be no argument that Congress did so with respect to the MCA, which “*explicitly* incorporated international norms into domestic U.S. law in 10 U.S.C. § 821...” *Hamdan II*, at 1249 n.8.

C) ~~██████████~~ International Law Provides no Basis for Assertion of Military Jurisdiction over MV Limburg³

“Punishing a crime committed on foreign soil...is an intrusion into the sovereign territory of another nation. As a matter of comity and fairness, such an intrusion should not be

³ The defense does not concede the Charges IX-XI were established war crimes at the time they were allegedly committed, and it will address that issue in a separate motion. This motion is confined to the second requirement of international law “whether customary international law provides some basis for the exercise of jurisdiction over the conduct.” *United States v. Bellaizac-Hurtado*, 700 F. 3d 1245, 1259 (11th Cir. 2012)(Barkett, J., concurring).

undertaken absent proof that there is a connection between the criminal conduct and the United States sufficient to justify the United States' pursuit of its interests." *United States v. Caicedo*, 47 F. 3d 370, 372 (9th Cir. 1995). Accordingly, international law provides for limited instances in which nations may prosecute the crimes of foreign nationals committed abroad. *Id.* at 941. These include the protective principle, the territorial principle, the effects principle, the nationality principle, and the universality principle. *United States v. Ibarguen-Mosquera*, 634 F. 3d 1370, 1378-79 (11th Cir. 2011); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 195 (S.D.N.Y. 2000); *Hasan*, 747 F. Supp. at 606-07; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402-03. Because *Charming Betsy* counsels against interpreting federal statutes to contravene international law, this Commission must conclude that prosecuting Mr. Al-Nashiri for the alleged attack on the *MV Limburg* is inconsistent with the law of nations and the charges at issue should be dismissed. *See Ali*, 718 F. 3d at 935.

International law provides no basis for the assertion of jurisdiction by this Commission over the alleged attack on the *MV Limburg*. Bulgaria could arguably assert jurisdiction based upon the nationality of the crewman who was found dead. As a French-flagged vessel, France could also assert jurisdiction. Yemen has jurisdiction under the territorial principle and arguably under the effects principle. In fact, Yemen has already asserted its jurisdiction over this incident and tried those allegedly responsible. Both Malaysia and Iran may arguably also have jurisdiction, although the assertion of jurisdiction under either the effects principle or protective principle by these nations would be reasonably tenuous. But the United States does not have jurisdiction under any principle.

“The United States cannot be the world’s policeman. If we continue to extend our natural borders of our national jurisdiction, we can expect others to do the same to us.” *United States v. Angulo-Hernandez*, 565 F. 3d 2, 20 (1st Cir. 2009) (Torruella, J., concurring in part). Simply put, international law does not provide the United States with war-crimes jurisdiction to try Saudi citizens for allegedly attacking Bulgarian nationals, French oil tankers, or Iranian oil.

7. ~~(b)(7)(C)~~ **Oral Argument:** The defense requests oral argument on this motion.
8. ~~(b)(7)(C)~~ **Witnesses:** None.
9. ~~(b)(7)(C)~~ **Conference with Opposing Counsel:** The defense has conferred with the government and it objects to this motion.
10. ~~(b)(7)(C)~~ **List of Attachments:** None

/s/ Brian Mizer
BRIAN L. MIZER
CDR, JAGC, USN
Assistant Detailed Defense Counsel

/s/ Allison Daniels
ALLISON C. DANELS, Maj, USAF
Assistant Detailed Defense Counsel

/s/ Richard Kammen
RICHARD KAMMEN
DOD Appointed Learned Counsel

/s/ Daphne L. Jackson
DAPHNE L. JACKSON, Capt, USAF
Assistant Detailed Defense Counsel

CERTIFICATE OF SERVICE

█████ I certify that on 26 August 2013, I electronically filed the forgoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

/s/ Daphne L. Jackson
DAPHNE L. JACKSON, Capt, USAF
Assistant Detailed Defense Counsel

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27 August 2013

Appellate Exhibit 168 (Al-Nashiri)
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19 April 2019

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Attachment C

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 168C</p> <p>Government Response To Defense Motion to Dismiss Charges IX-XI [sic]¹ For Lack of Jurisdiction Under International Law</p> <p>9 September 2013</p>
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1. Timeliness

This response is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

2. Relief Sought

The government respectfully requests that the Commission deny the defense motion to dismiss all charges related to the MV *Limburg*, specifically Charges VII-IX¹ for lack of jurisdiction under international law.

3. Overview

It is well-established under international law that belligerent States may try captured unprivileged enemy belligerents for violations of the law of war committed in the context of hostilities against them. Thus, this Commission has jurisdiction over the offenses related to the attack on MV *Limburg* under both the M.C.A. and international law. The defense motion to dismiss for lack of jurisdiction should therefore be denied.

¹ Although the charges related to the attack on the MV *Limburg* were numbered IX-XI on the original charge sheet, subsequent pen-and-ink changes to the referred charges dated 28 September 2011 have resulted in the renumbering of these charges to VII-IX. Referred Charges at 12 (Sept. 28, 2011).

4. Burden of Proof

As the moving party, the defense typically is required to demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2). However, to the extent the defense motion poses a jurisdictional challenge, the government bears the burden of demonstrating jurisdiction by a preponderance of the evidence. R.M.C. 905(c)(2)(B).

5. Facts

Abd Al Rahim Hussayn Muhammad Al Nashiri (“the accused”) is charged with multiple offenses under the M.C.A. relating to terrorist attacks against the United States and its coalition partners. These include the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000, and the attacks on USS COLE (DDG 67) on 12 October 2000 and on the French supertanker MV *Limburg* on 6 October 2002, which together resulted in the deaths of 18 people, serious injury to dozens of others, and significant property damage, including the spillage of approximately 90,000 barrels of oil into the Gulf of Aden.

On 6 October 2002, the French flagged double-hulled supertanker MV *Limburg* approached Al Mukalla, Yemen. At that time, MV *Limburg* was carrying roughly 397,000 barrels of crude oil. MV *Limburg* was traveling to Yemen to obtain and transport additional barrels of oil to a company in Malaysia. As MV *Limburg* prepared for mooring operations, a small boat approached the supertanker. Once the small boat was alongside MV *Limburg*'s starboard, two suicide bombers in the small boat detonated explosives. The resulting explosion ripped through the starboard ballast tank and cargo tank, creating a hole ten-meters wide and eleven-meters high in the supertanker's hull. The blast caused crude oil to spill into the water, ultimately resulting in a massive fire.

The smoke generated by the fire engulfed the supertanker, causing the crew to evacuate the MV *Limburg* by escaping into the water. One crewmember died while trying to evacuate from the supertanker. A subsequent investigation into the attack on MV *Limburg* revealed pieces of fiberglass on wood, aluminum components consistent with a boat motor, and pieces of flesh consistent with human remains—all found onboard MV *Limburg*. In addition to killing one crewmember, the attack caused tens of thousands of barrels of crude oil to spill into the Gulf of Yemen.

6. Law and Argument²

The exercise of jurisdiction by the United States for the accused's alleged offense against the MV *Limburg* is lawful under any relevant standard. As someone who chose to join al Qaeda and engage in hostilities against the United States, the accused should "reasonably anticipate being haled into court in this country." *United States v. Ali*, 718 F.3d 929, 943 (D.C. Cir. 2013) (quoting *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998)).

The accused does not dispute that the text of the M.C.A. authorizes Charges VII-IX. Instead, in this motion, the accused argues that the application of Charges VII-IX in this case violate international law by exceeding the limits that international law imposes on the United States' exercise of its criminal jurisdiction abroad.

² The defense continues to assert—as it now does in nearly all of its pleadings—that denying the motion will violate various rights of the accused. See AE 168 at 2. The defense, however, persists in omitting any explanation of how those rights are implicated in the present case. Absent any explanation as to how those rights are implicated in this request and under these facts, the Commission should reject this boilerplate language. See *Harding v. Illinois*, 196 U.S. 78, 87 (1904) (dismissing writ of error because no federal question properly was raised in the state court where the Illinois Supreme Court concluded that "no authorities were cited nor argument advanced in support of the assertion that [a] statute was unconstitutional" and thus the "point, if it could otherwise be considered, was deemed to be waived"); *United States v. Heijnen*, 215 F. App'x 725, 726 (10th Cir. 2007) ("We nevertheless reject these arguments because they are unsupported by legal argument or authority or by any citations to the extensive record of the proceedings [A]ppellant's issues are not supported by any developed legal argument or authority, and we need not consider them.").

At the outset, the accused's motion raises serious legal questions concerning the proper application of customary international law in U.S. courts. The Supreme Court has long observed that resort to customary international law is warranted "where there is no treaty, and no controlling executive or legislative act or judicial decision." *The Paquete Habana*, 175 U.S. 677, 700 (1900). Here, a controlling legislative act—the M.C.A.—would seem to preempt the need for a *de novo* assessment of customary international law by the Commission. To be sure, under the *Charming Betsy* canon, customary international law can play an important role in the construction of domestic law, including the M.C.A. But, "[t]he *Charming Betsy* canon comes into play only where Congress's intent is ambiguous." *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003); *Serra v. Lappin*, 600 F.3d 1191, 1199 (9th Cir. 2010) (same); see also *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004) ("Court ordinarily construes *ambiguous* statutes to avoid unreasonable interference with the sovereign authority of other nations") (emphasis added). The text of the M.C.A. is clear in granting jurisdiction for Charges VII-IX in the present case. Such clarity may very well "instance [a] situation[] where the legislative and executive branches of government agree on what that international law is," *Nguyen Thang Loi v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 373 F.Supp.2d 7, 110 (E.D.N.Y. 2005), as opposed to an encouragement for the Commission "to conform the law of the land to norms of customary international law." *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

Moreover, unlike *Hamdan II*, in which one party raised a serious question concerning whether prosecution for the offenses might violate the Ex Post Facto Clause and thus triggered the application of the canon of construction that seeks to avoid constitutional issues, here the accused raised a potential of conflict with customary international law. See *Hamdan v. United*

States, 696 F.3d 1238, 1247 n.6 (D.C. Cir. 2012) (Kavanaugh, J., concurring) (“international-law considerations are not *constitutional* constraints incorporated into the Article I war powers clauses and thereby enforceable in U.S. courts.”).

Although the defense raises questions regarding the application of customary international law, these questions need not be addressed because the defense’s claim that “international law provides no basis for the assertion of military [commission] jurisdiction over the accused for the alleged attack on the MV *Limburg*” is incorrect. AE 168 at 3. Indeed, international law fully supports prosecuting the accused on these charges and, accordingly, the defense motion to dismiss these charges should be denied.

Customary international law recognizes five principle bases for jurisdiction: (1) territoriality (either occurring within a State’s territory or having a substantial effect within the territory), (2) nationality (of the alleged offender), (3) protective principle (threat to State security or government function), (4) passive personality (nationality of victim), and (5) universality (any State has jurisdiction). Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law* 534 (2003); *United States v. Yunis*, 681 F. Supp. 896, 899-903 (D.D.C. 1988); Restatement §§ 402, 404 & *cmt. a*.

This Commission has jurisdiction over the offenses related to the attack on MV *Limburg* under international law. First, prosecution of the accused for crimes related to the MV *Limburg* is fully justified by the protective principle. Second, the protective principle has long been applied in armed conflict to justify a belligerent State’s prosecution of unprivileged enemy belligerents in custody for alleged war crimes or other serious offenses. Third, World War II practice makes clear that a belligerent may prosecute enemy belligerents for violations of the law of war, even when the victim was not a national of that belligerent.

I. The Protective Principle Fully Supports the Prosecution of the Accused for the Alleged Attack on the MV *Limburg*

First, the prosecution of the accused for offenses related to the attack on the MV *Limburg* is fully supported by the protective principle, which “recognizes the right of a state to punish a limited class of offenses committed outside its territory by persons who are not its nationals—offenses directed against the security of the state or other offenses threatening the integrity of government functions that are generally recognized as crimes by developed legal systems, e.g., espionage” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. f (1987); see, e.g., *United States v. Ayes*, 702 F.3d 162, 166 (4th Cir. 2012) (describing “the protective principle of international law, which ‘permits a nation to assert subject matter criminal jurisdiction over a person whose conduct outside the nation’s territory threatens the national interest.’”) (quoting *United States v. Alomia-Riascos*, 825 F.2d 769, 771 (4th Cir. 1987)). The government will show that the conduct here was part of a broader al Qaeda plot to conduct terrorist attacks against U.S. interests. The United States’ interest in punishing those who seek to harm its national security would suffice under protective principle. See *United States v. Yousef*, 327 F.3d 56, 110 (2d Cir. 2003) (the protective principle justified the prosecution of a defendant for a terrorist plot to attack U.S. aircraft in order to influence U.S. foreign policy); cf. *United States v. Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003) (“Congress, under the ‘protective principle’ of international law, may assert extraterritorial jurisdiction over vessels in the high seas that are engaged in conduct that ‘has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems.’”).

That al Qaeda attacked a non-U.S. flagged vessel and injured non-U.S. nationals as part of its campaign against the United States does not diminish the interest of the United States in

punishing offenses related to the attack on MV *Limburg*, which occurred as part of the hostilities between the United States and al Qaeda.

II. It is Well-Established that Belligerents May Prosecute Unprivileged Enemy Belligerents in their Custody for Alleged Violations of the Law of War

In accordance with the protective principle, a State that is engaged in hostilities is entitled to exercise jurisdiction to punish unprivileged enemy belligerents for war crimes and other serious offenses committed against it during hostilities. This principle reflects the time-honored principle that a State engaged in hostilities may exercise jurisdiction over suspected “offenders” (including enemy belligerents) for “offenses” (*i.e.*, war crimes) committed during hostilities. *See In re Yamashita*, 327 U.S. 1, 11 (1946) (“An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war.”); *Ex parte Quirin* 317 U.S. 1, 28 (1942) (same); *see also United States v. List, et al.* (Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1241 (1950) (war crimes “are punishable by the *belligerent* into whose hands the criminals have fallen . . .”) (emphasis added); *United States v. Ohlendorf, et al.* (*Einsatzgruppen* Case), IV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 460 (“[t]here is no authority which denies any *belligerent* nation jurisdiction over individuals in its actual custody charged with violations of international law.”); H. Lauterpacht, 2 *Oppenheim’s International Law: Disputes, War and Neutrality* 587 (7th ed. 1952) (“The right of the belligerent to punish, during the war, such war criminals as fall into his hands is a well-recognized principle of International Law.”); *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957) (“[T]he *charges and specifications* before us clearly state *an offense* of unlawful belligerency, contrary to

the established and judicially recognized law of war—an offense within the jurisdiction of the duly constituted Military Commission with power to try, decide and condemn”) (emphasis added).

The United States is at war with al Qaeda, the Taliban, and associated forces. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 628-32 (2006) (“*Hamdan I*”); *Hamdan v. United States*, 696 F.3d 1238, 1240 (D.C. Cir. 2012) (“*Hamdan II*”); President Barack Obama, Remarks at the National Archives and Records Administration, 1 Pub. Papers 689 (May 21, 2009) (“Now let me be clear: We are indeed at war with Al Qaida and its affiliates.”); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The government will show that the accused is an unprivileged enemy belligerent and that Charges VII-IX are violations of the law of war committed in the context of, and associated with, these hostilities against the United States. These facts are sufficient to establish jurisdiction under international law.

III. World War II Precedents Make Clear that a Belligerent May Prosecute Enemy Belligerents for Violations of the Law of War Even if Their Own Nationals Are Not the Actual Victim of the Violations

The attack on the MV *Limburg* was part of an al Qaeda plot against U.S. interests and part of its war against the United States and its coalition partners, so it is of no moment that a U.S. national or vessel was not directly harmed in this specific attack. Moreover, World War II precedent makes clear that the accused may not escape accountability from the United States for his participation in the attack on MV *Limburg* simply because the accused’s conduct in Charges VII-IX did not directly injure the United States or U.S. nationals. Rather, that precedent establishes that a belligerent State may exercise jurisdiction to prosecute an unprivileged enemy belligerent for an offense against nationals of cobelligerents or allies.

The question whether it was permissible for a belligerent to punish enemy belligerents for war crimes where the victim was not a national of that State was presented during a World War II trial. The United States took the position that such a prosecution was justified. *See, e.g.*, Memorandum Opinion from Maj. Gen. Myron C. Cramer, U.S. Army, The J. Advoc. Gen., to the Joint Intelligence Committee, The Joint Chiefs of Staff, Jurisdiction To Punish War Criminals (Dec. 13, 1943) (“The right to punish for such an offense against an ally proceeds upon the well-established principle that allies or cobelligerents constitute but a single side of an armed struggle. This office has heretofore properly held that ‘cobelligerents fighting a common enemy are considered as constituting but a single side (2 Halleck, Int. Law (3d ed.) 503; Vattel, Law of Nations, Ch. XIV, sec. 207 (Carnegie trans.) p. 313)’ (SPJGW 1943/5930, 4 June).”).

The Department of Army Field Manual 27-10 reflects the World War II practice and explains that “[t]he jurisdiction of United States military tribunals in connection with war crimes is not limited to offenses committed against nationals of the United States but extends also to all offenses of this nature committed against nationals of allies and of cobelligerents and stateless persons.” FM 27-10, ¶ 507a (“Universality of Jurisdiction”). Congress endorsed this view in the M.C.A. by defining unprivileged belligerent to include “an individual (other than a privileged belligerent) who—(A) has engaged in hostilities against the United States or its coalition partners.” 10 U.S.C. § 948a(7)(A); R.M.C. 103(a)(29)(A). A coalition partner is defined as “any State or armed force directly engaged along with the United States in such hostilities or providing direct operational support to the United States in connection with such hostilities.” 10 U.S.C. § 948a(3); R.M.C. 103(a)(8).

Thus, the fact that the accused's attack against the MV *Limburg* only directly injured coalition partners, such as France, can in no way be a basis for depriving this Commission of jurisdiction.

7. Conclusion

The government respectfully requests that this Commission deny the defense motion to dismiss Charges VII-IX, as these charges are clearly authorized by the M.C.A. and international law.

8. Oral Argument

The defense has requested oral argument on this motion. The government joins that request.

9. Witnesses and Evidence

The government does not anticipate relying on any witnesses or evidence in support of this response.

10. Additional Information

The government has no additional information.

11. Attachments

A. Certificate of Service, dated 9 September 2013.

Respectfully submitted,

//s//

Anthony W. Mattivi
CDR Andrea Lockhart, JAGC, USN
Justin T. Sher
Joanna Baltes
Maj Chris Ruge, USMC
LT Bryan Davis, JAGC, USN
Trial Counsel
Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

Filed with TJ
9 September 2013

Appellate Exhibit 168C (Al-Nashiri)
Page 12 of 13

Filed with TJ
19 April 2019

Appellate Exhibit 617F (AAA)
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CERTIFICATE OF SERVICE

I certify that on the 9th day of September 2013, I filed **AE 168C, Government Response To Defense Motion to Dismiss Charges IX-XI [sic]** For Lack of Jurisdiction Under International Law, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//

CDR Andrea K. Lockart, JAGC, USN
Trial Counsel
Office of the Chief Prosecutor
of Military Commissions

Filed with TJ
9 September 2013

Appellate Exhibit 168C (Al-Nashiri)
Page 13 of 13

Filed with TJ
19 April 2019

Appellate Exhibit 617F (AAA)
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Attachment D

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 168G / AE 241C</p> <p>ORDER</p> <p>DEFENSE MOTION TO DISMISS CHARGES VII-IX FOR LACK OF JURISDICTION UNDER INTERNATIONAL LAW¹</p> <p>11 August 2014</p>
-------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act of 2009(2009 M.C.A.), 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111 84, 123 Stat. 2574 (Oct. 28, 2009). He was arraigned on 9 November 2011.

2. Procedural History. Defense moved for the dismissal of all charges related to the MV Limburg, specifically Specification 2 of Charge IV and Charges VII – IX, due to a lack of subject matter jurisdiction under international law. (AE 168 (Classified), AE 168A (Unclassified) and AE 168G (Supplemental Filing (filed after oral argument)). The Prosecution asserted the “Commission has jurisdiction over the offenses related to the attack on MV Limburg under both the [2009] M.C.A. and international law.” (AE 168C at 1.) The Prosecution focused on the protective principle of jurisdiction under international law as the basis for jurisdiction. Defense did not file a reply, and the Prosecution did not respond to the Defense’s supplemental filing. Oral argument occurred on 24 February 2014.² During oral argument, the Defense’s comments focused on how 10 U.S.C. §

¹ AE 168, DEFENSE MOTION TO DISMISS CHARGES IX - XI FOR LACK OF JURISDICTION UNDER INTERNATIONAL LAW, as originally filed on 26 August 2013, incorrectly identified the charges involving the MV Limburg as Charges IX – XI, which became Charges VII – IX at referral on 28 September 2011. Defense corrected this in AE 168G, Supplement to Defense Motion at pg 1. See also Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 24 February 2014, from 9:11 A.M. to 10:33 A.M. at 3074 where the Prosecution identified the error.

² See Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 24 February 2014, from 9:11 A.M. to 10:33 A.M. at 3068 to 3101.

948a(7)(A) and an application of Article 21, Uniform Code of Military Justice and international law did not provide a basis for the Commission to assert jurisdiction over the offenses involving the MV Limburg. The Prosecution failed to establish France was a coalition partner and the United States had an interest to vindicate or protect in a prosecution based on the alleged attack of the MV Limburg. The Prosecution argued jurisdiction vested under the protective principle of international law, 10 U.S.C. § 948a(7)(A), and raised 10 U.S.C. § 948a(7)(C) as an alternative basis of jurisdiction for the first time. The parties were granted permission to file additional pleadings on the Prosecution's assertion 10 U.S.C. § 948a(7)(C) provided a basis for jurisdiction, and the Defense filed AE 168G.

3. The Defense filed AE 241 and requested dismissal of the same charges and specifications as the Prosecution had not established that the Accused "was a member of al Qaeda at the time of the alleged offense under this chapter." (AE 241 at 1). The Prosecution responded and continued to assert "the Commission's exercise of jurisdiction over the Accused with respect to the charges at issue is lawful under both domestic and international law. States may lawfully try enemy belligerents before military commissions for violations of the law of war committed in the context of hostilities against them." (AE 241A at 1.) Oral argument on AE 241 occurred on 24 April 2014.³ During oral argument, the Defense pointed out the lack of evidence to support the Prosecution's assertions. The Prosecution on several instances averred it would provide evidence to the panel during the merits portion of the trial to establish jurisdiction beyond a reasonable doubt.

4. The Prosecution bears the burden of persuasion by a preponderance of the evidence when the Defense seeks dismissal of charges due to a lack of jurisdiction. (Rule for Military Commission (R.M.C.) 905(c)(2)(B).) The Prosecution acknowledged this burden in its pleadings. (*See* AE 168C at 2 and AE 241A at 2.) This would normally suggest the necessity to request and conduct an evidentiary hearing as part of the interlocutory motion. The Prosecution did not request such a

³ *See* Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 24 April 2014, from 2:59 P.M. to 4:54 P.M. at 3874 to 3905.

hearing despite the topic being discussed throughout both oral arguments by counsel and the Military Judge.⁴ It is not the responsibility of the Commission to sua sponte require the parties to conduct such a hearing.

5. In its pleadings and during its oral argument, the Prosecution proffered, without offering any evidence in support of the proffer, the existence of the following facts to support its assertion of jurisdiction:

- a. an attack on a civilian vessel (MV Limburg) occurred (*See* AE 168C at pg 2, AE 241A at pg 2, and Unofficial Transcript pg 3076);
- b. the attack was conducted by cells of al Qaeda fighters (*See* Unofficial Transcript pg 3076);
- c. the attack occurred in maritime lanes in Southwest Asia / in a Yemeni Port (*See* AE 168C at pg 2 and Unofficial Transcript pp 3076, 3085, and 3887);
- d. the U.S. and world economies were disrupted (*See* Unofficial Transcript pp 3077 and 3891);
- e. the price of oil rose for all countries because insurance rates rose (*See* Unofficial Transcript pp 3077, 3891, and 3893);
- f. since 2001, France was in Afghanistan fighting along with the U.S. against al Qaeda as a member of North Atlantic Treaty Organization (NATO) (*See* Unofficial Transcript pg 3079);
- g. NATO Members invoked Article 5 of the NATO Treaty to conduct operations in Afghanistan (*See* Unofficial Transcript pg 3079);
- h. MV Limburg was a French flagged vessel (*See* AE 168C at pg 2, AE 241A at pg 2, and Unofficial Transcript pg 3080);
- i. "hostilities," as the term is defined in 10 U.S.C. § 948a(9), against the United States existed (*See* Unofficial Transcript pg 3081);

⁴ See Unofficial Transcript at pages 3070, 3071, 3076, 3096, 3878, 3882, 3883, 3887, 3888, 3889, 3890, 3897, 3899, and 3903.

j. the MV Limburg was destined for Malaysia (*See* AE 168C at pg 2, AE 241A at pg 2, and Unofficial Transcript pg 3085);

k. the crew was composed of non-U.S. persons (*See* Unofficial Transcript pg 3085);

l. the oil in the MV Limburg was Iranian (*See* Unofficial Transcript pg 3085);

m. the Accused was a member of al Qaeda (*See* Unofficial Transcript pg 3885);

n. in 2002, when the attack occurred, one-quarter of all imported U.S. oil came from the Middle East (*See* Unofficial Transcript pg 3887);

o. U.S. interests extended to ensuring safe refueling ports for U.S. Navy vessels (destroyers) in the region (*See* Unofficial Transcript pg 3892);

p. U.S. financial, security, and governmental operations were all directly affected by the bombing of the MV Limburg (*See* Unofficial Transcript pg 3896);

q. MV Limburg was carrying crude oil (*See* AE 168C at pg 3 and AE 241A at pg 3); and,

r. tens of thousands of barrels of crude oil were lost due to the explosion and resulting damage to the hull of the MV Limburg (*See* AE 168C at pg 3 and AE 241A at pg 3).

6. The Defense, in its pleadings and during its oral arguments, acknowledged the following:

a. the MV Limburg was a French flagged vessel (*See* Unofficial Transcript pp 3069, 3072, and 3875);

b. the MV Limburg was attacked (*See* Unofficial Transcript pp 3069 and 3875);

c. the MV Limburg was carrying Iranian oil (*See* Unofficial Transcript pp 3069, 3072, and 3875);

d. the MV Limburg's destination was Malaysia (*See* Unofficial Transcript pp 3069, 3072, and 3875); and,

e. France was fighting in Afghanistan in 2002 (Unofficial Transcript pg 3095).⁵

⁵ This is the only statement of fact by the Prosecution which Defense Counsel specifically agreed was correct.

7. The Defense, to contest the Prosecution assertion of a rise in oil prices, proffered world oil prices were not adversely impacted by the attack on the MV Limburg based on a report from the Energy Information Administration.⁶ (AE 168G at pg 3.)

8. The Commission need not reach any conclusions of law based on both parties' legal arguments raised in their written filings and oral arguments. While the facts argued by the Prosecution may be easily susceptible of proof, the Prosecution failed to request an evidentiary hearing and offer any documentary or testimonial evidence into the record to factually support their assertion of jurisdiction as to the charges and specification involving the MV Limburg. The Prosecution has thus failed to meet its burden of persuasion in this interlocutory matter. (*See* R.M.C. 905c(2)(B).)

Accordingly, AE 168 and AE 241 are **GRANTED**.

So **ORDERED** this 11th day of August, 2014.

//s//
VANCE H. SPATH, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

⁶ The Defense stated the report was available at <http://www.eia.gov/dnav/pet/hist/LeafHandler.aspx?n=PET&s=RWTC&f=D>. (AE 168G at pg 3.)

Attachment E

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

Defense Motion

to Dismiss Specification 1 of Charge 1 and Specifications 1, 2, 5, 6, 7 and 8 of Charge 2 for Lack of Subject Matter Jurisdiction as a Matter of *Res Judicata*

9 January 2008

1. **Timeliness:** This motion is filed within the time frame permitted by the Military Commissions Trial Judiciary Rules of Court and the Military Judge's order dated 20 December 2007.
2. **Relief Sought:** Defendant Salim Ahmed Hamdan moves to Dismiss Specification 1 of Charge 1 and Specifications 1, 2, 5, 6, 7, and 8 of Charge 2 for lack of subject matter jurisdiction as a matter of *res judicata* under R.M.C. 905(g).
3. **Facts:**
 - A. In July of 2004, Mr. Hamdan was charged in a military commission convened by Order of the President of the United States pursuant in part to the President's powers under Article 21 of the U.C.M.J. with a single specification of Conspiracy to commit offenses triable by military commission. Charge Sheet, 13 July 2004 (Attachment A).
 - B. The specification alleged jurisdiction over Mr. Hamdan's conduct from February 1996 to November 24, 2001. Overt Acts alleged in support of the 2004 charge included:
 - From 1996 through 2001, Hamdan:
 1. delivered weapons, ammunition or other supplies to al Qaeda members and associates;
 2. picked up weapons at Taliban warehouses for al Qaeda use and delivered them directly to Saif al Adel, the head of al Qaeda's security committee, in Qandahar, Afghanistan;

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3. purchased or ensured that Toyota Hi Lux trucks were available for use by the Usama bin Laden bodyguard unit tasked with protecting and providing physical security for Usama bin Laden; and

4. served as a driver for Usama bin Laden and other high ranking al Qaeda members and associates. At the time of the al Qaeda sponsored attacks on the U.S. Embassies in Tanzania and Kenya in August of 1998, and the attacks on the United States on September 11, 2001, Hamdan served as a driver in a convoy of three to nine vehicles in which Usama bin Laden and others were transported to various areas in Afghanistan. Such convoys were utilized to ensure the safety of Usama bin Laden and the others. Bodyguards in these convoys were armed with Kalashnikov rifles, rocket propelled grenades, hand-held radios and handguns.

5. On divers occasions between 1996 and November of 2001, Hamdan drove or accompanied Usama bin Laden to various al Qaeda-sponsored training camps, press conference, or lectures. During these trips, Usama bin Laden would give speeches in which he would encourage others to conduct "martyr missions" (meaning an attack wherein one would kill himself as well as the targets of the attack) against the Americans, to engage in war against the Americans, and to drive the "infidels" out of the Arabian Peninsula. And

6. Between 1996 and November of 2001, Hamdan, on divers occasions received training on rifles, handguns and machine guns at the al Qaeda-sponsored al Farouq camp in Afghanistan.

Charge Sheet, 13 July 2004 (Attachment A).

- C. Among other arguments, in his petition for habeas corpus before the Supreme Court of the United States, Mr. Hamdan challenged the military commission's jurisdiction over the charges against him as being outside of the period of hostilities and therefore beyond the jurisdiction of the military commission.
- D. Writing for a plurality of the court in Mr. Hamdan's case, Justice Stevens ruled that "the offense alleged must have been committed both in a theater of war and during, not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore—indeed are symptomatic of—the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2779 (2006).

- E. After the passage of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600 (2006), codified at 10 U.S.C. §§ 948a-950w, Mr. Hamdan was again charged with a specification of conspiracy alleging substantially the same conduct that the Supreme Court (plurality) ruled to be outside of the scope of the relevant conduct and therefore not triable by law-of-war military commission in his case. To wit: "[F]rom in or about February 1996 to on or about November 24, 2001, conspire and agree with Usama bin Laden . . . Hamdan knowingly committed at least one of the following overt acts:
- a. Hamdan served as bodyguard for Usama Bin Laden;
 - b. Hamdan served as Usama bin Laden's personal driver;
 - c. Hamdan transported and delivered weapons, ammunition or other supplies to al Qaeda members and associates;
 - d. Hamdan drove or accompanied Usama bin laden to various al Qaeda-sponsored training camps, press conferences or lectures."

Charge Sheet, 10 May 2007 (Attachment B).

- F. Mr. Hamdan was also charged with material support for terrorism based, in whole or in part, on the same facts in Charge 2, Specifications 1, 2, 5, 6, 7, and 8. To wit: "[F]rom in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: personnel, himself, to be used in preparation for or carrying out an act of terrorism, and that the said Hamdan knew the said material support or resources were to be used for an act of terrorism, by joining the terrorist organization known as al Qaeda and performing at least one of the following:
- a. Received training at an al Qaeda training camp;
 - b. Served as a driver for Usama bin Laden transporting him to various locations in Afghanistan;

- c. Served as Usama bin Laden's armed bodyguard at various locations through Afghanistan;
- d. Transported weapons or weapons systems other supplies for the purpose of delivering or attempting to deliver said weapons or weapons systems to Taliban or al Qaeda members and associates."

Charge Sheet, 10 May 2007 (Attachment B).

4. Law and Argument:

A. Any Charges Prosecuted Against Mr. Hamdan in This Commission Must Concern Alleged Acts Occurring After September 11, 2001

In defining the crimes within the Commission's jurisdiction, Congress stated in the MCA that its intent was to codify "offenses that have traditionally been triable by military commissions." 10 U.S.C. § 950p. Traditionally there have been three types of military commissions, each with varying limits of jurisdiction. These include: (1) martial law commissions exercising jurisdiction in places where martial law has been declared, (2) occupation commissions exercising jurisdiction over area where civilian government cannot and does not function, and (3) war crimes commissions exercising jurisdiction over enemies that violate the law of war. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2776 (2006). There can be no serious disagreement that the MCA contemplates trying only those offenses traditionally triable by the third type of commission—war crimes.

Nor can it be seriously argued that a fundamental element of crimes traditionally tried before this third type of commission is that they occur in the context of hostilities. *See Hamdan*, 126 S. Ct. at 2779 (plurality op.) ("[A]s Winthrop makes plain, the offense alleged must have been committed both in a theater of war and *during*, not before, the relevant conflict."). "An offense, to be brought within the cognizance of a military commission, must have been committed within the period of the war." William Winthrop, *Military Law and Precedents* 837 (2d ed. 1920). "[A] military commission cannot . . . legally assume jurisdiction of, or impose a punishment for, an offence committed either before or after the war." *Id.*

The specifications against Mr. Hamdan at issue acknowledge this requirement, alleging in the case of the conspiracy specification that al Qaeda was "engaged in hostilities against the United States," and in the case of the material support specifications that the offense occurred in "the context of or associated with an armed conflict."

What is disputed is when the period of armed conflict began. While this question is open for argument in other cases brought before military commissions under the MCA, it is not open in Mr. Hamdan's case. Where Mr. Hamdan is concerned, a plurality of the Supreme Court reached a final decision that a state of armed conflict did not exist prior to September 11, 2001. *Hamdan*, 126 S. Ct. at 2777-79.

B. R.M.C. 905(g) Mandates Dismissal of Allegations Relating to Conduct Occurring Prior to September 11, 2001

R.M.C. 905(g) provides that:

Effect of final determinations. Any matter put in issue and finally determined by a military commission, reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other commission of the same accused, except that, when the offenses charged at one commission did not arise out of the same transaction as those charged at the commission at which the determination was made, a determination of law and the application of law to the facts may be disputed by the United States. *This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a Federal governmental unit were parties.*

R.M.C. 905(g) (emphasis added).

In short, R.C.M. 905(g) sets out the rule of *res judicata*. As explained in *Massie v. Paul*, 263 Ky. 183, 190 (1936): "*Res judicata* is a rule of law pervading every system of civilized jurisprudence, grounded upon public policy, in the interest of society, that there should be an end of litigation, and upon reasonable necessity which impels protection of the individual from the vexation of repeated suits. The doctrine applies and treats the final determination of the action as speaking the infallible truth as to the rights of the parties as to the entire subject of the controversy, and such controversy and every part of it must stand irrevocably closed by such

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determination. The sum and substance of the whole doctrine is that a matter once judicially decided is finally decided." *Massie*, 263 Ky. at 190 (internal quotation marks omitted). In criminal cases, *res judicata* "does not rest upon any constitutional provision. Rather it is 'a rule of evidence' which is imported into the criminal law by virtue of section 392 of the Code of Criminal Procedure, which provides that the rules of evidence in civil cases are applicable to criminal cases." *United States v. Carlisi*, 32 F. Supp. 479, 482 (D.N.Y. 1940).

The doctrine of *res judicata* is equally part of military law. See *United States v. Smith*, 4 U.S.C.M.A. 369, 15 C.M.R. 369 (1954); *United States v. Martin*, 8 U.S.C.M.A. 346, 24 C.M.R. 156 (1957); *United States v. Hooten*, 12 U.S.C.M.A. 339, 30 C.M.R. 339 (1961); *United States v. Doughty*, 14 U.S.C.M.A. 540, 543 (1964).

Of these cases, *Smith* is particularly germane. In *Smith* the court reversed the accused's conviction for larceny, finding that where a confession was found to be inadmissible in a previous court-martial, it could not later be introduced in a second proceeding on separate charges, even if the underlying decision could be argued to be error on its face. *Smith*, 15 C.M.R. at 375-76. In applying the doctrine, Judge Latimore observed with regards to what was then paragraph 71b of the Manual for Courts-Martial and what is now R.C.M. 905(g) that:

If we are not guided by the wording of the Manual, we might be inclined not to extend the doctrine to issues which do not arise out of one transaction or which do not bar a subsequent finding of guilt of another offense. However, the language used by the framers of the Manual is broad and sweeping and covers any issue of fact or law in issue and finally determined; makes no distinction as to issues directly involved or collaterally involved; it does not limit its application to issues arising out of one transaction; and we find no good reason to interpret the provision so narrowly as to require the accused again to litigate an issue which has been decided in his favor.

Id. at 374.

The language of R.C.M. 905(g) and R.M.C. 905(g) are identical and, accordingly, the application of the protective reach of *res judicata* equally broad. The Supreme Court plurality's conclusion that hostilities did not exist before September 11, 2001 therefore dictates that the

United States is estopped with respect to Specification 1 of Charge 1 from proving that "al Qaeda was engaged in hostilities against the United States" prior to September 11, 2001; and with regards to Specifications 1, 2, 5, 6, 7, and 8 of Charge 2 that the United States is estopped from proving that the conduct "occurred in the context of or associated with an armed conflict" prior to September 11, 2001. Accordingly, these Specifications should be dismissed in so far as they improperly rely on conduct pre-dating September 11, 2001.

5. **Request for Oral Argument:** The Defense requests oral argument. Oral argument is necessary to provide the Commission with the opportunity to fully explore the legal issues raised by this motion. As provided by R.M.C. 905(h), "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions."

6. **Request for Witnesses:** At this time, the Defense does not anticipate calling live witnesses. The Defense reserves the right to amend its request should the Prosecution response raise issues that would require Defense witnesses to rebut.

7. **Conference with Opposing Counsel:** The Defense has conferred with opposing counsel. The Prosecution objects to the requested relief.

8. **Attachments:**

- A. Charge Sheet, 13 July 2004
- B. Charge Sheet, 10 May 2007

Respectfully submitted,

By: 

LT. BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
Assistant Defense Counsel
Office of the Chief Defense Counsel



PROF. CHARLES SWIFT
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Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Berkman Center



ATTACHMENT A

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UNITED STATES OF AMERICA)	
)	
v.)	
)	CHARGE:
SALIM AHMED HAMDAN)	CONSPIRACY
a/k/a Salim Ahmad Hamdan)	
a/k/a Salem Ahmed Salem Hamdan)	
a/k/a Saqr al Jadawy)	
a/k/a Saqr al Jaddawi)	
a/k/a Khalid bin Abdallah)	
a/k/a Khalid wl'd Abdallah)	

Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah) is a person subject to trial by Military Commission. At all times material to the charge:

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 3, 2003 that Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jadawy, a/k/a Saqr al Jaddawi, a/k/a Khalid bin Abdallah, a/k/a Khalid wl'd Abdallah, hereinafter "Hamdan") is subject to his Military Order of November 13, 2001.
2. Hamdan's charged conduct is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others around 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee;

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security committee; finance committee; media committee; and religious/legal committee.

7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan and other countries for the purpose of supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula.
9. In February of 1998, Usama bin Laden, Ayman al Zawahari and others under the banner of the "International Islamic Front for Jihad on the Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
10. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize enemies of God."
11. Since 1989, members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the USS COLE in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

12. Salim Ahmed Hamdan (a/k/a Salim Ahmad Hamdan, a/k/a Salem Ahmed Salem Hamdan, a/k/a Saqr al Jadawy, a/k/a Saqr al Jaddawi, Khalid bin Abdallah, a/k/a Khalid w'l'd Abdallah, hereinafter "Hamdan"), in Afghanistan, Pakistan, Yemen and other countries, from on or about February 1996 to on or about November 24, 2001, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden, Saif al Adel, Dr. Ayman al Zawahari (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
13. In furtherance of this enterprise and conspiracy, Hamdan and other members or associates of al Qaida committed the following overt acts:

- a. In 1996, Hamdan met with Usama bin Laden in Qandahar, Afghanistan and ultimately became a bodyguard and personal driver for Usama bin Laden. Hamdan served in this capacity until his capture in November of 2001. Based on his contact with Usama bin Laden and members or associates of al Qaida during this period, Hamdan believed that Usama bin Laden and his associates were involved in the attacks on the U.S Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001.
- b. From 1996 through 2001, Hamdan:
 - 1) delivered weapons, ammunition or other supplies to al Qaida members and associates;
 - 2) picked up weapons at Taliban warehouses for al Qaida use and delivered them directly to Saif al Adel, the head of al Qaida's security committee, in Qandahar, Afghanistan;
 - 3) purchased or ensured that Toyota Hi Lux trucks were available for use by the Usama bin Laden bodyguard unit tasked with protecting and providing physical security for Usama bin Laden; and
 - 4) served as a driver for Usama bin Laden and other high ranking al Qaida members and associates. At the time of the al Qaida sponsored attacks on the U.S Embassies in Tanzania and Kenya in August of 1998, and the attacks on the United States on September 11, 2001, Hamdan served as a driver in a convoy of three to nine vehicles in which Usama bin Laden and others were transported to various areas in Afghanistan. Such convoys were utilized to ensure the safety of Usama bin Laden and the others. Bodyguards in these convoys were armed with Kalishnikov rifles, rocket propelled grenades, hand-held radios and handguns.
- c. On divers occasions between 1996 and November of 2001, Hamdan drove or accompanied Usama bin Laden to various al Qaida-sponsored training camps, press conferences, or lectures. During these trips, Usama bin Laden would give speeches in which he would encourage others to conduct "martyr missions" (meaning an attack wherein one would kill himself as well as the targets of the attack) against the Americans, to engage in war against the Americans, and to drive the "infidels" out of the Arabian Peninsula.
- d. Between 1996 and November of 2001, Hamdan, on divers occasions received training on rifles, handguns and machine guns at the al Qaida-sponsored al Farouq camp in Afghanistan.

ATTACHMENT B

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Filed with TJ
19 April 2019

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CHARGE SHEET		
I. PERSONAL DATA		
1. NAME OF ACCUSED: SALIM AHMED HAMDAN (hereafter "Hamdan")		
2. ALIASES OF ACCUSED: Salim Ahmad Hamdan, Salem Ahmed Salem Hamdan, Saqr al Jadawy, Saqr al Jaddawi, Khalid bin Abdalla, Khalid w/d Abdallah		
3. ISN NUMBER OF ACCUSED (LAST FOUR): [REDACTED]		
II. CHARGES AND SPECIFICATIONS		
4. CHARGE: VIOLATION OF SECTION AND TITLE OF CRIME IN PART IV OF M.M.C. SPECIFICATION: (See Attached Charge Sheet)		
III. SWEARING OF CHARGES		
[REDACTED]	5b. GRADE [REDACTED]	5c. ORGANIZATION OF ACCUSER OMC-PROSECUTION
		5e. DATE (YYYYMMDD) 20070405
<p>AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser the <u>5th</u> day of <u>April</u>, <u>2007</u>, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.</p>		
<p>_____ WILLIAM B. BRITT <i>Typed Name of Officer</i></p>	<p>_____ OMC-PROSECUTION <i>Organization of Officer</i></p>	
<p>_____ [REDACTED]</p>	<p>_____ 10 U.S.C. 1044(b) <i>Official Capacity to Administer Oath</i> <i>(See R.M.C. 307(b) must be commissioned officer)</i></p>	

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JK

IV. NOTICE TO THE ACCUSED		
6. On <u>5th April</u> , <u>2007</u> the accused was notified of the charges against him/her (See R.M.C. 308).		
<u>LTC WILLIAM B. BRITT</u> <i>Typed Name and Grade of Person Who Caused Accused to Be Notified of Charges</i>	<u>OMC-PROSECUTION</u> <i>Organization of the Person Who Caused Accused to Be Notified of Charges</i>	
<div style="background-color: black; width: 200px; height: 40px; margin: 0 auto;"></div>		
V. RECEIPT OF CHARGES BY CONVENING AUTHORITY		
7. The sworn charges were received at <u>1411</u> hours, on <u>6 April 2007</u> , at <u>Arlington, Virginia</u>		
Location		
For the Convening Authority: <u>[Redacted]</u> <u>g</u> <i>of Officer</i>		
_____ <u>o</u> <i>o</i>		
_____ <u>ure</u> <i>ure</i>		
VI. REFERENCE		
8a. DESIGNATION OF CONVENING AUTHORITY <u>Convening Authority 10USC §948h</u> <u>Appointed on 6 Feb 2007</u>	8b. PLACE <u>Arlington, Virginia</u>	8c. DATE (YYYYMMDD) <u>20070510</u>
Referred for trial to the (non)capital military commission convened by military commission convening order <u>07-04</u> <u>dated 1 May 2007</u>		
_____ subject to the following instructions ¹ : <u>this case is referred</u> <u>non-capital</u>		
<input checked="" type="checkbox"/> <u>Command, Order, or Direction</u> <input checked="" type="checkbox"/>		
<u>Susan J. Crawford</u> <i>Typed Name and Grade of Officer</i>	<u>Convening Authority 10USC §948h</u> <i>Official Capacity of Officer Signing</i>	
<div style="background-color: black; width: 200px; height: 40px; margin: 0 auto;"></div>		
VII. SERVICE OF CHARGES		
9. On _____, <u>2007</u> I (caused to be) served a copy these charges on the above named accused.		
<u>WILLIAM B. BRITT</u> <i>Typed Name of Trial Counsel</i>	<u>O-5</u> <i>Grade of Trial Counsel</i>	
_____ <u>Signature of Trial Counsel</u>		
FOOTNOTES		
¹ See R.M.C. 601 concerning instructions. If none, so state.		

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UNITED STATES OF AMERICA)	CHARGES
v.)	<i>Conspiracy</i>
SALIM AHMED HAMDAN (hereafter "Hamdan"))	Providing Material Support for Terrorism

CHARGE I: VIOLATION OF 10 U.S.C. §950v(b)(28), CONSPIRACY


Specification 1: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, conspire and agree with Usama bin Laden, Saif al Adel, Ayman al Zawahiri, Sheikb Sayeed al Masri, Mohammad Atef (a/k/a Abu Hafs al Masri), Saif al Adel and various members and associates, known and unknown, of the al Qaeda organization and join an enterprise of persons known as al Qaeda, and said al Qaeda engaged in hostilities against the United States, including the 1998 attack against the American Embassies in Kenya and Tanzania, the 2000 attack against the USS Cole, the September 11, 2001 attack against the United States and other, separate attacks, continuing to date and the aforementioned members and associates of al Qaeda shared a common criminal purpose that involved the commission or intended commission of one or more substantive offenses subject to trial by military commission, to wit: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; ~~hijacking or hazarding a vessel or aircraft~~; and terrorism and the said Hamdan knew the unlawful purpose of the agreement and the common criminal purpose of the enterprise and joined willfully, with the intent to further said unlawful purpose, and in order to accomplish some objective or purpose of the agreement or enterprise, Hamdan knowingly committed at least one of the following overt acts:

SJC
5-10-07

SJC
5-10-07

- a. Hamdan served as bodyguard for Usama Bin Laden;
- b. Hamdan served as Usama Bin Laden's personal driver;
- c. Hamdan transported and delivered weapons, ammunition or other supplies to al Qaeda members and associates;

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d. Hamdan drove or accompanied Usama bin Laden to various al Qaeda-sponsored training camps, press conferences, or lectures.

e. Hamdan, on various occasions, received weapons training in Afghanistan.

Specification 2: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about November 24, 2001, willfully enter into an agreement with one or more known or unknown members of al Qaeda or Taliban to commit the offense of Murder in Violation of the Law of War, a substantive offense subject to trial by military commission, to wit: the murder of United States or Coalition service members serving as pilots, crew or passengers of United States or Coalition military aircraft, knowing the unlawful purpose of said agreement and joining into said agreement willingly with the intent to further said unlawful purpose, knowingly commit an overt act in order to accomplish some objective or purpose of said agreement, to wit, transporting one or more SA-7 surface to air missiles to be ultimately used to unlawfully and intentionally kill said United States or Coalition service members.

**CHARGE II: VIOLATION OF 10 U.S.C. §950v(b)(25) – PROVIDING
MATERIAL SUPPORT FOR TERRORISM**

Specification 1: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: personnel, himself, to be used in preparation for or carrying out an act of terrorism, and that the said Hamdan knew the said material support or resources were to be used for an act of terrorism, by joining the terrorist organization known as al Qaeda and performing at least one of the following:

- a. Received training at an al Qaeda training camp;
- b. Served as a driver for Usama bin Laden transporting him to various locations in Afghanistan;
- c. Served as Usama bin Laden's armed bodyguard at various locations throughout Afghanistan;

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d. Transported weapons or weapons systems or other supplies for the purpose of delivering or attempting to deliver said weapons or weapons systems to Taliban or al Qaeda members and associates.

Specification 2: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in context of or associated with an armed conflict and with knowledge that al Qaeda has engaged in or engages in terrorism, did provide material support or resources, to wit: personnel, himself, to al Qaeda, an international terrorist organization engaged in hostilities against the United States, with the intent to provide such material support and resources to al Qaeda, by becoming a member of the organization and performing at least one of the following:

- a. Received training at an al Qaeda training camp;
- b. Served as a driver for Usama bin Laden transporting him to various locations in Afghanistan;
- c. Served as Usama bin Laden's armed bodyguard at various locations throughout Afghanistan;
- d. Transported weapons or weapons systems or other supplies for the purpose of delivering or attempting to deliver said weapons or weapons systems to Taliban or al Qaeda members and associates.

Specification 3: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: weapons and weapons systems, to wit: one or more SA-7 surface to air missiles, to be used in preparation for or carrying out an act of terrorism, and the said Hamdan knew these missiles were to be used for an act of terrorism, by joining the terrorist organization known as al Qaeda and knowingly providing one or more SA-7 surface to air missiles to members of al Qaeda, Taliban or others directly associated with said organizations.

Specification 4: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, on or about November 24, 2001, in the context of or associated with an armed conflict and with knowledge that al Qaeda, has engaged in or engages in terrorism, did provide material support or resources, to wit,

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weapons and weapons systems, to wit: one or more SA-7 surface to air missiles to al Qaeda, an international terrorist organization engaged in hostilities against the United States, with the intent to provide such material support and resources to al Qaeda, by knowingly providing one or more SA-7 surface to air missiles to members of al Qaeda, Taliban or others directly associated with said organizations.

Specification 5: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: service or transportation by serving as a driver for Usama bin Laden by transporting him to various locations in Afghanistan knowing that by providing said service or transportation he was directly facilitating communication and planning used for an act of terrorism.

Specification 6: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict and with knowledge that al Qaeda, an international terrorist organization engaged in hostilities against the United States, had engaged in or engages in terrorism, intentionally provide material support or resources to al Qaeda, to wit: service or transportation to Usama bin Laden by transporting him to various areas in Afghanistan knowing that by providing said service or transportation he was directly facilitating communication and planning used for acts of terrorism.

Specification 7: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict, provide material support and resources to wit: service as an armed body guard for Usama bin Laden, knowing that by providing said service as an armed bodyguard he was protecting the leader of al Qaeda and facilitating communication and planning used for acts of terrorism.

Specification 8: In that Hamdan, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan and other countries, from in or about February 1996 to on or about November 24, 2001, in the context of or associated with an armed conflict and with knowledge that al Qaeda, an international terrorist organization has engaged in hostilities against the United States, had engaged in or engages in terrorism, intentionally provide material support or resources, to al Qaeda, to wit: service as an armed

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body guard for Usama bin Laden by knowing that by providing said service as an armed body guard for Usama bin Laden he was protecting the leader of al Qaeda and facilitating communication and planning used for acts of terrorism.

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[REDACTED]

From: Cf [REDACTED]
Sent: Wednesday, January 09, 2008 4:37 PM
To: 'McMillan, Joseph M. (Perkins Coie)'; Britt, William, LTC, DoD [REDACTED];
Prasow, Andrea, Ms, DoD OGC; 'Schneider, Harry (Perkins Coie)'; Stone, Tim, LCDR, DoD OGC;
Mizer, Brian, LT, DoD OGC; Murphy, John, Mr, DoD OGC
Cc: Berrigan, Michael, Mr, DoD OGC; [REDACTED]
[REDACTED]
Subject: Filing Designation: D016 Defense Motion to Dismiss Specifications based on Res Judicata-US v.
Hamdan

All parties,

The filing designation for the 9 JAN 08 Defense Motion to Dismiss Specifications based on Res
Judicata is D016 Defense Motion to Dismiss Specifications based on Res Judicata - Hamdan. See RC 5.

v/r,

LTC [REDACTED]ell, USAR
Senior Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From: McMillan, Joseph M. (Perkins Coie) [mailto:[REDACTED]]
Sent: Wednesday, January 09, 2008 16:21
Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC;
[REDACTED]
Subject: US v. Hamdan: Defense Motion to Dismiss Specifications based on Res Judicata

LTC [REDACTED]
Attached for filing in the case of *United States v. Hamdan* please find the Defense Motion to Dismiss Specification
1of Charge 1 and Specifications 1, 2, 5, 6, 7 and 8 of Charge 2 for lack of Subject Matter Jurisdiction as a Matter
of *Res Judicata*. The PDF version is signed and the Word version is unsigned. The attachment is in the separate
pdf.

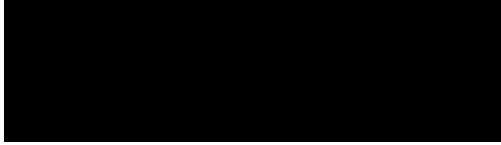
<<13862537_1.DOC>> <<Def M Res Judicata.pdf>> <<Attachments - Res Judicata.pdf>>

Respectfully submitted,

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1/9/2008

Joe McMillan
Perkins Coie LLP



NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

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1/9/2008

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19 April 2019

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Attachment F

UNITED STATES OF AMERICA)	
)	
v.)	Government's Response to
)	Motion to Dismiss Specification 1 of
)	Charge I and Specifications 1, 2, 5, 6, 7 and
SALIM AHMED HAMDAN)	8 of Charge II as a Matter of <i>Res Judicata</i>
)	

1. **Timeliness.** This response is timely pursuant to the Military Judge's order of 20 December 2007.

2. **Relief.** The Prosecution respectfully requests that the Military Judge deny the accused's motion to dismiss Specification 1 of Charge I and Specifications 1, 2, 5, 6, 7 and 8 of Charge II as a matter of *res judicata*.

3. **Overview.**

a. The accused supports his motion by reference to *Hamdan v Rumsfeld*, 126 S. Ct. 2749 (2006). Accordingly, the accused asks this Court to give *res judicata* effect to doubts expressed in *Hamdan's* plurality opinion, that offenses occurring before 11 September 2001 could be triable by military commission. He thus moves this Court to dismiss specifications alleging acts that occurred, or might have occurred, prior to 11 September 2001.

b. The plurality's opinion bears none of the hallmarks of a decision having *res judicata* effect. It did not constitute a final decision of the Court on the merits of the issue and was unnecessary to the Court's decision, and thus is not preclusive. Indeed, the Court's controlling opinion expressly declined to address questions concerning the starting point and period of hostilities applicable to this case. Moreover, the plurality itself declined actually to determine the period of hostilities and the issue was ultimately unnecessary even to the plurality's own opinion. For these reasons, the Court should deny the accused's Motion to dismiss the listed Specifications.

4. **Burden of Proof.**

a. Rule 905(c)(2)(A) of the Rules for Military Commissions (R.M.C.) provides that "[e]xcept as otherwise provided," the burden of persuasion for a motion rests with the moving party. One such exception is that "[i]n the case of a motion to dismiss for lack of jurisdiction, the burden shall be on the prosecution." R.M.C. 905(c)(2)(B). The accused characterizes his motion to apply preclusive effect to an issue tangentially discussed by a plurality of Members of the Supreme Court as one asserting a lack of subject matter jurisdiction. See Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction as a Matter of *Res Judicata* at 1 (hereinafter Motion).

b. However, "[s]ubject-matter jurisdiction defines a court's authority to hear a given

type of case,” *United States v. Morton*, 467 U.S. 822, 828 (1984), and matters pleaded as *res judicata* are generally viewed as affirmative “defense[s] to any issue or element of an offense,” *United States v. Smith*, 15 C.M.R. 369, 372 (C.M.A. 1954) (internal quotation marks and citation omitted). In other words, the accused does not here argue that the Court lacks authority to hear the type of offense with which he is charged, but rather asserts that certain referred charges are defective, and fail to state an offense, because they refer to conduct that is, in his view, outside the period of hostilities between the United States and al-Qaeda.

c. Such a challenge to the substantive sufficiency of referred charges questions the merits of a case, rather than the Court's subject-matter jurisdiction or authority to adjudicate that type of case. See *United States v. Cotton*, 535 U.S. 625, 630–31 (2002); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1342 (D.C. Cir. 2004); *United States v. Gonzalez*, 311 F.3d 440, 442 (1st Cir. 2002); *United States v. Brown*, 164 F.3d 518, 520–22 (10th Cir. 1998). The Rules similarly recognize that the dismissal of a charge for failure to state an offense is not jurisdictional in nature. See R.M.C. 907(b) (separately enumerating dismissals for lack of jurisdiction and for failure to state an offense).

d. Placing the burden of persuasion in pleading *res judicata* upon the accused as a defense, rather than upon the prosecution as a jurisdictional matter, is a result supported by precedent in military jurisprudence, see *Smith*, 15 C.M.R. at 372, as well as of the Supreme Court, see *Schiro v. Farley*, 510 U.S. 222, 233 (1994) (“The burden is on the accused to demonstrate that the issue whose re-litigation he seeks to foreclose was actually decided in the first proceeding.”) (internal quotation marks and citation omitted). The burden of proof here properly rests with the accused.¹

5. **Facts.**

a. The accused was captured in Afghanistan during the course of hostilities between forces of the United States and members of the Taliban and al-Qaeda. On 13 July 2004, the accused was charged in a military commission authorized by the President of the United States with conspiring with al-Qaeda associates, from February 1996 to November 2001, to commit offenses triable by military commission. See Motion, Attachment A, ¶ 12.

¹ For reasons discussed below, the accused's assertion that preclusive effect should be given to a non-final opinion by a plurality of the Court's Members, which only arguably and unnecessarily expressed an opinion about the issue at hand, fails even if the burden of persuasion rested with the Prosecution.

b. The Specification further alleged that the accused committed a number of overt acts between 1996 and November 2001, in furtherance of the conspiracy. These overt acts included, among others, serving as Usama bin Laden's bodyguard and driver until the time of the accused's capture; delivering weapons and supplies to al-Qaeda members; receiving training in military skills at an al-Qaeda-sponsored camp; and transporting Usama bin Laden throughout Afghanistan to ensure his safety after the attacks on U.S. embassies in 1998 and on the United States in 2001. *See id.* Attachment A, ¶ 13.

c. The accused filed a petition for habeas corpus, which the U.S. District Court for the District of Columbia granted. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). The district court did not address any claim that the charges against the accused failed to state an offense because the overt acts occurred outside the period of hostilities between the United States and al-Qaeda. The government appealed, and the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's decision. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). In doing so, the court of appeals likewise considered only the accused's separation-of-powers, Geneva Convention and other, procedural, claims, but did not address a contention that the charge failed to state an offense under the laws of war.

d. The Supreme Court granted certiorari, and reversed. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). In doing so, the Court held, in essence, that the military commission as then constituted lacked the power to proceed with the accused's case because its structure and procedures violated the Uniform Code of Military Justice (UCMJ) and certain Geneva Convention provisions. *See id.* at 2786.

e. As relevant here, in *Hamdan* the accused had asserted other deficiencies in the government's authority to subject him to trial by military commission. The accused claimed that a military commission lacked jurisdiction to try him because the charge of conspiracy is not cognizable by such commission and the war on terror is not properly understood as a conflict allowing for the establishment of military commissions. Neither party fully addressed the issue raised here—determining when the period of hostilities began for purposes of conspiracy and material support charges and whether conduct pre-dating 11 September 2001 could support Specifications for such charges.

f. A plurality of four Justices in *Hamdan* did address the issue, opining that the President's war powers were activated only after the events of 11 September 2001 and the subsequent Authorization for Use of Military Force (AUMF), 50 U.S.C. § 1541 note. *Hamdan*, 126 S. Ct. at 2777–78 & n.31 (plurality opinion). As a result, the plurality expressed doubt that a conspiracy charge triable by military commission could be based upon conduct that predated 11 September 2001. *Id.* at 2778–79 (plurality opinion). However, the plurality focused upon a far broader question than establishing the time in which hostilities commenced: whether the offense of conspiracy could be tried in a military commission at all. *Id.* at 2779–86 (plurality opinion). The plurality answered this question by expressing its belief that the crime of conspiracy “is not a

recognized violation of the law of war,” regardless of when hostilities began. *Id.* at 2784 (plurality opinion).

g. Three Justices disagreed with the plurality's assessment, asserting that the starting point of the present conflict must be judged by the initiation of hostilities, and that such judgments are committed solely to the President in exercising his constitutional role as commander-in-chief. *Hamdan*, 126 S. Ct. at 2827 (Thomas, J., dissenting). The dissent also found support for a determination that the period of hostilities pre-dated 11 September 2001, both in the actions of Congress and in the available evidence. *Id.* at 2827–28 (Thomas, J., dissenting). A fourth Justice concurred in part with the Court's decision, agreeing that the military commission as constituted violated the UCMJ and portions of the Geneva Conventions, and therefore declining to address the validity and scope of the conspiracy charge. *Id.* at 2809 (Kennedy, J., concurring in part). The Court's ninth Member, the Chief Justice, took no part in the consideration or decision of *Hamdan*. *Id.* at 2799.

h. On 10 May 2007, charges were referred against the accused after enactment of the Military Commissions Act of 2006 (M.C.A.), Pub. L. No. 109-366, 120 Stat. 2600. In Charge I, Specification 1, the accused stands accused of conspiring, from February 1996 to November 2001, to commit offenses subject to trial by military commission, and of committing overt acts in furtherance of same conspiracy, in violation of 10 U.S.C. § 950v(b)(28). Specification 2 of the same Charge alleges a conspiracy and overt act occurring in November 2001. The referred charges also accuse the accused, in Charge II, of providing material support for terrorism, in violation of 10 U.S.C. § 950v(b)(25). Specifications 1, 2, 5, 6, 7 and 8 of Charge II allege acts of providing such support that occurred between February 1996 and November 2001, while Specifications 3 and 4 allege acts occurring in November 2001. *See* Motion, Attachment B.

6. **Discussion.**

a. The accused's motion urges this Court apply the doctrine of *res judicata* to the period-of-hostilities portion of the plurality opinion in *Hamdan*, 126 S. Ct. 2749, as described in paragraph 5.f. above. Specifically, the accused asks this Court to dismiss the Specifications that refer to conduct that occurred, or might have occurred, in a period pre-dating 11 September 2001. This Court should reject the accused's invitation to extend the limited doctrine of *res judicata* to include giving preclusive effect to the non-final opinion of a plurality of Justices about an issue whose resolution was unnecessary to the Court's holding and, indeed, was unnecessary even to that plurality's opinion.²

² The accused's assertion is properly and more specifically characterized as one of issue preclusion or collateral estoppel, rather than claim preclusion; however, given the separate causes of action before the Supreme Court in *Hamdan* and before this Court, his assertion of claim preclusion in the previous proceeding, even if it could be made, would amount to issue preclusion here and, at any rate, would fail for the same reasons.

The *Hamdan* plurality's opinion is not a final decision on the merits by the Court, and is not subject to *res judicata* effect.

b. “The doctrine of *res judicata* provides that a matter put in issue and finally determined by a court of competent jurisdiction cannot be disputed between the same parties in a subsequent trial . . .” *United States v. Jackson*, 20 M.J. 83, 85 (C.M.A. 1985) (quoting *Manual for Courts-Martial* ¶ 71b (1969)); see *Smith*, 15 C.M.R. at 372. The doctrine, originally a civil law construct, has been recognized in criminal law as well as military law. *Smith*, 15 C.M.R. at 372 (citing *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916)). In military jurisprudence, the doctrine is codified by Rules 905(g) of the Rules for Courts Martial (R.C.M.) and of the Rules for Military Commissions. These two provisions are virtually identical:

Any matter put in issue and finally determined by a military commission [or court-martial, R.C.M. 905(g)], reviewing authority, or appellate court which had jurisdiction to determine the matter may not be disputed by the United States in any other commission [or court-martial, *id.*] of the same accused, except that, when the offenses charged at one commission [or court-martial, *id.*] did not arise out of the same transaction as those charged at the commission [or court-martial, *id.*] at which the determination was made, a determination of law and the application of law to the facts may be disputed by the United States. This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a Federal governmental unit were parties.

R.M.C. 905(g).

c. At the outset, it is not clear that Rule 905(g) requires this Court to give preclusive effect even to final judgments made during an appellate court's consideration of a habeas petition. Although both Rules 905(g) provide that they “shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a Federal governmental unit were parties,” R.M.C. 905(g); R.C.M. 905(g), preclusive effect traditionally has been given only to issues that were finally resolved in separate *criminal* judicial proceedings. Indeed, the four examples provided in the discussion of R.C.M. 905(g) as illustrations of the preclusive effect of a previous judgment all contemplate issues decided in the course of a separate criminal proceeding, as do the precedents relied upon by the Court of Military Appeals in *Smith*, 15 C.M.R. at 373–74; see *United States v. Morrison*, 12 M.J. 272, 275 (C.M.A. 1982) (“[I]n situations where the doctrine of collateral estoppel or *res judicata* is applied, usually the *prior trial* bars re-litigation in a *later trial*.”) (emphasis added); *United States v. Doughty*, 34 C.M.R. 320, 323 (C.M.A. 1964) (“Military law likewise has adopted the defense of *res judicata* and permitted it to be pleaded in bar of conviction upon a *second trial* involving the same facts.”) (emphasis added); see also *Oppenheimer*, 242 U.S. at 87–88 (collecting

criminal cases). That Court has thus far declined to consider the preclusive effect of issues resolved during previous, civil, habeas litigation in a subsequent court-martial. *See United States v. Saulter*, 5 M.J. 281, 283 (C.M.A. 1978). There is no reason to believe that the scope of R.M.C. 905(g) is broader than the nearly-identical provision in R.C.M. 905(g)—indeed, the accused agrees that their scope is identical, *see* Motion at 6—and therefore the preclusive effect that this Court should give to an issue decided in a separate civil proceeding is equally doubtful.

d. Nevertheless, this Court need not address whether separate habeas litigation involving this accused constitutes a “judicial proceeding” under R.M.C. 905(g) because, even under the terms of the Rule, the plurality’s opinion concerning the period of hostilities in this case is not entitled to *res judicata* effect.

e. As is apparent from the text of Rule 905(g), “a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties.” *Frank v. Mangum*, 237 U.S. 309, 334 (1915). “The rules of *res judicata* are applicable only when a final judgment is rendered.” Restatement (Second) of Judgments § 13 (1980) (hereinafter Restatement); *see* 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4432, at 52 (2d ed. 2002) (hereinafter Wright, Miller & Cooper) (“To qualify for preclusion, a judgment must be valid, final, and on the merits.”). “Finality will be lacking if an issue of law or fact essential to the adjudication of the claim has been reserved for future determination” Restatement § 13 cmt. b. “If [an] appellate court terminates the case by final rulings as to some matters only, preclusion is limited to the matters actually resolved . . . whether it terminated the case on terms that left it unnecessary to resolve other matters or affirmed on some grounds and vacated or reversed on others.” 18A Wright, Miller & Cooper § 4432, at 63–64. As described below, the plurality opinion upon which the accused relies bears none of the hallmarks of a preclusive decision.

f. At the outset, the plurality’s opinion concerning the period of hostilities was not a decision of the Court; it did not carry a majority of Members of the Court, and the Court was, at best, equally divided on the question. Assuming for the sake of argument that four Members agreed in the plurality opinion that actions pre-dating 11 September 2001 are not triable by this Court (an uncertain assumption, for reasons discussed in paragraph 6.j.–k. below), an equal number of the Court’s Members disagreed with that assertion or declined to consider the issue. In such a circumstance, the opinion is entitled to no precedential weight, let alone preclusive effect. *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

g. But even if the Court cannot be considered “equally divided” given the divergence in resolving the period-of-hostilities issue between *Hamdan*’s dissenting and concurring Members, the plurality opinion does not constitute the judgment of the Court. “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members

who concurred in the judgments on the narrowest grounds . . .” *Marks v. United States*, 430 U.S. 188, 193 (1977) (citations omitted); *cf. CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987) (“[W]e are not bound by [a plurality opinion’s] reasoning.”); *see also Horton v. California*, 496 U.S. 128, 136 (1990) (reaffirming that a plurality view that does not command a majority is not binding precedent). In *Hamdan*, Justice Kennedy’s concurring opinion represented the “position taken . . . on the narrowest grounds,” agreeing with the majority only in that the military commissions as then constituted violated certain provisions of Federal law, but reserving judgment on questions about the scope and validity of the conspiracy charges. *Hamdan*, 126 S. Ct. at 2809 (Kennedy, J., concurring in part). Indeed, a majority of Members expressed this limited holding in *Hamdan*’s controlling opinion: “Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed.” *Id.* at 2786. To the extent that *Hamdan* offered any judgment on the period-of-hostilities question, then, that judgment was to decline to reach the question at all. A decision thus deferring judgment on the issue critical to the accused’s assertion here cannot be final, *see* Restatement § 13 cmt. b, and the plurality’s opinion about that deferred issue is not entitled to preclusive effect.

Determining the period of hostilities was not necessary to resolving the question at issue in *Hamdan*, and the plurality’s opinion on that subject is not *res judicata*.

h. The accused’s attempt to extend preclusive effect to the non-final opinion of a plurality of the Court’s fails for other, related, reasons. It is axiomatic that such preclusion only applies to matters that have been actually and necessarily decided in a previous proceeding. 18 Wright, Miller & Cooper § 4420, at 505; 18 *id.* § 4421, at 536. Invocation of the doctrine of *res judicata* is limited to circumstances where the previous decision of a tribunal “could *only* have been based on resolution against the government of an issue which is again before the court.” *United States v. Hairston*, 15 M.J. 892, 895 (A.C.M.R. 1983) (citing, among others, *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)) (emphasis added); *see United States v. Marks*, 45 C.M.R. 55, 59 (C.M.A. 1972); *see also Schiro*, 510 U.S. at 232–33. This principle extends to decisions made in habeas; a judgment granting a petitioner habeas relief “is *res judicata* only . . . of the issues of law and fact *necessarily* involved in that result.” *Collins v. Loisel*, 262 U.S. 426, 430 (1923) (emphasis added).

i. As is clear from the discussion above, the *Hamdan* Court as a whole did not actually decide whether the period of hostilities in this case pre-dated 11 September 2001. Rather, in reversing the District of Columbia Circuit’s decision, the Court determined that the military commissions as then constituted violated provision of the UCMJ and other law. Determining when hostilities started for purposes of charging offenses under the M.C.A. simply had nothing to do with the controlling *Hamdan* decision, nor did the plurality’s analysis of the

scope or extent of conspiracy liability. Notwithstanding opinions expressed on these subjects by the plurality and the dissenting Members, neither of those competing opinions is entitled to preclusive effect in this proceeding.

Even by its terms, the plurality opinion did not purport to determine the period of hostilities, and resolution of that question was unnecessary even for the plurality's preferred result.

j. Indeed, the defects in the accused's argument are apparent from scrutiny of the plurality's opinion itself. As noted above, *res judicata* is only available for issues finally determined in a prior proceeding. But even if the plurality's opinion controlled, *res judicata* would be unavailable because the plurality never *actually decided* the issue that the accused seeks to give preclusive effect. In its opinion, the plurality briefly explained that the overt acts specified in the original charge post-dated the events of 11 September 2001, and enactment of the AUMF, and expressed its belief that the present conflict commenced on the date of those attacks. *Hamdan*, 126 S. Ct. at 2778 & n.31 (plurality opinion). The plurality then noted that "[t]hese facts alone *cast doubt upon* the legality of the charge" then pending, *id.* at 2778-79 (plurality opinion) (emphasis added), but opined that the conspiracy charge could not be prosecuted by a military commission because such an offense was not a violation of the law of war, *id.* at 2779-86 (plurality opinion). Such an expression of doubt by a plurality of the Court is far removed from the final determination of an issue that Rule 905(g) requires, and falls short of the accused's burden to demonstrate that the issue was actually decided. *See Schiro*, 510 U.S. at 233.

k. Moreover, resolution of the issue that the accused seeks to give preclusive effect was unnecessary for the plurality opinion itself. Even if a plurality of the Court's Members did determine that the present conflict started on 11 September 2001, determining the period of hostilities was wholly unnecessary for the plurality's ultimate opinion. Rather, the plurality made clear after expressing its doubts about the scope of the hostilities period that it otherwise believed the conspiracy charge could not be prosecuted as a matter of law, regardless of when the present conflict began. *See id.* at 2785 (plurality opinion). Indeed, the plurality dedicated most of its opinion to analyzing the validity of a conspiracy charge generally, and its discussion of the period of hostilities was, even to the plurality, tangential to the broader question. *Compare id.* at 2778-79 (plurality opinion) (discussing doubts about the scope of the conflict period), *with id.* at 2779-86 (plurality opinion) (analyzing the validity of the conspiracy charge).

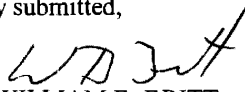
l. In sum, the *Hamdan* plurality's opinion concerning the period of hostilities bears none of the characteristics necessary for *res judicata* effect in this separate proceeding. The plurality did not command a majority of Members of the Court, and was not a final determination of the issue, because the controlling opinion expressly found the issue's resolution to be unnecessary. The plurality opinion did not actually decide the issue for the Court, nor was its rationale necessary to the Court's decision. Indeed, the plurality did not actually determine the period of hostilities even for its own opinion, but rather simply expressed doubt that this conflict

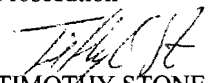
began before 11 September 2001. Moreover, the plurality's view of the period of hostilities applicable to this accused's case was entirely unnecessary to its opinion of the validity of the original conspiracy charges. For these reasons, the Court should decline the accused's unprecedented request to give the *Hamdan* plurality's opinion *res judicata* effect, and deny his motion to dismiss the listed Specifications.

7. **Oral Argument.** The Prosecution does not believe that oral argument is necessary to resolve the accused's Motion, as a determination of the issue presented may be made through reference to the written pleadings and the *Hamdan* decision. The Prosecution is prepared to present oral argument on the accused's Motion, however, should the Military Judge schedule it.

8. **Request for Witnesses.** The Prosecution does not anticipate calling witnesses.

Respectfully submitted,


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Attachment G

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D016

Defense Supplemental Submission
in Support of Defense Motion to Dismiss
Specification 1 of Charge 1 and Specifications
1, 2, 5, 6, 7 and 8 of Charge 2 for Lack of
Subject Matter Jurisdiction as a
Matter of Res Judicata

7 March 2008

1. **Timeliness:** This supplemental brief is filed in accordance with the invitation by the Military Judge to submit additional authority bearing on the issue of the date of the beginning of the relevant armed conflict.
2. **Relief Sought:** Defendant Salim Ahmed Hamdan seeks dismissal of Specification 1 of Charge 1 (Conspiracy) and Specifications 1, 2, 5, 6, 7 and 8 of Charge 2 (Providing Material Support for Terrorism) for lack of subject matter jurisdiction, as the acts alleged in those Specifications involve, either in whole or in part, conduct that predates the onset of the armed conflict in which Mr. Hamdan was captured.
3. **Overview:** At oral argument on the Defense motion to dismiss the above-referenced charges (D016) on 7 February 2008, the Military Judge invited the parties to submit additional authority relating to the start of the "war" for purposes of determining if the military commission has jurisdiction over the acts alleged in the Charge Sheet. The Military Judge is the proper authority to determine when the war started for such jurisdictional purposes, as the facts concerning the use of U.S. armed forces during the relevant period are undisputed, and the proper application of law to undisputed facts is a question of law. Indeed, on numerous occasions throughout our history, courts have made a determination of whether a state of war exists and drawn legal conclusions based on that determination. In this case, the undisputed facts

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also show that the political branches of the U.S. Government regarded the armed conflict with the perpetrators of the September 11, 2001, attacks to have begun on or near that date. Likewise, it is undisputed that U.S. military personnel were inserted into Afghanistan in October 2001 to respond to those attacks, following the Authorization for the Use of Military Force ("AUMF") passed by Congress on 18 September 2001. Accordingly, the date of the start of the relevant armed conflict for the purpose of this Commission's jurisdiction over Mr. Hamdan should be deemed to be on or near 11 September 2001, and charges relating to conduct that occurred in whole or in part prior to that date should be dismissed.

4. **Facts:**

- A. In June 1996, President Clinton spoke at a memorial service at Eglin Air Force Base, Florida, for American Servicemen killed in Saudi Arabia, saying: "We're blessed to live in a prosperous land *in a time of peace*, but we are not free from peril." (Attachment A.)
- B. In August 1998, President Clinton announced the capture of a suspect in the bombing attack on the U.S. Embassy in Nairobi, Kenya. He thanked "our law enforcement and intelligence agencies" along with "Kenyan and Tanzanian authorities for their hard work and close cooperation with the FBI." He stated that "we will continue to use all the tools at our disposal – law enforcement, diplomacy, and when necessary, America's military might," but made no mention of the deployment of armed forces or hostilities under way against the persons or group responsible for the embassy attacks. (Attachment B.)
- C. On October 14, 2000, immediately following the attack on the USS *Cole*, President Clinton stated: "This tragic loss should remind us that even when America is not at war, the men and women of our military risk their lives every day in places where comforts are few and dangers are many. No one should think for a moment that the strength of our military is less important in times of peace, because *the strength of our military is a major reason we are at peace.*" (Attachment C.)
- D. On October 18, 2000, at a memorial service for the sailors killed on the USS *Cole*, President Clinton repeated his statement that "even when America is not at war, the men and women of our military still risk their lives for peace." He also stated that the men and women of the USS *Cole* "*were standing guard for peace.*" (Attachment D.)
- E. On September 11, 2001, members of al Qaeda attacked the United States by

crashing hijacked airplanes into the World Trade Towers in New York, the Pentagon in Washington, D.C., and a field in western Pennsylvania, killing approximately 3000 people. President Bush subsequently referred to this as an "act of war." *See, e.g.*, Remarks by the President at Photo Opportunity with House and Senate Leadership (Sept. 19, 2001). (Attachment E).

- F. On September 15, 2001, in responding to the terrorist attacks, President Bush said in a radio address to the nation: "This *will be* a different kind of conflict against a different kind of enemy." (Attachment F.)
- G. On September 18, 2001, one week after the terrorist attacks, Congress passed the Authorization for the Use of Military Force, P.L. 107-40 ("AUMF"), which provides: "the President is authorized 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." (Attachment G.)
- H. On September 20, 2001, in an address to a Joint Session of Congress and to the American People, President Bush stated: "Tonight we are a country awakened to danger and called to defense freedom. . . . Our war on terror begins with al Qaeda, but it does not end there. . . . Our nation has been put on notice: We are not immune from attack. We will take defensive measures against terrorism to protect Americans." (Attachment H.)
- I. On October 7, 2001, the United States and the United Kingdom launched a military assault on Afghanistan "designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime." Presidential Address to the Nation (Oct. 7, 2001) (Attachment I.)
- J. On November 13, 2001, President Bush issued a Military Order, 3 C.F.R. 918 (2002), that provided: "International terrorists, including 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* that requires the use of the United States Armed Forces." (Attachment J.)
- K. In July 2002, for the purposes of permitting expedited naturalization of aliens, President Bush declared in Executive Order 13269: "I designate as a period in which the Armed Forces of the United States were engaged in armed conflict with a hostile foreign force the period beginning on September 11, 2001." (Attachment K).

6. **Law and Argument:**

A. **Determining When the Relevant Armed Conflict Began Is a Jurisdictional Issue Appropriately Decided By the Military Judge in This Case**

This is a law of war commission that properly exercises jurisdiction only over alleged offenses taking place "in the context of and...associated with an armed conflict." Manual for Military Commissions, Crimes and Elements (identifying "armed conflict" as a necessary element of each of the substantive offenses triable by commission under the MCA).

In *United States v. Khadr*, the Court of Military Commission Review instructed that the military judge in a commission convened pursuant to the MCA should determine both the factual and legal issues necessary to assess whether jurisdiction exists:

The text, structure, and history of the M.C.A. demonstrate clearly that a military judge presiding over a military commission may determine both the factual issue of an accused's "unlawful enemy combatant status" and the corresponding legal issue of the military commission's *in personam* jurisdiction. A contrary interpretation would ignore . . . the long-standing history of military judges in general courts-martial finding jurisdictional facts by a preponderance of the evidence, and resolving pretrial motions to dismiss for lack of jurisdiction.

CMCR 07-001 (24 September 2007) at 24.

Thus, even if there were disputed facts bearing on the question of when the relevant armed conflict began, the Military Judge would be the finder of fact on that jurisdictional issue, based on a preponderance of the evidence standard. In this case, the relevant markers of whether the United States was at war with any group with which Mr. Hamdan was associated are not subject to reasonable dispute. There can be no contention that the political branches of the U.S. Government maintained that the United States was at war during the period immediately prior to 11 September 2001. Likewise, there can be no contention that U.S. military personnel were deployed in a war against al Qaeda. "Questions of the applicability of a rule of law to an undisputed set of facts are normally questions of law." Manual for Military Commissions,

R.M.C. 801, Discussion. In light of these undisputed facts, the Military Judge can and should rule that the United States was not involved in armed conflict with al Qaeda prior to 11 September 2001 for purposes of determining the jurisdiction of this Commission.

B. American Courts Have Often Determined Whether a State of War Exists, Relying on an Empirical Assessment of Facts and the Stance of the Political Branches

Because the existence of a state of war has legal significance in numerous contexts, American courts have often been called upon to determine whether a state of war exists, a duty they discharge in order to resolve the cases they must adjudicate:

Since the earliest years of the nation, courts have not hesitated to determine when military action constitutes "war." In *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 1 L.Ed. 731 (1800), the Supreme Court had to decide whether hostilities between France and the United States amounted to a state of war in order to resolve disputes over captured ships. Because outright war had not been declared, the justices examined both the facts of the conflict...and the acts of Congress that had authorized limited military action.

Campbell v. Clinton, 203 F.3d 19, 37 (D.C. Cir. 2000) (Tatel, Circuit Judge, concurring).

In *Bas v. Tingy*, after making note of the relevant facts (congressional action as well as the "bloodshed, depredation and confiscation, which has unhappily occurred," *Bas*, 4 U.S. at 39), the Supreme Court concluded that France and the United States were at war both "[i]n fact and in law." *Id.* at 42. The Court distinguished between a declared, "perfect" war, and an undeclared, "imperfect" war, which is typically "confined in nature and extent, being limited as to places, persons, and things." *Id.* at 40. Addressing the same conflict in a different case a year later, Chief Justice John Marshall wrote, "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this enquiry.... To determine the real situation of America in regard to France, the acts of congress are to be inspected." *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

A half century later, the Supreme Court was again called upon to decide whether a state

of war existed, this time in the undeclared civil war raging between the United States and the Confederate States of America. In the *Prize Cases*, the Supreme Court affirmed as lawful captures under international law the seizure of a number of ships that had attempted to run the Union blockade. The Court's decision was informed by both international law and by the division of the war powers under the U.S. Constitution:

The right of prize and capture has its origin in the '*jus belli*,' and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Prize Cases, 67 U.S. 635, 666 (1862). The Court then "enquire[d] whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force." *Id.* It held that a formal declaration of war was unnecessary.

Rather, in assessing whether a war existed *de facto*, the Court looked to the underlying facts:

A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. 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. The Court emphasized that while "a civil war is never publicly proclaimed," "its actual existence is a fact in our domestic history which the Court is bound to notice and to know." *Id.* at 667. It refused to "affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war in the history of the human race." *Id.* at 669.

With respect to the exercise of the war power by the United States, the Court noted both the exclusive power of Congress to initiate a war, and the responsibility of the President to defend the nation even in the absence of congressional action:

By the Constitution, Congress alone has the power to declare a national or foreign war.... The Constitution confers on the President the whole Executive power.... He has no power to initiate or declare a war either against a foreign nation or a domestic State.... [But,] [i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. 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.'

Id. at 668. Ultimately, as in *Bas v. Tingy*, the Court had no trouble determining that a state of war existed based on its own notice of (1) the existence of active hostilities, and (2) the acts of both political branches of the government, which clearly evidenced their understanding that they were acting pursuant to their respective war powers. To resolve the legal issue posed by the seizure of the vessels and cargo, the Court needed to make such a determination, and it did not shy away from that obligation. A similar obligation rests on this Commission, as it must determine whether armed conflict existed in order to assess whether it can exercise subject matter jurisdiction over the referred charges.¹

More recent cases have also recognized that courts are fully competent to determine whether a state of war exists. *See, e.g., Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992) ("no one can doubt that a state of war existed when our armed forces marched first into Kuwait and then into Iraq"); *United States v. Castillo*, 34 M.J. 1160, 1163 (C.M.R. 1992) (identifying two tests—the *de jure* war test and the *de facto* war test—employed by courts to determine whether a "time of war" statutory requirement is satisfied); *Mitchell v. Laird*, 488 F.2d 611, 614 (D.C. Cir. 1973) ("There would be no insuperable difficulty in a court determining

¹ *See Hamilton v. McClaughry*, 136 F. 445, 451 (U.S. Ct. of Appeals, 1905) (finding, based on "the many conflicts between the forces of this government and the armed Chinese troops, and the recognition of a condition of war by the Congress of the United States," that a state of war existed in China during the Boxer Rebellion, a finding necessary to support the jurisdiction of a general court-martial that had convicted a soldier of murder during that campaign).

whether...allegations" concerning the conflict in Vietnam "are substantially true. If they are, then in our opinion...there has been a war in Indo-China."); *Western Reserve Life Ins. Co. v. Meadows*, 261 S.W.2d 554, 559 (1953) ("We are unwilling in deciding this case to shut our eyes to what everyone knows, that there has been...actually and in reality a war in Korea in which the United States has been seriously engaged").² In *Castillo*, the court noted that the existence of a *de facto* war is "determined by the realities of the situation as distinguished from legalistic niceties, and the existence of armed hostilities against an organized enemy is of crucial importance." 34 M.J. at 1163 (internal quotation marks and citation omitted).

Notably, in what may be the situation most analogous to the instant case—involving the issue of whether civilians should be subject to the jurisdiction of military tribunals—the U.S. Court of Military Appeals held that under the UCMJ, "for a civilian to be triable by court-martial in 'time of war,' Article 2(10) [of the UCMJ] means a war formally declared by Congress." *United States v. Averette*, 41 C.M.R. 363, 365 (CMA 1970). That result, requiring a heightened threshold for the application of military justice to a civilian, is consistent with the legal traditions of a Republic founded on the principle of civilian rule and committed to its preservation.³

C. In the *Prize Cases*, the Supreme Court Also Determined When the War Began

It is also noteworthy—and particularly pertinent in the context of the Defense motion to dismiss charges based on pre-war conduct—that the Supreme Court did not fully affirm the seizure of property by the Executive in the *Prize Cases*. Although all of the vessels were found

² In *United States v. Ayers*, 15 C.M.R. 220 (1954), the U.S. Court of Military Appeals looked to the analysis set forth in insurance cases such as *Western Reserve* in the course of determining whether a state of war existed. The court noted the "realism" and common-sense approach taken by the civilian courts adjudicating the meaning of "war" in insurance contracts, and stated that that approach was consistent with "the yardstick of practicality" adopted by military courts in addressing the issue for statutory and jurisdictional purposes. *Id.* at 222-224.

³ See, e.g., *Lee v. Madigan*, 358 U.S. 228, 232 (1959) ("We do not write on a clean slate. The attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for nonmilitary offenses—has a long history").

to be legitimate prizes under the laws of war, the Court ordered that one portion of the cargo be returned to the claimants who were challenging the Executive's exercise of the war power. The property returned consisted of a quantity of tobacco, "which was bought and paid for *before hostilities commenced*" and which therefore could not rightfully constitute "an illegal traffic with the enemy." *Id.* at 682 (emphasis added). Thus, the Court did not hesitate to independently evaluate the facts concerning the date on which hostilities commenced, and to hold that action taken prior to that date could not give rise to any legal forfeiture or penalty. To that extent, then, the landmark *Prize Cases* held an Executive act (seizure of property) taken in the purported exercise of its war power to be legally insupportable, and resulted in an order from the Court countermanding that action. The Court took a similar step a century later in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), when it held that President Truman exceeded his authority in seizing privately-owned steel mills during the Korean War. Accordingly, there is no basis whatever to contend that American courts are disqualified from evaluating the legality of actions taken under the guise of the war power. Indeed, the Supreme Court has repeatedly emphasized that "a state of war is not a blank check for the President. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (citing *Youngstown*, 343 U.S. at 587).

D. Whether and When the War Began Is Not A Non-Justiciable Political Question

Here, a ruling on whether a state of war existed prior to 11 September 2001 will have significant legal consequences for the liberty interests of the accused. Indeed, the ruling on this issue determines whether Mr. Hamdan can be liable at all for alleged "war crimes" during that period (although, even in the absence of a state of war, he might still be subject to prosecution

under domestic law for alleged criminal offenses). It also determines whether this Commission can exercise criminal jurisdiction over Mr. Hamdan for those acts, the gravity of which was noted by the CMCR in *Khadr*: "In defining what was clearly intended to be limited jurisdiction, Congress [in the MCA] also prescribed serious criminal sanctions for those members of this select group who were ultimately convicted by military commissions." CMCR 07-001 (24 September 2007) at 13. These factors strongly militate against any argument that the existence of a war is a non-justiciable political question.

Some courts have refrained from ruling on whether a state of war existed when to do so would inject the court into a dispute between the political branches. *See, e.g.*, the concurring opinion of Judge Silberman in *Campbell*, 203 F.3d at 24-28, where members of Congress were challenging the legality of the President's policy in Kosovo. Here, however, there is no conflict between the political branches on whether a state of war existed in the period prior to 11 September 2001. Rather, as shown in the Fact section above, contemporaneous sources reveal that the Executive and Legislative Branches spoke with one voice in acknowledging peacetime conditions prior to the attacks of that date. Accordingly, this is not the context in which the political question doctrine applies.⁴

⁴ Moreover, even if there were a conflict between the political branches concerning the existence of a state of war, or concerning the proper division of powers relating to war (issues not raised here by the Defense motion to dismiss charges based on pre-war conduct), courts can still adjudicate those issues. *See, e.g., Massachusetts v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971) ("The war in Vietnam is the product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries. Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court might well take a different view"); *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971) ("[T]he constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of the war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine"); *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970) ("History makes clear that the congressional power 'to declare War' conferred by Article I, section 8, of the Constitution was intended as an explicit restriction upon the power of the Executive to initiate war on his own prerogative which was enjoyed by the British sovereign... [E]xecutive officers are under a threshold constitutional duty which can be judicially identified and its breach judicially determined.") (internal quotation marks omitted); *Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.D.C. 1990) ("[C]ourts do not lack the power

E. Under Traditional Law of War Principles, "Wars" Only Exist When There Are Hostilities Between States or State-Like Entities

It is also worth pointing out that, in the context of terrorism, courts have held that violence by non-state actors generally does not constitute an "act of war." *See, e.g., Pan Am. World Airways, Inc. v. Aetna Casualty & Sur. Co.*, 505 F.2d 989, 1012-15 (2d Cir. 1974) (holding that "under the ancient international law definition[,] war refers to and includes only hostilities carried on by entities that constitute governments at least de facto in character"; and "[t]he cases establish that war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty. Under international law war is waged by states or state-like entities."); *Morris v. Khadr*, 415 F. Supp.2d 1323, 1330-31 (D. Utah 2006) (finding that plaintiffs had made a prima facie showing under the federal Anti-Terrorism Act, 18 U.S.C. § 2333(a), that violent acts by alleged al Qaeda members in Afghanistan in 2002 were "not 'acts of war'...but are acts of international terrorism").

In this case, the Commission is applying the law of war as defined in the first instance by the MCA. *See, e.g.*, 10 U.S.C. § 950p (providing that the MCA does not create new offenses, but rather codifies pre-existing offenses under the law of war). But where the MCA is silent, it is appropriate for the Commission to look to other law of war authority, including, for example, "the ancient international law definition" of war. As noted above, American courts have relied on that definition, which required that the exercise of force be undertaken in the name of some sovereign authority, or at least an authority claiming the attributes of sovereignty.⁵ In this case,

and the ability to make the factual and legal determination of whether this nation's military actions constitute war for the purposes of the constitutional War Clause").

⁵ *See, e.g., Campbell*, 203 F.3d at 28 n.3 (relying on the definition of war set forth in Samuel Johnson's Dictionary of the English Language (1755): "War may be defined [as] the exercise of violence *under sovereign command* against withstanders; force, authority and resistance being the essential parts thereof.") (emphasis added) (Randolph, Circuit Judge, concurring). Under traditional law of war principles, al Qaeda's relationship with the Taliban in Afghanistan would not confer on the organization the quasi-sovereign status necessary to raise conflict with al Qaeda to the level

whatever action may have been taken by or against al Qaeda in the years prior to 11 September 2001, it did not amount to "a course of hostility engaged in by entities that have at least significant attributes of sovereignty." *Pan Am.*, 505 F.2d at 1012. While the United States is a sovereign state, no one contends that al Qaeda is or was a "state[] or state-like entit[y]." ⁶ *Id.* Accordingly, there is no basis for contending that isolated terrorist attacks by al Qaeda, or reprisals that may have been launched by the United States on one or two occasions prior to 11 September 2001, constituted a "war" or "armed conflict" as those terms are understood in international law.⁷

F. Under the Concept of "War" Evident in the War Powers Resolution, It Is Clear that the United States Was Not at War with Al Qaeda During the Period Prior to 11 September 2001

While "armed conflict" is a necessary element of each substantive offense punishable under the MCA, the statute does not define either "armed conflict" or "war." Nevertheless, it is instructive to look at another statute passed by Congress to see what it reveals about the meaning of these terms as understood by the Legislative Branch. For this purpose, the War Powers Resolution (50 U.S.C. § 1541 *et seq.*), which "implements Congress's power to declare war under the Constitution," is particularly pertinent. *Campbell*, 203 F.3d at 28 (Randolph, Circuit Judge,

of "war." See *Holiday Inns Inc. v. Aetna Ins. Co.*, 571 F. Supp. 1460, 1500 (S.D.N.Y. 1983) ("It is not sufficient to achieve such status that the group or entity in question occupy territory within the boundary of the sovereign state upon the consent of that state's *de jure* government").

⁶ Indeed, the Prosecution has elsewhere relied on that undisputed fact in order to argue that the Geneva Conventions do not apply in this case. See, e.g., Govt. Response to Defense Motion for Order Implementing Requirements of the Fourth Geneva Convention at 10-11 (arguing that al Qaeda is neither a "State" nor a "Power" as that term is used in the Geneva Conventions, and hence, the Civilian Convention does not apply in the "U.S.—al Qaeda armed conflict").

⁷ In this connection, it is worth noting that the finding of personal jurisdiction by this Commission in its 19 December 2007 ruling was premised entirely on events that occurred within the context of a war as defined under traditional law of war principles, i.e., hostilities in Afghanistan in November 2001 between the armed forces of sovereign states, or militia or volunteer corps belonging to those armed forces. The Commission held that Mr. Hamdan was directly engaged in hostilities, but there had not been adequate showing that he was associated with legitimate armed forces. Having relied on events recognizable as a traditional war to establish personal jurisdiction, the Prosecution is now moving well beyond that war to acts remote in time, charging them as alleged war crimes.

concurring). That statute is triggered by "the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." 50 U.S.C. § 1541. Thus, there are at least two essential conditions that must be present for Congress's prerogatives with respect to "war" to be activated: (1) a deployment of U.S. armed forces, and (2) hostilities, or the imminent threat of hostilities. In this regard, the concept of "war" evidenced by the statute conforms precisely to the definitions of war that have previously been recognized in American courts and that prevail in the international community as a whole. *See, e.g., Montoya v. United States*, 180 U.S. 261, 267 (1901), ("the fact that Indians are engaged in acts of general hostility to settlers, especially if the government has deemed it necessary to despatch a military force for their subjugation, is sufficient to constitute a state of war"); ICRC, *Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War* at 37 (J. Pictet, ed., 1960) ("Speaking generally, it must be recognized that the conflicts referred to in [Common] Article 3 are armed conflicts, with *armed forces* on either side engaged in *hostilities*—conflicts in short, which are in many respects similar to an international war...."). In this case, prior to the September 11 attacks, there was not a deployment of U.S. armed forces against al Qaeda, nor a body of al Qaeda armed forces deployed against the United States, nor a course of hostilities, either active or imminent. Accordingly, and consistent with the empirical approach taken by American courts addressing whether a state of war exists, it cannot credibly be maintained that the United States was "at war" or involved in "armed conflict" with al Qaeda prior to 11 September 2001.

G. The Political Branches of the U.S. Government Did Not Regard the United States as Engaged in a War with Al Qaeda During the Period Prior to 11 September 2001

The Prosecution maintains that as early as February 1996, Mr. Hamdan joined (in some unspecified manner) an armed conflict against the United States. Unofficial transcript of 7

February 2008 hearing at 133, 136-37 (Attachment L). This contention is insupportable in light of numerous statements of U.S. Government officials, both before and after September 11, 2001, evidencing the widespread understanding that the United States was not at war with al Qaeda, or with any other terrorist organization, in the period prior to September 11. *See* Fact section above.

The clear import of these numerous statements is that prior to 11 September 2001, neither the American people nor their elected representatives regarded the United States as a nation at war. On the contrary, part of the shock of September 11 was that the attack came suddenly and without warning during a period when the nation generally believed itself to be at peace. Under these circumstances, it is an exercise in revisionist history to now contend that a state of war existed between the United States and al Qaeda in the period prior to 11 September 2001.⁸

H. The AUMF Authorized the Limited Use of Military Force Against the Perpetrators of the September 11 Attacks, During a Timeframe that Necessarily Postdated September 11, 2001

Of the documents and statements set forth above, perhaps the most significant for purposes of determining whether an armed conflict existed prior to 11 September 2001 is the AUMF. *See Talbot*, 5 U.S. (1 Cranch) at 28 ("The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this enquiry"). That measure clearly authorized the use of U.S. armed forces in a carefully limited engagement, *i.e.*, "against those nations, organizations, or persons [the

⁸ Indeed, it was the understanding of the plurality of the Supreme Court in *Hamdan v. Rumsfeld* that the Government at that time (2006) was only contending that "the war commenced with the events of September 11, 2001." 126 S. Ct. 2749, 2778 n.31 (2006) ("Justice Thomas would treat Osama bin Laden's 1996 declaration of jihad against Americans as the inception of the war. But even the Government does not go so far;...neither in the charging document nor in submissions before this Court has the Government asserted that the President's *war powers* were activated prior to September 11, 2001."). *Id.* Likewise, the U.S. military apparently did not believe it was involved in a war until after 11 September 2001. *See, e.g.*, The United States Army in Afghanistan, Operation Enduring Freedom, available at <http://www.history.army.mil/brochures/Afghanistan/Operation%20Enduring%20Freedom.htm> (last visited 28 Feb. 2008) ("The campaign was a stirring beginning to the newly announced Global War on Terrorism").

President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons...." There is no hint of a suggestion that Congress understood the United States to be already involved in an ongoing war. On the contrary, the use of military force contemplated by the AUMF was expressly tied to the September 11 attacks, indicating by negative implication that there was no existing authorization in place or use of military force already under way in some open-ended war on terror.

Accordingly, this Commission should hold that the armed conflict against al Qaeda began no earlier than 11 September 2001, and should dismiss all charges against Mr. Hamdan that relate, in whole or in part, to alleged acts occurring prior to that time.⁹

7. **Request for Oral Argument:** The parties previously conducted oral argument on the Defense motion (D016) to dismiss certain specifications based on pre-war conduct. Given the importance of the issue, the Defense requests additional oral argument on the subject of this supplemental brief.

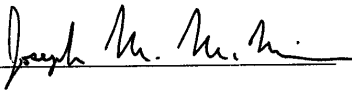
⁹ Section 948d of the MCA provides that "a military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001." However, that provision neither states, nor can be reasonably construed to imply, that the United States was engaged in a war with al Qaeda prior to September 11, 2001. Rather, it simply means that alien unlawful enemy combatants in previous armed conflicts—for example, Kosovo or the first Gulf War—could be tried by military commissions under the MCA if circumstances warranted such a prosecution. To interpret § 948d as a retroactive declaration of a state of war would run afoul of the principle discussed by the CMCR in *Khadr*: "No serious legal authority would contest the notion that one of the most indispensable and important judicial guarantees among civilized nations honoring a tradition of due process and fundamental fairness is the right to adequate notice and an opportunity to be heard in regard to allegations which might result in criminal sanctions. The M.C.A. did not exist until October 2006. [A current defendant before the military commissions] could not have known that [events in 2004, or earlier] could dispositively qualify him two years after the fact for potential criminal liability before a military commission.... Such lack of notice offends our most basic and fundamental notions of due process; therefore it also violates Common Article 3." CMCR, 07-001, at 15. While that passage related to a statutory interpretation that would retroactively affect personal jurisdiction in an unfair way, it holds equally true for interpretations that would retroactively affect subject matter jurisdiction in a manner offensive to due process and Common Article 3. After all, a retroactive declaration of war could easily transform conduct that was innocent at the time into a war crime, for example, aiding or communicating with the enemy (a party that may not have been the enemy at the time the acts occurred).

8. **Request for Witnesses:** The Defense does not presently anticipate a need for witnesses, but reserves the right to call witnesses should the Prosecution submit a response that requires rebuttal in the form of live testimony.

9. **Attachments:**

- A. Remarks of President Clinton at a memorial service at Eglin Air Force Base, Florida, for American Servicemen killed in Saudi Arabia, 30 June 1996.
- B. Statement of President Clinton announcing the capture of a suspect in the bombing attack on the U.S. Embassy in Nairobi, Kenya, 27 August 1998
- C. Radio address of President Clinton following the attack on the USS *Cole*, 14 October 2000.
- D. Remarks of President Clinton at a memorial service in Norfolk, Virginia, for sailors killed on the USS *Cole*, 18 October 18, 2000.
- E. Remarks by President Bush at White House photo opportunity with House and Senate Leadership, 19 September 2001.
- F. Radio address to the nation of President Bush, 15 September 2001.
- G. Authorization for the Use of Military Force, P.L. 107-40 ("AUMF"), passed by Congress, 18 September 2001.
- H. Address by President Bush to Joint Session of Congress and to the American People, 20 September 2001.
- I. Presidential Address to the Nation announcing deployment of U.S. armed forces to Afghanistan, 7 October 2001.
- J. Military Order issued by President Bush, 3 C.F.R. 918 (2002), 13 November 2001.
- K. Executive Order 13269, issued by President Bush, 3 July 2002.
- L. Selected pages from the unofficial transcript of hearing before the Military Commission at Guantanamo Bay Naval Station, 7 February 2008.

Respectfully submitted,

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ATTACHMENT A

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Public Papers of the Presidents

June 30, 1996

CITE: 32 Weekly Comp. Pres. Doc. 1161**LENGTH:** 969 words**HEADLINE:** Remarks at the Memorial Service for American Servicemen Killed in Saudi Arabia at Eglin Air Force Base, Florida**BODY:**

Governor Chiles, Congressman Scarborough, Lieutenant Governor MacKay, General Shalikashvili, Secretary White, Secretary Widnall, Under Secretary DeLeon, General Fogleman, General Hawley, General Cranston, Colonel Dylewski, the chaplains, Chief Lowe; to those brave servicemen who were injured, we thank God for your presence here today; to the families of the 12 men who we honor today who died in the service of our Nation.

These men represented the best of America, and they gave America their best. They stepped forward to lead our mission for peace and freedom. They did so with courage, strength, and skill. As members of the Nomads, the 33d Fighter Wing, as communicators and mechanics, crew chiefs and technicians, they kept our aircraft flying, and they owned the skies. Time and again they gave up the comforts that most of us take for granted, traveling far from home and family to take up America's cause.

There is a passage in Isaiah in which God wonders, "Whom shall I send, and who will go for us?" Isaiah answers, "Here am I, Lord. Send me." These men we honor today said to America, "Send me."

We will remember them as patriots, but they were also husbands and fathers, sons and brothers, colleagues, neighbors, and friends. Some came from families with a proud tradition of military service, Some have brothers and sisters sewing our military today. Some had dreamed of joining the Air Force since they were little boys.

All of them showed by the example of their lives the same spirit of service they brought to their careers. They were always among the first to lend a hand when someone was in need. They served as soccer coaches and Sunday school teachers. They helped the victims of hurricanes and volunteered as firemen. They loved their cars, their sports, their families, and their mission. One of them was on his third tour in Saudi Arabia. Another volunteered so a man with larger family obligations could stay home.

They were all very different, as I saw when I met with their families. They came from different regions, different ethnic groups, different religious and political backgrounds. But they were united by love of nation, mission, and family. They touched the lives of many other people, and because of them we all lead safer and better lives.

On behalf of the American people, let me say to their families and loved ones and to their friends in the Eglin community: We are grateful for their service. We stand with you in sorrow and in outrage. They were taken before their time, felled by the hands of hatred in an act whose savagery is matched only by its cowardice. We will not rest in our efforts to capture, prosecute, and punish those who committed this evil deed. But today, in the warm embrace of our faith, let us put aside our anger for a moment to remember and honor those who were lost, to find strength in their service, to thank God for the lives they lived, to continue the struggle for freedom and decency to which they devoted their lives.

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Remarks at the Memorial Service for American Servicemen Killed in Saudi Arabia at Eglin Air Force Base, Florida
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We're blessed to live in a prosperous land in a time of peace, but we are not free from peril. While the modern world brings to all of us many new opportunities, it also leaves us more open to the forces of intolerance and destruction and especially to terrorism, so often rooted in ethnic and religious hatreds, because terrorists can strike anywhere, from the Tokyo subway to the streets of London, from the Holy Land to the World Trade Center in New York and Oklahoma City and now in Saudi Arabia.

My fellow Americans, during the long struggles of World War II and the cold war, America stood fast for freedom. In our time, terrorism is the enemy of peace and freedom. America must not and America will not be driven from the fight against terrorism. In this effort, every American must stand behind the men and women of our Armed Forces. Every American must stand against violence and hatred and stand for dignity and tolerance at home as well as abroad. We must honor the memory of those we have lost by upholding the ideals for which they lived and the mission for which they gave their lives.

To the loved ones of these 12 fine men, I know there are no words to soothe the loss of a father or a husband, a brother or a son, a fiance or a dear friend. The rest of us can only hope that there is some solace for you in the pride and passion they brought to their work, the strength and decency they demonstrated every day, the love and respect they engendered and which surround you today, and the gratitude of their Nation.

Let us now praise these quiet American heroes who gave their lives in service to America. May they rest in peace, and may their names live on forever:

Technical Sergeant Daniel Cafourek

Sergeant Millard Dee Campbell

Senior Airman Earl Cartrette, Jr.

Technical Sergeant Patrick Fennig

Master Sergeant Kendall Kitson, Jr.

Technical Sergeant Thanh Gus Nguyen

Airman First Class Brent Marthaler

Airman First Class Brian McVeigh

Airman First Class Peter Morgera

Airman First Class Joseph Rimkus

Senior Airman Jeremy Taylor

Airman First Class Joshua Woody

Our Nomads have ceased their wandering. They have come home. May God embrace their souls. May God bless their families and their loved ones. And may God bless America's mission of peace and freedom, for which they gave the last full measure of their devotion.

NOTE: The President spoke at 10:32 a.m. in the King Hangar. In his remarks, he referred to Gov. Lawton Chiles and Lt. Gov. Buddy MacKay of Florida; Gen. Richard E. Hawley, USAF, Commander, Air Combat Command; Maj. Gen. Stewart E. Cranston, USAF, Commander, Air Force Development Test Center; and Col. Gary R. Dylewski, USAF, Commander, and Chief Master Sgt. Troy Lowe, USAF, Senior Enlisted Adviser, 33d Fighter Wing.

Remarks at the Memorial Service for American Servicemen Killed in Saudi Arabia at Eglin Air Force Base, Florida
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Public Papers of the Presidents

August 27, 1998

CITE: *34 Weekly Comp. Pres. Doc. 1660*

LENGTH: 249 words

HEADLINE: Statement on the Arrest of Mohammad Rashid for the Terrorist Attack on the United States Embassy in Kenya

BODY:

Late last night, American law enforcement authorities brought to the United States Mohammad Rashid, a suspect in the bombing attack on the United States Embassy in Nairobi, Kenya. The suspect's involvement in the bombing was established as the result of a joint investigation by the Kenyan police and an FBI team. He is associated with Usama bin Ladin, the pre-eminent organizer and financier of international terrorism whose network we struck in Afghanistan and Sudan last week.

This arrest does not close this case. We will continue to pursue all those who helped plan, finance, and carry out the attacks on our Embassies in Kenya and Tanzania, which took the lives of 12 Americans and hundreds of Africans.

Let me express my gratitude to our law enforcement and intelligence agencies for a job very well done and to the Kenyan and Tanzanian authorities for their hard work and close cooperation with the FBI.

This is an important step forward in our struggle against terrorism, but there is a long road ahead. The enemies of peace and freedom undoubtedly will strike again. Our resolve must be for the long run. We have and we will continue to use all the tools at our disposal -- law enforcement, diplomacy, and when necessary, America's military might. No matter what it takes, how long it takes, or where it takes us, we will bring to justice those responsible for the murder and maiming of American citizens. We will defend our interests, our people, and our values.

LOAD-DATE: September 22, 1998

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October 14, 2000

CITE: *36 Weekly Comp. Pres. Doc. 2464*

LENGTH: 751 words

HEADLINE: The President's Radio Address

BODY:

Good morning. This week an apparent terrorist attack claimed the lives of brave American sailors off the coast of Yemen, and new violence erupted between Israelis and Palestinians in the Middle East.

Our sailors aboard the U.S.S. *Cole* were simply doing their duty, but a dangerous duty, standing guard for peace. Yesterday I spoke to the Captain of the *Cole*, Commander Kirk Lippold. On behalf of all Americans, I expressed our deepest sympathies and commended him and his crew for the great job they're doing at this very difficult time.

To our sailors' families, let me say we hold you in our prayers. We will never know your loved ones as you did or remember them as you will, but we join you in grief. For your loss is America's loss, and we bow our heads to God in gratitude for the lives and service of your loved ones.

In their honor, I have ordered that flags be flown at halfstaff in the United States, our territories, our Embassies, military bases, and naval vessels until sunset on Monday. As we see the flag this weekend, we should think of the families and the sacrifice they have made for America.

This tragic loss should remind us all that even when America is not at war, the men and women of our military risk their lives every day in places where comforts are few and dangers are many. No one should think for a moment that the strength of our military is less important in times of peace, because the strength of our military is a major reason we are at peace. History will record our triumphs on the battlefield, but no one can ever write a full account of the wars never fought, the losses never suffered, the tears never shed because the men and women of our military were risking their lives for peace. We should never, ever forget that.

Our military power is not all people see when ships of the United States enter a foreign port. When U.S. sailors head down the brow of the ship or our troops set foot on foreign soil, our hosts see in the uniform of the United States men and women of every race, creed, and color who trace their ancestry to every region on Earth, yet are bound together by a common commitment to freedom and a common pride in being Americans.

That image of unity amidst diversity must confound the minds of the hate-filled cowards who killed our sailors. They can take innocent life. They can cause tears and anguish, but they can never heal or build harmony or bring people together. That is work only free, law-abiding people can do.

And that is why we will do whatever it takes, for as long as it takes, to find those who killed our sailors and hold them accountable, and why we will never let the enemies of freedom and peace stop America from seeking peace, fighting terrorism, and promoting freedom. For only by defending our people, our interests, and our values will we redeem the lives of our sailors and ruin the schemes of their killers.

That includes, of course, our efforts to promote peace in the Middle East. The conflict between Israelis and

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The President's Radio Address Public Papers of the Presidents October 14, 2000

Palestinians is one of the greatest tragedies of our time and one of the very hardest problems to solve. Every step forward has been marked with pain. Each time the forces of reconciliation have reached out, the forces of destruction have lashed out. The violence we've seen there demonstrates beyond a shadow of a doubt that the alternative to peace is unacceptable, and that no one will gain from an endless contest of inflicting and absorbing pain.

Ending the violence and getting people of the Middle East back to dialog will be hard after what has happened. But no matter how difficult that task may be, no matter how terrible the images of this week's violence, the effort must continue with America's strong support. We must do so because we have a profound national interest in peace in the Middle East and a very special bond to the State of Israel. As in all the world's troubled places, our efforts do not guarantee success. But not to try is to guarantee failure.

So today I ask your prayers for our men and women in uniform, for the families of our fallen sailors, and for all those here and everywhere who hope and work for a world at peace.

Thanks for listening.

Note: The address was recorded at 5:25 p.m. on October 13 in the Roosevelt Room at the White House for broadcast at 10:06 a.m. on October 14. The transcript was made available by the Office of the Press Secretary on October 13 but was embargoed for release until the broadcast.

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Public Papers of the Presidents

October 18, 2000

CITE: 36 Weekly Comp. Pres. Doc. 2507**LENGTH:** 1239 words**HEADLINE:** Remarks at the Memorial Service for the U.S.S. Cole in Norfolk, Virginia**BODY:**

The President. Secretary Cohen; General Reno; Secretary Danzig; General Shelton; distinguished Members of the Senate and House; Governor; Admiral Clark; Admiral Natter; Chaplain Black; Master Chief Herdt; Master Chief Hefty; the sailors of the U.S.S. *Cole*; the family members and friends; the Norfolk naval community; my fellow Americans. Today we honor our finest young people, fallen soldiers who rose to freedom's challenge. We mourn their loss, celebrate their lives, offer the love and prayers of a grateful nation to their families.

For those of us who have to speak here, we are all mindful of the limits of our poor words to lift your spirits or warm your hearts. We know that God has given us the gift of reaching our middle years. And we now have to pray for your children, your husbands, your wives, your brothers, your sisters who were taken so young. We know we will never know them as you did or remember them as you will, the first time you saw them in uniform or the last time you said goodbye.

They all had their own stories and their own dreams. We Americans have learned something about each and every one of them over these last difficult days as their profiles, their lives, their loves, their service have been given to us. For me, I learned a little more when I met with all the families this morning.

Some follow the family tradition of Navy service; others hoped to use their service to earn a college degree. One of them had even worked for me in the White House: Richard Costelow was a technology wizard who helped to update the White House communications system for this new century.

All these very different Americans, all with their different stories, their lifelines and love ties, answered the same call of service and found themselves on the U.S.S. *Cole*, headed for the Persian Gulf, where our forces are working to keep peace and stability in a region that could explode and disrupt the entire world.

Their tragic loss reminds us that even when America is not at war, the men and women of our military still risk their lives for peace. I am quite sure history will record in great detail our triumphs in battle, but I regret that no one will ever be able to write a full account of the wars we never fought, the losses we never suffered, the tears we never shed because men and women like those who were on the U.S.S. *Cole* were standing guard for peace. We should never, ever forget that.

Today I ask all Americans just to take a moment to thank the men and women of our Armed Forces for a debt we can never repay, whose character and courage, more than even modern weapons, makes our military the strongest in the world. And in particular, I ask us to thank God today for the lives, the character, and courage of the crew of the U.S.S. *Cole*, including the wounded and especially those we lost or are missing: Hull Maintenance Technician Third Class Kenneth Eugene Clodfelter; Electronics Technician Chief Petty Officer First Class Richard Costelow; Mess Management Specialist Seaman Lakeina Monique Francis; Information Systems Technician Seaman Timothy Lee Gauna; Signalman Seaman Apprentice Cherone Louis Gunn; Seaman James Rodrick McDaniels; Engineman Second

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Class Mark Ian Nieto; Electronics Warfare Technician Third Class Ronald Scott Owens; Seaman Apprentice Lakiba Nicole Palmer; Engine Fireman Joshua Langdon Parlett; Fireman Apprentice Patrick Howard Roy; Electronics Warfare Technician Second Class Kevin Shawn Rux; Mess Management Specialist Third Class Ronchester Manangan Santiago; Operations Specialist Second Class Timothy Lamont Saunders; Fireman Gary Graham Swenchonis, Jr; Ensign Andrew Triplett; Seaman Apprentice Craig Bryan Wibberley.

In the names and faces of those we lost and mourn, the world sees our Nation's greatest strength: people in uniform rooted in every race, creed, and region on the face of the Earth, yet bound together by a common commitment to freedom and a common pride in being American. That same spirit is living today as the crew of the U.S.S. *Cole* pulls together in a determined struggle to keep the determined warrior afloat.

The idea of common humanity and unity amidst diversity, so purely embodied by those we mourn today, must surely confound the minds of the hate-filled terrorists who killed them. They envy our strength without understanding the values that give us strength. For for them, it is their way or no way; their interpretation, twisted though it may be, of a beautiful religious tradition; their political views, their racial and ethnic views; their way or no way.

Such people can take innocent life. They have caused your tears and anguish, but they can never heal or build harmony or bring people together. That is work only free, law-abiding people can do. People like the sailors of the U.S.S. *Cole*.

To those who attacked them, we say: You will not find a safe harbor. We will find you, and justice will prevail. America will not stop standing guard for peace or freedom or stability in the Middle East and around the world.

But some way, someday, people must learn the lesson of the lives of those we mourn today, of how they worked together, of how they lived together, of how they reached across all the lines that divided them and embraced their common humanity and the common values of freedom and service.

Not far from here, there is a quiet place that honors those who gave their lives in service to our country. Adorning its entrance are words from a poem by Archibald Macleish, not only a tribute to the young we lost but a summons to those of us left behind. Listen to them.

The young no longer speak, but:

They have a silence that speaks for them at night.

They say: We were young. Remember us.

They say: We have done what we could, but until it is finished, it is not done.

They say: Our deaths are not ours; they are yours; they will mean what you make them.

They say: Whether our lives and our deaths were for peace and a new hope, we cannot say; it is you who must say this.

They say: We leave you our deaths. Give them their meaning.

The lives of the men and women we lost on the U.S.S. *Cole* meant so much to those who loved them, to all Americans, to the cause of freedom. They have given us their deaths. Let us give them their meaning. Their meaning of peace and freedom, of reconciliation and love, of service, endurance, and hope. After all they have given us, we must give them their meaning.

I ask now that you join me in a moment of silence and prayer for the lost, the missing, and their grieving families.

Remarks at the Memorial Service for the U.S.S. Cole in Norfolk, Virginia Public Papers of the Presidents October 18, 2000

[At this point, those gathered observed a moment of silence.]

The President. Amen.

Thank you, and may God bless you all.

Note: The President spoke at 11:38 a.m. on Pier 12. In his remarks, he referred to Gov. James S. Gilmore III of Virginia; Adm. Barry C. Black, USN, Chief of Chaplains, U.S. Navy, who gave the invocation; Master Chief Petty Officer of the Navy James L. Herdt, USN; Master Chief Thomas B. Hefty, USN, U.S. Atlantic Fleet Master Chief. The transcript released by the Office of the Press Secretary also included the remarks of Adm. Robert J. Natter, USN, Commander in Chief, U.S. Atlantic Fleet; Adm. Vern Clark, USN, Chief of Naval Operations; Secretary of the Navy Richard Danzig; Gen. Henry H. Shelton, USA, Chairman, Joint Chiefs of Staff; and Secretary of Defense William Cohen.

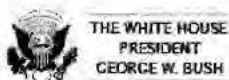
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 For Immediate Release
Office of the Press Secretary
September 19, 2001

Remarks by the President At Photo Opportunity with House and Senate Leadership

The Oval Office

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4:39 P.M. EDT

THE PRESIDENT: I want to welcome the members of the leadership of the Congress here, and I want the nation to know how proud I am of how they have helped unite our country. Senator Daschle and the Speaker and Senator Lott and Representative Gephardt have really showed that in times of emergency and crisis, that our government can function in a way that is just exemplary. And I want to thank them for coming down.

I'm also so pleased to accept the invitation of the Speaker and the leaders to come and address the Congress tomorrow night. I look forward to the opportunity to explaining to the American people who it is and who would do this to our great country, and why -- why would people choose America?

A lot of our citizens have got a lot of questions about what has taken place on September the 11th and subsequent to that. And I owe it to the country to give an explanation. And I want to thank the Congress for giving me a chance. I can't think of a better place than to talk about freedom and the battle to maintain freedom in one of the greatest halls of freedom. And that is in the United States Congress.

So, thank you for the invitation. I accept wholeheartedly, and I will see you all tomorrow night.

I would be glad to answer a couple of questions. Ron?

Q Mr. President, will you be able to tell all Americans whether they're going to be safe while you prepare to retaliate, or could terrorists strike again while we prepare for war?

THE PRESIDENT: Ron, I think America needs to know that we in government are on alert; that we recognize life around the White House or around the Congress is not normal, or is not the way it used to be, because we're very aware that people have conducted an act of war on our country; and that all of us urge our fellow Americans to go back to work and to work hard, but we must be on alert. Our government is working hard to make sure that we run down every lead, every opportunity, to find someone who would want to hurt any American.

The American people are united. They're united in their resolve to help heal the nation. But they're also united in the understanding that we've entered into a new day, and we'll deal with it.

Q Sir, you've been stressing that this is not a war against Islam. However, there are some around the world who view the coming battle along religious lines. I'm wondering how worried you are that some view this as a holy war. And are declarations of jihad at all affecting U.S. plans

THE PRESIDENT: I appreciate that question. First of all, it is so important for my fellow Americans, as well as everybody in the world to understand that America will hold those evil-doers accountable. We don't view this as a war of religion, in any way, shape or form. As a matter of fact, Islam preaches peace. The Muslim faith is a peaceful faith. And there are millions of good Americans who practice the Muslim faith who love their country as much as I love the country, who salute the flag as strongly as I salute the flag.

And for those who try to pit religion against religion, our great nation will stand up and reject that kind of

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thought. We won't allow that to creep into the consciousness of the world. We're going to lead the world to fight for freedom, and we'll have Muslim and Jew and Christian side-by-side with us.

Q Mr. President, you promised only to dip into the Social Security surplus in an emergency, a recession, or war. And in your words, this constitutes a war. How much of the Social Security surplus are you prepared to spend?

THE PRESIDENT: We are -- not only has someone conducted an act of war on us, our economy has slowed way down and this is an emergency. We've had all three, it seems like to me. And I'm going to work with Congress to send a clear message to America, American workers, American business people, that this government will respond to this emergency.

We'll respond to the emergency in terms of working on a package for the airline industry that has been severely affected. We'll respond to work to fight terrorism. The Congress has already responded, with a supplemental that will not only help fund our military, but as importantly, will send a clear message to the people of New York and New Jersey and Connecticut that we'll help you rebuild.

And this is exactly the subject we talked about. The definition of how much -- is enough to get America going again as to be able to endure this emergency.

Q And if that means all the surplus, are you prepared to spend all the surplus?

THE PRESIDENT: We're reasonable people. The members here, the leaders from the Congress are very reasonable. And they are mindful about government money as well as anybody else. But we're dedicated, we're dedicated to saying to the American people, this is an emergency, the likes of which we have not seen in a long time in this country, and this government will come together and deal with it. And that's exactly what's going to happen.

Q Sorry to ask another one, but did you mean to say just now that we are in a recession? You said, it looks to me like we've got all three.

THE PRESIDENT: No, I said -- well, I said -- let me put it this way -- tough economic times. There's no question it's tough times. And, Ron, I don't have all the numbers, but let me just say this: I can pick up all the statistics, but make no mistake about it, this has affected our economy in a big way. Now, I've still got faith that we'll recover. The strength of the American economy has always been our entrepreneurial spirit and our workers, and that's still prevalent. But you've seen the statistics on the airlines -- they're beginning to lay off people. Big airline manufacturing companies responding. And this government will respond.

Now, I don't have -- don't get me wrong, I don't have all the numbers at my disposal because they have to start counting them up, but this has shocked our economy. And we're going to respond. And that's exactly what this leadership and I have been talking about.

Q Mr. President, do you feel like you've got the full support of President Musharraf? And how hard is it going to be for him to live up to his pledges, given his domestic situation?

THE PRESIDENT: Well, there's no question that President Musharraf has taken a bold position, which is to say he will work to the extent he can with America and our allies as we deal with the prime suspect in the case. And we appreciate so very much his statement of support.

I said we'll give the President a chance to perform, and I believe he has done -- done so. We will work and consult closely with Pakistan and India to make sure that that part of the world is as stable as can possibly be stable.

Let me say that, in terms of foreign policy and in terms of the world, this horrible strategy has provided us with an interesting opportunity. One of the opportunities is in the Middle East. I'm pleased with the fact that Chairman Arafat and Prime Minister Sharon have taken positive steps toward bringing peace to the region. I think we have an opportunity to refashion the thinking between Pakistan and India. I think there's some interesting

opportunities to shake terrorism loose from sponsor states.

And this government, working with Congress, are going to seize the moment. Out of our tears I said I see opportunity, and we will seek opportunity, positive developments from this horrible tragedy that has befallen our nation.

Thank you all.

THE PRESS: Thank you.

END 4:47 P.M. EDT

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THE WHITE HOUSE
PRESIDENT
GEORGE W. BUSH

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For Immediate Release
Office of the Press Secretary
September 15, 2001

Radio Address of the President to the Nation

[Listen to the President's Remarks](#)

THE PRESIDENT: Good morning. This weekend I am engaged in extensive sessions with members of my National Security Council, as we plan a comprehensive assault on terrorism. This will be a different kind of conflict against a different kind of enemy.

This is a conflict without battlefields or beachheads, a conflict with opponents who believe they are invisible. Yet, they are mistaken. They will be exposed, and they will discover what others in the past have learned: Those who make war against the United States have chosen their own destruction. Victory against terrorism will not take place in a single battle, but in a series of decisive actions against terrorist organizations and those who harbor and support them.

We are planning a broad and sustained campaign to secure our country and eradicate the evil of terrorism. And we are determined to see this conflict through. Americans of every faith and background are committed to this goal.

Yesterday I visited the site of the destruction in New York City and saw an amazing spirit of sacrifice and patriotism and defiance. I met with rescuers who have worked past exhaustion, who cheered for our country and the great cause we have entered.

In Washington, D.C., the political parties and both Houses of Congress have shown a remarkable unity, and I'm deeply grateful. A terrorist attack designed to tear us apart has instead bound us together as a nation. Over the past few days, we have learned much about American courage – the courage of firefighters and police officers who suffered so great a loss, the courage of passengers aboard United 93 who may well have fought with the hijackers and saved many lives on the ground.

Now we honor those who died, and prepare to respond to these attacks on our nation. I will not settle for a token act. Our response must be sweeping, sustained and effective. We have much to do, and much to ask of the American people.

You will be asked for your patience; for, the conflict will not be short. You will be asked for resolve; for, the conflict will not be easy. You will be asked for your strength, because the course to victory may be long.

In the past week, we have seen the American people at their very best everywhere in America. Citizens have come together to pray, to give blood, to fly our country's flag. Americans are coming together to share their grief and gain strength from one another.

Great tragedy has come to us, and we are meeting it with the best that is in our country, with courage and concern for others. Because this is America. This is who we are. This is what our enemies hate and have attacked. And this is why we will prevail.

Thank you for listening.

END

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Authorization for Use of Military Force
September 18, 2001

Public Law 107-40 [S. J. RES. 23]

107th CONGRESS

JOINT RESOLUTION

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the 'Authorization for Use of Military Force'.

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL- That the President is authorized 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements-

(1) SPECIFIC STATUTORY AUTHORIZATION- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS- Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Approved September 18, 2001.

<http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html>

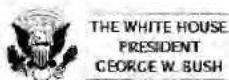
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For Immediate Release
Office of the Press Secretary
September 20, 2001

Address to a Joint Session of Congress and the American People

United States Capitol
Washington, D.C.

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 [En Español](#)

9:00 P.M. EDT

THE PRESIDENT: Mr. Speaker, Mr. President Pro Tempore, members of Congress, and fellow Americans:

In the normal course of events, Presidents come to this chamber to report on the state of the Union. Tonight, no such report is needed. It has already been delivered by the American people.

We have seen it in the courage of passengers, who rushed terrorists to save others on the ground -- passengers like an exceptional man named Todd Beamer. And would you please help me to welcome his wife, Lisa Beamer, here tonight. (Applause.)

We have seen the state of our Union in the endurance of rescuers, working past exhaustion. We have seen the unfurling of flags, the lighting of candles, the giving of blood, the saying of prayers -- in English, Hebrew, and Arabic. We have seen the decency of a loving and giving people who have made the grief of strangers their own.

My fellow citizens, for the last nine days, the entire world has seen for itself the state of our Union -- and it is strong. (Applause.)

Tonight we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done. (Applause.)

I thank the Congress for its leadership at such an important time. All of America was touched on the evening of the tragedy to see Republicans and Democrats joined together on the steps of this Capitol, singing "God Bless America." And you did more than sing; you acted, by delivering \$40 billion to rebuild our communities and meet the needs of our military.

Speaker Hastert, Minority Leader Gephardt, Majority Leader Daschle and Senator Lott, I thank you for your friendship, for your leadership and for your service to our country. (Applause.)

And on behalf of the American people, I thank the world for its outpouring of support. America will never forget the sounds of our National Anthem playing at Buckingham Palace, on the streets of Paris, and at Berlin's Brandenburg Gate.

We will not forget South Korean children gathering to pray outside our embassy in Seoul, or the prayers of sympathy offered at a mosque in Cairo. We will not forget moments of silence and days of mourning in Australia and Africa and Latin America.

Nor will we forget the citizens of 80 other nations who died with our own: dozens of Pakistanis; more than 130 Israelis; more than 250 citizens of India; men and women from El Salvador, Iran, Mexico and Japan; and hundreds of British citizens. America has no truer friend than Great Britain. (Applause.) Once again, we are joined together in a great cause -- so honored the British Prime Minister has crossed an ocean to show his unity

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of purpose with America. Thank you for coming, friend. (Applause.)

On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars -- but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war -- but not at the center of a great city on a peaceful morning. Americans have known surprise attacks -- but never before on thousands of civilians. All of this was brought upon us in a single day -- and night fell on a different world, a world where freedom itself is under attack.

Americans have many questions tonight. Americans are asking: Who attacked our country? The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda. They are the same murderers indicted for bombing American embassies in Tanzania and Kenya, and responsible for bombing the USS Cole.

Al Qaeda is to terror what the mafia is to crime. But its goal is not making money; its goal is remaking the world -- and imposing its radical beliefs on people everywhere.

The terrorists practice a fringe form of Islamic extremism that has been rejected by Muslim scholars and the vast majority of Muslim clerics -- a fringe movement that perverts the peaceful teachings of Islam. The terrorists' directive commands them to kill Christians and Jews, to kill all Americans, and make no distinction among military and civilians, including women and children.

This group and its leader -- a person named Osama bin Laden -- are linked to many other organizations in different countries, including the Egyptian Islamic Jihad and the Islamic Movement of Uzbekistan. There are thousands of these terrorists in more than 60 countries. They are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan, where they are trained in the tactics of terror. They are sent back to their homes or sent to hide in countries around the world to plot evil and destruction.

The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. In Afghanistan, we see al Qaeda's vision for the world.

Afghanistan's people have been brutalized -- many are starving and many have fled. Women are not allowed to attend school. You can be jailed for owning a television. Religion can be practiced only as their leaders dictate. A man can be jailed in Afghanistan if his beard is not long enough.

The United States respects the people of Afghanistan -- after all, we are currently its largest source of humanitarian aid -- but we condemn the Taliban regime. (Applause.) It is not only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists. By aiding and abetting murder, the Taliban regime is committing murder.

And tonight, the United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land. (Applause.) Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. (Applause.) Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.

These demands are not open to negotiation or discussion. (Applause.) The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate.

I also want to speak tonight directly to Muslims throughout the world. We respect your faith. It's practiced freely by many millions of Americans, and by millions more in countries that America counts as friends. Its teachings are good and peaceful, and those who commit evil in the name of Allah blaspheme the name of Allah. (Applause.) The terrorists are traitors to their own faith, trying, in effect, to hijack Islam itself. The enemy of America is not our many Muslim friends; it is not our many Arab friends. Our enemy is a radical network of terrorists, and every government that supports them. (Applause.)

Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of

global reach has been found, stopped and defeated. (Applause.)

Americans are asking, why do they hate us? They hate what we see right here in this chamber -- a democratically elected government. Their leaders are self-appointed. They hate our freedoms -- our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.

They want to overthrow existing governments in many Muslim countries, such as Egypt, Saudi Arabia, and Jordan. They want to drive Israel out of the Middle East. They want to drive Christians and Jews out of vast regions of Asia and Africa.

These terrorists kill not merely to end lives, but to disrupt and end a way of life. With every atrocity, they hope that America grows fearful, retreating from the world and forsaking our friends. They stand against us, because we stand in their way.

We are not deceived by their pretenses to piety. We have seen their kind before. They are the heirs of all the murderous ideologies of the 20th century. By sacrificing human life to serve their radical visions -- by abandoning every value except the will to power -- they follow in the path of fascism, and Nazism, and totalitarianism. And they will follow that path all the way, to where it ends: in history's unmarked grave of discarded lies. (Applause.)

Americans are asking: How will we fight and win this war? We will direct every resource at our command -- every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war -- to the disruption and to the defeat of the global terror network.

This war will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion. It will not look like the air war above Kosovo two years ago, where no ground troops were used and not a single American was lost in combat.

Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. (Applause.) From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.

Our nation has been put on notice: We are not immune from attack. We will take defensive measures against terrorism to protect Americans. Today, dozens of federal departments and agencies, as well as state and local governments, have responsibilities affecting homeland security. These efforts must be coordinated at the highest level. So tonight I announce the creation of a Cabinet-level position reporting directly to me -- the Office of Homeland Security.

And tonight I also announce a distinguished American to lead this effort, to strengthen American security: a military veteran, an effective governor, a true patriot, a trusted friend -- Pennsylvania's Tom Ridge. (Applause.) He will lead, oversee and coordinate a comprehensive national strategy to safeguard our country against terrorism, and respond to any attacks that may come.

These measures are essential. But the only way to defeat terrorism as a threat to our way of life is to stop it, eliminate it, and destroy it where it grows. (Applause.)

Many will be involved in this effort, from FBI agents to intelligence operatives to the reservists we have called to active duty. All deserve our thanks, and all have our prayers. And tonight, a few miles from the damaged Pentagon, I have a message for our military: Be ready. I've called the Armed Forces to alert, and there is a reason. The hour is coming when America will act, and you will make us proud. (Applause.)

This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom.

We ask every nation to join us. We will ask, and we will need, the help of police forces, intelligence services, and banking systems around the world. The United States is grateful that many nations and many international organizations have already responded -- with sympathy and with support. Nations from Latin America, to Asia, to Africa, to Europe, to the Islamic world. Perhaps the NATO Charter reflects best the attitude of the world: An attack on one is an attack on all.

The civilized world is rallying to America's side. They understand that if this terror goes unpunished, their own cities, their own citizens may be next. Terror, unanswered, can not only bring down buildings, it can threaten the stability of legitimate governments. And you know what -- we're not going to allow it. (Applause.)

Americans are asking: What is expected of us? I ask you to live your lives, and hug your children. I know many citizens have fears tonight, and I ask you to be calm and resolute, even in the face of a continuing threat.

I ask you to uphold the values of America, and remember why so many have come here. We are in a fight for our principles, and our first responsibility is to live by them. No one should be singled out for unfair treatment or unkind words because of their ethnic background or religious faith. (Applause.)

I ask you to continue to support the victims of this tragedy with your contributions. Those who want to give can go to a central source of information, libertyunites.org, to find the names of groups providing direct help in New York, Pennsylvania, and Virginia.

The thousands of FBI agents who are now at work in this investigation may need your cooperation, and I ask you to give it.

I ask for your patience, with the delays and inconveniences that may accompany tighter security; and for your patience in what will be a long struggle.

I ask your continued participation and confidence in the American economy. Terrorists attacked a symbol of American prosperity. They did not touch its source. America is successful because of the hard work, and creativity, and enterprise of our people. These were the true strengths of our economy before September 11th, and they are our strengths today. (Applause.)

And, finally, please continue praying for the victims of terror and their families, for those in uniform, and for our great country. Prayer has comforted us in sorrow, and will help strengthen us for the journey ahead.

Tonight I thank my fellow Americans for what you have already done and for what you will do. And ladies and gentlemen of the Congress, I thank you, their representatives, for what you have already done and for what we will do together.

Tonight, we face new and sudden national challenges. We will come together to improve air safety, to dramatically expand the number of air marshals on domestic flights, and take new measures to prevent hijacking. We will come together to promote stability and keep our airlines flying, with direct assistance during this emergency. (Applause.)

We will come together to give law enforcement the additional tools it needs to track down terror here at home. (Applause.) We will come together to strengthen our intelligence capabilities to know the plans of terrorists before they act, and find them before they strike. (Applause.)

We will come together to take active steps that strengthen America's economy, and put our people back to work.

Tonight we welcome two leaders who embody the extraordinary spirit of all New Yorkers: Governor George Pataki, and Mayor Rudolph Giuliani. (Applause.) As a symbol of America's resolve, my administration will work with Congress, and these two leaders, to show the world that we will rebuild New York City. (Applause.)

After all that has just passed -- all the lives taken, and all the possibilities and hopes that died with them -- it is natural to wonder if America's future is one of fear. Some speak of an age of terror. I know there are struggles ahead, and dangers to face. But this country will define our times, not be defined by them. As long as the United

States of America is determined and strong, this will not be an age of terror; this will be an age of liberty, here and across the world. (Applause.)

Great harm has been done to us. We have suffered great loss. And in our grief and anger we have found our mission and our moment. Freedom and fear are at war. The advance of human freedom -- the great achievement of our time, and the great hope of every time -- now depends on us. Our nation -- this generation -- will lift a dark threat of violence from our people and our future. We will rally the world to this cause by our efforts, by our courage. We will not tire, we will not falter, and we will not fail. (Applause.)

It is my hope that in the months and years ahead, life will return almost to normal. We'll go back to our lives and routines, and that is good. Even grief recedes with time and grace. But our resolve must not pass. Each of us will remember what happened that day, and to whom it happened. We'll remember the moment the news came -- where we were and what we were doing. Some will remember an image of a fire, or a story of rescue. Some will carry memories of a face and a voice gone forever.

And I will carry this: It is the police shield of a man named George Howard, who died at the World Trade Center trying to save others. It was given to me by his mom, Arlene, as a proud memorial to her son. This is my reminder of lives that ended, and a task that does not end. (Applause.)

I will not forget this wound to our country or those who inflicted it. I will not yield; I will not rest; I will not relent in waging this struggle for freedom and security for the American people.

The course of this conflict is not known, yet its outcome is certain. Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them. (Applause.)

Fellow citizens, we'll meet violence with patient justice -- assured of the rightness of our cause, and confident of the victories to come. In all that lies before us, may God grant us wisdom, and may He watch over the United States of America.

Thank you. (Applause.)

END 9:41 P.M. EDT

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For Immediate Release
Office of the Press Secretary
October 7, 2001

Presidential Address to the Nation

The Treaty Room

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1:00 P.M. EDT

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THE PRESIDENT: Good afternoon. On my orders, the United States military has begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. These carefully targeted actions are designed to disrupt the use of Afghanistan as a terrorist base of operations, and to attack the military capability of the Taliban regime.

We are joined in this operation by our staunch friend, Great Britain. Other close friends, including Canada, Australia, Germany and France, have pledged forces as the operation unfolds. More than 40 countries in the Middle East, Africa, Europe and across Asia have granted air transit or landing rights. Many more have shared intelligence. We are supported by the collective will of the world.

More than two weeks ago, I gave Taliban leaders a series of clear and specific demands: Close terrorist training camps; hand over leaders of the al Qaeda network; and return all foreign nationals, including American citizens, unjustly detained in your country. None of these demands were met. And now the Taliban will pay a price. By destroying camps and disrupting communications, we will make it more difficult for the terror network to train new recruits and coordinate their evil plans.

Initially, the terrorists may burrow deeper into caves and other entrenched hiding places. Our military action is also designed to clear the way for sustained, comprehensive and relentless operations to drive them out and bring them to justice.

At the same time, the oppressed people of Afghanistan will know the generosity of America and our allies. As we strike military targets, we'll also drop food, medicine and supplies to the starving and suffering men and women and children of Afghanistan.

The United States of America is a friend to the Afghan people, and we are the friends of almost a billion worldwide who practice the Islamic faith. The United States of America is an enemy of those who aid terrorists and of the barbaric criminals who profane a great religion by committing murder in its name.

This military action is a part of our campaign against terrorism, another front in a war that has already been joined through diplomacy, intelligence, the freezing of financial assets and the arrests of known terrorists by law enforcement agents in 38 countries. Given the nature and reach of our enemies, we will win this conflict by the patient accumulation of successes, by meeting a series of challenges with determination and will and purpose.

Today we focus on Afghanistan, but the battle is broader. Every nation has a choice to make. In this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves. And they will take that lonely path at their own peril.

I'm speaking to you today from the Treaty Room of the White House, a place where American Presidents have worked for peace. We're a peaceful nation. Yet, as we have learned, so suddenly and so tragically, there can be no peace in a world of sudden terror. In the face of today's new threat, the only way to pursue peace is to pursue those who threaten it.

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We did not ask for this mission, but we will fulfill it. The name of today's military operation is Enduring Freedom. We defend not only our precious freedoms, but also the freedom of people everywhere to live and raise their children free from fear.

I know many Americans feel fear today. And our government is taking strong precautions. All law enforcement and intelligence agencies are working aggressively around America, around the world and around the clock. At my request, many governors have activated the National Guard to strengthen airport security. We have called up Reserves to reinforce our military capability and strengthen the protection of our homeland.

In the months ahead, our patience will be one of our strengths – patience with the long waits that will result from tighter security; patience and understanding that it will take time to achieve our goals; patience in all the sacrifices that may come.

Today, those sacrifices are being made by members of our Armed Forces who now defend us so far from home, and by their proud and worried families. A Commander-in-Chief sends America's sons and daughters into a battle in a foreign land only after the greatest care and a lot of prayer. We ask a lot of those who wear our uniform. We ask them to leave their loved ones, to travel great distances, to risk injury, even to be prepared to make the ultimate sacrifice of their lives. They are dedicated, they are honorable; they represent the best of our country. And we are grateful.

To all the men and women in our military – every sailor, every soldier, every airman, every coastguardsman, every Marine – I say this: Your mission is defined; your objectives are clear; your goal is just. You have my full confidence, and you will have every tool you need to carry out your duty.

I recently received a touching letter that says a lot about the state of America in these difficult times – a letter from a 4th-grade girl, with a father in the military: "As much as I don't want my Dad to fight," she wrote, "I'm willing to give him to you."

This is a precious gift, the greatest she could give. This young girl knows what America is all about. Since September 11, an entire generation of young Americans has gained new understanding of the value of freedom, and its cost in duty and in sacrifice.

The battle is now joined on many fronts. We will not waver; we will not tire; we will not falter; and we will not fail. Peace and freedom will prevail.

Thank you. May God continue to bless America.

END 1:07 P.M, EDT

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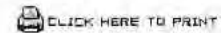
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For Immediate Release
Office of the Press Secretary
November 13, 2001

President Issues Military Order

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. Findings.

- (a) International terrorists, including 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 that requires the use of the United States Armed Forces.
- (b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, 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, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).
- (c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.
- (d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.
- (e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.
- (f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.
- (g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy.

- (a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

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(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit,

acts of international terrorism, or acts in preparation therefor,

that have caused, threaten to cause, or have as their aim to

cause, injury to or adverse effects on the United States, its

citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in

subparagraphs (i) or (ii) of subsection 2(a)(1) of this order;

and

(2) it is in the interest of the United States that such individual

be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be --

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

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(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for --

(1) military commissions to sit at any time and any place, consistent

with such guidance regarding time and place as the Secretary of

Defense may provide;

(2) a full and fair trial, with the military commission sitting as

the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the

presiding officer of the military commission (or instead, if any other

member of the commission so requests at the time the presiding officer

renders that opinion, the opinion of the commission rendered at that

time by a majority of the commission), have probative value to a

reasonable person;

(4) in a manner consistent with the protection of information

classified or classifiable under Executive Order 12958 of April 17,

1995, as amended, or any successor Executive Order, protected by

statute or rule from unauthorized disclosure, or otherwise protected

by law, (A) the handling of, admission into evidence of, and access to

materials and information, and (B) the conduct, closure of, and access

to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by

the Secretary of Defense and conduct of the defense by attorneys for

the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members

of the commission present at the time of the vote, a majority being

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present;

(7) sentencing only upon the concurrence of two-thirds of the members

of the commission present at the time of the vote, a majority being

present; and

(8) submission of the record of the trial, including any conviction

or sentence, for review and final decision by me or by the Secretary

of Defense if so designated by me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defense.

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums.

(a) Nothing in this order shall be construed to --

(1) authorize the disclosure of state secrets to any person not

otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the

Armed Forces or the power of the President to grant reprieves and

pardons; or

(3) limit the lawful authority of the Secretary of Defense, any

military commander, or any other officer or agent of the United States

or of any State to detain or try any person who is not an individual

subject to this order.

(b) With respect to any individual subject to this order --

(1) military tribunals shall have exclusive jurisdiction with respect

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to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. Publication.

This order shall be published in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE,

November 13, 2001.

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Executive Order 13269 of July 3, 2002**Expedited Naturalization of Aliens and Noncitizen Nationals Serving in An Active-Duty Status During the War on Terrorism**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 329 of the Immigration and Nationality Act (8 U.S.C. 1440) (the "Act"), and solely in order to provide expedited naturalization for aliens and noncitizen nationals serving in an active-duty status in the Armed Forces of the United States during the period of the war against terrorists of global reach, it is hereby ordered as follows:

For the purpose of determining qualification for the exception from the usual requirements for naturalization, I designate as a period in which the Armed Forces of the United States were engaged in armed conflict with a hostile foreign force the period beginning on September 11, 2001. Such period will be deemed to terminate on a date designated by future Executive Order. Those persons serving honorably in active-duty status in the Armed Forces of the United States, during the period beginning on September 11, 2001, and terminating on the date to be so designated, are eligible for naturalization in accordance with the statutory exception to the naturalization requirements, as provided in section 329 of the Act. Nothing contained in this order is intended to affect, nor does it affect, any other power, right, or obligation of the United States, its agencies, officers, employees, or any other person under Federal law or the law of nations.

[signed:] George W. Bush

THE WHITE HOUSE,

July 3, 2002.

<http://www.fas.org/irp/offdocs/eo/eo-13269.htm>

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1 [The 803 session was called to order at 0942, 7 February, 2008.]

2 MJ: Court's called to order. All parties present when the
3 court last recessed are once again present. As near as I can tell,
4 it looks like we have two new representatives on the government side.
5 Counsel, would you introduce yourselves and state your qualifications
6 and status as to oath, please?

7 APROS [Mr. Oldham]: Your Honor, my name is Andrew Oldham. I
8 have been detailed to the Military Commission by the Chief
9 Prosecutor. I'm qualified to serve under RMC 503 and I have
10 previously been sworn in accordance with RMC 807. I have not acted
11 in any manner that might tend to disqualify me in this proceeding. I
12 am a civilian attorney with the Department of Justice.

13 MJ: Thank you.

14 APROS [Mr. Goldstein]: Your Honor, I am Jordan Goldstein. I
15 have been detailed to this Military Commission by the Chief
16 Prosecutor. I am qualified to serve under RMC 503 and have been
17 previously sworn in accordance with RMC 807. I have not acted in any
18 manner that might tend to disqualify me in this proceeding. I'm a
19 civilian attorney with the Department of Justice.

20 [The court reporter was present, was detailed to the Court-Martial by
21 the Convening Authority and was previously sworn.]

22 MJ: Very good. Thank you. I noticed that Lieutenant Mizer has
23 been promoted to Lieutenant Commander. Congratulations.

1 plurality's statement or its determination that conspiracy was not a
2 violation of the Law of War. The accused is attempting to
3 disaggregate the Court's factual findings, if that's what it was,
4 from the Court's role in adjudicating particular issues, and that
5 doesn't make any sense.

6 The Supreme Court's decision in Hamdan was not intended to
7 be an encyclopedia of the War of al Qaeda. It was decision intended
8 to resolve particular legal issues between the parties, in this case,
9 whether conspiracy was a violation of the Law of War. Some facts
10 were relevant to that determination and some facts were not. Those
11 facts that were irrelevant, such as whether hostilities commenced in
12 2001 or 1996 cannot have preclusive affect either on these litigants
13 or on any others, because the plurality's statements regarding the
14 commencement of hostilities with al Qaeda were irrelevant to the
15 ultimate conclusion regarding conspiracy status under the Law of War.
16 It was dicta; therefore had no *res Judicata* affect.

17 With respect to our other arguments on *res Judicata*, we're
18 content to rest on our briefs. And we urge the commission to deny
19 this motion and I'm happy to take any questions at this point.

20 MJ: Well you just used the term "sometime before 9/11" as the
21 start date of hostilities, but in your specification you've alleged a
22 conspiracy that began in 1996. Does this commission have to

1 determine what the start date was and preclude evidence of the
2 accused's acts before that start date?

3 APROS [Mr. Goldstein]: Well, the government would certainly--I
4 guess agrees with the defense that military commissions try
5 violations of the Law of War, in other words try offenses committed
6 in the context of armed conflicts. It's the government's position
7 that this period of armed conflicts included all events in the dates
8 alleged so that would be part of the Court's determination, but the
9 government's position is that this case goes forward because the
10 period of armed conflict includes all the offenses and dates alleged,
11 in other words, from February 1996 through November 24, 2001.

12 MJ: Is it the government's position that the conflict with al
13 Qaeda began a different time than the conflict with the Taliban, and
14 that these are two separate conflicts?

15 APROS [Mr. Goldstein]: I don't know if the government has taken
16 a position in terms of whether the dates of those are co-terminus.
17 They might well not be. I mean, the government's charging indicates
18 that the armed conflict from which these offenses arose was ongoing.
19 But the conflict with Al Qaeda and the Taliban need not have occurred
20 at the same time and there's no requirement of that under the MCA or
21 just logically.

22 MJ: Let me--let me ask you to respond to this and I'll give the
23 defense a chance if they'd like to do it as well. The Supreme Court

1 was trying to--I guess I don't have a very well-formulated question.
2 I'll wave off on that I guess.

3 APROS [Mr. Goldstein]: But again, we advanced a number of
4 different arguments for why there is no *res Judicata* effect, but I
5 think the simplest one is that even if the plurality is taken on its
6 own terms. Even if he had commanded the assent of all nine of the
7 Justices, just accepting that, which it obviously he did not; it
8 determined that conspiracy was not a violation of the Law of War.

9 Government concedes that that is the determination
10 plurality makes, and disagrees vigorously with it. That
11 determination was not based on whether hostilities began in 1996 or
12 2002. There is nothing in Justice Stevens' opinion that would in
13 anyway suggest that that date is a relevant one. To the extent that
14 the plurality sort of goes off on a detour and has other facts in its
15 opinion that are not essential to its conclusions, that might well be
16 interesting, but that certainly cannot have preclusive effect.
17 Plurality cannot put dicta in and give preclusive affect that is not
18 relevant to its conclusions even if it actually had some sort of
19 binding effect, which it did not.

20 MJ: Well I appreciate your argument. Thank you.

21 APROS [Mr. Goldstein]: Thank you.

22 MJ: I'll read your briefs carefully in the case decided and try
23 to work through this one as well.

1 We're making pretty good progress. Are we ready for the
2 next one?

3 ADDG [Mr. Swift]: Yes, Your Honor.

4 [Defense paralegal and counsel set up laptop at podium.]

5 ADDG [Mr. Swift]: A matter of house-keeping, Your Honor. With
6 regards, and understanding where your questions are going in the
7 event we of course argued you don't need to, but in the event that
8 you find something we both agree on. You find that it's not *res*
9 *Judicata* you're not bound your decision. We would--if Your Honor
10 wants briefs on when the war started irrespective of *res Judicata*,
11 what authorities and all hold--there's a lot out there--and would
12 invite us to brief, we would be willing to do so on that subject. It
13 was not directly in mind because I was arguing it as a matter of
14 procedure, but both sides do agree----

15 MJ: The thought--the thought did occur to me that maybe
16 September 1 or some period before 9/11 but I don't know how far
17 before might be the time when the attack was swarming, so that the
18 period of hostilities clearly began, you know, at some vague date
19 before September 11. I don't know----

20 ADDG [Mr. Swift]: Your responding----

21 MJ: You're welcome.

22 ADDG [Mr. Swift]: ----to add to your----

23 MJ: Submit your supplemental briefs on that if you----

1 ADDC [Mr. Swift]: ----certainly.

2 MJ: ----like. I guess I don't know----

3 ADDC [Mr. Swift]: ----actually, it's some case law----

4 MJ: ----if I have to decide when the conflict began so that the
5 specification reads not 1996 but 1998 or 1999 or--or not. Well let's
6 see how that *res Judicata* motion works out and then maybe we can take
7 up----

8 PROS [LTC Britt]: Your Honor, if I could just speak for a brief
9 bit on that. We'd like to decline the opportunity to brief this
10 issue, because we don't believe that resolution of that particular
11 point is necessary for your determination in our case.

12 MJ: You know I think that's true.

13 PROS [LTC Britt]: And the reason is, is we're simply contending
14 that Mr. Hamdan entered into the ongoing conspiracy as of the date
15 alleged. And that----

16 MJ: February 96.

17 PROS [LTC Britt]: Yes, sir. And therefore hostilities were
18 ongoing as of that date whether or not hostilities were going
19 previously and as of what date the hostilities commenced is not
20 relevant to your determination.

21 MJ: What happened in February of 96 that represented the
22 beginning of hostilities?

23 [Prosecution counsel conferring.]

1 MJ: Let me whisper to counsel.

2 PROS [LTC Britt]: Yes, sir. Thank you. I think we can
3 adequately address the, the Court's question. In February of 1996,
4 that was essentially the date when Mr. Hamdan entered Afghanistan,
5 and therefore that would be the date that we contend that he joined
6 the ongoing hostilities which were taking place. So that's the
7 significance of us choosing that particular date.

8 MJ: Okay.

9 ADDC [Mr. Swift]: We would really like to brief that if the
10 court finds not res Judicata, the war started with Mr. Hamdan by him
11 entering Afghanistan at a time--I would like to brief that, Your
12 Honor. And whether that's within the jurisdiction of this court?

13 MJ: I don't think the government said Mr. Hamdan started the
14 war when he crossed into Afghanistan. I think they allege that there
15 was an ongoing conspiracy to join on that date.

16 PROS [LTC Britt]: Yes, sir. That's correct.

17 MJ: Were there hostilities? Had there been an attack prior to
18 February of 96?

19 PROS [LTC Britt]: Our position would be there had been several
20 attacks prior to that and I think that's part of our case, is
21 developing what constituted hostilities at that time, but I don't, I
22 don't----

[REDACTED]

From: McMillan, Joseph M. (Perkins Coie) [REDACTED]
Sent: Friday, March 07, 2008 4:13 PM
To: [REDACTED]; Britt, William, LTC, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC; Murphy, John, Mr, DoD OGC
Cc: [REDACTED], DoD OGC; Morns, Lawrence, COL, DoD OGC; Schneider, Harry (Perkins Coie); Trivett, Clayton, Mr, DoD OGC; [REDACTED]
Subject: Defense Supplemental Brief re Date of Start of War (D016)
Attachments: 14049823_1.DOC; DefenseMotion.pdf; AttachmentsA-L.pdf

LTC [REDACTED]

Attached for filing in the matter *United States v. Hamdan* is the Defense Supplemental Brief regarding the Date of the Start of the War (supplemental to the Defense *res judicata* motion to dismiss charges involving pre-war conduct, D016). The brief is attached in both Word and pdf format (the pdf version is signed), and the Exhibits to the brief are attached in a separate pdf.

Thank you.

Joe McMillan
Perkins Coie LLP

[REDACTED]

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

3/7/2008

AE 123 (Hamdan)
Page 65 of 66

[REDACTED]

From: Prasow, Andrea, Ms, DoD OGC
Sent: Tuesday, March 04, 2008 3:59 PM
To: [REDACTED]
Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; [REDACTED], DoD OGC; McMillan, Joseph M. (Perkins Coie); Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Schneider, Harry (Perkins Coie); Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC
Subject: U.S. v. Hamdan - Defense Notice of Intent to File Supplemental Brief
Signed By [REDACTED]

LTC [REDACTED]

The Defense hereby provides notice to the military commission and opposing counsel that, in accordance with the invitation of the Military Judge at the 7 February 2008 hearing, it intends to submit supplemental briefing on the date of the start of the war (relevant to D016) by no later than Friday, 7 March 2008. (See unofficial transcript of 7 Feb. 2008 hearing at p. 138.)

Thank you,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Office of Military Commissions

[REDACTED]

AE 123 (Hamdan)
Page 66 of 66

3/7/2008

Attachment H

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D 016
RULING ON MOTION
TO DISMISS (RES JUDICATA)

2 April 2008

The Defense has moved this Commission to Dismiss Specification 1 of Charge I (Conspiracy) and Specifications 1, 2, 5, 6, 7 and 8 of Charge II (Providing Material Support for Terrorism) for lack of Subject Matter Jurisdiction based on the doctrine of *res judicata*. The Defense also argues that portions of the charged offenses occurred outside the period of hostilities, and that the Supreme Court has already determined, in this case, that conspiracy is not an offense triable by a military commission. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006). The Government argues variously that the Supreme Court's plurality decision in *Hamdan* is not binding on this Commission, that a decision made in a *habeas corpus* proceeding must be limited to the issues necessary to the resolution of that issue, and that in any event, the Court did not fully and finally decide these matters in that opinion. Oral argument was heard in open court at Guantanamo Bay, Cuba on 7 February 2008.

ASSIGNMENT OF BURDEN

The Defense characterizes the motion as a jurisdictional issue, and urges the Commission to assign the burden of persuasion to the Government, in accordance with RMC 905(c)(2)(B). Except with respect to the issue of jurisdiction, the Manual for Military Commissions assigns the burden of persuasion to the moving party, RMC 905(c)(2)(A). Appellate Courts have traditionally found that the issue of *res judicata* is an affirmative defense, rather than a jurisdictional question. *United States v. Smith*, 15 C.M.R. 369, 372 (C.M.A. 1954). Other federal courts have considered *res judicata* challenges to be substantive challenges to the sufficiency of the referred charges, and not challenges to jurisdiction. *United States v. Delgado-Garcia*, 374 F. 3d 1337, 1342 (D.C. Cir 2004); *United States v. Gonzalez*, 311 F. 3d 440, 442 (1st Cir. 2002). "The burden is on the accused to demonstrate that the issue whose re-litigation he seeks to foreclose was actually decided in the first proceeding." *Schiro v. Farley*, 510 U.S. 222, 233 (1994), quoting *Dowling v. United States*, 493 U.S. 342, 350 (1990). The Defense Motion cites *United States v. Carlisi*, 32 F. Supp. 479, 482 (D.N.Y. 1940) for the proposition that *res judicata* is a 'rule of evidence.'

The Commission concludes that the burden is on the Defense, as the moving party, "to demonstrate that the issue whose re-litigation he seeks to foreclose was actually decided in the first proceeding." *Schiro v. Farley*, 510 U.S. 222, 233 (1994), quoting *Dowling v. United States*, 493 U.S. 342, 350 (1990); RMC 905(c)(2)(A).

THE LAW OF RES JUDICATA

R.M.C.905(g) provides that "Any matter put in issue and finally determined by a military commission, reviewing authority, or appellate court which had jurisdiction to determine the

matter may not be disputed by the United States in any other military commission of the same accused This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a Federal governmental unit were parties.” The doctrine of *res judicata* is also a part of military law, as RCM 905(g), applicable to Courts-Martial, is identical to the rule for military commissions. The gist of the rule is that an issue, once decided in the case of a particular accused, is finally decided, and that decision binds subsequent courts as to that issue.

“Finality will be lacking if an issue of law or fact essential to the adjudication of the claim has been reserved for future determination.” Restatement (Second) of Judgments §13 cmt. b. “If an appellate court terminates the case by final rulings as to some matters only, preclusion is limited to the matters actually resolved . . . whether it terminated the case on terms that left it unnecessary to resolve other matters or affirmed on some grounds and vacated or reversed on others.” 18A Wright, Miller & Cooper § 4432, at 63-64.

The Government urges this Commission to distinguish the opinion of the Supreme Court on the grounds that it was issued in a *habeas corpus* proceeding, rather than after a “trial.” In the Government’s view, a *habeas corpus* proceeding is not a “proceeding” with the meaning of RMC 905(g) that binds a subsequent court. It argues that a “proceeding” must be another adversarial proceeding, such as a criminal trial. In *United States v. Saulter*, 5 M.J. 281, 283 (C.M.A. 1978) the Court of Military Appeals determined that there was no jurisdiction over the accused after the United States District Court for the Eastern District of North Carolina, ruling on a *habeas corpus* petition, had determined that there was. A judgment rendered in a *habeas corpus* proceeding “is *res judicata* only . . . of the issues of law and fact necessarily involved in that result.” *Collins v. Loisel*, 262 U.S. 426, 430 (1923). The Supreme Court having addressed these charges against this accused, the Commission declines to distinguish an opinion of the Supreme Court on so narrow and technical a ground.

WHAT IS THE EFFECT OF A PLURALITY DECISION?

In the reported decision of *Hamdan v. Rumsfeld*, four members of the Supreme Court comprised the plurality. Many of the issues the Defense considers to be *res judicata* by virtue of that plurality opinion were opposed by three other members of the Court. Justice Roberts did not participate in the case and Justice Kennedy did not consider it necessary to address these issues. The issue for the Commission, therefore, is whether a 4-3-1-1 decision has the effect of *res judicata* in the current proceedings.

The Government cites a host of cases for the proposition that it does not. “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977), *Greggs v. Georgia*, 428 U.S. 153, 169 n. 15 (1976). In *CTS Corp. v. Dynamics Corp of Am.*, 481 U.S. 69, 81 (1987), the Court wrote “As the plurality opinion . . . did not represent the views of a majority of the Court, we are not bound by its reasoning.” In another case, the Court refused to be bound by a plurality that did not command a majority of the Court. *Horton v. California*, 496 U.S. 128, 136 (1990).

The Defense points to another case holding that a plurality decision, while it may not be binding precedent for other cases, is binding on the litigants *in that case*. In *Durant v. Essex Co.*, 74 U.S. 107 (U.S. 1868) the Court explained that:

The statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. It serves to explain the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character. *But the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.*

Id. at 113.

In light of this authority, the Commission concludes that the plurality opinion of the United States Supreme Court in *Hamdan v. Rumsfeld* meets the “finally decided” standard of RMC 905(g), and that while the Court’s plurality decision may not be precedent in other military commission cases, it is binding on this Commission in the case of Mr. Hamdan. The question for this commission is whether the matters put in issue before the Supreme Court in 2006 are still in issue before this military commission.

WHAT MATTER WAS PUT IN ISSUE?

The Defense argues that two matters were put in issue and decided in 2006, and therefore are binding upon this commission:¹ whether conspiracy is a violation of the Law of Armed Conflict; and whether a military commission can try Hamdan for offenses that occurred before the beginning of the war.

The plurality opinion addressed both of these issues in these words “the offense alleged must have been committed both in a theater of war and during, not before, the relevant conflict. But the deficiencies in time and place allegations also underscore—indeed are symptomatic of—the most serious defect of this charge: The offense it alleges is not triable by a law-of-war military commission.” *Hamdan*, at 2779.

The Commission addresses these issues separately.

1. Whether conspiracy is a violation of the Law of Armed Conflict.

The plurality was clearly concerned about the conspiracy specification before it in 2006:

“The charge against Hamdan . . . alleges a conspiracy extending over a number

¹ The Supreme Court’s determination that the President did not have authority, independent of Congress, to establish military commissions, identify offenses against the law of nations, and justify deviations from the procedures established by the UCMJ are not challenged or addressed here.

of years, from 1996 to November 2001. The elements of this conspiracy have been defined not by Congress but by the President. All but two months of that more than 5-year-long period preceded the attacks of September 11, 2001, and the enactment of the AUMF—the Act of Congress on which the Government relies for exercise of its war powers and thus for its authority to convene military commissions. Neither the purported agreement with Osama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 1, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.” *Hamdan* at 2777-2778 [footnote 30 inserted in text]

The Plurality opinion that conspiracy is not a violation of the law of war was based on the case then before it. The President, and not Congress, had authorized military commissions and outlined the elements of the offense of conspiracy. “When, however, neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent [for “incorporation by reference” of the common law of war] must be plain and unambiguous.” *Id.* at 2780. In essence, the issue before the Court was whether conspiracy was plainly and unambiguously a violation of the common law of war. “There is no suggestion that Congress has, in exercise of its constitutional authority to “define and punish . . . Offences against the Law of Nations,” U.S. Const., Art. I, § 8, cl. 10, positively identified “conspiracy” as a war crime.” *Id.* at 2779-2780. The Court refused to allow the President to identify conspiracy as a violation of the common law of war, reminding us that “The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny” *Id.* (Quoting James Madison, *The Federalist*, No. 47) The Court’s response was clear: the President does not have authority to establish military tribunals that do not comply with the UCMJ, and he does not have authority, in the absence of Congressional action, to establish conspiracy as a violation of the common law of armed conflict. The Commission concludes that these findings are indeed binding on this Commission, under the principle of *res judicata*.

The issue now before the Commission, however, is different. Congress has now acted under its Constitutional authority to define and punish offenses against the law of nations, and has identified conspiracy as a violation of the law of war. In doing so, Congress declared that it was not creating new offenses, but merely codifying existing law MCA §950p(b). The President’s establishment of military commissions to try violations of that act is specifically authorized by Congress. Thus, the issues decided by the Supreme Court are no longer before the Commission. The Supreme Court may ultimately have occasion to address Congress’s determination, but it has not yet done so.

2. Whether Hamdan can be tried for offenses that pre-dated the start of hostilities

The Supreme Court also addressed the requirement in military law that to be triable by military commission as a violation of the law of war, an offense must have been committed “within the period of the war.” *Id.* at 2778, quoting Colonel Winthrop’s treatise, *Military Law and Precedent*, at 837. The issue before the Court was whether Hamdan can be tried for any conspiracy that predated September 11, 2001. The Justices disagreed over whether the war began on September 11, 2001.

Once again, Winthrop was describing, and the Supreme Court was discussing, the common law of war. The Court wrote “All parties agree that Colonel Winthrop’s treatise accurately describes *the common law* governing military commissions, and that the jurisdictional limitations he identifies were incorporated in Article of War 15 and, later, Article 21 of the UCMJ.” *Id.* at 2777 (emphasis added). The Court continued “First, Kuehn was tried for the *federal espionage crimes* under what were then 50 USC §§ 31, 32 and 34, *not* with *common-law* violations of the law of war.” *Id.* at 2778. (first two emphases in original; third emphasis added). It is clear, therefore, that Winthrop’s well-regarded treatise and the Court’s opinion addressed *the common law of war*, not the situation that currently faces this Commission: whether Congress has determined that offenses occurring before, on or after September 11th may properly be tried by military commission.

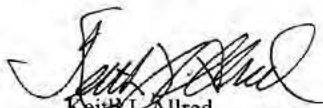
The Supreme Court’s opinion also turned on its finding that the President was bound by Article 21, UCMJ. “If nothing else, Article 21 of the UCMJ requires that the President comply with the law of war in his use of military commissions” *Id.* at 2778. Article 21 provides that the UCMJ does not deprive military commissions of jurisdiction “with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions . . .” Indeed, in 2006 he was so bound, and the offenses a military commission could entertain were only those that “by *the law of war* may be tr[ie]d by military commissions.” (emphasis added) Since Congress has now acted, the President may, consistent with Article 21, compose military commissions that hear “offenses that by statute . . . may be tried by military commissions.” Article 21, UCMJ. In addition, Congress has tempered the effect of Article 21 by making it inapplicable to these military commissions. MCA §4a(2), 120 STAT. 2631, where Article 21 is amended to add “This section does not apply to a military commission established under Chapter 47A of this title.”

The question before this Commission, therefore, is whether Congress has amended or expanded the reach of the common law of war, such that offenses committed prior to September 1, 2001 may be tried by military commission. The Commission finds that Congress intended to enact a system of offenses broader than the common law of war, and that in doing so, it has relied on its express Constitutional authority to define and punish offenses against the law of nations. Because the MCA was so clearly a response to the Supreme Court’s opinion in *Hamdan*, the Commission finds that Congress intended to address the Court’s ruling regarding the significance of September 11, 2001 when it chose the “before, on, or after” language of MCA §948d(a). The language of that section, of course, only applies to *unlawful alien enemy combatants*, and this term is defined to include one who has “engaged in hostilities” MCA§948a(1)(i). Reading these provisions together, the Commission concludes that offenses committed prior to September 11, 2001 by unlawful enemy combatants may be tried by military commission, so long as they affected or were related to the period of hostilities. If *Hamdan* is to be convicted of a conspiracy in violation of the Law of War, it must be a conspiracy that occurred during the period of hostilities, or which affected or related to the period of hostilities. Membership in a conspiracy that planned and carried out the attacks of September 11th, 2001 will be deemed to be in violation of the law of war; membership in a conspiracy that planned or carried out other attacks long before that date, and unrelated to hostilities will not.

CONCLUSION AND RULING

The Defense Motion to Dismiss Charge I and its specification, and Charge Specifications 1,2,5,6,7 and 8 of Charge II on the grounds of *res judicata* is DENIED for the following reasons:

1. The Supreme Court did not address or decide any question relating to the offense of Material Support for Terrorism;
2. The Supreme Court's opinion regarding conspiracy as a violation of the common law of war is not germane in light of Congress's subsequent action passing the MCA.
3. The Supreme Court's opinion regarding the period of hostilities is based on the common law of war. Congress has decided, in enacting the MCA, that offenses made punishable by the MCA, when committed by unlawful enemy combatants, may be punished whether committed before, on or after September 11, 2001, so long as they are related to the period of hostilities.


Keith J. Allred
Captain, JAGC, U.S. Navy
Military Judge

UNCLASSIFIED//FOR PUBLIC RELEASE

[REDACTED]

From: [REDACTED].mil
Sent: Thursday, April 10, 2008 8:43 PM
To: Prasow, Andrea, Ms, DoD OGC; Britt, William, LTC, DoD OGC; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC; [REDACTED]; Murphy, John, Mr, DoD OGC
Cc: Berrigan, Michael, Mr, DoD [REDACTED]; [REDACTED]; DoD OGC; McMillan, Joseph M. (Perkins Coie); Morris, Lawrence, COL, DoD OGC; Murphy, John; Schneider, Harry (Perkins Coie); [REDACTED]; [REDACTED]
Subject: USSOUTHCOM JTFGTMO; Chapman, Michael, Mr, DoD OGC; US v HAMDAN-- RULING on Res Judicata Motion D-016
Attachments: HAMDAN.MOTION TO DISMISS.RES JUDICATA RULING.PDF



HAMDAN MOTION TO DISMISS.RES J.

CAPT Allred has directed that I send the attached Ruling to counsel and other interested persons.

v/r,

LTC [REDACTED], USAR Senior Attorney Advisor Military Commissions Trial Judiciary
Depa [REDACTED] ense

Attachment I

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN
a/k/a Saqr al Jaddawi
a/k/a/ Khalid bin Abdalla

D016

PROSECUTION RESPONSE TO THE
DEFENSE'S SUPPLEMENTAL
SUBMISSION IN SUPPORT OF ITS
MOTION TO DISMISS CERTAIN
SPECIFICATIONS AS A MATTER OF
RES JUDICATA

21 APRIL 2008

1. **Timeliness:** This motion is filed within the timeline established by the Military Judge following his invitation to submit additional authority bearing on the issue of the date of the beginning of the relevant armed conflict, which deadline has been further extended by the Military Judge's e-mail of 11 April 2008.
2. **Relief Requested:** The Government respectfully requests that the Military Judge find that—jurisdiction over the accused having been established by the Military Judge's 19 December 2007 order—it is for the members of the Military Commission to determine whether the accused's conduct "took place in the context of and was associated with an armed conflict."
3. **Overview:**
 - a. Under the Military Commissions Act of 2006 ("MCA"), the Military Judge must determine whether the accused "has engaged in hostilities or . . . has purposefully and materially supported hostilities against the United States or its co-belligerents." MCA § 948a(1)(A)(i). The Military Judge determined in his 19 December 2007 order that the accused in fact *had* "engaged in hostilities or . . . purposefully and materially supported hostilities against the United States or its co-belligerents," MCA § 948a(1)(A)(i), and was therefore subject to jurisdiction before this Commission. *See United States v. Hamdan*, On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction at 8 (19 Dec. 2007).
 - b. Whether each offense occurred "in the context of and was associated with an armed conflict" is a question of fact for the members to decide, and therefore is not properly before this Commission at the present time. Accordingly, the Defense's submission of additional authorities is irrelevant.
 - c. At trial, the Government will present evidence to prove to the members beyond a reasonable doubt that the accused committed each element of the charged offenses, including that the offenses occurred "in the context of and [were] associated with an armed conflict." Until that time, however, it is neither necessary nor appropriate for the Military Judge to determine the precise date hostilities began, so long as the

AE 151 (Hamdan)
Page 1 of 14

accused has been determined to have been an alien unlawful enemy combatant subject to the jurisdiction of this Commission.*

4. Burden of Persuasion: As the Prosecution previously argued in its response to the underlying motion, *see* Government’s Response to Motion to Dismiss Specification 1 of Charge I and Specifications 1, 2, 5, 6, 7 and 8 of Charge II as a Matter of *Res Judicata* at 1-2 (23 Jan. 2008)—and as the Military Judge agreed in his 2 April 2008 ruling on that motion, *see United States v. Hamdan*, D016 Ruling on Motion to Dismiss (*Res Judicata*) at 1 (2 Apr. 2008)—the Defense bears the burden of persuasion on whether a matter “whose re-litigation he seeks to foreclose was actually decided in the first proceeding.” *Id.*; *see also* Rule for Military Commissions (“RMC”) 905(c)(2)(A); Military Commission Trial Judiciary Rules of Court, Rule 3(7)(a).

5. Facts:

a. During oral argument held on 7 February 2008 at Guantanamo Bay, Cuba, on the Defense’s motion to dismiss certain specifications as a matter of *res judicata*, the Military Judge raised the question of whether it was appropriate for him to determine, at that point, whether hostilities had commenced before, on or after 11 September 2001. *See United States v. Hamdan*, Military Commission, Trans. at 136 (7 Feb. 2008) (“MJ: I guess I don’t know . . . if I have to decide when the conflict began so that the specification reads not 1996 but 1998 or 1999 or—or not. Well let’s see how that *res Judicata* motion works out and then maybe we can take up . . .”).

b. Trial counsel responded to the Military Judge’s remarks, and stated the Government’s position that determining the start date of hostilities was not relevant at that point in the case. *See id.* at 136 (“PROS [LTC BRITT]: Your Honor, if I could just speak for a brief bit on that. We’d like to decline the opportunity to brief this issue, because we don’t believe that resolution of that particular point is necessary for your determination in our case.”). The Military Judge agreed with trial counsel. *Id.*

c. Several minutes later, the Military Judge posed the following question, which is presumably what the Defense’s supplemental briefing is meant to respond to:

This is the question that just escaped me and now it’s come back.
Whether the existence of a state of war is a question for the jury or not?
Whether it will be an element that you’ll have to prove or whether that’s a legal question that has to be resolved. In other words, when I end up instructing the members at the end of the evidence what the elements of the offense are, will it include the element that these were, you know, connected to a period of hostilities?

Id. at 138.

* To the extent the Military Judge believes that the precise date hostilities began must in fact be determined prior to trial, the Government respectfully requests the opportunity to brief that issue.

d. On 7 March 2008, the Defense filed a brief entitled, “Defense Supplemental Submission in Support of Defense Motion to Dismiss Specification 1 of Charge 1 and Specifications 1, 2, 5, 6, 7 and 8 of Charge 2 for Lack of Subject Matter Jurisdiction as a Matter of *Res Judicata*.” In that brief, the Defense argued that the Military Judge must determine when the relevant armed conflict began, and further argued that the relevant armed conflict began on or near 11 September 2001.

e. On 10 April 2008, the Government received a copy of the Military Commission’s ruling, dated 2 April 2008, on the Defense’s motion to dismiss the above-referenced specifications as a matter of *res judicata*. In that ruling, the Military Judge determined that “offenses committed prior to September 11, 2001 by unlawful enemy combatants may be tried by military commission, so long as they affected or were related to the period of hostilities.” *Hamdan*, D016 Ruling on Motion to Dismiss (*Res Judicata*) at 5. The Military Judge further stated that “[i]f Hamdan is to be convicted of a conspiracy in violation of the Law of War, it must be a conspiracy that occurred during the period of hostilities, or which affected or related to the period of hostilities.” *Id.*

6. Discussion:

THE MEMBERS OF THIS MILITARY COMMISSION—RATHER THAN THE MILITARY JUDGE—MUST DETERMINE WHETHER THE ACCUSED’S CONDUCT “TOOK PLACE IN THE CONTEXT OF AND WAS ASSOCIATED WITH AN ARMED CONFLICT”

a. Although the Government agrees with certain aspects of the 2 April 2008 ruling, there appears to be some confusion both in that ruling and in the Defense’s supplemental briefing on the proper role of the Military Judge in determining when hostilities began.

b. First, the relevant use of the word “hostilities” in the MCA is in its jurisdictional provision. In MCA § 948a(1)(A)(i), the term “unlawful enemy combatant” is defined, in relevant part, as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).” Only persons who are alien unlawful enemy combatants may be tried under the MCA before a military commission.

c. This Commission has already found that the accused is an alien unlawful enemy combatant and therefore subject to the jurisdiction of the Commission. *See Hamdan*, On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction at 8. Both the Prosecution and the Defense agree that it is for the Military Judge to make this initial jurisdictional assessment, and the Military Judge has done precisely that.

d. Contrary to the Defense’s Supplemental Submission of 7 March 2008, it is unnecessary for the Military Judge to determine the start date of hostilities beyond what is required to determine whether jurisdiction is appropriate under MCA § 948a(1). In his 19 December 2007 ruling, the Military Judge found that hostilities were in progress by at

least 24 November 2001, *see id.* at 6, and that the accused's participation in those hostilities made him an unlawful enemy combatant, and triable under the MCA, *see id.* at 7-8.

e. The Defense conflates the requirement that the Military Judge must determine whether the accused is "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant," MCA § 948a(1)(A)(i), with the requirement in the Manual for Military Commissions ("MMC") that a particular substantive offense "took place in the context of and was associated with an armed conflict." *See, e.g.*, MMC IV-6(a)(25) (Providing Material Support for Terrorism).

f. The requirement that a particular act of the accused "took place in the context of and was associated with an armed conflict" is an element of certain substantive offenses, and must, in accordance with the MCA and MMC, be proved to the members of the Military Commission beyond a reasonable doubt. *See, e.g.*, RMC 918(b), 920(e)(5).

g. It is therefore not for the Military Judge to decide whether the particular acts of the accused that constitute the charged offenses of Conspiracy and Providing Material Support for Terrorism occurred in the context of or were associated with an armed conflict. Rather, that is a matter of fact for the members to decide. Moreover, the specific issue that is to be decided by the members, at the conclusion of trial proceedings, is not whether the relevant offenses occurred "during hostilities," *per se*, but rather whether the conduct "took place in the context of and was associated with an armed conflict" (concepts that may, but need not, overlap).

h. Once the Military Judge has determined, as he has already, that the accused is an unlawful enemy combatant based on the accused's having "engaged in hostilities or . . . purposefully and materially supported hostilities against the United States or its co-belligerents," the start date of hostilities with respect to *other* charged conduct that may not have been part of the Military Judge's jurisdictional determination (e.g., conduct by the accused prior to 24 November 2001) is not an appropriate matter for the Military Judge to determine. Rather, it is the members who must decide whether the accused committed offenses "in the context of and . . . associated with an armed conflict."

7. Conclusion:

a. Now that jurisdiction over the accused has been established by the Military Judge's 19 December 2007 order, it is for the members to decide whether the accused's conduct "took place in the context of and was associated with an armed conflict."


b. At trial, the Government will present evidence to prove to the members beyond a reasonable doubt that the accused committed each element of the charged offenses, including that the offenses occurred "in the context of and [were] associated with an armed conflict." Until that time, however, it is neither necessary nor appropriate

for the Military Judge to determine the precise date hostilities began, so long as the accused has been determined to have been an alien unlawful enemy combatant subject to the jurisdiction of this Commission.[†]

8. **Certificate of Conference:** Not applicable.
9. **Attachments:** None.

Respectfully Submitted,

/s/
William Britt
LTC, JAGC, USA



Timothy Stone
LCDR, JAGC, USN

/s/
John Murphy
Department of Justice

/s/
Clayton Trivett
Department of Defense

[†] The Prosecution will present evidence at trial that the hostilities between the United States and al Qaeda was ongoing at the time the charged offenses, 1996. The Prosecution is prepared to present (and anticipates filing) a specific bench brief with supporting analysis and documentation when requested.

[REDACTED]

From: Stone, Tim, LCDR, DoD OGC
Sent: Monday, April 21, 2008 10:28 AM
To: Mizer, Brian, LCDR, DoD OGC; Bley, Natalie, Ms, DoD OGC; [REDACTED]
Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; 'Charles Swift', Cox, [REDACTED]
[REDACTED], DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John, Mr, DoD OGC;
Prasow, Andrea, Ms, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wi kins, Donna, Ms, DoD
OGC
Subject: Prosecution response to D-016 Supplemental
Signed By: [REDACTED]
Attachments: Pros Resp Def Suppl Subm Res Judicata Motion.pdf

To all: [Please find the Prosecution submission to Defense supplemental filing on D-16.](#)

v/r
LCDR Stone

4/21/2008

AE 151 (Hamdan)
Page 6 of 14

[REDACTED]

From: Allred, Keith J CAPT NAVMARTRIJUDCIR SW, [REDACTED]
Sent: Friday, April 11, 2008 5:44 PM
To: Britt, William, LTC, DoD OGC; [REDACTED] TC USSOUTHCOM JTFGTMO; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD OGC; Mizer, Brian, LCDR, DoD OGC
Cc: [REDACTED] DoD OGC; McMillan, Joseph M. (Perkins Cole); Morris, Lawrence, COL, DoD OGC; Schneider, Harry (Perkins Cole); [REDACTED], DoD OGC;
Subject: USSOUTHCOM JTFGTMO
 RE: US v HAMDAN-- D-016 - Request for continuance to file permissive brief

Counsel:

I will be out of the office trying several cases in the Pacific Northwest all of next week, and will be unable to give attention to this issue until at least Monday, April 21st in any event. Both sides may have a continuance until the morning of that date (1000 EST) to file their briefs on this issue.

Captain Allred

-----Original Message-----

From: Britt, William, LTC, DoD OGC [REDACTED]
Sent: 11, 2008 13:21
To: [REDACTED] M LTC USSOUTHCOM JTFGTMO; Prasow, Andrea, Ms, DoD OGC; Stone, Tim; Mize, [REDACTED] DoD OGC
Cc: Allred, Keith J CAPT NAVMARTRIJUDCIR SW, CMJ; [REDACTED] 1; McMillan, J [REDACTED]

Subject: RE: US v HAMDAN-- D-016 - Request for continuance to file permissive brief
Importance: High

Sir/ALCON - Respectfully request a one week continuance to file the Government's Brief pertaining to the commencement of hostilities. Previously, your Honor invited both parties to submit briefs concerning the following issues. 1) commencement of hostilities (2) Is this an issue for decision by the Military Judge or the members (Law v fact) or a mixed question. The Government received the Res Judicata ruling (attached) at 1943 yesterday evening. Review of the Court's ruling may significantly effect the Government's Brief on this critical issue. Since the Government's response to this question will require input and coordination between a number of governmental departments, the Government requires a full week until 18 April 2008 @ 1630 to adequately advise the court of the Government's position. This continuance should in no way effect the trial schedule and will assist the Court in properly determining these crucial and central questions. Due to the time, the Government has been unable to coordinate with the defense. Respectfully submitted, LTC William Britt.

[REDACTED]

AE 151 (Hamdan)
Page 7 of 14

[REDACTED] an,

Subject: US v HAMDAN-- RULING on Res Judicata Motion D-016

CAPT Allred has directed that I send the attached Ruling to counsel and other interested persons.

v/r,

LTC [REDACTED], USAR Senior Attorney Advisor Military Commissions
Tria [REDACTED] epartment of Defense

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D 016
RULING ON MOTION
TO DISMISS (RES JUDICATA)

2 April 2008

The Defense has moved this Commission to Dismiss Specification 1 of Charge I (Conspiracy) and Specifications 1, 2, 5, 6, 7 and 8 of Charge II (Providing Material Support for Terrorism) for lack of Subject Matter Jurisdiction based on the doctrine of *res judicata*. The Defense also argues that portions of the charged offenses occurred outside the period of hostilities, and that the Supreme Court has already determined, in this case, that conspiracy is not an offense triable by a military commission. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006). The Government argues variously that the Supreme Court's plurality decision in *Hamdan* is not binding on this Commission, that a decision made in a *habeas corpus* proceeding must be limited to the issues necessary to the resolution of that issue, and that in any event, the Court did not fully and finally decide these matters in that opinion. Oral argument was heard in open court at Guantanamo Bay, Cuba on 7 February 2008.

ASSIGNMENT OF BURDEN

The Defense characterizes the motion as a jurisdictional issue, and urges the Commission to assign the burden of persuasion to the Government, in accordance with RMC 905(c)(2)(B). Except with respect to the issue of jurisdiction, the Manual for Military Commissions assigns the burden of persuasion to the moving party, RMC 905(c)(2)(A). Appellate Courts have traditionally found that the issue of *res judicata* is an affirmative defense, rather than a jurisdictional question. *United States v. Smith*, 15 C.M.R. 369, 372 (C.M.A. 1954). Other federal courts have considered *res judicata* challenges to be substantive challenges to the sufficiency of the referred charges, and not challenges to jurisdiction. *United States v. Delgado-Garcia*, 374 F. 3d 1337, 1342 (D.C. Cir 2004); *United States v. Gonzalez*, 311 F. 3d 440, 442 (1st Cir. 2002). "The burden is on the accused to demonstrate that the issue whose re-litigation he seeks to foreclose was actually decided in the first proceeding." *Schiro v. Farley*, 510 U.S. 222, 233 (1994), quoting *Dowling v. United States*, 493 U.S. 342, 350 (1990). The Defense Motion cites *United States v. Carlisi*, 32 F. Supp. 479, 482 (D.N.Y. 1940) for the proposition that *res judicata* is a 'rule of evidence.'

The Commission concludes that the burden is on the Defense, as the moving party, "to demonstrate that the issue whose re-litigation he seeks to foreclose was actually decided in the first proceeding." *Schiro v. Farley*, 510 U.S. 222, 233 (1994), quoting *Dowling v. United States*, 493 U.S. 342, 350 (1990); RMC 905(c)(2)(A).

THE LAW OF RES JUDICATA

R.M.C.905(g) provides that "Any matter put in issue and finally determined by a military commission, reviewing authority, or appellate court which had jurisdiction to determine the

matter may not be disputed by the United States in any other military commission of the same accused This rule also shall apply to matters which were put in issue and finally determined in any other judicial proceeding in which the accused and the United States or a Federal governmental unit were parties.” The doctrine of *res judicata* is also a part of military law, as RCM 905(g), applicable to Courts-Martial, is identical to the rule for military commissions. The gist of the rule is that an issue, once decided in the case of a particular accused, is finally decided, and that decision binds subsequent courts as to that issue.

“Finality will be lacking if an issue of law or fact essential to the adjudication of the claim has been reserved for future determination.” Restatement (Second) of Judgments §13 cmt. b. “If an appellate court terminates the case by final rulings as to some matters only, preclusion is limited to the matters actually resolved . . . whether it terminated the case on terms that left it unnecessary to resolve other matters or affirmed on some grounds and vacated or reversed on others.” 18A Wright, Miller & Cooper § 4432, at 63-64.

The Government urges this Commission to distinguish the opinion of the Supreme Court on the grounds that it was issued in a *habeas corpus* proceeding, rather than after a “trial.” In the Government’s view, a *habeas corpus* proceeding is not a “proceeding” with the meaning of RMC 905(g) that binds a subsequent court. It argues that a “proceeding” must be another adversarial proceeding, such as a criminal trial. In *United States v. Saulter*, 5 M.J. 281, 283 (C.M.A. 1978) the Court of Military Appeals determined that there was no jurisdiction over the accused after the United States District Court for the Eastern District of North Carolina, ruling on a *habeas corpus* petition, had determined that there was. A judgment rendered in a *habeas corpus* proceeding “is *res judicata* only . . . of the issues of law and fact necessarily involved in that result.” *Collins v. Loisel*, 262 U.S. 426, 430 (1923). The Supreme Court having addressed these charges against this accused, the Commission declines to distinguish an opinion of the Supreme Court on so narrow and technical a ground.

WHAT IS THE EFFECT OF A PLURALITY DECISION?

In the reported decision of *Hamdan v. Rumsfeld*, four members of the Supreme Court comprised the plurality. Many of the issues the Defense considers to be *res judicata* by virtue of that plurality opinion were opposed by three other members of the Court. Justice Roberts did not participate in the case and Justice Kennedy did not consider it necessary to address these issues. The issue for the Commission, therefore, is whether a 4-3-1-1 decision has the effect of *res judicata* in the current proceedings.

The Government cites a host of cases for the proposition that it does not. “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977), *Greggs v. Georgia*, 428 U.S. 153, 169 n. 15 (1976). In *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987), the Court wrote “As the plurality opinion . . . did not represent the views of a majority of the Court, we are not bound by its reasoning.” In another case, the Court refused to be bound by a plurality that did not command a majority of the Court. *Horton v. California*, 496 U.S. 128, 136 (1990).

The Defense points to another case holding that a plurality decision, while it may not be binding precedent for other cases, is binding on the litigants *in that case*. In *Durant v. Essex Co.*, 74 U.S. 107 (U.S. 1868) the Court explained that:

The statement which always accompanies a judgment in such case, that it is rendered by a divided court, is only intended to show that there was a division among the judges upon the questions of law or fact involved, not that there was any disagreement as to the judgment to be entered upon such division. It serves to explain the absence of any opinion in the cause, and prevents the decision from becoming an authority for other cases of like character. *But the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case.*

Id. at 113.

In light of this authority, the Commission concludes that the plurality opinion of the United States Supreme Court in *Hamdan v. Rumsfeld* meets the “finally decided” standard of RMC 905(g), and that while the Court’s plurality decision may not be precedent in other military commission cases, it is binding on this Commission in the case of Mr. Hamdan. The question for this commission is whether the matters put in issue before the Supreme Court in 2006 are still in issue before this military commission.

WHAT MATTER WAS PUT IN ISSUE?

The Defense argues that two matters were put in issue and decided in 2006, and therefore are binding upon this commission:¹ whether conspiracy is a violation of the Law of Armed Conflict; and whether a military commission can try Hamdan for offenses that occurred before the beginning of the war.

The plurality opinion addressed both of these issues in these words “the offense alleged must have been committed both in a theater of war and during, not before, the relevant conflict. But the deficiencies in time and place allegations also underscore—indeed are symptomatic of—the most serious defect of this charge: The offense it alleges is not triable by a law-of-war military commission.” *Hamdan*, at 2779.

The Commission addresses these issues separately.

1. Whether conspiracy is a violation of the Law of Armed Conflict.

The plurality was clearly concerned about the conspiracy specification before it in 2006:

“The charge against Hamdan . . . alleges a conspiracy extending over a number

¹ The Supreme Court’s determination that the President did not have authority, independent of Congress, to establish military commissions, identify offenses against the law of nations, and justify deviations from the procedures established by the UCMJ are not challenged or addressed here.

of years, from 1996 to November 2001. The elements of this conspiracy have been defined not by Congress but by the President. All but two months of that more than 5-year-long period preceded the attacks of September 11, 2001, and the enactment of the AUMF—the Act of Congress on which the Government relies for exercise of its war powers and thus for its authority to convene military commissions. Neither the purported agreement with Osama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 1, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.” *Hamdan* at 2777-2778 [footnote 30 inserted in text]

The Plurality opinion that conspiracy is not a violation of the law of war was based on the case then before it. The President, and not Congress, had authorized military commissions and outlined the elements of the offense of conspiracy. “When, however, neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent [for “incorporation by reference” of the common law of war] must be plain and unambiguous.” *Id.* at 2780. In essence, the issue before the Court was whether conspiracy was plainly and unambiguously a violation of the common law of war. “There is no suggestion that Congress has, in exercise of its constitutional authority to “define and punish . . . Offences against the Law of Nations,” U.S. Const., Art. I, § 8, cl. 10, positively identified “conspiracy” as a war crime.” *Id.* at 2779-2780. The Court refused to allow the President to identify conspiracy as a violation of the common law of war, reminding us that “The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny” *Id.* (Quoting James Madison, *The Federalist*, No. 47) The Court’s response was clear: the President does not have authority to establish military tribunals that do not comply with the UCMJ, and he does not have authority, in the absence of Congressional action, to establish conspiracy as a violation of the common law of armed conflict. The Commission concludes that these findings are indeed binding on this Commission, under the principle of *res judicata*.

The issue now before the Commission, however, is different. Congress has now acted under its Constitutional authority to define and punish offenses against the law of nations, and has identified conspiracy as a violation of the law of war. In doing so, Congress declared that it was not creating new offenses, but merely codifying existing law MCA §950p(b). The President’s establishment of military commissions to try violations of that act is specifically authorized by Congress. Thus, the issues decided by the Supreme Court are no longer before the Commission. The Supreme Court may ultimately have occasion to address Congress’s determination, but it has not yet done so.

2. Whether Hamdan can be tried for offenses that pre-dated the start of hostilities

The Supreme Court also addressed the requirement in military law that to be triable by military commission as a violation of the law of war, an offense must have been committed “within the period of the war.” *Id.* at 2778, quoting Colonel Winthrop’s treatise, *Military Law and Precedent*, at 837. The issue before the Court was whether Hamdan can be tried for any conspiracy that predated September 11, 2001. The Justices disagreed over whether the war began on September 11, 2001.

Once again, Winthrop was describing, and the Supreme Court was discussing, the common law of war. The Court wrote "All parties agree that Colonel Winthrop's treatise accurately describes *the common law* governing military commissions, and that the jurisdictional limitations he identifies were incorporated in Article of War 15 and, later, Article 21 of the UCMJ." *Id.* at 2777 (emphasis added). The Court continued "First, Kuehn was tried for the *federal espionage crimes* under what were then 50 USC §§ 31, 32 and 34, *not* with *common-law* violations of the law of war." *Id.* at 2778. (first two emphases in original; third emphasis added). It is clear, therefore, that Winthrop's well-regarded treatise and the Court's opinion addressed *the common law of war*, not the situation that currently faces this Commission: whether Congress has determined that offenses occurring before, on or after September 11th may properly be tried by military commission.

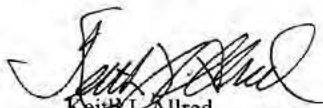
The Supreme Court's opinion also turned on its finding that the President was bound by Article 21, UCMJ. "If nothing else, Article 21 of the UCMJ requires that the President comply with the law of war in his use of military commissions" *Id.* at 2778. Article 21 provides that the UCMJ does not deprive military commissions of jurisdiction "with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions . . ." Indeed, in 2006 he was so bound, and the offenses a military commission could entertain were only those that "by *the law of war* may be tr[ie]d by military commissions." (emphasis added) Since Congress has now acted, the President may, consistent with Article 21, compose military commissions that hear "offenses that by statute . . . may be tried by military commissions." Article 21, UCMJ. In addition, Congress has tempered the effect of Article 21 by making it inapplicable to these military commissions. MCA §4a(2), 120 STAT. 2631, where Article 21 is amended to add "This section does not apply to a military commission established under Chapter 47A of this title."

The question before this Commission, therefore, is whether Congress has amended or expanded the reach of the common law of war, such that offenses committed prior to September 1, 2001 may be tried by military commission. The Commission finds that Congress intended to enact a system of offenses broader than the common law of war, and that in doing so, it has relied on its express Constitutional authority to define and punish offenses against the law of nations. Because the MCA was so clearly a response to the Supreme Court's opinion in *Hamdan*, the Commission finds that Congress intended to address the Court's ruling regarding the significance of September 11, 2001 when it chose the "before, on, or after" language of MCA §948d(a). The language of that section, of course, only applies to *unlawful alien enemy combatants*, and this term is defined to include one who has "engaged in hostilities" MCA§948a(1)(i). Reading these provisions together, the Commission concludes that offenses committed prior to September 11, 2001 by unlawful enemy combatants may be tried by military commission, so long as they affected or were related to the period of hostilities. If *Hamdan* is to be convicted of a conspiracy in violation of the Law of War, it must be a conspiracy that occurred during the period of hostilities, or which affected or related to the period of hostilities. Membership in a conspiracy that planned and carried out the attacks of September 11th, 2001 will be deemed to be in violation of the law of war; membership in a conspiracy that planned or carried out other attacks long before that date, and unrelated to hostilities will not.

CONCLUSION AND RULING

The Defense Motion to Dismiss Charge I and its specification, and Charge Specifications 1,2,5,6,7 and 8 of Charge II on the grounds of *res judicata* is DENIED for the following reasons:

1. The Supreme Court did not address or decide any question relating to the offense of Material Support for Terrorism;
2. The Supreme Court's opinion regarding conspiracy as a violation of the common law of war is not germane in light of Congress's subsequent action passing the MCA.
3. The Supreme Court's opinion regarding the period of hostilities is based on the common law of war. Congress has decided, in enacting the MCA, that offenses made punishable by the MCA, when committed by unlawful enemy combatants, may be punished whether committed before, on or after September 11, 2001, so long as they are related to the period of hostilities.


Keith J. Allred
Captain, JAGC, U.S. Navy
Military Judge

Attachment J

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D-016 Defense Second Supplemental Brief
In Support of Defense Motion to Dismiss
Specification 1 of Charge 1 and Specifications
1, 2, 5, 6, 7 and 8 of Charge 2 for Lack of
Subject Matter Jurisdiction as a Matter of *Res*
Judicata

21 April 2008

1. **Timeliness:** This supplemental brief is filed within the time frame permitted by the Military Judge's order dated 11 April 2008.
2. **Relief Sought:** Defendant Salim Ahmed Hamdan seeks dismissal of Specification 1 of Charge 1 (Conspiracy) and Specifications 1, 2, 5, 6, 7 and 8 of Charge 2 (Providing Material Support for Terrorism) because the acts alleged in those Specifications involve conduct that predates the onset of the armed conflict in which Mr. Hamdan was captured.
3. **Law and Argument:**

The Defense filed this motion on 9 January 2008 and, after full briefing, it was argued on 7 February 2008. During the hearing, the Military Judge invited supplemental briefing from the parties. Pursuant to that invitation, the Defense submitted its supplemental brief on 7 March 2008. In its supplemental brief, the Defense argued that the Military Judge is the proper authority to determine when the relevant armed conflict began. The Defense also argued that the relevant armed conflict began on September 11, 2001.

On 7 March 2008, the Military Judge issued an order granting the Prosecution's request to have until 11 April 2008 to file its supplemental brief. On 10 April 2008, the Military Judge issued a ruling on the motion (dated 2 April 2008). *See* D 016 Ruling on Motion to Dismiss (*Res Judicata*) 2 April 2008 ("Ruling"). On 11 April 2008, the Prosecution requested additional time to file its supplemental brief in light of the Ruling. The same day, the Military Judge granted the Prosecution's request and allowed both parties until 21 April 2008 to file supplemental briefs.

AE 152 (Hamdan)
Page 1 of 4

With respect to the Military Judge's 11 April 2008 order allowing the parties to file supplemental briefs, the Defense relies on its supplemental brief filed on 7 March 2008. In addition, the Defense notes that the Ruling agrees with the Defense that the Military Judge may properly determine the date of the start of hostilities. The Ruling also agrees with the Defense that to be triable by military commission, offenses must have occurred during hostilities. In relevant part, the Ruling concludes:


[T]he Commission concludes that offenses committed prior to September 11, 2001 by unlawful enemy combatants may be tried by military commission, so long as they affected or were related to the period of hostilities. If Hamdan is to be convicted of a conspiracy in violation of the Law of War, it must be a conspiracy that occurred during the period of hostilities, or which affected or related to the period of hostilities. Membership in a conspiracy that planned and carried out the attacks of September 11th, 2001 will be deemed to be in violation of the law of war; membership in a conspiracy that planned or carried out other attacks long before that date, and unrelated to hostilities[,] will not.


Ruling at 5. While the Ruling did not grant the specific relief requested by the Defense (dismissal of certain Specifications), it made it clear that the Prosecution must prove that any offenses allegedly committed by Mr. Hamdan "are related to the period of hostilities," *id.* at 6, which began on September 11, 2001.¹ *Id.* at 5, 6.

Because of the Military Judge's request for simultaneous briefing, the Defense files this second supplemental brief without knowing what matters the Prosecution will raise in its brief. To the extent the Prosecution's supplemental brief disagrees with the Ruling, the Defense respectfully requests that the Prosecution's supplemental brief be treated as a motion for reconsideration and that the Defense be allowed to respond to it in full in due course under the schedule set by the Military Commissions Trial Judiciary Rules of Court or a schedule set by the Military Judge.

¹ By separate motion, the Defense intends to request a Bill of Particulars regarding all Specifications of Charge 1 (Conspiracy) and Charge 2 (Material Support for Terrorism) to determine what facts the Prosecution intends to prove to meet the requirement that all charges and specifications be related to the period of hostilities.

Respectfully submitted,


By:
LCDR BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
Assistant Defense Counsel
Office of the Chief Defense Counsel
Office of Military Commissions

PROF. CHARLES SWIFT
Emory School of Law

Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP


[Redacted]

From: Mizer, Brian, LCDR, DoD OGC
Sent: Monday, April 21, 2008 8:20 AM
To: [Redacted]
Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; Charles Swift, [Redacted] OGC; David, Steven, COL, DoD OGC; [Redacted] Joseph McMillan; Keith Alfred [Redacted] DoD OGC; Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD OGC; Trivett, Clayton, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC
Subject: D016-Defense Second Supplement Brief
Signed By: [Redacted]
Attachments: D016-Defense Second Supplemental Brief Filed.pdf; D016-Defense Second Supplemental Brief.DOC

LtCo [Redacted]

Please find attached for filing in the case of *United States v. Hamdan* the Defense Second Supplemental Brief on D016. The PDF version is signed and includes attachments; the Word version is unsigned and does not include attachments.

V/r

B. L. MIZER
 LCDR, JAGC, USN
 Defense Counsel
 Office of Military Commissions
 Office of Chief Defense Counsel

[Redacted]

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Page 4 of 4

4/21/2008

Attachment K

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

Defense MotionIn Limine to Exclude Evidence Regarding
Transportation Services Not Constituting
Direct Involvement in Hostilities

15 April 2008

1. **Timeliness:** This motion is timely, as it arises from the guidance received from the Court in its D-016 Ruling on Motion to Dismiss (*Res Judicata*), dated 2 April 2008, but released to the parties on 10 April 2008. This filing allows for complete briefing of this motion prior to the 28 April 2008 hearing.
2. **Relief Sought:** Defendant Salim Ahmed Hamdan moves for an order excluding all evidence regarding the accused's services as a driver for Osama bin Laden or others, insofar as those services were provided at times and in locations remote from the battlefield. This includes, but is not necessarily limited to, services as a driver in Afghanistan prior to the introduction of U.S. military forces into that country in October 2001, as such services, unless directly connected with the execution of an attack on the United States such as the 9/11 attacks, are "unrelated to hostilities."
3. **Overview:** In its D-016 Ruling on Motion to Dismiss (*Res Judicata*) ("*Res Judicata* Ruling"), dated 2 April 2008 (but released to the parties on 10 April 2008), the Commission provided important guidance regarding the manner in which an MCA provision relating to personal jurisdiction, § 948a(1)(A)(i), modifies the substantive offenses for which an accused may be tried by a military commission. Specifically, the Commission held that the "engaged in hostilities" element statutorily required for the exercise of personal jurisdiction must be read alongside the statutory language relating to the date of the alleged offense over which the Commission can properly exercise subject matter jurisdiction ("before, on, or after September 11, 2001"). "Reading these provisions together," the Commission ruled that "[m]embership in a conspiracy that planned and carried out the attacks of September 11th 2001 will be deemed to be

AE 166 (Hamdan)
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in violation of the law of war; membership in a conspiracy that planned or carried out other attacks long before that date, and *unrelated to hostilities* will not." (*Res Judicata* Ruling at 5) (emphasis added). Thus, the Commission properly limited trial for a substantive offense (conspiracy) to conduct that constituted "engage[ment] in hostilities" as required by the MCA's provision defining individuals over whom it could exercise personal jurisdiction, § 948a(1)(A)(i). That Ruling related specifically to the temporal aspect of the relevant "hostilities," indicating that the hostilities began on or about 9/11, with the Commission's language concerning actions "relating to hostilities" signaling jurisdiction broad enough to cover conduct involved in planning and executing the 9/11 attacks.

In this motion, the issue is both spatial and temporal proximity to "hostilities." Mr. Hamdan moves to exclude evidence of his alleged transportation services that were distant from the battlefield and unrelated to the planning and execution of the 9/11 attacks. This would include, at a minimum, the testimony of FBI Special Agent George Crouch at the 5-6 December 2007 hearing concerning transportation services provided to Osama bin Laden by Mr. Hamdan in September 2001 prior to the introduction of U.S. military forces into Afghanistan. Record at 262-63. Any such services would have been consistent with the job duties of a civilian driver, and, because they are alleged to have occurred at locations remote from any battlefield, they cannot properly be deemed "engage[ment] in hostilities." Excluding evidence concerning such activity that has only the most attenuated link to hostilities will preserve the all-important distinction in the law of war between combatants and civilians, and give effect to the previously stated presumption of this Commission that "Congress intended to comply with the International Law of Armed Conflict when it enacted the Military Commissions Act and chose [its] definition of 'unlawful enemy combatant'." (19 December 2007 Ruling at 5.) This is because civilians are often involved in economic activity that supports a war effort, but they do not thereby lose their civilian status and become "unlawful combatants." Rather, to become an unlawful combatant, a civilian must be directly "engaged in hostilities or . . . ha[ve] purposefully and materially

supported hostilities." This connotes direct participation, such as firing weapons or delivering ammunition to firing positions in close proximity to combat. As previously noted by this Commission, "[d]irect participation in hostilities implies a *direct causal relationship* between the activity engaged in and the harm done to the enemy at the *time and the place where the activity takes place*." *Id.* (quoting ICRC, *Commentary on Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflict* [Protocol I], at 516) (emphasis in the Commission's 19 December 2007 Ruling at 5).

The testimony of Special Agent Crouch concerning the transportation services at issue in this motion does not relate to direct participation in hostilities. Rather, it relates to conduct distant from any battlefield. Nevertheless, this evidence will presumably be offered by the Prosecution to prove Material Support for Terrorism, which, as set out in the Manual for Military Commissions, Crimes and Elements, subpart (25), requires proof that the accused (1) provided material support to an international terrorist organization engaged in hostilities against the United States, (2) intended to provide such support, and (3) knew that the organization "has engaged or engages in terrorism." However, such testimony threatens to confuse the Commission members regarding the fourth element necessary to prove Material Support, which is that (4) "[t]he conduct took place in the context of and was associated with an armed conflict." In sharp contrast to, say, delivering ammunition to a firing position, the transportation services described by Special Agent Crouch are not sufficiently "associated with an armed conflict" to satisfy either the fourth element of the substantive offense of Material Support, or the jurisdictional prerequisite of "engag[ment] in hostilities" required by § 948a(1)(i). The introduction of such evidence would violate the principle identified in the Commission's recent *Res Judicata* Ruling, that the personal jurisdiction provision of the MCA (limiting jurisdiction to those "engaged in hostilities") modifies the substantive offenses triable by the Commission, prohibiting trial for conduct "unrelated to hostilities." (*Res Judicata* Ruling at 5).

Accordingly, in order to preserve the fundamental distinction in the law of war between a combatant and a civilian, and consistent with the intent of Congress in carefully circumscribing the jurisdiction of military commissions under the MCA, the Commission should exclude all evidence relating to the accused's conduct in situations remote from the battlefield and "unrelated to hostilities," including but not limited to transportation services provided in September 2001 prior to the introduction of U.S. military forces into Afghanistan, unless such conduct was directly related to the planning and execution of the 9/11 attacks.¹

4. Burden of Proof: When an appropriate motion or objection has been made by the Defense under Mil. Comm'n R. Evid. 304(c), the Prosecution has the burden of establishing the admissibility of the evidence.

5. Facts:

- A. While the Prosecution has not yet identified its witnesses for trial, the Defense has reason to believe based on the 5-6 December 2007 hearing that the Prosecution intends to introduce testimony regarding alleged services provided by the accused at locations remote from any battlefield or hostilities, including (1) "driving bin-Laden around Afghanistan after the attacks of 9/11, in an effort to help him avoid detection and punishment by the United States," and (2) "continuing to work for bin-Laden after he became aware that bin-Laden had planned and directed" attacks on the United States, including the 9/11 attacks. 19 December 2007 Ruling at 6.
- B. On 10 April 2008, this Commission released its *Res Judicata* Ruling, which provided important guidance concerning the proper interpretation of the Military Commissions Act ("MCA"). Specifically, the Commission ruled that the provision describing the subject matter jurisdiction of military commissions

¹ It should be noted, however, that "[t]he accused is not charged with having foreknowledge of the attacks of September 11th, nor is the accused charged with conspiring in or supporting those attacks." P-004 On Reconsideration Ruling on Motion for Stay and for Access to High Value Detainees, 14 March 2008, at 3.

(§ 948d(a)) must be read in conjunction with the MCA provision relating to personal jurisdiction, § 948a(1)(A)(i), leading to a conclusion that offenses triable by the Commission cannot consist of conduct "unrelated to hostilities." *Res Judicata* Ruling at 5.

- C. The interpretation of the MCA set forth in the *Res Judicata* Ruling gives rise to the present motion, in which the Defense seeks to exclude from trial evidence of Mr. Hamdan's routine activity in the service of his employer that cannot in any normal sense be deemed direct participation in hostilities. Introduction of such evidence is likely to confuse the Commission members about conduct that defines unlawful combatancy and that can support a law of war violation, and undermine Congress's intention to preserve the fundamental distinction in the law of war between combatants and civilians.

6. Law and Argument:

A. The *Res Judicata* Ruling Interpreted the MCA to Prevent Commission Jurisdiction Over Substantive Offenses "Unrelated to Hostilities"

In its *Res Judicata* Ruling, released 10 April 2008, this Commission properly recognized a significant limitation on the jurisdiction conferred by the MCA. In addressing whether it can try the accused for offenses occurring before September 11, 2001, the Commission looked to the definition of "unlawful enemy combatant" – that is, an individual over whom the Commission may properly exercise jurisdiction – and noted that this term only applies to one who has "engaged in hostilities." *Res Judicata* Ruling at 5. Based on this provision, the Commission ruled that jurisdiction over a substantive offense (such as conspiracy) will only exist with respect to conduct "during the period of hostilities, or which affected or related to the period of hostilities." *Id.* Thus, the Commission interpreted the MCA provision on its subject matter jurisdiction, § 948d(a) – which allows for prosecution of offenses occurring "before, on, or after September 11, 2001" – to be qualified by § 948a(1)(A)(i), which imposes a requirement that the

accused was "engaged in hostilities . . . or purposefully and materially support[ing] hostilities against the United States or its co-belligerents" "Reading these provisions together," the Commission concluded that "[m]embership in a conspiracy that planned and carried out the attacks of September 11th 2001 will be deemed to be in violation of the law of war; membership in a conspiracy that planned or carried out other attacks long before that date, and *unrelated to hostilities* will not." (*Res Judicata* Ruling at 5) (emphasis added). In other words, the subject matter jurisdiction of the Commission – the substantive offenses it can try – is limited to conduct that constitutes "engage[ment] in hostilities."

In this regard, the Commission's *Res Judicata* Ruling comports with the statements of the United States Supreme Court in the military commission case, *Ex parte Quirin*. In that case, the Court observed:

Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals *for acts which render their belligerency unlawful*.

317 U.S. 1, 30-31 (1942) (emphasis added).

Thus, an unlawful combatant loses the mantle of combatant immunity and can be tried for illegal acts associated with their participation in hostilities, *i.e.*, those acts "which render their belligerency unlawful," but not for acts unconnected to the armed conflict, unless the commission is sitting as an occupation or martial law commission, which is not the case here.

B. The Definition of an Unlawful Enemy Combatant Requires Direct Participation in Hostilities

The MCA defines as an "unlawful enemy combatant" one who has "engaged in hostilities or . . . purposefully and materially supported hostilities, who is not a lawful enemy combatant." § 948a(1)(A)(i). "This Commission assumes that Congress intended to comply with the International Law of Armed Conflict when it enacted the Military Commissions Act and chose this definition of 'unlawful enemy combatant.'" (19 December 2007 Ruling at 5.) The

International Law of Armed Conflict provides that a person, not a member of the armed forces of a State, only loses his or her civilian status and becomes a combatant if he or she directly participates in hostilities. This is an important protection to prevent civilians, who are often engaged in economic activity that indirectly supports a war effort, from becoming legitimate targets of military operations. As this Commission has noted, international law as reflected in the *Commentaries* to the Additional Protocols to the Geneva Conventions, generally sets "a high threshold" for conduct to be deemed direct participation in hostilities. One scholar on the law of war, quoted in this Commission's 19 December 2007 Ruling, has written:

The Commentary appears to support the premise of a high threshold: "[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place." It also describes direct participation as "acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces" and defines hostilities as "acts of war which are intended by their nature or their purpose to hit specifically the personnel and the matériel of the armed forces of the adverse Party." In much the same vein, the Commentary to Protocol II notes that in noninternational armed conflict the notion of direct participation in hostilities "implies that there is a sufficient causal relationship between the act of participation and its immediate consequences."

Direct participation, therefore, seemingly requires "but for" causation (in other words, the consequences would not have occurred but for the act), causal proximity (albeit not direct causation) to the foreseeable consequences of the act, and a *mens rea* of intent. In other words, the civilian must have engaged in an action that he or she knew would harm (or otherwise disadvantage) the enemy in a relatively direct and immediate way. The participation must have been part of the process by which a particular use of force was rendered possible, either through preparation or execution. It is not necessary that the individual foresaw the eventual result of the operation, but only that he or she knew his or her participation was indispensable to a discrete hostile act or series of related acts

Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi. J. Int'l L. 511, 533 (2004).

In this case, the Commission found that the Prosecution had made a preliminary showing, by a preponderance of the evidence, that Mr. Hamdan "directly participated in [] hostilities by driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to . . . ongoing combat operations," consisting of "the local battle for control of Takta Pol and the ongoing battle for the more distant Kandahar." 19 December 2007 Ruling at 6. However, the Commission pointedly avoided making the same finding with respect to evidence that the accused (1) served as the driver and bodyguard for Osama bin Laden, (2) continued to work for bin Laden even after becoming aware of his role in attacks against the United States, including the 9/11 attacks, and (3) drove bin Laden "around Afghanistan after the attacks of 9/11, in an effort to help him avoid detection and punishment by the United States." *Id.* Instead, recognizing the unprecedented nature of any argument that such conduct could be deemed direct participation in hostilities, the Commission left those Prosecution arguments as "grist for the debates of future generations of Law of Armed Conflict Scholars." *Id.* at 6-7.

C. Evidence of Conduct "Unrelated to Hostilities," Such as the Transportation Services That Were the Subject of Special Agent Crouch's Testimony, Cannot Support a Law of War Violation and Should Be Excluded

However, it appears that the Prosecution intends to introduce evidence of those very activities, which are unrelated to hostilities, in an effort to secure a conviction for Material Support for Terrorism. The elements of the Offense of Material Support for Terrorism, insofar as pertinent here, are:

- B. (1) The accused provided material support or resources to an international terrorist organization engaged in hostilities against the United States;
- (2) The accused intended to provide such material support or resources to such an international terrorist organization;
- (3) The accused knew that such organization has engaged or engages in terrorism; and
- (4) [t]he conduct took place in the context of and was associated with an armed conflict

Manual for Military Commission, Crimes and Elements, subpart (25).

There is reason to believe that the Prosecution will seek to satisfy these elements by introducing evidence of the accused's role in providing transportation services distant from any battlefield. But this evidence, of the sort presented through the testimony of FBI Special Agent George Crouch at the 5-6 December 2007 hearing, pertains to conduct "unrelated to hostilities," in precisely the same manner as evidence of "other attacks long before" 9/11. Just as the Commission ruled that the latter conduct falls outside its jurisdiction, so too does the former, and accordingly evidence of it should be excluded. Such testimony, if introduced, is likely to confuse the Commission members regarding the fourth element necessary to prove Material Support, which is that the conduct "took place in the context of and was associated with an armed conflict." Evidence of conduct that does not relate to hostilities should not be introduced to satisfy the first three elements of the offense. To hold otherwise would unduly broaden the Material Support offense, improperly sweeping civilian activity within its ambit, even though such conduct cannot legitimately give rise to a law of war offense. This is directly analogous to the conduct long pre-dating 9/11 that the *Res Judicata* Ruling held cannot give rise to a law of war offense, as it lacks a sufficient nexus to an armed conflict. To admit such evidence would undermine the intent of Congress to limit the jurisdiction of military commissions to those truly acting as combatants, and contradict the *Res Judicata* Ruling, whereby the Commission properly recognized the limitations on its jurisdiction imposed by the requirements of § 948a(1)(A)(i).

For the reasons above, this Commission should exclude all evidence regarding the accused's services as a driver for Osama bin Laden or others, insofar as those services were provided at times and in locations remote from the battlefield. This includes, but is not limited to, transportation services provided by the accused in Afghanistan prior to the introduction of U.S. military forces into that country in October 2001, as such services were "unrelated to hostilities" in the same manner as events long pre-dating 9/11.

7. Request for Oral Argument: The Defense requests oral argument. Oral argument is necessary to provide the Commission with the opportunity to fully explore the legal issues raised


by this motion. As provided by R.M.C. 905(h), "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions."

8. **Request for Witnesses:** The Defense does not request witnesses at this time, but reserves the right to do so should the Prosecution's Opposition raise issues live testimony.


9. **Conference with Opposing Counsel:** The Defense has conferred with opposing counsel. The Prosecution objects to the requested relief.

10. **Attachments:** None

Respectfully submitted,

By: 
LCDR BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW



PROF. CHARLES SWIFT
Emory School of Law

Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
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[Redacted]

From: [Redacted]
Sent: Thursday, April 17, 2008 4:31 PM
To: Mizer, Brian, LCDR, DoD OGC; Britt, William, LTC, DoD OGC; 'Charles Swift'; 'Harry Schneider'; 'Joseph McMillan'; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD OGC
Cc: Berrigan, Michael, Mr, DoD OGC; [Redacted]

Subject: Filing Designation: D-033 Motion in Limine (Exclude Evidence Not Constituting Direct Involvement in Hostilities) - US v. Hamdan

All parties,

The filing designation for the 15 April 08 Defense Motion in Limine to Exclude Evidence Not Constituting Direct Involvement in Hostilities is D-033 Motion in Limine (Exclude Evidence Not Constituting Direct Involvement in Hostilities) - Hamdan. All future communications - whether in hard copy or by email - concerning this motion will use the filing designation as a reference in addition to the name of the filing. See RC 5.3:

3. Filing designation and future communications or filings.

a. Once a filing designation has been assigned, all future communications - whether in hard copy or by email - concerning that series of filings will use the filing designation as a reference in addition to the name of the filing. This includes adding the initial file designations to the style of all filings, the subject lines of emails, and the file names to ALL email attachments. Examples:

* An email subject line forwarding a response to P2 in US v Jones should read: "P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith." The filename of the filings shall be the same as the response being sent.

* The filename of a document that is an attachment to the response should read: "P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith - attachment - CV of Dr Smith."

v/r,

[Redacted], USAR
Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From: Mizer, Brian, LCDR, DoD OGC
Sent: Tuesday, April 15, 2008 9:19 AM
To: [Redacted]
Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; Charles Swift; [Redacted]
[Redacted], DoD OGC; Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; Murphy, John, Mr, DoD OGC; Prasow, Andrea, Ms, DoD OGC; Stone, Tim, LCDR, DoD

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4/21/2008

OGC; Trivett, Clayton, Mr, DoD OGC; [REDACTED]

Subject: Defense Motion in Limine to Exclude Evidence Not Constituting Direct Involvement in Hostilities

LtCol [REDACTED]

Please find attached for filing in the case of *United States v. Hamdan* the Defense Motion to Exclude Evidence Not Constituting Direct Involvement in Hostilities. The PDF version is signed and includes attachments; the Word version is unsigned and does not include attachments.

V/r
LCDR Mizer

B. L. MIZER
LCDR, JAGC, USN
Defense Counsel
Office of Military Commissions
Office of Chief Defense Counsel

[REDACTED]

4/21/2008

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Attachment L

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN
a/k/a Saqr al Jaddawi
a/k/a/ Khalid bin Abdalla

D033

PROSECUTION RESPONSE TO THE
DEFENSE MOTION IN LIMINE TO
EXCLUDE EVIDENCE REGARDING
TRANSPORTATION SERVICES NOT
CONSTITUTING DIRECT
INVOLVEMENT IN HOSTILITIES

22 APRIL 2008

1. **Timeliness:** This motion is filed within the timelines established by the Military Commissions Trial Judiciary Rule of Court 3(6)(b).

2. **Relief Requested:** The Government respectfully requests that the Defense Motion in Limine to Exclude Evidence Regarding Transportation Services Not Constituting Direct Involvement in Hostilities (“Def. Motion”) be denied.

3. **Overview:**

a. Under the Military Commissions Act of 2006 (“MCA”), the Military Judge must determine whether the accused “has engaged in hostilities or . . . has purposefully and materially supported hostilities against the United States or its co-belligerents.” MCA § 948a(1)(A)(i). The Military Judge determined in his 19 December 2007 order that the accused in fact *had* “engaged in hostilities or . . . purposefully and materially supported hostilities against the United States or its co-belligerents,” MCA § 948a(1)(A)(i), and was therefore subject to jurisdiction before this Commission. *See United States v. Hamdan, On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction at 8 (19 Dec. 2007).*

b. Whether each offense occurred “in the context of and was associated with an armed conflict” is a question of fact for the members to decide, and therefore is not properly before this Commission at the present time. At trial, the Government will present evidence to prove to the members beyond a reasonable doubt that the accused committed each element of the charged offenses, including that the offenses occurred “in the context of and [were] associated with an armed conflict.”

c. The testimony of FBI Special Agent George Crouch, or his partner during the taking of the statement, is relevant to the offenses with which the accused has been charged: Conspiracy and Providing Material Support for Terrorism. Agent Crouch has provided substantial inculpatory testimony, including that the accused was aware of Usama bin Laden’s role in the bombing of the USS Cole, as well as the accused’s involvement with al Qaeda. That testimony is relevant to the charged conduct because it proves various elements of the charged offenses, including the accused’s degree of intent. Agent Crouch also will testify regarding the services the accused provided to Usama bin

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Laden and al Qaeda, including body guarding and transportation services that facilitated acts of terrorism. Such evidence would be neither confusing nor unduly prejudicial to the members, and the motion in limine to exclude such evidence should be denied.

4. Burden of Persuasion: The Defense inexplicably claims that the Prosecution bears the burden of persuasion on this motion because it “has been made by the Defense under Mil. Comm’n R. Evid. 304(c).” Def. Motion at 4. However, Military Commission Rule of Evidence 304(c) governs the admission of statements allegedly produced by coercion. The Prosecution notes that none of the words “coerce,” “coercion,” “coercing,” or any synonyms thereof appear in the Defense’s motion. Rather, the Defense is apparently seeking to exclude certain evidence because it might “confuse the Commission members.” Def. Motion at 9. As such, MCRE 304(c), which governs the admission of statements allegedly produced by coercion, is wholly inapplicable to the present motion. Rather, the applicable standard is set forth in Rule for Military Commissions (“RMC”) 905(c)(2)(A), which provides that the moving party (here, the Defense) bears the burden of persuasion for non-jurisdictional challenges, such as the present evidentiary motion. Accordingly, the Defense bears the burden of persuasion on this motion.

5. Facts:

a. In the Commission’s 2 April 2008 ruling, which was received by trial counsel on 10 April 2008, the Military Judge denied the Defense’s motion to dismiss Specification 1 of Charge 1 and Specifications 1, 2, 5, 6, 7 and 8 of Charge 2 for lack of subject matter jurisdiction based on the doctrine of res judicata. See *United States v. Hamdan*, D016 Ruling on Motion to Dismiss (Res Judicata) at 6 (2 Apr. 2008) (“Res Judicata Ruling”).

b. In his ruling, the Military Judge held that the res judicata effect on the accused of the Supreme Court’s decision in *United States v. Hamdan*, 548 U.S. 557 (2006), did not prevent the accused from being tried for the offense of Conspiracy under the MCA, where Congress had codified that offense pursuant to its authority under the Offenses Clause, U.S. Const. art. I, § 8, cl. 10. The Military Judge also held that the accused could be tried under the MCA for offenses pre-dating the attacks of 11 September 2001, based on Congress’s extension of jurisdiction to offenses occurring “before, on, or after September 11, 2001.” MCA § 948d(a); see also Res Judicata Ruling at 5.

6. Discussion:

a. **IT IS THE MEMBERS—RATHER THAN THE MILITARY JUDGE—WHO MUST DETERMINE WHETHER THE ACCUSED’S CONDUCT “TOOK PLACE IN THE CONTEXT OF AND WAS ASSOCIATED WITH AN ARMED CONFLICT.”**

i. In his Res Judicata Ruling, the Military Judge noted that “offenses committed prior to September 11, 2001 by unlawful enemy combatants may be tried by

military commission, so long as they affected or were related to the period of hostilities.” Res Judicata Ruling at 5. As an initial matter, the Government notes that the relevant use of the word “hostilities” in the MCA is in its jurisdictional provision. In MCA § 948a(1)(A)(i), the term “unlawful enemy combatant” is defined, in relevant part, as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).” Only persons who are alien unlawful enemy combatants may be tried under the MCA before a military commission.

ii. This Commission has already found that the accused is an alien unlawful enemy combatant and is therefore subject to the jurisdiction of the Commission. See *Hamdan*, On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction at 8. Both the Prosecution and the Defense agree that the Military Judge may make this initial jurisdictional assessment, and the Military Judge has done precisely that.

iii. It is unnecessary for the Military Judge to determine the start date of hostilities beyond what is required to determine whether jurisdiction is appropriate under MCA § 948a(1). In his 19 December 2007 ruling, the Military Judge found that hostilities were in progress by at least 24 November 2001, *see id.* at 6, and that the accused’s participation in those hostilities made him an unlawful enemy combatant, triable under the MCA, *see id.* at 7-8.

iv. The Defense conflates the requirement that the Military Judge must determine whether the accused is “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant,” MCA § 948a(1)(A)(i), with the requirement in the Manual for Military Commissions (“MMC”) that a particular substantive offense “took place in the context of and was associated with an armed conflict.” *See, e.g.*, MMC IV-6(a)(25) (Providing Material Support for Terrorism).

v. The requirement that a particular act of the accused “took place in the context of and was associated with an armed conflict” is an element of certain substantive offenses, and must, in accordance with the MCA and MMC, be proved to the members of the Military Commission beyond a reasonable doubt. *See, e.g.*, RMC 918(b), 920(e)(5).

vi. It is therefore not for the Military Judge to determine whether the particular acts of the accused that constitute the charged offenses of Conspiracy and Providing Material Support for Terrorism occurred in the context of or were associated with an armed conflict. Rather, that is a matter of fact for the members to decide. Moreover, the specific issue that is to be decided by the members, at the conclusion of trial proceedings, is not whether the relevant offenses occurred “during hostilities,” per se, but rather whether the conduct “took place in the context of and was associated with an armed conflict” (concepts that may, but need not, overlap).

vii. Once the Military Judge has determined, as he has already, that the accused is an unlawful enemy combatant based on the accused's having "engaged in hostilities or . . . purposefully and materially supported hostilities against the United States or its co-belligerents," the start date of hostilities with respect to *other* charged conduct that may not have been part of the Military Judge's jurisdictional determination (e.g., conduct by the accused prior to 24 November 2001) is not an appropriate matter for the Military Judge to determine. Rather, it is the members who must decide whether the accused committed offenses "in the context of and . . . associated with an armed conflict."

b. TESTIMONY BY FBI SPECIAL AGENT GEORGE CROUCH AND OTHER PROFFERED TESTIMONY RELATING TO THE ACCUSED'S PRE-9/11 CONDUCT IS RELEVANT AND ADMISSIBLE BEFORE THIS COMMISSION.

i. In his Res Judicata Ruling, the Military Judge found that

[i]f Hamdan is to be convicted of a conspiracy in violation of the Law of War, it must be a conspiracy that occurred during the period of hostilities, or which affected or related to the period of hostilities. Membership in a conspiracy that planned and carried out the attacks of September 11th, 2001 will be deemed to be in violation of the law of war; membership in a conspiracy that planned or carried out other attacks long before that date, *and unrelated to hostilities* will not.

Res Judicata Ruling at 5 (emphasis added). The Defense, however, ignores the phrase "and unrelated to hostilities," thus misreading the ruling of the Military Judge, who found that the accused could be tried for offenses that *either* occurred around or after 11 September 2001 *or* were related to hostilities.

ii. The Defense misinterprets the Military Judge's ruling and claims that "[t]hat Ruling related specifically to the temporal aspect of the relevant 'hostilities,' indicating that the hostilities began on or about 9/11." Def. Motion at 2. However, the Military Judge did *not* find that all hostilities began "on or about" 11 September 2001. Rather, the Military Judge found that hostilities had begun *no later than* 11 September 2001, and may, in fact, have begun before. Any other interpretation would make the above-quoted clause, "and unrelated to hostilities," in the Military Judge's ruling surplusage. Accordingly, there is no basis in the Res Judicata Ruling for excluding testimony merely because such events concern activities prior to 11 September 2001.

iii. The proffered testimony of FBI Special Agent George Crouch relates to the conduct with which the accused is charged. Hamdan is charged with "conspir[ing] and agree[ing]" with Usama bin Laden and others to commit certain violations of the law of war—which violations occurred both prior to and following the terrorist attacks of 9/11. *See United States v. Hamdan*, Referred Charges at 3-4 (10 May 2007). The accused is also charged with joining a criminal enterprise that involved, at least in part, the commission of various violations of the law of war—which violations

occurred both long prior to and following the terrorist attacks of 9/11. *See id.* The accused is additionally charged with providing material support for terrorism, based on conduct that occurred both before and after 9/11, which support included providing the accused's own person to support the terrorism of al Qaeda. *See id.* at 4, *et seq.* In each of these instances, evidence relating to the accused's pre-9/11 conduct is relevant to determining whether he is, in fact, guilty of Conspiracy and Providing Material Support for Terrorism.

iv. The Defense has moved to "exclude evidence of [the accused's] alleged transportation services that were distant from the battlefield and unrelated to the planning and execution of the 9/11 attacks," Def. Motion at 2, and has cited as an example of the evidence that should be excluded the testimony of FBI Special Agent George Crouch detailing the conduct of the accused in Afghanistan prior to the introduction of U.S. forces.

v. However, the accused has been charged with acts that both pre- and post-date 9/11 and that "took place in the context of and [were] associated with an armed conflict." For example, Agent Crouch testified at the 5 December 2007 hearing, and is prepared to testify at trial, how Usama bin Laden attempted to contact the accused in 1996; how the accused was eventually offered a position in bin Laden's security convoy; how in 1998, the accused drove bin Laden to a news conference; the accused's role in evacuating the compound in Kandahar just prior to the 1998 embassy bombings; and the accused's awareness of bin Laden's role in the bombing of the USS Cole. *See United States v. Hamdan*, Hearing Trans. 256 - 60 (5 Dec. 2007). This testimony is relevant to establishing the accused's role in conspiring with, and providing material support to, members of al Qaeda (including by providing the accused's own person), as well as establishing the degree to which the accused was aware of al Qaeda's criminal aims at the time.

vi. The Defense also claims that Agent Crouch's testimony regarding the accused's conduct fails to describe conduct that satisfies the fourth element of the offense of Providing Material Support for Terrorism, that is, that "[t]he conduct took place in the context of and was associated with an armed conflict." MMC IV-6(a)(25). We note, as an initial matter, that the phrase, "took place in the context of and was associated with an armed conflict," includes conduct beyond that which specifically occurs during hostilities per se, so long as the conduct is fairly related to such hostilities. Whether the accused's conduct, in fact, was associated with armed conflict is a question that the trier of fact (i.e., the members of this Military Commission) must decide. It is not a jurisdictional question to be decided by the Military Judge, and it does not become a jurisdictional question merely because the phrase "armed conflict" in MMC IV-6(a)(25) may resemble the word "hostilities" in MCA § 948a(1)(A)(i). Moreover, Agent Crouch's testimony is relevant to establishing the accused's state of mind, and his awareness of the criminal aims of al Qaeda.*

* At trial, the Government will present evidence to the members that will demonstrate that a state of armed conflict between al Qaeda and the United States existed as early as 1996. To the extent the

vii. At trial, the accused will have an opportunity to question or attempt to rebut Agent Crouch's testimony. There is no basis, however, in either the MCA, the MMC or the Military Judge's Res Judicata Ruling for excluding such evidence now. Accordingly, the motion in limine to exclude Agent Crouch's testimony and similar evidence should be denied.

7. Conclusion:

a. In his 19 December 2007 ruling, the Military Judge determined that the accused is an alien unlawful enemy combatant and that this Commission may exercise jurisdiction over him. Whether a state of armed conflict existed at the time of the charged offenses is a matter of fact that must be determined by the members, rather than by the Military Judge. The testimony of Agent Crouch is relevant to establishing the accused's actions and intent during that time, and therefore is relevant to the members' consideration of the instant case, and is neither confusing nor unduly prejudicial. Accordingly, the motion in limine to exclude such evidence should be denied.

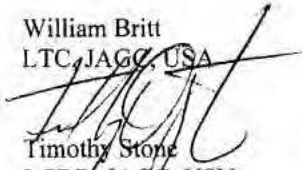
8. Certificate of Conference: Not applicable.

9. Attachments: None.

Respectfully Submitted,

//s//

William Britt
LTC, JAGC, USA



Timothy Stone
LCDR, JAGC, USN

//s//

John Murphy
Department of Justice

//s//

Clayton Trivett
Department of Defense

Military Judge believes that the precise date hostilities began must in fact be determined prior to trial, the Government respectfully requests the opportunity to brief that issue.

[REDACTED]

From: Stone, Tim, LCDR, DoD OGC
Sent: Tuesday, April 22, 2008 4:37 PM
To: Prasow, Andrea, Ms, DoD OGC; [REDACTED]
Cc: Berrigan, Michael, Mr, DoD OGC; Britt, William, LTC, DoD OGC; [REDACTED], DoD OGC; McMillan, Joseph M. (Perkins Cole); Mizer, Brian, LCDR, DoD OGC; Morris, Lawrence, COL, DoD OGC; 'Murphy, John'; Murphy, John, Mr, DoD OGC; [REDACTED]
Subject: Govt response to D033 motion in limine
Signed By: [REDACTED]
Attachments: Pros Response Transportation Services Not Direct Involvement Motion in Limine.pdf; Prosecution Response to Motion to Exclude (22 4 08 1400).doc

To all: Government response.

v/r

4/22/2008

AE 170 (Hamdan)
Page 7 of 7

Attachment M

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D033 - Defense Replyto Government Response to Defense Motion in
Limine to Exclude Evidence of Transportation
Services Unrelated to Hostilities

25 April 2008

1. **Timeliness:** This Reply is filed within the time frame permitted by the Military Commissions Trial Judiciary Rules of Court and the Military Judge's orders dated 20 December 2007 and 15 February 2008.

2. **Overview:**

The Prosecution intends to introduce evidence of conduct and events that long pre-dated 9/11 and were otherwise unrelated to hostilities, and to argue that such evidence satisfies the elements of the criminal offenses charged in this case. That trial strategy is calculated to evade the 2 April 2008 Ruling (D-016) of this Commission, which instructed that pursuant to MCA § 948a(1)(A)(i), conduct prior to 9/11 and unrelated to the hostilities initiated by the 9/11 attacks cannot be tried as law of war violations. The Prosecution argues that each of the charged offenses includes an element that "the conduct took place in the context of and was associated with an armed conflict," and that this opens the door to the introduction of such evidence, making the existence of an armed conflict and the relationship of such conduct to hostilities questions of fact for Commission members to decide. But this approach disregards the well established principles that (1) the Military Judge must strictly enforce jurisdictional limits established by Congress in the MCA (limits that must be respected to preserve the all-important distinction in the law of war between civilians and combatants, and which the Commission has already properly enforced in its Ruling on D-016), and (2) jurisdictional facts not subject to reasonable dispute – such as the fact that, contrary to the Prosecution's theory, the United States was not at war with al Qaeda in 1996 – can properly be determined by the Military Judge. Accordingly, evidence offered by the Prosecution that will confuse Commission members on the

AE 180 (Hamdan)
Page 1 of 8

43439-0001/LEGAL14207567.1

jurisdictional fact of the existence of an armed conflict should be excluded, as should evidence of civilian activity that cannot be deemed to be "related to hostilities" without breaching the long-standing distinction in the law of war between civilians and combatants.

3. Law and Argument:

A. An Order in Limine Is Needed to Ensure That the Jurisdictional Limits Recognized by the 2 April 2008 Ruling Are Respected by the Prosecution

This motion poses a question of considerable significance, *i.e.*, whether evidence of civilian conduct unrelated to hostilities can be introduced to obtain a conviction on what are alleged to be law of war offenses. The Defense has moved to exclude such evidence based on the reasoning in this Commission's 2 April 2008 Ruling (D-016). That Ruling properly held that the "engaged in hostilities" language of MCA § 948a(1)(A)(i) (defining an unlawful enemy combatant) necessarily modifies the substantive offenses over which the Commission can exercise jurisdiction. Specifically, the Commission said that "membership in a conspiracy that planned or carried out other attacks long before [9/11], and unrelated to hostilities will not [be deemed to be a violation of the law of war]." 2 April 2008 Ruling (D-016) at 5.

If conduct unrelated to hostilities cannot constitute an offense triable by military commission, then evidence of such conduct should be excluded from commission proceedings. In the absence of a direct relationship to hostilities, such evidence lacks probative value on any law of war offense, risks confusing Commission members concerning what is, and what is not, culpable conduct under the MCA, and threatens to undermine the fundamental distinction that the law of war endeavors above all to preserve, the distinction between civilians and combatants. Such evidence weakens that distinction by characterizing civilian activity as the very conduct that satisfies the elements of a law of war offense. This motion urges that such a dangerous blurring of the line between civilian and combatant be rejected. It requests that, consistent with the 2 April 2008 Ruling, this Commission hold firmly to the "engaged in hostilities" requirement, both as a limit on what offenses can be tried, and as a limit on what evidence can be introduced

to prove a law of war offense. Only in this way can the Commission implement the will of Congress that military commission jurisdiction be limited to unlawful *combatants*, and avoid an unwarranted and dangerous expansion of that category.

For its part, the Prosecution seeks to evade the import of the 2 April 2008 Ruling and to prosecute Mr. Hamdan for conduct unrelated to the period of hostilities. It argues that "[t]he accused is . . . charged with joining a criminal enterprise that involved, at least in part, the commission of various violations of the law of war—*which violations occurred both long prior to and following the terrorist attacks of 9/11*. The accused is additionally charged with providing material support for terrorism, *based on conduct that occurred both before and after 9/11*, which support included providing the accused's own person to support the terrorism of al Qaeda." Govt. Response to Defense Motion in Limine at 4-5 (emphases added).

That passage in the Prosecution's brief illustrates why this motion in limine is necessary. The Defense contends, consistent with the 2 April 2008 Ruling, that violations triable by this Commission cannot have occurred "long prior to" the 9/11 attacks, and indeed, that conduct before 9/11 cannot give rise to any offense triable by this Commission, unless such conduct was directly related to the planning or execution of the 9/11 attacks or to the hostilities that followed those attacks. The Defense believes this guidance was unambiguously set forth in the 2 April 2008 Ruling. Nevertheless, an Order in Limine should issue to make this abundantly clear to the Prosecution. Such an Order is necessary because the Prosecution (1) contends that the United States was at war with al Qaeda as early as 1996 (*see* Govt. Response to Defense Motion in Limine at 5 n*), (2) intends to introduce evidence concerning conduct that long pre-dated 9/11, and (3) will argue that such conduct satisfies elements of the charged offenses. This trial strategy, if permitted by the Military Judge, will confuse the Commission members concerning what can, and cannot, constitute an offense under the MCA. It will expand the meaning of Conspiracy and Material Support for Terrorism to criminalize conduct that has always been regarded under the law of war as civilian activity. The MCA need not, and should not, be

interpreted to require such a result. Rather, just as the Commission read § 948d(a) in conjunction with § 948a(1)(A)(i) to properly limit its jurisdiction in the Ruling on D-016, it should read the MCA provisions relating to Conspiracy and Material Support to also incorporate the same "engaged in hostilities" requirement. This reading, which comports with both the intent of Congress and with international law, mandates the exclusion of evidence offered in support of those charges, unless that evidence genuinely reflects direct involvement in hostilities.¹

This motion also seeks to exclude evidence of post 9/11 conduct that cannot reasonably be deemed to constitute "engage[ment] in hostilities." Thus, it goes beyond the temporal aspect of the 2 April 2008 Ruling to also address geographic or spatial proximity to hostilities. The Defense maintains that a civilian performing his or her routine job duties – such as driving one's employer to and from locations remote from any battlefield, even after 9/11 – cannot constitute evidence of a war crime. This is because there is an insufficient nexus to armed conflict, even if the employer happens to be a combatant. The employee is not "engaged in hostilities" by virtue of that conduct, and evidence of it should not be admitted for the purpose of proving the elements of a war crime.

B. The "In the Context of and Associated With an Armed Conflict" Jurisdictional Element Should Be Enforced by the Military Judge Through Evidentiary Rulings

The Prosecution's primary argument is that the Military Judge has no role in determining whether an alleged offense "took place in the context of and was associated with an armed conflict." Rather, according to the Prosecution, the Manual for Military Commissions

¹ The Charges in this case, Conspiracy and Providing Material Support for Terrorism, present particular challenges in this regard. The Prosecution has adopted an expansive reading of the MCA provisions regarding these offenses, which is reflected in the overbroad language of the Charge Sheet. This approach not only departs from the intention of Congress to strictly limit the jurisdiction of this tribunal, it threatens to dismantle longstanding law of war constructs. Of course, as the Defense has explained elsewhere, neither Conspiracy nor Material Support is a law of war offense. If that proposition is recognized, then the difficulties largely disappear. However, if they are (erroneously) deemed to be law of war offenses, then at a minimum, they must be carefully circumscribed (as the MCA instructs) to prevent routine civilian activity from being transformed into unlawful engagement in hostilities or used as evidence of alleged war crimes.

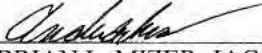
(promulgated by the Secretary of Defense) makes this an element of each offense and therefore a question of fact for the Commission members. (Govt. Response to Motion in Limine at 1, 3, 5.)

But the matter is not quite so simple. The "in the context of and associated with" requirement is clearly a jurisdictional element of each offense, of the sort recognized by federal cases such as *United States v. Yermian*, 468 U.S. 63, 68-74 (1984) ("[t]he jurisdictional language was added to the current provision solely to limit the reach of the . . . statute to matters of federal interest"), and *United States v. Cooper*, 482 F.3d 658, 664 (4th Cir. 2007) ("A jurisdictional element of a federal offense states the basis of Congress' power to regulate the conduct at issue"). In this case, the "war-context" element limits the reach of this Commission's jurisdiction, as was recognized in the 2 April 2008 Ruling (D-016). Thus, if the conduct is "unrelated to hostilities," then it cannot constitute an offense triable under the MCA. 2 April 2008 Ruling (D-016) at 5. As noted by the Court of Military Commissions Review, the MCA "permit[s] military judges to hear evidence and decide factual and legal matters concerning the court's own jurisdiction over the accused appearing before it." *United States v. Khadr*, CMCR 07-001 at 24 (24 September 2007). Thus, it is not only appropriate, but expected, that the Military Judge will make factual findings affecting the Commission's jurisdiction (as has occurred in this case; *see* 19 December 2007 Ruling on Reconsideration). Whether a state of armed conflict exists is such a jurisdictional fact, and it can be ascertained in this case based on undisputed matters. Indeed, the Defense's Supplemental Submission on D-016 regarding the date of the start of the war (filed 7 March 2008) presented undisputed facts determinative of that issue, and demonstrated that the question is properly decided by the Military Judge. As detailed in that Supplemental Submission, U.S. courts on numerous occasions throughout our history have made determinations regarding whether a state of war existed, and drawn legal conclusions based on those determinations.


This motion simply requests that the Commission properly enforce the jurisdictional ruling on D-016 that it has already made, and apply that Ruling to evidentiary matters so that


evidence introduced at trial does not become a mechanism to expand this Commission's jurisdiction in a manner offensive to both the MCA and international law. The Prosecution's proposal – allowing all evidence to be admitted and the Commission members to sort out whether the conduct occurred in the context of a war – poses a serious risk of inconsistent findings (*e.g.*, one commission saying the war began in 1996, another saying 1998, a third saying 2001, etc.). It also risks (1) confusing Commission members concerning what is, and what is not, culpable conduct under the MCA, (2) improperly expanding the jurisdiction of the Commission over conduct "unrelated to hostilities," and (3) blurring the line between civilians and combatants in a manner that defeats a fundamental objective of the law of war. For these reasons, the Military Judge should play a gate-keeping function with respect to evidence offered by the Prosecution, excluding evidence of conduct and events pre-dating 9/11 (unless directly related to 9/11 or the hostilities that followed), and excluding evidence of civilian activity remote from any battlefield (even activity post-dating 9/11) absent a clear nexus to hostilities of the sort that would be recognized as "direct participation" under international law. The testimony of Special Agent Crouch as presented at the 5-6 December 2007 hearing (and as described in the Prosecution's opposition to this motion (Govt. Response at 5) is an example of such evidence lacking a sufficient nexus to hostilities. Without an Order in Limine, the Prosecution will interpret the MCA's Conspiracy and Material Support provisions far more broadly than Congress intended, asserting military jurisdiction and law of war culpability over the civilian sphere and characterizing routine civilian conduct as evidence of war crimes. Accordingly, the Defense respectfully requests that the Military Judge enforce this Commission's jurisdictional limits by issuing an appropriate Order in Limine excluding evidence of activity unrelated to hostilities.

Respectfully submitted,

By: 
LCDR BRIAN L. MIZER, JAGC, USN
Detailed Defense Counsel
ANDREA J. PRASOW
Assistant Defense Counsel

 88

PROF. CHARLES SWIFT
Emory School of Law

Civilian Defense Counsel

HARRY H. SCHNEIDER, JR.
JOSEPH M. MCMILLAN
Perkins Coie LLP


[REDACTED]
From: [REDACTED]
Sent: Friday, April 25, 2008 11:14 AM
To: [REDACTED]
Subject: FW: U.S. v. Hamdan - D-033 Defense Reply to Defense Motion in Limine to Exclude Evidence Unrelated to Hostilities

Attachments: D033 Defense Reply to Defense Motion in Limine to Exclude Evidence of Transportation Services.pdf; D033 Defense Reply to Defense Motion in Limine to Exclude Evidence of Transportation Services.DOC



D033 Defense Reply to Defense ...
D033 Defense Reply to Defense ...

From: [REDACTED]
[REDACTED]

Evidence Unrelated to Hostilities to Exclude

LTC [REDACTED]

Attached for filing in the case of United States v. Hamdan please find D-033 Defense Reply to Government Response to Defense Motion in Limine to Exclude Evidence of Transportation Services Unrelated to Hostilities. The PDF version is signed; the Word version is unsigned.

Respectfully submitted,
AJP

Andrea J. Prasow
Office of the Chief Defense Counsel
Commissions

[REDACTED]

<<...>> <<...>>

Attachment N

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D-033, D-016RULING ON MOTION IN LIMINE
(TRANSPORTATION SERVICES)
AND START OF HOSTILITIES

13 May 2008

The Defense has moved this Commission *in limine* (D-033) to exclude all evidence relating to transportation services the accused provided to bin Laden and others at times and in locations remote from the battlefield. The Defense position is that "hostilities" began no earlier than September 11, 2001, and that evidence of the accused's support for al Qaeda before that date is therefore unrelated to hostilities. The Government argues that hostilities against al Qaeda encompass a broader spectrum of times and places, and began as early as 1996. Thus, the Government seeks to offer evidence of all of Hamdan's activities in support of bin Laden and al Qaeda, from 1996 until his capture in November of 2001.

In supplemental filings captioned D-016, both parties address a question posed from the bench pertaining to the start of hostilities. The Defense argues that the start date for hostilities is a question of law for the Commission to decide; the Government asserts again that it is a question of fact for the members to decide.

The Commission addresses both of these related issues with this single ruling.

WITH RESPECT TO THE MOTION IN LIMINE:

In pressing its argument, the Defense points to the language Congress chose to describe unlawful combatants: "a person who has engaged in hostilities or purposefully and materially supported hostilities against the United States or its co-belligerents . . ." MCA §948a(1)(i), and to this Commission's reference to the terms "direct participation in hostilities" in addressing jurisdiction over the accused. The accused's "employment" as bin Laden's driver between 1996 and 2001 does not, in the Defense view, amount to "direct participation in hostilities," and therefore cannot support a finding that Hamdan's driving for bin Laden "took place in the context of or was associated with an armed conflict."

The Government counters that each of the Specifications alleging material support for terrorism requires proof that the accused's conduct "took place in the context of and was associated with an armed conflict." Thus, whether the accused's conduct meets or fails to meet this test is a question of fact for the members to decide, and the government urges the Commission not to address it. The Government asserts in its response brief that it will "present evidence to the members that will demonstrate that a state of armed conflict between al Qaeda and the United States existed as early as 1996" (Government Brief at 5).

The Commission finds that whether the accused's conduct "took place in the context of and was associated with an armed conflict" is an element of each of the offenses under Charge II. The Commission has earlier ruled that, for activity that occurred before September 11, 2001 to

be a violation of the law of armed conflict, the Government must show that it "affected or was related to a period of hostilities." Ruling on Motion to Dismiss-(Res Judicata) at 5. Thus, the existence or a state of armed conflict before 2001 is clearly a question of fact for the members to decide. Evidence bearing upon the issue may be offered by either side, and the Commission will instruct the members appropriately before they retire to deliberate.

The Motion in Limine is DENIED.

WITH RESPECT TO THE SUPPLEMENTAL BRIEF ON THE START OF HOSTILITIES:

The parties have also briefed the issue whether the start of hostilities was a question for the Judge or the members. The Defense urges the Commission to decide the matter in advance of trial, and cites numerous cases in which American Courts have decided that the nation was or was not at war, or observed that a state of armed conflict did or did not exist. The Defense further argues that the issue is not a political question, and that "wars" have traditionally existed only between states or state-like entities. Citing *Pan Am World Airways, Inc. v Aetna Casualty & Sur. Co.*, 505 F.2d 989, 1012-1015 (2d Cir. 1974), the Defense argues that whatever action may have been taken by or against al Qaeda in the years prior to 11 September 2001, it did not amount to "a course of hostilities engaged in by entities that have at least significant attributes of sovereignty." Finally, the Defense offers a number of statements by various national leaders suggesting that they did not consider the United States to be at war before September 11, and did after September 11th.

The Government urges the Commission to treat this as a matter for the members to decide. As it argued with respect to the motion in limine, the Government promises to prove, beyond a reasonable doubt at trial, that the United States was engaged in armed conflict with al-Qaeda prior to September 11, 2001. Indeed, whether the accused's conduct occurred "in the context of and was associated with an armed conflict" is expressly or by necessary implication an element of each offense before the Commission. Thus, the Government will have to prove at trial that each of the charged offense was substantially related to a period of armed conflict. The Defense, as part of the trial of the case, will offer its evidence that there was no period of armed conflict prior to September 11, 2001.

The Commission finds that, because the Government must prove, as an element of each offense for which it seeks to find Mr. Hamdan guilty, that his actions were significantly related to a period of armed conflict, that the members should hear and decide the matter.

The Motion for the Commission to determine the commencement of hostilities is DENIED.



Keith J. Alfred
Captain, JAGC, USN
Military Judge

[REDACTED]

From: [REDACTED]
Sent: Wednesday, May 14, 2008 6:38 PM
To: Schneider, Harry (Perkins Coie); Britt, William, LTC, DoD OGC; Prasow, Andrea, Ms, DoD
 [REDACTED]
 [REDACTED]
Cc: [REDACTED]
Subject: US v Hamdan - D-033, D-016 Ruling Motion in Limine (Transportation Services) and Start of Hostilities
Attachments: HAMDAN.RULING D-033,D-016.pdf



HAMDAN.RULING
 D-033,D-016.pdf ...

Captain Allred had directed that I send the attached ruling to counsel in US v Hamdan and to other interested persons.

v/r,

LTC [REDACTED] USAR
 Attc [REDACTED]
 Military Commissions Trial Judiciary
 Department of Defense

From: [REDACTED]
Sent: May 14, 2008 15:14
To: [REDACTED]
Subject: US v Hamdan - RULING ON D-033, D016

[REDACTED]

Please forward the attached ruling to the parties and others interested in the case of United States v. Hamdan.

R,
 Captain Allred

Attachment O

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 104</p> <p>Government Response To Defense Motion to Dismiss Because The Convening Authority Exceeded His Power In Referring This Case To A Military Commission</p> <p>13 September 2012</p>
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1. **Timeliness**

This response is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

2. **Relief Sought**

The government respectfully requests the Commission to deny the defense motion to dismiss.

3. **Overview**

The defense motion to dismiss should be denied for three reasons: (1) whether the offense was committed in the context of and associated with hostilities is a common element of fact that the government must prove at trial; (2) these charges properly were referred because the Convening Authority found reasonable grounds to believe they were committed in the context of and associated with hostilities; and (3) the existence of hostilities is an objective question of fact for the members.

4. **Burden of Proof**

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

Abd Al Rahim Hussayn Muhammad Al Nashiri ("accused") is a Saudi Arabian citizen and senior member of al Qaeda. He is charged with multiple offenses under the Military Commissions Act of 2009 ("2009 M.C.A.") for violations of the law of war, which were committed in the context of and associated with hostilities between the United States and al Qaeda. These charges relate to the accused's alleged role in planning and executing attacks on USS COLE (DDG 67) on 12 October 2000, and *MV Limburg* on 6 October 2002, and an attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000. The attack on USS COLE (DDG 67) occurred while it was refueling in Aden, Yemen. This attack killed 17 U.S. sailors, injured at least 37 others, and caused significant property damage. The attack on *MV Limburg*, a civilian oil tanker, occurred in or around the coast of Al Mukallah, Yemen. This attack killed one civilian crewmember, caused significant property damage, and resulted in a large oil spill. The government alleges that these attacks were attempts to strike the United States on behalf of al Qaeda. The government also alleges that these attacks were committed in the context of and associated with hostilities between the United States and al Qaeda.

On 23 August 1996, Usama bin Laden issued a public "Declaration of War Against the Americans Occupying the Land of the Two Holy Places," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula. *See* Usama bin Laden, Declaration of War Against the Americans Occupying the Land of the Two Holy Places (Aug. 23, 1996).

In about March 1997, in an interview with CNN, Usama bin Laden promised to drive Americans away from all Muslim countries. *See* CNN Interview with Osama bin Laden at 2, available at <http://11.findlaw.com/news.findlaw.com/cnn/docs/binladen/binladenintvw-cnn.pdf>. Usama bin Laden also warned the United States of the deadly consequences if it did not leave the Arabian Peninsula: "So if the U.S. does not want to kill its sons who are in the army, then it has to get out." *Id.* at 5. Usama bin Laden also indicated he could not guarantee the safety of U.S. civilians because they voted to elect America's political leaders and, therefore, were responsible for the consequences of U.S. foreign policy. *Id.* at 2.

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On 23 February 1998, Usama bin Laden and others, issued a fatwah (a purported religious ruling) claiming that it was God's order and an individual duty for every Muslim to "kill the Americans and plunder their money wherever and whenever they find it." See World Islamic Front, Statement (Feb. 23, 1998), available at <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>. The fatwah directed all Muslims to kill Americans and their allies, be they civilian or military. *Id.*

On 25 May 1998, Usama bin Laden publicly announced the formation of the "International Islamic Front for Jihad Against the Jews and the Crusaders." Three days later, on 28 May 1998, in an interview with ABC News in Afghanistan, Usama bin Laden reiterated the February 1998 fatwah's call for killing Americans, stating: "We do not differentiate between those dressed in military uniforms and civilians; they are all targets in this fatwah." ABC News Interview with Usama bin Laden at 2, available at <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/prosecution/AQ00081T.pdf>. Usama bin Laden further stated that if his demands were not met, al Qaeda would send to the United States coffins containing the corpses of American troops and American civilians. *Id.* at 5.

On 29 May 1998, Usama bin Laden issued a statement entitled, "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting the Jews and Crusaders," in which Usama bin Laden stated "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God." See CNN, Timeline: Osama Bin Laden, Over the Years (May 2, 2011), available at http://articles.cnn.com/2011-05-02/world/bin.laden.timeline_1_bin-laden-group-osama-bin-king-abdul-aziz-university/3?s=PM:WORLD (quoting International Islamic Front for Fighting the Jews and Crusaders, The Nuclear Bomb of Islam (May 29, 1998)).

On 7 August 1998, al Qaeda engaged in coordinated attacks against U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. These attacks killed 224 people, including Americans, and injured thousands more. *United States v. Ghailani*, 761 F. Supp. 2d 167, 185-86 (S.D.N.Y. 2011) ("These bombings killed over two hundred people, injured and maimed

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thousands, and did tremendous damage to the embassies themselves. Two hundred and thirteen individuals perished in Nairobi. Eleven died in Dar es Salaam. Approximately 4,000 people were injured by the bombing in Nairobi, while 85 were injured in Dar es Salaam.”). The attacks also caused significant property damage to the two U.S. embassies. *Id.*

On 20 August 1998, in response to these attacks, U.S. armed forces struck terrorist training camps in Afghanistan and a suspected chemical weapons laboratory in Khartoum, Sudan. *See* Permanent Rep. of the United States to the U.N., Letter from the Permanent Rep. of the United States of America to the President of the Security Council of the United Nations, 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.”); President William J. Clinton, Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 Pub. Papers 1460 (Aug. 20, 1998); 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). The United States also contemplated and prepared to launch follow-on military operations. *See* Nat’l Comm’n on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 120-21 (2004) [hereinafter 9/11 Commission Report], *available at* <http://www.9-11commission.gov/report/911Report.pdf>.

On 3 January 2000, al Qaeda attempted to armed attack the USS THE SULLIVANS (DDG 68) near Aden, Yemen. On 12 October 2000, al Qaeda attacked the USS COLE (DDG 67) while it was refueling in Aden, Yemen. This attack killed 17 U.S. sailors, injured at least 37 others, and caused significant property damage.

On 11 September 2001, al Qaeda continued its attacks against the United States. In coordinated attacks, terrorists from that organization hijacked four commercial airliners and used them as guided missiles to attack prominent U.S. targets, including the World Trade Center and the Pentagon. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds

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of millions of dollars in property, and severe damage to the U.S. economy. *See* 9/11 Commission Report 4-14 (2004).

On 18 September 2001, Congress passed, and the President of the United States signed, the Authorization for Use of Military Force (“AUMF”), Pub. L. No. 107-40, 115 Stat. 224 (2001). Among other things, the AUMF authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” al Qaeda. *Id.* On 7 October 2001, acting pursuant to the AUMF, the President ordered U.S. Armed Forces to begin military operations in Afghanistan, where he determined that the Taliban was harboring members of al Qaeda. *See* Permanent Rep. of the United States to the U.N., Letter from the Permanent Rep. of the United States of America to the President of the Security Council of the United Nations, U.N. Doc. S/2001/946 (Oct. 7, 2001). In addition, on 13 November 2001, the President issued a military order that authorized trial by military commission of noncitizens he had reason to believe were or had been members of al Qaeda; those who had engaged in, aided or abetted, or conspired to commit international acts of terrorism against the United States; and those who had harbored others covered by the military order. *See* President George W. Bush, Mil. Order, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001) (“International terrorists, including members of al Qaeda, 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 that requires the use of the United States Armed Forces.”).

On 6 October 2002, al Qaeda attacked MV *Limburg*, a civilian oil tanker, off the coast of Al Mukallah, Yemen. This attack killed one civilian crewmember, caused significant property damage, and resulted in a large oil spill.

In October 2006, Congress enacted the Military Commissions Act of 2006 (“2006 M.C.A.”), which provided statutory authority for military commissions, limited their jurisdictional scope, and provided significant procedural rights for an accused. In October 2009,

Congress amended the 2006 M.C.A. to provide greater procedural protections to detainees tried by military commission ("2009 M.C.A.").

On 28 September 2011, capital charges were referred against the accused. The Commission arraigned the accused on 9 November 2011.

6. Law and Argument

An offense enumerated in the 2009 M.C.A. is only triable by military commission "if the offense is committed in the context of and associated with hostilities." 10 U.S.C. § 950p(c) (the "hostilities element"). The government has alleged in every charge that the accused committed his offenses in the context of and associated with hostilities. The 2009 M.C.A. defines "hostilities" as "any conflict subject to the laws of war," which apply during "armed conflict." 10 U.S.C. § 948a(9). A military commission convened under the 2009 M.C.A. has "jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter . . . whether such offense was committed before, on, or after September 11, 2001." 10 U.S.C. § 948d.

The defense argues that the Convening Authority could not have found that the offenses charged took place in the context of and associated with hostilities, and, therefore, the referral was defective. This untenable request should be denied for three reasons. First, whether the offense was committed in the context of and associated with hostilities is a common element of fact that the government must prove at trial. Second, these charges properly were referred because the Convening Authority found reasonable grounds to believe they were committed in the context of and associated with hostilities. Third, the existence of hostilities is an objective question of fact for the members.

I. Whether the Offense Was Committed in the Context of and Associated with Hostilities Is a Common Element of Fact the Government Must Prove at Trial

The requirement that offenses must be "committed in the context of and associated with hostilities" is a common element of fact that the government must prove to the members at trial. It is a fundamental principle of statutory construction that individual clauses in a statute should be read in context, not in isolation. *See Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("In reading a

statute we must not look merely to a particular clause, but consider [it] in connection with it the whole statute.”) (citing *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)) (internal quotation marks omitted); *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850) (“[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”). Here, the hostilities requirement is in a provision called, “Common Circumstances,” which is contained in subchapter VIII of the 2009 M.C.A., called “Punitive Matters.” See 10 U.S.C. § 950p(c). This “Punitive Matters” subchapter broadly lists the triable offenses, the elements of those offenses, and the different forms of criminal liability. See 10 U.S.C. § 950p (definitions, construction of certain offenses, common circumstances); 10 U.S.C. § 950q (principals); 10 U.S.C. § 950r (accessory after the fact); 10 U.S.C. § 950s (conviction of lesser offenses); 10 U.S.C. § 950t (crimes triable by military commission). By placing the hostilities requirement in the punitive matters section, which lists the offenses and their elements, Congress intended to make the hostilities requirement a common element of fact for all the triable offenses.

If Congress wanted the hostilities element to be approached as a threshold jurisdictional requirement, it could have included it in the statute’s “Jurisdiction of military commissions” section. That section, however, does not mention any hostilities requirement:

A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, sections 904 and 906 of this title (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war, *whether such offense was committed before, on, or after September 11, 2001*, and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized under this chapter. A military commission is a competent tribunal to make a finding sufficient for jurisdiction.

10 U.S.C. § 948d (emphasis added). Instead, the statute explicitly gives this Commission jurisdiction to try offenses committed “before, on, or after September 11, 2001.” *Id.*

The *Hamdan* commission (convened under the 2006 M.C.A.) agreed that the hostilities nexus was a question of fact for the members. See *United States v. Hamdan*, AE 190, Ruling on Motion *in Limine* (Transportation Services) and Start of Hostilities (D-033 & D-016) at 2 (May

13, 2008) (“[T]he existence o[f] a state of armed conflict before 2001 is clearly a question of fact for the members to decide. Evidence bearing upon the issue may be offered by either side, and the Commission will instruct the members appropriately before they retire to deliberate.”). The Commission ruled that because the “Government must prove, as an element of each offense,” that the accused’s offenses “were significantly related to a period of armed conflict,” the “members should hear and decide that matter.” *Id.*

Because the hostilities requirement is an element of the crime, the only discernible basis for the defense motion to dismiss is that the Convening Authority improperly referred these charges.¹

II. The Convening Authority Properly Referred the Charges Because He Found Reasonable Grounds To Believe They Were Committed in the Context of and Associated with Hostilities

The Convening Authority properly referred these charges to this Commission. The Convening Authority may only refer charges to a military commission if he finds, or is advised by his Legal Advisor, that there are “reasonable grounds to believe that an offense triable by a military commission has been committed and that the accused committed it, and that the

¹ AE 104 is not properly read as a challenge to the Commission’s subject-matter jurisdiction. But even if the defense does file an appropriate motion to dismiss for lack of subject-matter jurisdiction, the Military Judge would have to determine whether the charged offenses are among those Congress authorized for trial, nor whether those offenses were committed in the context of and associated with hostilities. As argued above, the hostilities nexus is to be treated at trial as a common element of fact, rather than a threshold jurisdictional requirement. Because every charge here is an enumerated offense under the 2009 M.C.A., a motion to dismiss for lack of subject-matter jurisdiction in this case would fail.

AE 104 also does not challenge this Commission’s personal jurisdiction. The 2009 M.C.A. states that “[a]ny alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.” 10 U.S.C. § 948c. An unprivileged enemy belligerent is one who “has engaged in hostilities against the United States or its coalition partners; has purposefully and materially supported hostilities against the United States or its coalition partners; or was a part of a) Qaeda at the time of the alleged offense under this chapter.” 10 U.S.C. § 948a(7). By referring this case, the government made a *prima facie* showing for personal jurisdiction. See *United States v. Khadr*, 717 F. Supp. 2d 1215, 1235 (U.S.C.M.C.R. 2007) (“We find that this facial compliance by the Government with all the pre-referral criteria . . . combined with an unambiguous allegation in the pleadings that Mr. Khadr is ‘a person subject to trial by military commission as an alien unlawful enemy combatant,’ entitled the military commission to initially and properly exercise *prima facie* personal jurisdiction over the accused until such time as that jurisdiction was challenged by a motion to dismiss for lack thereof, or proof of jurisdiction was lacking on the merits.”). There is no plausible way to read AE 104 as challenging this Commission’s personal jurisdiction and, as such, the government does not address that issue in this response.

specification alleges an offense.” R.M.C. 601(d)(1). To refer a charge, the Convening Authority must be convinced by the evidence that there are reasonable grounds to believe every element of that charge. And he must make such a determination independently and free from influence. *See* R.M.C. 601 and 104. In this case, the defense does not claim that the Convening Authority failed to follow the proper procedure or to review the evidence. In fact, after reviewing the evidence presented, the Convening Authority declined to refer sworn charges VII and VIII, both of which related to the destruction of property in violation of the law of war. The defense nonetheless argues that the Convening Authority somehow exceeded his authority in referring the remaining charges.

The defense motion does not claim that the charges fail to allege a nexus to hostilities, or that the facts alleged foreclose the existence of such a nexus. Rather, it claims that the Convening Authority could not have found reasonable grounds to believe that each offense was committed in the context of and associated with hostilities because, in the defense’s view, hostilities did not exist at the time and place of the alleged offenses. In effect, the defense asks this Commission to reach into the Convening Authority’s purview and reevaluate the Convening Authority’s determination that reasonable grounds existed to support the hostilities element. By referring these charges, the Convening Authority necessarily determined that there were reasonable grounds to believe that each charge was committed in the context of and associated with hostilities. The defense provides no legal basis for reconsidering this determination.

This Commission should decline the defense’s novel request to reevaluate the Convening Authority’s referral of charges. The government is aware of no case where a military judge dismissed a properly referred charge at court-martial simply because the military judge disagreed with the Convening Authority’s determination that reasonable grounds existed to support that charge. Similarly, the government could not find a single case where a federal judge dismissed an indictment because the defense argued the government would not be able to prove a disputed factual element at trial. Just like certain federal crimes that require an interstate nexus as an element, a military commission under the 2009 M.C.A. may only try substantive offenses with a

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nexus to hostilities. However, there is no authority in either system for the defense to move for dismissal based solely on its claim that the government will not be able to prove the hostilities or interstate commerce nexus at trial. Rather, so long as the charge or indictment alleges that nexus, the defense cannot challenge the adequacy of proof for that allegation before the prosecution has presented its evidence at trial. See *United States v. Costello*, 350 U.S. 359, 409 (1956) (“[A]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for a trial on the charge on the merits.”); accord *United States v. Moore*, 563 F.3d 583, 586 (7th Cir. 2009); *United States v. Todd*, 446 F.3d 1062, 1068 (10th Cir. 2006); *United States v. Hickey*, 367 F.3d 888, 894 (9th Cir. 2004); *United States v. Salman*, 378 F.3d 1266, 1268 (11th Cir. 2004).

Once the grand jury or convening authority sends a case to trial, the remedy for the defense claim that the government lacks evidence on an element is to obtain a directed verdict or an acquittal at trial. Instead, the defense seeks to have the Commission intrude into the Convening Authority’s deliberative process and reconsider his otherwise valid determination. The charges in this case clearly allege that the offenses were committed in the context of and associated with hostilities, and the Convening Authority has found that the government’s evidence establishes reasonable grounds to believe the same. Because there is no basis in law for this Commission to reevaluate the Convening Authority’s reasonable-grounds determination, the defense motion to dismiss should be denied.

III. The Existence of Hostilities Is an Objective Question of Fact for the Members

Although the defense motion has no basis in law and should be denied outright, it also fails on the merits. The defense argues that “the recognition of hostilities . . . is a political act that must be decided by the political branches” and that the Convening Authority therefore has no authority to “countermand the decisions of the political branches” AE 104 at 6, 8. The defense then claims that because the offenses allegedly were committed when there was no political recognition of hostilities in Yemen, the Convening Authority did not have the power to

refer these charges. *See* AE 104. There are at least three major problems with the defense's argument.

First, the defense's focus on the recognition of hostilities specifically in Yemen is misplaced. *See* AE 104 at 8 (“[T]he earliest date on which the political branches officially recognized hostilities in any sense *in Yemen* was September 19, 2003.”) (emphasis added). The government does not argue, and does not intend to prove, that hostilities, within the meaning of the 2009 M.C.A., existed between the United States and Yemen during the relevant timeframe. The defense seems to argue that separate conflicts existed and continue to exist between the United States and al Qaeda in different geographical locations. To the contrary, al Qaeda is a transnational terrorist organization that has committed, and plans to commit, violent acts against American people and interests throughout the world. As the military judges in *Hamdan* and *Al Bahlul* instructed the members:

Conduct of the accused that occurs *at a distance from the area of 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.

United States v. Hamdan, 801 F. Supp. 2d 1247, 1279 n.54 (U.S.C.M.C.R. 2011) (quoting *Hamdan* Tr. 3752-53) (emphases added). This instruction is consistent with U.S. historical practice. During World War II, for instance, hostilities existed between Germany and the United States. Nonetheless, battles that occurred at a great distance from either nation—such as in North Africa—still were unarguably in the context of and associated with those hostilities, as were offenses committed outside a theater of active military operations. *See Ex parte Quirin*, 317 U.S. 1, 38 (1942) (finding that individuals properly may be subject to trial by military commission even if “they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations”). The government will prove at trial that hostilities existed between the United States and al Qaeda, and that the charged offenses were all committed in the “context of and associated with” those hostilities. That is all that the 2009 M.C.A. requires.

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Second, the defense purports to argue that the recognition of hostilities is a “political question,” but in fact argues that the existence of hostilities in Yemen must be decided by the Military Judge on an incomplete record consisting only of selected contemporaneous statements made by political figures. See AE 104 at 5-6 (stating that the existence of hostilities “is a political act that must be decided by the political branches”). The defense cites no support for its position, which fundamentally misunderstands the 2009 M.C.A. and ignores binding U.S.C.M.C.R. precedent. Under the statute and the caselaw, the duration and scope of the hostilities between the United States and al Qaeda is an objective factual element that the members must resolve at trial after receiving an instruction on the proper legal standard. See *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1189 (U.S.C.M.C.R. 2011) (stating that “the determination whether the hostilities in issue satisfy [the hostilities nexus] is objective in nature and generally relate to the intensity and duration of those hostilities.”); *Hamdan*, 801 F. Supp. 2d at 1278-79 (affirming the conviction because the military judge “properly instructed” the members on hostilities, and that the members “found beyond a reasonable doubt that this requirement was met”).² Along the same lines, international criminal tribunals applying the law

² The full text of the military judge’s instruction reads:

With respect to each of the ten specifications [of material support] before you, the government must prove beyond a reasonable doubt that the actions of the accused took place in the context of and that they were associated with armed conflict. In determining whether an armed conflict existed between the U.S. and AQ and when it began, you should consider the length, duration, and intensity of hostilities between the parties, whether there was protracted armed violence between governmental authorities and organized armed groups, whether and when the U.S. decided to employ the combat capabilities of its armed forces to meet the AQ threat, the number of persons killed or wounded on each side, the amount of property damage on each side, statements of the leaders of both sides indicating their perceptions regarding the existence of an armed conflict, including the presence or absence of a declaration to that effect, and any other facts or circumstances you consider relevant to determining the existence of armed conflict. The parties may argue the existence of other facts and circumstances from which you might reach your determination regarding this issue. In determining whether the acts of the accused took place in the context of and were associated with an armed conflict, you should consider whether the acts of the accused occurred during the period of an armed conflict as defined above, whether they were performed while the accused acted on behalf of or under the authority of a party to the armed conflict, and whether they constituted or were closely and substantially related to hostilities occurring during the armed conflict and other facts and circumstances you consider relevant to this issue. Counsel may address this matter during their closing arguments, and may suggest other factors for your consideration. Conduct of the accused that occurs at a distance from the area of

of war also repeatedly have held that the existence of hostilities is an objective question of fact.³ Although not binding on this Commission, these international cases lend support to the U.S.C.M.C.R.'s holdings in *Hamdan* and *Al Bahlul* that the existence of hostilities is not a political question in the context of a military-commission trial, but a question of fact for the members to determine. In this case, the members will decide at trial, upon consideration of the totality of the circumstances, whether these offenses were committed in the context of and associated with hostilities between the United States and al Qaeda.

Third, none of the four cases cited in the defense motion actually supports the defense position that the existence of hostilities is a "political question" in the context of a military commission. The defense relies most heavily on *Baker v. Carr*, where the Supreme Court held that a challenge to a state-apportionment statute under the Fourteenth Amendment's Equal Protection Clause was justiciable. 369 U.S. 186 (1962). In considering (and rejecting) the respondent's claim that the challenge infringed on a nonjusticiable political question, the Court "analyze[d] representative cases [and] infer[red] from them the analytical threads that make up the political question doctrine." *Id.* at 211. One such area of cases concerned the duration of hostilities. The Court explained that it generally would refuse "to review the political departments' determination of when or whether a war has ended." *Id.* at 213. This judicial deference to the political branches, however, "is primarily a function of the separation of

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.

Hamdan, 801 F. Supp. 2d at 1278 n.54 (quoting *Hamdan* Tr. 3752-53).

³ For example, in *Prosecutor v. Tadic*, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") rejected the defense argument that "there was no armed conflict at all in the region where the crimes were allegedly committed." Case No. IT-94-I-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 65 (2 Oct. 1995). Instead of relying on contemporaneous political determinations, the ICTY found that an armed conflict exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Id.* at ¶ 70; see also *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement ¶¶ 619-26 (2 Sept. 1998) (not requiring a contemporaneous political determination before assessing that an "armed conflict" exists for the purposes of triggering war crimes liability); *Juan Carlos Abella v. Argentina*, Case 11,137, Report No. 55/97, Inter-Am. Commission on Human Rights, OEA/Ser.L/V/II.98, Doc. 6 rev. (18 Nov. 1997) (determining that an engagement of Argentina's armed forces with organized, armed militants that lasted thirty hours and resulted in casualties and property destruction was an armed conflict under international law without requiring a formal contemporaneous political determination).

powers.” *Id.* at 210. In this case, there is no separation-of-powers concern. Congress and the President, through the 2009 M.C.A., created a system of military commissions to try violations of the law of war and expressly made the nexus to hostilities an element of each offense. In so doing, far from removing the determination of the existence of hostilities from the purview of the Commission, Congress and the President actually empowered the members to decide whether the government has proven the hostilities element beyond a reasonable doubt in each case. As in any criminal trial, the members will be asked to weigh the evidence against the legal standards on which they are instructed, and to make a determination as to guilt or innocence. Therefore, *Baker* actually cuts against the defense argument that the political branches must decide the existence of hostilities, and instead supports the government’s position that the existence of hostilities is an objective, fact-based inquiry, best left to members.

The three other cases cited by the defense are no more supportive of the defense position than *Baker*. In *The Protector*, 79 U.S. (12 Wall.) 700 (1872), the Supreme Court granted a motion to dismiss because the appellant exceeded the five-year limitations period for the filing of his appeal. Because the limitations period was tolled during the Civil War, the Court had to decide when the war started and how long it lasted. In a three-page opinion, the Court decided that the war began in Alabama on 19 April 1861, when the President proclaimed an intended blockade, and the war ended on 2 April 1866, when the President proclaimed “the war had closed.” *Id.* at 702. The Court itself acknowledged, however, that it only chose those dates “[i]n absence of more certain criteria, of equally general application” *Id.* at 702. Here too, the members can look to the totality of circumstances to decide whether a given offense was committed in the context of and associated with hostilities. The last two cases cited by the defense, *Ludecke v. Watkins*, 335 U.S. 160 (1948), and *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), arose in the habeas context and concerned the determination of the end of declared war or hostilities. They do not concern how a member’s panel, in a military commission, should determine whether a given offense was committed in the context of and associated with some pending or historical hostilities, even absent the controlling political determinations referenced in

those cases. In *Ludecke*, the Attorney General ordered the petitioner removed from the United States as an alien enemy, and the petitioner filed a petition for a writ of habeas corpus. The Supreme Court affirmed the denial of the writ because Congress gave the President summary and unreviewable power to order the removal of enemy aliens during a declared war, and because the declared war between the United States and Germany had not yet terminated. Similarly, in *Al-Bihani*, the D.C. Circuit affirmed the denial of the petitioner's habeas petition and deferred to the executive's determination that the war against the Taliban and al Qaeda was ongoing. An actual declaration of war or hostilities, however, is not at issue in this Commission. At issue here is whether the members may decide whether certain offenses were committed in the context of and associated with hostilities, prior to a formal authorization of military force. Nothing in either *Ludecke* or *Al-Bihani* supports the defense argument that this role of the members, as created by the 2009 M.C.A., should be displaced by the cherry-picked statements offered by the defense. *See* AE 104 at 6.

The defense provides no legal support for its argument that the existence of hostilities is a political question in the context of a military commission. The 2009 M.C.A. and binding U.S.C.M.C.R. precedent establish that the existence of hostilities is an objective question of fact for the members to decide. The defense motion to dismiss, therefore, should be denied.

7. Conclusion

For the foregoing reasons, the Commission should deny the defense motion to dismiss.

8. Oral Argument

The defense has requested oral argument, and the government joins this request.

9. Witnesses

The government has no witnesses at this time.

10. Additional Information

The government has no additional information.

II. Attachments

A. Certificate of Service, dated 13 September 2012.

Respectfully submitted,

//s//

Anthony W. Mattivi
CDR Andrea Lockhart, JAGC, USN
Justin T. Sher
Joanna Baltes
Maj Chris Ruge, USMC
LT Cherie Jolly, JAGC, USN
Trial Counsel
Mark Martins
Chief Prosecutor
Military Commissions

CERTIFICATE OF SERVICE

I certify that on the 13th day of September 2012, I filed **AE 104, Government Response To Defense Motion To Dismiss Because The Convening Authority Exceeded His Power In Referring This Case To A Military Commission**, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//

Anthony W. Mattivi
Trial Counsel
Office of the Chief Prosecutor
of Military Commissions

Filed with TJ
13 September 2012

Attachment A
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Attachment P

1 [The R.M.C. 803 session was called to order at 0833, 1 August 2008.]

2 MJ [CAPT ALLRED]: Court is called to order. All parties
3 present when the court recessed are once again present. The members
4 are not here.

5 The defense motion to dismiss Specification 2 under Charge
6 I, under RMC 917 is denied.

7 The defense motion--is there any evidence that the
8 interpreters are listening?

9 CT INT: Hello.

10 MJ [CAPT ALLRED]: Good morning.

11 CT INT: We're here, Your Honor.

12 MJ [CAPT ALLRED]: Okay. Thank you.

13 I was announcing that the defense motion under Rule 917 for
14 a finding of not guilty as to Charge II--I'm sorry, Specification 2
15 under Charge I is denied.

16 In reaching this finding, I determined that there is some
17 evidence which, together with all reasonable inferences and
18 applicable presumptions, could reasonably tend to establish every
19 essential element of this charged offense. The evidence has been
20 viewed in the light most favorable to the prosecution without an
21 evaluation of the credibility of the witnesses.

22 As to Specifications 3 and 4 of Charge II, the motion is
23 granted.

1 I will instruct the members on the lesser included offense
2 of attempt.

3 There is another motion pending.

4 Okay. Apparently there's a problem getting the feed to the
5 media center that we'll have to resolve.

6 Two weeks ago, the defense team made a motion for pretrial
7 confinement credit or an improvement in the conditions of Mr.
8 Hamdan's confinement and for double credit for the time in which he's
9 been confined in punitive conditions. I have been waiting now for
10 some additional evidence from the government, and I believe that the
11 defense has some additional evidence they might want to offer on that
12 motion.

13 Trial Counsel, where are we with respect to your homework?

14 TC [LCDR STONE]: I think we'll have it by this afternoon, sir.
15 It's drafted, it's signed. We're going over the last bit to make
16 sure that it includes everything that you had otherwise asked for,
17 and you should have it hopefully by lunchtime.

18 MJ [CAPT ALLRED]: What exactly do you remember me having asked
19 for?

20 TC [LCDR STONE]: I have my notes specifically here.

21 Your main concerns were to update his conditions of what
22 his discipline status and behavior was basically from the end of the
23 last declaration, which was February through June, but now it would

1 be through July. And then an explanation with regards to how JTF
2 GTMO moves individuals through different----

3 MJ [CAPT ALLRED]: ----camps and levels and things.

4 TC [LCDR STONE]: The purpose of moving individuals at the times
5 when they may otherwise be moved. We do have some information, in
6 fact, I think we even took some of that information with regards to
7 the last motion that was heard on the [REDACTED] information, we'll
8 provide that. We can provide it with regards to 2003 and then 2005
9 and then 2007 as well. I don't think that it's changed much, but
10 there are different SOPs that both sides have and have had that
11 probably address that.

12 MJ [CAPT ALLRED]: Okay.

13 TC [LCDR STONE]: Probably easier than anything else that would
14 otherwise be done. And those were the two main pieces of information
15 that you were primarily looking for.

16 MJ [CAPT ALLRED]: Okay. And is a chronology easy to come up
17 with that indicates why he was in different camps and whether those
18 conditions are essentially the same or different?

19 TC [LCDR STONE]: Well, the initial declaration talks about and
20 does say that--does lay out each camp and how they're, by Bureau of
21 Prison standards Camps 1, 2, 3, 5, and 6 are considered, the same
22 with regards to the type of confinement that exists. That's in the
23 original declaration. However, I think if you look at the defense's

1 motion, if you look at physically what it looks like in Camps 1, 2,
2 and 3; there is a difference between the fact that there are wire
3 separating detainees at Camps 1, 2, and 3 vice 5 and 6.

4 So there's--the affidavit lays out that they are
5 technically by Bureau of Prisons standards and here considered the
6 same type of confinement. That's already set out. There is a
7 factual distinction that probably I think the defense mentioned that
8 deals with, while it may technically be the same that you have a
9 functional living difference with regards to Camps 1, 2, and 3.

10 MJ [CAPT ALLRED]: Okay.

11 TC [LCDR STONE]: The declaration will have us say that, for JTF
12 GTMO purposes, one, two, three, five, and six are all considered the
13 same type of cell.

14 MJ [CAPT ALLRED]: Okay. Well, I will look forward to receiving
15 that affidavit and that explanation, then, and I will resolve this
16 motion this weekend.

17 TC [LCDR STONE]: Yes, sir.

18 MJ [CAPT ALLRED]: Is there some additional evidence that the
19 defense has collected from its discovery?

20 CDC [MR. SWIFT]: We did. We received a complete log of the
21 camps, including Camp Echo, detailing things like how much exercise
22 Mr. Hamdan received.

1 The Court has his declaration of conditions in Camp Echo at
2 the time that the camp was put in, at the time that he filed it in
3 the federal courts. We have now a log that proved that that
4 conditions is exact.

5 MJ [CAPT ALLRED]: Even though the taking of evidence on the
6 motion ended the other day, I will accept from you as well as from
7 the government additional documents you might want to provide. And
8 to make sure I understand what it is you're showing me, I will be
9 happy to have you highlight for me notes on the documents so that I
10 get what it is that these things are telling me.

11 Sometimes these camp documents are a little bit full of
12 code, and I don't necessarily understand what you have learned about
13 what those documents mean. Okay? Mr. Hamdan's waited patiently for
14 a ruling on this motion, and I will give it on Monday. Okay?

15 Now, is there anything else before we call the next
16 witness?

17 DC [LCDR MIZER]: Your Honor, I just want to be clear for the
18 record that the central thrust of our 917 motion was Specification 1
19 of Charge I, which I don't think you addressed on the record.

20 MJ [CAPT ALLRED]: I thought it was Specification 2.

21 DC [LCDR MIZER]: It's Specification 1, the conspiracy, Your
22 Honor. It is the defense's position that there is no evidence again
23 that there was an agreement by Mr. Hamdan to participate in any of

1 the most serious allegations of against him. It's the first issue
2 addressed in the motion, the written motion that we submitted.

3 MJ [CAPT ALLRED]: Well, the reason I concluded that there was
4 sufficient evidence with respect to Specification 2, which is another
5 specification of conspiracy, is because I felt that the evidence
6 suggesting that Mr. Hamdan was aware of the al Qaeda's purposes and
7 bin Laden's plans and his oath of bayat, even conditional bayat, was
8 enough to get over a 917 motion.

9 CDC [MR. SWIFT]: To that effect, Your Honor, I would ask for
10 reconsideration with what you just stated, because it's charged as
11 two separate conspiracies. And I would note, in Specification 1, we
12 charged transportation of weapons systems, generally. In
13 Specification 2, we charge a separate conspiracy, a separate one that
14 exists independently of any other conspiracy. There has to be a
15 separate meeting of the minds. And so if you're seeing this level of
16 evidence for Specification 1 and then bringing it down to
17 Specification 2, where does the independent conspiracy that was
18 required for Specification 2 come from? Other than an inference
19 that--because one has missiles, there was a separate conspiracy, and
20 again will stand on my argument before. But there if we're using the
21 same set of evidence to prove two separate conspiracies that does not
22 make a lot of sense to me, at least, Your Honor.

1 So based on the Court's recitation of what it understood, I
2 don't understand how we have established a separate conspiracy. In
3 fact, just looking at the charges and how proof can be held on
4 whether we had had multiplitious charges of the contingencies of
5 proof, I don't see how Specification 2 does not merge into
6 Specification 1, because I would note that Specification 1 is charged
7 from 1996 until November 24, 2001.

8 Now, clearly there could be one conspiracy and a separate
9 conspiracy in this area, but the Court has not recited, and I would
10 ask if your written findings, if you continue to do it--the separate
11 evidence that was sufficient to determine there was a second
12 conspiracy for purposes of the record.

13 MJ [CAPT ALLRED]: Okay.

14 CDC [MR. SWIFT]: Thank you, Your Honor.

15 MJ [CAPT ALLRED]: Okay. Well, I'm sorry, when I listened to
16 your argument yesterday, perhaps, I did write down Specification 2 of
17 Charge I.

18 CDC [MR. SWIFT]: I did argue Specification 1 as well.

19 MJ [CAPT ALLRED]: Okay.

20 CDC [MR. SWIFT]: That they were proving that the government,
21 along the lines of a criminal enterprise theory on one, and there had
22 been no showing that he had entered into a conspiracy to kill or do
23 any of those things. If the Court disagrees, I won't belabor the

1 point or ask for reconsideration. But, based on the Court's
2 recitation of what you've considered, I don't see the separate
3 evidence for Specification 2.

4 MJ [CAPT ALLRED]: Okay. Well, what I guess I should do is let
5 Commander Stone speak.

6 TC [LCDR STONE]: Well, the only thing I can say, sir, is that I
7 think your ruling on, I think it was, D-014 on multiplicity, where it
8 was a hold open until the end of all evidence and then findings; and
9 then, my understanding was, is that you would then take a look at
10 whatever the findings happened to be, take the evidence, and then
11 make the final ruling based on that. Which----

12 MJ [CAPT ALLRED]: Well, I am still open. And I told the
13 members on the first day that I would probably merge any
14 specifications that appeared to be multiplitious after findings. But
15 I will reconsider. Over the weekend, as I look at writing the
16 instructions and looking again at the evidence, I will take another
17 look at that.

18 Okay. I apologize if I misunderstood your argument. Let's
19 call the members in and continue with presentation of the defense.
20 Shall we?

21 **[The R.M.C. 803 session terminated and the military commission**
22 **commenced at 0848, 1 August 2008.]**

1 MJ [CAPT ALLRED]: Good morning. Thank you very much. Please
2 be seated **[all persons did as directed]**. The members have returned
3 to the courtroom.

4 Defense, you may call your next witness.

5 CDC [MR. MCMILLAN]: Your Honor, the defense calls Ms. Gaskins.

6 MJ [CAPT ALLRED]: Good morning.

7 If you will face the trial counsel and he will swear you
8 in.

9 **AMY GASKINS, Civilian, was called as a witness for the defense, was**
10 **sworn, and testified as follows:**

11 **DIRECT EXAMINATION**

12 **Questions by the trial counsel:**

13 Q [LCDR STONE]: State your name, spelling your last name.

14 A [MS. GASKINS]: My name is Amy Gaskins. G-A-S-K-I-N-S.

15 **Questions by the civilian defense counsel:**

16 Q [MR. MCMILLAN]: Good morning, Ms. Gaskins.

17 A [MS. GASKINS]: Good morning.

18 Q [MR. MCMILLAN]: My name is Joe McMillan; I'm counsel for
19 Salim Hamdan. We've met before. Let me ask you first to state your
20 current position.

21 A [MS. GASKINS]: I'm a government contractor, and I work for
22 SRA International, Incorporated.

1 Q [MR. MCMILLAN]: Is your employer currently providing contract
2 services to the Office of the Chief Defense Counsel for Military
3 Commissions?

4 A [MS. GASKINS]: Yes.

5 Q [MR. MCMILLAN]: And have you been assigned to that project,
6 that is, to provide services to the Offices of the Chief Defense
7 Counsel?

8 A [MS. GASKINS]: Yes.

9 Q [MR. MCMILLAN]: Can you describe briefly what sort of
10 services you provide?

11 A [MS. GASKINS]: I'm assigned as an intelligence analyst to do
12 research, and also classified--look at classified documents.

13 Q [MR. MCMILLAN]: Prior to taking your current position, did
14 you ever serve in the United States military?

15 A [MS. GASKINS]: Yes.

16 Q [MR. MCMILLAN]: Can you describe to the members which service
17 you served in----

18 MJ [CAPT ALLRED]: Mr. McMillan----

19 Q [MR. MCMILLAN]: ----and which----

20 MJ [CAPT ALLRED]: I'm sorry; I'm getting signals from your
21 bench that makes it sound like you're going too fast.

22 CDC [MR. MCMILLAN]: I'll slow down.

1 Q [MR. MCMILLAN]: Ms. Gaskins, could you describe to the
2 Commission members the branch and service in which you served, and
3 the specific department or branch that you occupied?

4 A [MS. GASKINS]: I served in the United States Army, and I was
5 a Military Intelligence Officer.

6 Q [MR. MCMILLAN]: How long did you serve in the Army?

7 A [MS. GASKINS]: Six and a half years.

8 Q [MR. MCMILLAN]: Ms. Gaskins, do you have a security
9 clearance?

10 A [MS. GASKINS]: Yes.

11 Q [MR. MCMILLAN]: At what level?

12 A [MS. GASKINS]: I have a Top Secret SCI, and I've also taken
13 the CIA's full scope polygraph.

14 Q [MR. MCMILLAN]: Now, in light of your assignment to the
15 Office of the Chief Defense Counsel, you were asked by the defense
16 team on this case to undertake a couple of research projects. Is
17 that correct?

18 A [MS. GASKINS]: Yes.

19 Q [MR. MCMILLAN]: Can you explain what those two projects were?

20 A [MS. GASKINS]: I was assigned to research rules of engagement
21 that mentioned al Qaeda, and also publicly available information
22 concerning the start of hostilities.

1 Q [MR. MCMILLAN]: Okay. Two separate investigations; one
2 involving public records relating to Operation Enduring Freedom.
3 Correct?

4 A [MS. GASKINS]: Yes.

5 Q [MR. MCMILLAN]: And a second relating to classified Rules of
6 Engagement relating to Operation Enduring Freedom?

7 A [MS. GASKINS]: Yes.

8 Q [MR. MCMILLAN]: Okay.

9 CDC [MR. MCMILLAN]: Your Honor, may I have this document
10 displayed to the military judge and to the witness.

11 MJ [CAPT ALLRED]: You may.

12 Q [MR. MCMILLAN]: Ms. Gaskins, can you identify the document on
13 the screen?

14 A [MS. GASKINS]: Yes. It's the Authorization for Use of
15 Military Force.

16 Q [MR. MCMILLAN]: Is this one of the items that came to your
17 attention during the course of reviewing public documents?

18 A [MS. GASKINS]: Yes.

19 Q [MR. MCMILLAN]: And this is a Joint Resolution of the United
20 States Congress. Is that correct?

21 A [MS. GASKINS]: Yes.

22 CDC [MR. MCMILLAN]: Your Honor, the defense requests that this
23 document be admitted into evidence as the next defense exhibit in

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1 order, which I believe would be Defense Exhibit Z, Zulu, if I get
2 that right.

3 TC [LCDR STONE]: You got it right.

4 MJ [CAPT ALLRED]: Very well. Defense Exhibit Zulu will be
5 admitted without objection.

6 CDC [MR. MCMILLAN]: I would request that it be displayed to the
7 members, Your Honor.

8 MJ [CAPT ALLRED]: You may.

9 Q [MR. MCMILLAN]: Ms. Gaskins, you've identified this as the
10 Authorization for the Use of Military Force. Can you tell us the
11 date of this document?

12 A [MS. GASKINS]: The date is September 18, 2001.

13 Q [MR. MCMILLAN]: And can you tell us, by directing your
14 attention to the first sentence on your screen, what the purpose of
15 this joint resolution was?

16 A [MS. GASKINS]: The purpose of this joint resolution is to
17 authorize the use of United States Armed Forces against those
18 responsible for the recent attacks launched against the United
19 States.

20 CDC [MR. MCMILLAN]: Your Honor, may I display--have this next
21 document displayed to the witness and to the Military Judge?

22 MJ [CAPT ALLRED]: You may. Does the government need a
23 foundation for this document?

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1 ATC [MAJ ASHMAWY]: No, sir.

2 MJ [CAPT ALLRED]: What comes after Zulu?

3 CDC [MR. MCMILLAN]: Alpha-Alpha.

4 ATC [MAJ ASHMAWY]: Let the record reflect that the civilian
5 defense counsel got it right.

6 MJ [CAPT ALLRED]: I don't want to embarrass Major Indigo, but
7 the record will so reflect.

8 ATC [MAJ ASHMAWY]: Your Honor, I've got confirmation that the
9 Air Force does in fact use Indigo.

10 MJ [CAPT ALLRED]: Okay. I apologize. Defense Exhibit
11 Alpha-Alpha.

12 CDC [MR. MCMILLAN]: Your Honor, I would request that this
13 document be admitted into evidence as Exhibit Alpha-Alpha.

14 MJ [CAPT ALLRED]: Very well.

15 CDC [MR. MCMILLAN]: And that it be displayed to the members.

16 MJ [CAPT ALLRED]: You may.

17 **Questions by the civilian defense counsel:**

18 Q [MR. MCMILLAN]: Ms. Gaskins, can you identify this document
19 on your screen?

20 A [MS. GASKINS]: This is a Presidential Address to the Nation
21 dated October 7, 2001.

1 Q [MR. MCMILLAN]: And very briefly, just by looking at the
2 first paragraph of this set of remarks, can you tell us what the
3 general purpose of these comments were?

4 A [MS. GASKINS]: The general purpose of these comments is to
5 announce the beginning of hostile action in the Middle East toward al
6 Qaeda and the Taliban.

7 Q [MR. MCMILLAN]: And the date of this set of remarks was?

8 A [MS. GASKINS]: October 7, 2001.

9 Q [MR. MCMILLAN]: And this announced the commencement of
10 hostilities for Operation Enduring Freedom?

11 A [MS. GASKINS]: Yes.

12 Q [MR. MCMILLAN]: Specifically mentioning military strikes
13 having begun against al Qaeda, and military installations of the
14 Taliban regimes. Is that correct?

15 A [MS. GASKINS]: Yes.

16 CDC [MR. MCMILLAN]: Your Honor, the next two exhibits are
17 classified documents. We have cleared with the court security
18 officer the questions that we wish to ask Ms. Gaskins about these
19 documents. I will not display them on the overhead, but I would like
20 the bailiff to hand a copy to the witness and a copy to the Military
21 Judge.

22 MJ [CAPT ALLRED]: Very good.

1 CDC [MR. MCMILLAN]: The prosecution has previously been
2 provided with a copy of this document.

3 MJ [CAPT ALLRED]: Very good.

4 Q [MR. MCMILLAN]: Ms. Gaskins, can you identify the document
5 that has been handed to you?

6 A [MS. GASKINS]: This document is the CENTCOM Standing Rules of
7 Engagement for U.S. Forces.

8 Q [MR. MCMILLAN]: When were these rules of engagement issued,
9 and what period of time do they cover?

10 A [MS. GASKINS]: These Rules were issued 1 October 1995, and
11 they cover that period until the present.

12 Q [MR. MCMILLAN]: Did this set of Rules of Engagement come to
13 your attention in the course of one of the research projects you were
14 asked to undertake in this matter?

15 A [MS. GASKINS]: Yes.

16 CDC [MR. MCMILLAN]: Your Honor, the defense would move that
17 this document be accepted into evidence as the next defense exhibit
18 in order, Beta-Beta.

19 DC [LCDR MIZER]: Bravo-Bravo.

20 CDC [MR. MCMILLAN]: It was only a matter of time.

21 MJ [CAPT ALLRED]: Is that how we go to double letters, is
22 Bravo-Bravo? Okay. Very good. Without objection, apparently,
23 Defense Exhibit Bravo-Bravo can be admitted into evidence and the

1 words "for identification" be stricken. I will give my copy to the
2 court reporter, what appears to be the original.

3 Q [MR. MCMILLAN]: Ms. Gaskins, do these standing Rules of
4 Engagement for CENTCOM make any mention at all of al Qaeda as an
5 enemy of the United States?

6 A [MS. GASKINS]: No.

7 Q [MR. MCMILLAN]: Do they authorize strikes against al Qaeda?

8 A [MS. GASKINS]: No, they do not.

9 Q [MR. MCMILLAN]: Do they mention or authorize strikes against
10 terrorists, generally?

11 A [MS. GASKINS]: No.

12 Q [MR. MCMILLAN]: Are these Rules of Engagement still in
13 effect?

14 A [MS. GASKINS]: Yes.

15 Q [MR. MCMILLAN]: And can you remind us when they were first
16 issued?

17 A [MS. GASKINS]: 1 October 1995.

18 Q [MR. MCMILLAN]: And this relates to which theater of command?

19 A [MS. GASKINS]: U.S. CENTCOM, Central Command.

20 CDC [MR. MCMILLAN]: Your Honor, could I ask the bailiff to hand
21 the witness the next classified document? And there's a copy for the
22 Military Judge.

23 MJ [CAPT ALLRED]: You may.

1 Q [MR. MCMILLAN]: Ms. Gaskins, can you identify this document?

2 A [MS. GASKINS]: These are the Rules of Engagement, Serial 2,
3 for Operation Enduring Freedom.

4 Q [MR. MCMILLAN]: Is this set of Rules of Engagement
5 subordinate to the theater-wide Rules of Engagement issued by
6 CENTCOM?

7 A [MS. GASKINS]: Yes.

8 Q [MR. MCMILLAN]: So is this an operation-specific set of Rules
9 of Engagement within the CENTCOM area of command?

10 A [MS. GASKINS]: Yes.

11 Q [MR. MCMILLAN]: Was this a document that you also found in
12 the course of your research project in this matter?

13 A [MS. GASKINS]: Yes, it is.

14 CDC [MR. MCMILLAN]: Your Honor, the defense would move that
15 this document be admitted into evidence as Defense Exhibit
16 Charlie-Charlie.

17 MJ [CAPT ALLRED]: Very well. Without objection, this will be
18 admitted, apparently.

19 CTC [MR. TRIVETT]: No objections.

20 MJ [CAPT ALLRED]: Okay. I will give my copy to the court
21 reporter.

1 Q [MR. MCMILLAN]: Ms. Gaskins, does this document, the Rules of
2 Engagement for Operation Enduring Freedom, identify al Qaeda
3 explicitly?

4 A [MS. GASKINS]: Yes, it does.

5 Q [MR. MCMILLAN]: Does this document authorize status-based
6 strikes against al Qaeda?

7 A [MS. GASKINS]: Yes.

8 Q [MR. MCMILLAN]: Does it authorize strikes against command and
9 control elements of al Qaeda expressly?

10 A [MS. GASKINS]: Yes, it does.

11 Q [MR. MCMILLAN]: Is this the first time in the record of your
12 search where you found any reference to al Qaeda?

13 A [MS. GASKINS]: Yes, it is.

14 Q [MR. MCMILLAN]: Your review of classified rules of engagement
15 identified nothing earlier mentioning al Qaeda explicitly?

16 A [MS. GASKINS]: Not up to the SECRET level. No.

17 Q [MR. MCMILLAN]: As you look at this document, Ms. Gaskins,
18 are you able to determine the date on which this set of Rules of
19 Engagement for Operation Enduring Freedom was first issued?

20 A [MS. GASKINS]: The original Rules of Engagement are dated 5
21 October. This is based on the message traffic at the beginning of
22 this document. This is a serial 2. It's combining all previous
23 Rules of Engagement for Operation Enduring Freedom.

1 Q [MR. MCMILLAN]: Is it 5 October or is it 6 October,
2 Ms. Gaskins, that the first Rule of Engagement for Operation Enduring
3 Freedom was published? Do you recall Ms. Gaskins--let me ask this
4 next question.

5 Do you recall previously mentioning to me that an execute--
6 a Strike Execute Order was apparent in the message traffic in this
7 set of rules of engagement?

8 A [MS. GASKINS]: Yes.

9 Q [MR. MCMILLAN]: And what was the date of that strike execute
10 order?

11 A [MS. GASKINS]: The Strike Execute Order was dated October
12 5th, 2001. The first Rule of Engagement is dated October 6th.

13 Q [MR. MCMILLAN]: Now, is there also a reference to October 2,
14 2001 visible in that document?

15 A [MS. GASKINS]: Yes, there is.

16 Q [MR. MCMILLAN]: And what occurred or what was ordered on
17 October 2, 2001?

18 A [MS. GASKINS]: On October 2nd, there's a Rules of Engagement
19 for noncombatant evacuation operations.

20 Q [MR. MCMILLAN]: So the Authorization for the Use of Military
21 Force against those responsible for the September 11th attacks is
22 September 18th. Is that correct?

23 A [MS. GASKINS]: Yes.

1 Q [MR. MCMILLAN]: The order to evacuate civilians from
2 Afghanistan was October 2nd, 2001?

3 A [MS. GASKINS]: Yes.

4 Q [MR. MCMILLAN]: A Strike Execute Order was issued October 5,
5 2001?

6 A [MS. GASKINS]: Yes.

7 Q [MR. MCMILLAN]: The Rule of Engagement that expressly
8 mentioned al Qaeda and authorized status based strikes against al
9 Qaeda is dated October 6, 2001?

10 A [MS. GASKINS]: Yes, it is.

11 Q [MR. MCMILLAN]: And the President announced to the Nation in
12 an address from the White House on October 7th that strikes had
13 begun. Is that correct?

14 A [MS. GASKINS]: Yes.

15 CDC [MR. MCMILLAN]: Thank you, Ms. Gaskins.

16 I have no further questions.

17 MJ [CAPT ALLRED]: Very good.

18 Bailiff, would you return those two SECRET documents to Mr.
19 McMillan, please; unless the witness will need them.

20 **[The bailiff did as directed.]**

21 CTC [MR. TRIVETT]: Good morning, Ms. Gaskins.

22 WIT [MS. GASKINS]: Good morning.

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CROSS-EXAMINATION

Questions by the civilian trial counsel:

Q [MR. TRIVETT]: Can you briefly describe how you went about conducting your search regarding armed conflict?

A [MS. GASKINS]: I originally did an unclassified search, obviously, open sourced, and academic data bases as well as journal data bases. And then I went to the SIPRNET, which is the military's SECRET level, and used various search engines and also data bases that can find message traffic and documents classified at the SECRET level and below.

Q [MR. TRIVETT]: What exactly were you looking for? What kind of information were you looking for during your search?

A [MS. GASKINS]: I was looking for rules of engagement that mentioned al Qaeda.

Q [MR. TRIVETT]: So your entire search was limited to rules of engagement?

A [MS. GASKINS]: Yes.

Q [MR. TRIVETT]: Did you just search for al Qaeda? Or did you also search for Usama bin Laden?

A [MS. GASKINS]: I searched for both. Both are mentioned in the rules of engagement.

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1 Q [MR. TRIVETT]: So, just so we're clear. All you were looking
2 for were rules of engagement. You weren't looking for any other
3 public statements by any public officials regarding the United
4 States' response to anything that al Qaeda has done?

5 A [MS. GASKINS]: That was my original search. That was only in
6 open source.

7 Q [MR. TRIVETT]: Were you aware of the bombing in Aden, Yemen,
8 when our soldiers, who were en route to Somalia back in 1992, were
9 intentionally targeted by al Qaeda operatives?

10 A [MS. GASKINS]: I'm aware of that. Yes.

11 Q [MR. TRIVETT]: Did you find that significant in regard to
12 your search on whether an armed conflict existed?

13 A [MS. GASKINS]: Yes. I searched documents back to the late
14 1980s, but have not seen at the SECRET level or below any documents
15 that contained al Qaeda in their rules of engagement.

16 Q [MR. TRIVETT]: Well, isn't it true that the United States
17 wasn't aware that Usama bin Laden's organization was even called al
18 Qaeda until roughly 1996?

19 A [MS. GASKINS]: That's correct.

20 Q [MR. TRIVETT]: Did you look at also the bombing in Riyadh,
21 Saudi Arabia?

22 A [MS. GASKINS]: No, I did not.

1 Q [MR. TRIVETT]: In your search, did you find Usama bin Laden's
2 1996 declaration of war?

3 A [MS. GASKINS]: No, I did not.

4 Q [MR. TRIVETT]: Have you read that document before? Are you
5 familiar with that document?

6 A [MS. GASKINS]: No, I'm not.

7 Q [MR. TRIVETT]: How about the 1998 fatwa, where he declared
8 that civilians were legitimate targets in his war and that they could
9 be killed anywhere in the world, wherever they could be found?

10 A [MS. GASKINS]: It's my understanding that that's correct
11 based on the embassy bombings that took place that year.

12 Q [MR. TRIVETT]: And that was in fact done prior to the embassy
13 bombings. Right?

14 A [MS. GASKINS]: Yes.

15 Q [MR. TRIVETT]: You would agree that is significant in
16 determining whether or not there was a period of armed conflict if
17 our enemies declared war against us. Correct?

18 CDC [MR. MCMILLAN]: Objection, Your Honor. This calls for a
19 legal conclusion that is well beyond the scope of direct.

20 MJ [CAPT ALLRED]: Sustained.

21 Q [MR. TRIVETT]: You're familiar with the 1998 attacks on the
22 U.S. embassies you just referenced. Correct?

23 A [MS. GASKINS]: Yes.

1 Q [MR. TRIVETT]: And there's no Rule of Engagement involved in
2 how the United States might respond. Correct? That you found?

3 A [MS. GASKINS]: You're looking for specific rules of
4 engagement to counter those kinds of attacks?

5 Q [MR. TRIVETT]: Correct.

6 A [MS. GASKINS]: I didn't see them at the SECRET level or
7 below. No.

8 Q [MR. TRIVETT]: But in fact, we did respond militarily. The
9 United States responded militarily against Usama bin Laden in 1998.
10 Correct?

11 A [MS. GASKINS]: Yes.

12 Q [MR. TRIVETT]: Do you know how we responded?

13 A [MS. GASKINS]: They launched cruise missiles off a Navy ship
14 toward a training camp, I believe, in Afghanistan.

15 Q [MR. TRIVETT]: In looking at your open source search, did you
16 find a statement that former Secretary of State Madeleine Albright
17 made to the 9/11 Commission regarding the Clinton administration's
18 response to the East Africa embassy bombings?

19 A [MS. GASKINS]: No, I did not.

20 [END OF PAGE]

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1 Q [MR. TRIVETT]: Are you familiar with the fact that after the
2 bombings, not only did we respond with Tomahawk missiles, but that
3 President Clinton ordered submarines to stay at launch depth for
4 months afterwards in the event we got actionable intelligence so that
5 we could target and presumably kill Usama bin Laden if we knew his
6 whereabouts?

7 A [MS. GASKINS]: It's my understanding that actionable
8 intelligence collection does not constitute a state of armed
9 conflict.

10 CTC [MR. TRIVETT]: Sir, at this point the witness has just
11 given an opinion on a legal conclusion regarding armed conflict that
12 I think has opened the door to me asking the question that I asked
13 before.

14 CDC [MR. MCMILLAN]: It remains beyond the scope of direct, Your
15 Honor.

16 MJ [CAPT ALLRED]: I want the members--the members will be
17 called upon to decide when and whether a period of armed conflict
18 began. So let's ask the witness questions about facts that they can
19 testify to, and let the members make that conclusion.

20 CTC [MR. TRIVETT]: Yes, sir.

21 [END OF PAGE]

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1 Q [MR. TRIVETT]: So there were no rules of engagement that you
2 found despite the fact that we did respond militarily in 1998.
3 Correct?

4 A [MS. GASKINS]: I did not find them at the SECRET level or
5 below.

6 Q [MR. TRIVETT]: You're familiar with the attack on the USS
7 Cole that killed 17 sailors?

8 A [MS. GASKINS]: Yes.

9 Q [MR. TRIVETT]: Did you find any Rule of Engagement
10 authorizing our response to that attack?

11 A [MS. GASKINS]: Not at the SECRET level or below.

12 Q [MR. TRIVETT]: Do you believe we were authorized to respond
13 had we had actionable intelligence on where Usama bin Laden was?

14 CDC [MR. MCMILLAN]: Objection, Your Honor.

15 This calls for speculation. Again, it's beyond the scope.
16 It calls for an opinion----

17 MJ [CAPT ALLRED]: ----well, ask her if she knows, not whether
18 she believes, because if she knows, she can answer. And if she
19 doesn't know, that will be her answer to it.

20 CTC [MR. TRIVETT]: Yes, sir.

21 [END OF PAGE]

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1 Q [MR. TRIVETT]: Do you know if we were authorized under the
2 laws of war to respond to the attack on the USS Cole in October of
3 2000?

4 A [MS. GASKINS]: I haven't seen any documents that reference a
5 response, so I don't.

6 Q [MR. TRIVETT]: Are you aware of the attacks on 11 September
7 2001 which killed 2,973 Americans?

8 A [MS. GASKINS]: Yes.

9 Q [MR. TRIVETT]: When was the first time that you saw a Rule of
10 Engagement authorizing our response to that?

11 A [MS. GASKINS]: The first Rule of Engagement I saw was dated 6
12 October 2001.

13 Q [MR. TRIVETT]: Do you know if we were authorized to respond
14 militarily immediately had we known where our proper target package
15 was after the attacks on 11 September 2001.

16 CDC [MR. MCMILLAN]: Your Honor, this is the same question.

17 MJ [CAPT ALLRED]: This is the same problem. We're not asking
18 her to be an expert in the law of armed conflict. We're just asking
19 about what documents she found and what they reflect.

20 CTC [MR. TRIVETT]: I will move on, sir.

21 Q [MR. TRIVETT]: What was the date of the President's statement
22 to the Nation?

23 A [MS. GASKINS]: October 7th, 2001.

1 Q [MR. TRIVETT]: Isn't it true that the President also made not
2 only another public statement, but actually a military order on 13
3 November 2001?

4 A [MS. GASKINS]: I couldn't say.

5 Q [MR. TRIVETT]: So in all of your searches of all of the
6 public statements of officials near or around September 11, 2001, you
7 weren't aware that the President gave an order that would allow for
8 the detention and trial of certain detainees?

9 A [MS. GASKINS]: I don't. I was looking for the nearest rules
10 of engagement that I could find.

11 Q [MR. TRIVETT]: Were you aware specifically that he had found
12 attacks on our diplomatic facilities, our U.S. warships, and the
13 attacks of September 11th, to have given rise to an armed conflict to
14 which the laws of war would apply?

15 A [MS. GASKINS]: I believe that goes beyond my scope of whether
16 a rise of armed conflict dictates an armed conflict.

17 CTC [MR. TRIVETT]: Thank you, Ms. Gaskins.

18 No further questions.

19 [END OF PAGE]

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REDIRECT EXAMINATION

Questions by the civilian defense counsel:

Q [MR. MCMILLAN]: Just one question on redirect, Ms. Gaskins. Do you have an understanding as to why the defense felt it necessary to ask you to search for rules of engagement mentioning al Qaeda?

A [MS. GASKINS]: Yes.

Q [MR. MCMILLAN]: Could you explain what that was?

A [MS. GASKINS]: It was important to search for rules of engagement because rules of engagement named specifically a targeted enemy.

Q [MR. MCMILLAN]: Do you have an understanding as to whether the defense had requested the prosecution to produce rules of engagement mentioning al Qaeda?

A [MS. GASKINS]: Yes.

Q [MR. MCMILLAN]: Do you know what the response from the prosecution was to that discovery request?

A [MS. GASKINS]: The response to that discovery request was any rules of engagement that mentioned al Qaeda would be publicly available.

CDC [MR. MCMILLAN]: Thank you.

No further questions.

CTC [MR. TRIVETT]: No further questions, sir.

1 MJ [CAPT ALLRED]: Members of the court do you have any
2 questions for Ms. Gaskins? I think it seems like no.

3 Thank you very much, ma'am, for your testimony. You are
4 excused from the courtroom.

5 CDC [MR. SCHNEIDER]: Good morning, Your Honor.

6 MJ [CAPT ALLRED]: Good morning.

7 CDC [MR. SCHNEIDER]: The defense has two witnesses left, both
8 of whom we expect to complete before the morning recess, and I
9 propose to try to accomplish that right now.

10 As of this morning, neither of these witnesses is available
11 to testify in court. And what I would like to do is to lay out the
12 foundation for the admission of written answers to questions. And I
13 would like to do that--I will do that to the best of my ability
14 without commenting on the substance of the evidence. But I think it
15 will save time, instead of following the government security officer,
16 to indicate.

17 With your permission, I would like to have handed to both
18 the clerk and Your Honor a set of the exhibits that I will be going
19 through. And they will be marked--I hope they will be marked as my
20 request for identification I believe starting at Exhibit Delta-Delta
21 for identification. And I would ask that the first document set be
22 marked at this time for identification as to Defense Exhibit
23 Delta-Delta.

1 Your Honor, this is a 13-page type-written document
2 entitled Questions for Detainees. It is in English; it is undated.
3 I will represent to the Court that it was prepared in February 2008,
4 following the Court's 13 February order. It was transmitted to the
5 Government on 3 March. It was transmitted again on 18 March
6 following an additional ruling of the Court dated 14 March. It was
7 cleared for transmission to certain inhabitants at Guantanamo.
8 On 27 March it's delivered from Washington, D.C. from the government
9 security officer to Guantanamo. We were informed that the week of 31
10 March this was delivered to detainee Khalid Sheikh Mohammed, also
11 known as KSM.

12 At this time, I would ask that the second exhibit in the
13 group be marked as--Echo-Echo?

14 MJ [CAPT ALLRED]: Okay, I'm sorry. Now, Delta-Delta is the
15 English questions? The Arabic version of the English questions?

16 CDC [MR. SCHNEIDER]: Precisely.

17 MJ [CAPT ALLRED]: And the first set of responses from KSM is
18 Echo-Echo?

19 CDC [MR. SCHNEIDER]: To be clear, the document in Arabic is
20 Echo-Echo.

21 MJ [CAPT ALLRED]: Okay. I'm sorry.

22 CDC [MR. SCHNEIDER]: It's the second stapled document in the
23 group.

1 MJ [CAPT ALLRED]: Oh, staples.

2 CDC [MR. SCHNEIDER]: Sorry. I think if Your Honor would remove
3 the big paper clip that might facilitate following the presentation.

4 MJ [CAPT ALLRED]: I'm with you.

5 CDC [MR. SCHNEIDER]: It is our understanding that the Arabic
6 version also was cleared by the government security officer and
7 delivered to the detainee KSM sometime during the week of 31 March.
8 I would ask that the third stapled document in the package be marked
9 as I believe Foxtrot-Foxtrot. How am I doing? Okay.

10 Your Honor, this is what we understand to be the English
11 type-written four-page answers provided by KSM, submitted to the
12 government security officer for clearance, redactions made where
13 indicated by that entity or person, and returned to us in the format
14 you have in front of you, on 30 April 2008.

15 MJ [CAPT ALLRED]: Very good.

16 CDC [MR. SCHNEIDER]: Your Honor, the last--not the last, but
17 the fourth stapled document in the package is a 16-page document. I
18 will tell you that this is simply an integrated set of the questions
19 in English, Exhibit Delta-Delta, and KSM's answers in the English
20 which is Foxtrot-Foxtrot. I would call them the integrated answers
21 and questions for KSM.

22 I would ask that the next document in order be marked for
23 identification at this time as Defense Exhibit Golf-Golf.

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1 Needless to say, if one of my colleagues wanted to play a
2 trick on me, I could really embarrass myself with these. But I think
3 so far I have been given accurate, complete, and appropriate
4 information that checks out.

5 Golf-Golf, Your Honor, is--let me say this. That the same
6 first two documents, Delta-Delta and Echo-Echo, also were sent to
7 Detainee [REDACTED], Walid bin Attash. The document that you have before
8 you marked for identification as Golf-Golf--excuse me--as Hotel-Hotel
9 would be the typewritten answers in English, which we understand were
10 received from that individual sometime I believe in June, and
11 returned to us also in June. I can give you the precise dates if you
12 need them.

13 The last exhibit in order, which I would ask be marked for
14 identification only at this time, would be Defense Exhibit
15 India-India. It is, Your Honor, an integrated set of the questions
16 for detainees, which is also Exhibit Delta-Delta, and Mr. bin
17 Attash's written answers which were transmitted to us. I see I have
18 the date there 1 July 2008, not June. And so there, that would be an
19 integrated combination of Delta-Delta and Hotel-Hotel, the integrated
20 answers being marked for identification only as India-India.

21 I'm prepared to make representations regarding
22 unavailability of the witness. I think I can do it also without
23 commenting on the evidence.

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1 We have been in contact with detailed counsel for each of
2 those individuals. It's our understanding that, with regard to
3 Khalid Sheikh Mohammed, he is intending to invoke self-incrimination
4 rights and not appear.

5 The arrangements were made for the first time to be able to
6 visit with him individually. Lieutenant Commander Mizer was cleared
7 for a visit on Sunday, July 20. Mr. Mohammed had sent word that he
8 would not be available, in his view, would not meet with Lieutenant
9 Commander Mizer, and would not voluntarily appear in court. He is
10 aware that the written answers are available as a substitute.

11 Mr. bin Attash, his counsel, both--I will also say, no
12 surprise, both individuals have been charged with crimes. I won't go
13 into the details.

14 Mr. bin Attash we are told through counsel would meet with
15 Lieutenant Commander Mizer. Arrangements were made for the first
16 time for Lieutenant Commander Mizer, who has the appropriate security
17 clearance, to meet with Mr. bin Attash, and he did so 20 July,
18 Sunday, the day before trial. I will advise the Court that Mr. bin
19 Attash expressed that he would consider coming here and testifying,
20 but he wanted to think about it. He wanted to pray about it over the
21 weekend.

22 Lieutenant Commander Mizer was permitted to meet with him
23 again I believe on Sunday, July 27, at which time Mr. bin Attash

1 effectively sent his regards to the Court and said that he would not
2 be coming voluntarily in light of the written answers.

3 It is our position, again without commenting on any
4 substance, that under the Rules for Military Commission 703, the
5 written answers are appropriate given the unavailability of the
6 witness at this time. We would offer them both under the Court's
7 previous orders as in effect written answers to written questions
8 permitted by rule 702(c) and (g).

9 As the Court may be aware, we gave notice on July 10 under
10 the hearsay provision, which is rule, I believe it's 803. We believe
11 that, given the invocation of whatever privileges attach under
12 Military Commission Rule of Evidence 301 and the Fifth Amendment, the
13 witness is unavailable. And in light of objections to trial
14 testimony based on national security, we think that the written
15 answers are probative under Evidence Rule 401, admissible under rule
16 402, not classified under rule 505, competent under rule 601, based
17 on personal knowledge on their face based on rule 602. And given the
18 unavailability of the witness under Military Rules of Evidence as I
19 understand them, under the Manual For Courts-Martial, these witnesses
20 either will--either should be excused in this Court's discretion
21 based on the assertion of a privilege under 804(a)(1), the refusal to
22 testify under (a)(2), or unavailability under (a)(5) of rule 804,

1 and, as I understand it, under Article 49(b)(2) of the Manual For
2 Courts-Martial.

3 We also believe it is admissible under the hearsay
4 exception as a statement against interest under 804(a)(b)(3). That
5 would be A Bravo 3. We believe it is a statement against interest.
6 Again, I don't intend to comment on the evidence based on that the
7 declarant's penal interests would be so contrary to a reasonable
8 person's understanding that the statements should be considered to
9 have probative value and be reliable evidence.

10 I am prepared to offer additional discussion of the basis
11 for the offer, but I would suggest that what I've said so far should
12 be sufficient to permit counsel for the government to respond if they
13 wish and for the Court to consider it.

14 At this time, the defense offers into evidence Exhibits
15 Delta-Delta, Echo-Echo, Foxtrot-Foxtrot, Golf-Golf, Hotel-Hotel, and
16 India-India; and, if admitted into evidence, would ask that the
17 exhibits be passed among the members at this time.

18 What I would propose there, just so you know what's coming,
19 is that the originals would stay in the clerk's possession; we would
20 make copies so that one set need not be passed seriatim, and that
21 those courtesy copies would be collected after members have an
22 opportunity to review in court the written answers as much or as
23 little as they wish. And the only documents that would go into the

1 deliberations would be those, the one set of originals that are
2 admitted into evidence, if admitted. The courtesy copies would be
3 collected at the time that the members are excused from the
4 courtroom.

5 MJ [CAPT ALLRED]: Very well. Thank you for your proffer.

6 Does the government object to the introduction of these
7 exhibits?

8 CTC [MR. TRIVETT]: Sir, can we have five minutes to confer
9 amongst each other prior to giving you our objection, if any?

10 MJ [CAPT ALLRED]: Sure. Why don't we take a recess?

11 **[The military commission recessed at 0927, 1 August 2008.]**

12 **[The R.M.C. 803 session was called to order at 0941, 1 August 2008.]**

13 **All parties present when the commission recessed were once again**
14 **present. The members were absent.]**

15 MJ [CAPT ALLRED]: Court is called to order.

16 Is there government objection to these last six exhibits
17 from the defense?

18 CTC [MR. TRIVETT]: Sir, can we set forth our objection in front
19 of the members?

20 MJ [CAPT ALLRED]: No. I don't think you need to. I mean, I'm
21 going to rule on it. They don't need to hear it. Do they?

22 CTC [MR. TRIVETT]: Well, we think it's important that they hear
23 it, just based on certain representations that were made by defense

1 counsel that the prosecution doesn't necessarily agree with, although
2 we don't think it was an intentional misrepresentation.

3 MJ [CAPT ALLRED]: Okay. We will call the members back into the
4 courtroom. They can hear this if you think it's important.

5 **[The members entered the courtroom.]**

6 **[The R.M.C. 803 session terminated and the military commission**
7 **commenced at 0942, 1 August 2008.]**

8 MJ [CAPT ALLRED]: Thank you. Please be seated **[all persons did**
9 **as directed]**. The members have returned to the courtroom.

10 Trial counsel, what's the government's response to the
11 defense offer of these last six exhibits?

12 CTC [MR. TRIVETT]: Sir, in responding to certain
13 representations from the defense counsel, it's the prosecution's
14 understanding, based on the fact that I'm one of the prosecutors in
15 the case in which Khalid Sheikh Mohammed and Walid bin Attash are
16 being charged with, they're involved with the 9/11 case, is that they
17 represent themselves. They've made it very clear on the record that
18 they in fact represent themselves. Any representations by anyone as
19 their stand-by counsel, whether it be Captain Prescott Prince or Mr.
20 Ed McMahon, both of which are on their team, would not satisfy any
21 requirement from the accuseds themselves that they are in fact
22 unavailable or were unwilling to testify. So we just wanted to
23 clarify that aspect of it.

1 We in no way think that the defense intentionally
2 misrepresented that. But based on the facts as we know them, we
3 wanted the record very clear that that is our understanding.
4 Furthermore, the prosecution--we want the record to state very
5 clearly that the prosecution is in no way at this time preventing
6 them from coming to testify. We have in fact requested as an
7 alternative to their testimony that they be given a videotaped
8 deposition in which both defense and prosecution would be able to
9 question and cross-examine them and their answers that are based in
10 these records. But that being said, sir, we have no objection to--we
11 have no objection to them.

12 MJ [CAPT ALLRED]: Okay.

13 CTC [MR. TRIVETT]: We just want it very clear for the record
14 that that's the position of the U.S. Government.

15 MJ [CAPT ALLRED]: Okay. I thought you were going to make me
16 make a hard decision here. No objection. And I don't think Mr.
17 Schneider intended to misrepresent anything. Did you? It's been a
18 long road to try to see whether these witnesses could be made
19 available or would come.

20 CDC [MR. SCHNEIDER]: I can clarify one thing. It's not an
21 attempt to argue; it's actually an attempt to educate.

22 MJ [CAPT ALLRED]: Me?

23 CDC [MR. SCHNEIDER]: No.

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1 MJ [CAPT ALLRED]: Or Mr. Trivett?

2 CDC [MR. SCHNEIDER]: You're well aware, sir. Mr. Trivett.

3 Just to be clear, the counsels who were detailed to represent those
4 two individuals, or who were otherwise engaged, communicated to us
5 that they felt they were still in a position to make whatever
6 representation they told us.

7 Second, Mr. bin Attash communicated his position in person,
8 through a translator while he was incarcerated, to Lieutenant
9 Commander Mizer. KSM sent a handwritten note translated. So this
10 isn't just--well, that's what happened.

11 MJ [CAPT ALLRED]: Okay.

12 Well, members, you have been treated to representations by
13 both counsel, and there is no objection from the government to these
14 six exhibits. And, therefore, without objection, but noting the
15 positions of both parties, I will admit Defense Exhibits Delta-Delta
16 through India-India. And you may--bailiff, if you will give copies
17 to each of the members.

18 CDC [MR. SCHNEIDER]: Again, we would ask that the members each
19 be given a courtesy copy at this time to review as they sit in court.
20 And when sufficient time, in Your Honor's discretion, has transpired
21 we would propose that we would collect the courtesy copies and that
22 they would then have available to them the original admitted into
23 evidence along with all the other evidence admitted.

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1 MJ [CAPT ALLRED]: Okay.

2 CDC [MR. SCHNEIDER]: At this point, I will sit down, unless you
3 have any questions for me.

4 MJ [CAPT ALLRED]: No. Well, my only question is kind of for
5 the defense team. Are there other witnesses that you intend to call
6 now?

7 CDC [MR. SCHNEIDER]: No. We would rest at this time. And we
8 would like to give the members sufficient time to review the last six
9 exhibits admitted, at the completion of which the defense rests its
10 case.

11 MJ [CAPT ALLRED]: Okay. Well, let me ask the government to
12 think, while the members are reading, about whether they have
13 evidence in rebuttal that they would like to offer.

14 CDC [MR. SCHNEIDER]: I made a mistake. I made six copies, and
15 we have seven members.

16 MJ [CAPT ALLRED]: Oh, here. You can----

17 CDC [MR. SCHNEIDER]: Is that okay?

18 MJ [CAPT ALLRED]: Here's one more.

19 CDC [MR. SCHNEIDER]: My apologies.

20 CTC [MR. MURPHY]: Your Honor, may we have a few minutes?

21 MJ [CAPT ALLRED]: There was talk of a video teleconference
22 witness. Did you choose not to call that witness, or is there a time

1 issue that we need to resolve so that you can still call that
2 witness?

3 CDC [MR. MCMILLAN]: No. She will not be called by the defense,
4 Your Honor.

5 MJ [CAPT ALLRED]: Very good. Okay. So you're prepared to rest
6 then and haven't been prejudiced by the timing of the court sessions.

7 CDC [MR. SCHNEIDER]: No. We made a decision in light of the
8 evidence in the case not to call.

9 MJ [CAPT ALLRED]: Fair enough. Very good. Thank you, sir.

10 **[The members read and examined DE DD through II.]**

11 MJ [CAPT ALLRED]: Do any of the members need additional time to
12 review this? **[The members nodded in response]** Okay.

13 **[The members continued reading and examining DE DD through II.]**

14 Okay, members, it looks like everyone has had sufficient
15 time to read those exhibits.

16 Bailiff, if you will collect them, please; and return them
17 to the defense. **[The bailiff did as directed.]**

18 A copy or I should say the original of these documents will
19 be provided to you when you retire to deliberate with all the other
20 evidence that has been admitted, all the other documents and
21 photographs and things that have been admitted. And you will be able
22 to consult them along with all the other evidence during your
23 deliberations.

1 Does this represent the end of the defense case then?

2 CTC [MR. TRIVETT]: It does, Your Honor.

3 MJ [CAPT ALLRED]: Very good. Thank you. Does the government
4 have any evidence to offer in rebuttal?

5 CTC [MR. TRIVETT]: Sir, we have one document we may need to
6 litigate its admissibility outside the presence of the members.

7 MJ [CAPT ALLRED]: We do?

8 CDC [MR. SWIFT]: I concur, Your Honor.

9 MJ [CAPT ALLRED]: Okay. Well, members, if you will step into
10 the deliberation room, we will take up the final piece of evidence.

11 BAILIFF: All rise.

12 **[All persons did as directed, and the members withdrew from the
13 courtroom.]**

14 **[The military commission recessed terminated and the R.M.C. 803
15 session commenced at 1017, 1 August 2008.]**

16 MJ [CAPT ALLRED]: Okay. The members have withdrawn from the
17 courtroom. Please be seated. **[All persons did as directed.]**

18 What is the final document?

19 CTC [MR. TRIVETT]: Sir, it's the only document the prosecution
20 would ask to be admitted in its rebuttal case. It's a statement of
21 former Secretary of State Madeleine K. Albright. She made it on
22 March 23, 2004 in one of the public hearings. It's described as
23 testimony before the Commission, but it is a prepared written

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1 statement. To my knowledge, it's not in the final 9/11 Commission
2 Report, but it can be found on the official 9/11 Commission Web Site
3 and as part of the public record.

4 MJ [CAPT ALLRED]: Do you have a copy of it to mark? This is
5 prosecution exhibit, what?

6 CTC [MR. TRIVETT]: It's the next one in order, sir.

7 MJ [CAPT ALLRED]: 146. Prosecution 146 is marked for
8 identification. Have you shown this to the defense?

9 CTC [MR. TRIVETT]: Not yet, sir.

10 MJ [CAPT ALLRED]: Do you know your objection without looking at
11 the document?

12 CDC [MR. SWIFT]: I'm handling it, sir.

13 MJ [CAPT ALLRED]: Okay.

14 CDC [MR. SWIFT]: Yes, Your Honor, I do. I object on the basis
15 of hearsay. Although it's within a public record, it's not a
16 statement of a public official in that Madeleine Albright was quite
17 clear at the time she held no public capacity in her position. So I
18 object under hearsay, and we were not provided notice for the hearsay
19 catch-all rule and, therefore, object to its admissibility. However,
20 proffer, that if it is admitted then there are significant portions
21 of the 9/11 Report, statements of the President, et cetera, regarding
22 the issue of when the war begin that we will want to put into
23 evidence.

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1 MJ [CAPT ALLRED]: Okay. Well, I see a very long statement.
2 They are numbered. There are 23 pages.

3 CTC [MR. TRIVETT]: Yes, sir.

4 MJ [CAPT ALLRED]: What is this being offered for?

5 CTC [MR. TRIVETT]: Specifically, sir, through the defense case
6 in chief, through Professor Geoffrey Corn and on a lesser extent
7 Ms. Gaskins' testimony that there's some indication that, at least
8 according to Professor Corn specifically, that although al Qaeda
9 attacked the embassies, if I'm--I'm going to try to summarize his
10 testimony the best I can. If they attacked the embassies, that
11 wasn't necessarily an indication of an armed conflict, although once
12 we fired our missiles back, he said that it would. He then opined
13 that the armed conflict would then be over.

14 We believe that he misrepresented--not intentionally, but
15 was probably not competent to testify in regard to the United States'
16 response following the missile strikes of 21 August 1998.

17 Former Secretary Albright makes very clear all of the
18 administration's reactions to that missile strike or to the bombing
19 of the embassies specifically in regard to putting submarines at
20 launch depth, deploying them, trying to actively target Usama bin
21 Laden, potentially putting special forces in there to either kill or
22 capture him, and that they had looked at this as both a dual law
23 enforcement and military role.

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1 MJ [CAPT ALLRED]: Okay.

2 CTC [MR. TRIVETT]: And I think one of the quotes that she gave
3 specifically was: After all, when we fired missiles, it wasn't for
4 the purpose of serving legal papers.

5 That's in there, and we think it's an important part for
6 the jury to understand, because we do believe at this point the
7 members have a misconception as to how we reacted; that after we hit
8 the button and fired the missiles; that is all we did, and we weren't
9 actively targeting or involved in an armed conflict anymore. We
10 think that's a misrepresentation of an historical fact. I don't
11 think that there's any reason to believe that there's anything in
12 that statement that's unreliable. It's a former Secretary of State.

13 MJ [CAPT ALLRED]: So it's offered to prove the truth of the
14 matter asserted.

15 CTC [MR. TRIVETT]: Yes, sir.

16 MJ [CAPT ALLRED]: That we did put missiles--submarines at
17 launch depth, and positioned military forces, whatever she says.

18 CTC [MR. TRIVETT]: Absolutely, sir.

19 MJ [CAPT ALLRED]: Okay. The objection is hearsay.

20 CTC [MR. TRIVETT]: Yes, sir.

21 MJ [CAPT ALLRED]: What's your response?

22 CTC [MR. TRIVETT]: Our response specifically is there's no way
23 that the prosecution can anticipate every issue that the defense puts

1 in for its rebuttal case. Had we known specifically that Professor
2 Corn was going to testify regarding the armed conflict----

3 MJ [CAPT ALLRED]: I mean this is a plea for mercy. The
4 objection is hearsay, and I'm asking, what hearsay objection do you
5 want me to find applicable here?

6 CTC [MR. TRIVETT]: I'm sorry; I misunderstood your question,
7 sir. It's an official public document. Whether she was the
8 Secretary of State at the time or not, it is within the archives of
9 the 9/11 Commission Report Web site. It was a public hearing in
10 which they took testimony from several different people, to include
11 the former Secretary of Defense. As a public document, it would fall
12 under the public documents exception and it would be admitted into
13 evidence as such, not being hearsay, or at least being an exception
14 to the hearsay rule.

15 MJ [CAPT ALLRED]: Okay. Let's look at the rule for public
16 documents then.

17 Okay. Your position is Rule 803(8), public records and
18 reports. Is that right? Is the 9/11 Commission then the source of
19 this document?

20 CTC [MR. TRIVETT]: Yes, sir. The 9/11 Commission itself. My
21 understanding is that that statement is not within the 9/11 Report,
22 but that they took testimony and evidence and considered other things
23 in drafting it.

1 MJ [CAPT ALLRED]: Is the 9/11 Commission a public office or
2 agency?

3 CTC [MR. TRIVETT]: Yes, sir. It's a bipartisan committee
4 authorized by Congress and the President.

5 CDC [MR. SWIFT]: I would like to speak to this, Your Honor, in
6 that I think it's extremely significant that it's not within the 9/11
7 Report. They took testimony, they took parts, and they decided what
8 to put in the report. That's the report of the agency, not
9 everything that they considered, not statements made by persons, et
10 cetera. And it is noteworthy here that when Madeleine Albright made
11 that statement, she was in her private capacity. So she would not
12 fall within it in that it was not included into the report, which is
13 I believe my co-counsel said is some thousand and some pages, but
14 they did not include her statement.

15 So, it is not a report of the government agency. And what
16 the government tries to do is bootstrap it because it was presented
17 to them and it is not part of their official reports.

18 MJ [CAPT ALLRED]: Okay. Well, the exception applies to
19 records, reports, statements, or data compilations in any form of
20 public offices or agencies setting forth the activities of the office
21 or agency, or matters observed pursuant to duty imposed by law.

22 Okay. Final arguments?

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1 CTC [MR. TRIVETT]: The prosecution would just ask that it be
2 put into evidence and shown to the members.

3 MJ [CAPT ALLRED]: Mr. Swift?

4 CDC [MR. SWIFT]: And, again, holding part that the exception
5 applied--would apply to the report itself. It doesn't reply to all
6 the activities. We get to an exception that breaks the rule that
7 says that we will now admit statements made by persons to that
8 activity. There's no showing that it was part of the official
9 testimony other than it was provided, was not put into the records
10 themselves, and, therefore, is not part of the official record.

11 MJ [CAPT ALLRED]: Okay. I'll sustain the objection.

12 CDC [MR. SWIFT]: Thank you, Your Honor.

13 MJ [CAPT ALLRED]: I will give Prosecution Exhibit 146 for
14 identification to the court reporter as an exhibit offered but not
15 admitted.

16 Anything else for the government?

17 CDC [MR. SWIFT]: The prosecution rests its case, sir.

18 MJ [CAPT ALLRED]: Thank you, sir. Let's call the members back
19 into the courtroom.

20 DC [LCDR MIZER]: Sir, may we take up one issue with respect to
21 argument?

22 MJ [CAPT ALLRED]: Sure.

23 DC [LCDR MIZER]: Just very briefly.

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1 Your Honor, yesterday I think it was raised during the
2 cross-examination of our two principal witnesses that Mr. Hamdan had
3 not been helpful before arriving at Bagram Air Base on 28 December
4 2001. And we would ask the government not be permitted to make this
5 argument in front of the members, aside from the questions that
6 they've already asked, given the fact that they haven't told us where
7 Mr. Hamdan was between 2 December and 28 December of 2001. We still
8 have no idea now that we've heard all the evidence where Mr. Hamdan
9 was.

10 We have not objected to them commenting on Mr. Hamdan's
11 election to remain silent or an election to decline to provide
12 information because, as we understand it, the Fifth Amendment, that
13 right does not apply to Mr. Hamdan in his present situation. But we
14 think it's unfair to allow the government to argue that he was not
15 cooperating and we have no idea what Mr. Hamdan was doing during that
16 roughly 30-day period.

17 MJ [CAPT ALLRED]: Does the government intend to make that
18 argument?

19 TC [LCDR STONE]: The government will make the argument with
20 regards to Sergeant Major A, [REDACTED], the capture video. And
21 between other periods of time, it's not argued nor will we be
22 advancing the arguments regarding it. So I don't see where we really
23 have an issue.

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1 DC [LCDR MIZER]: And, Your Honor, we have no issue with the
2 Takteh-Pol video and the government arguing what took place in
3 Takteh-Pol. What I'm concerned about is he didn't give you
4 actionable intelligence until such and such date. But we don't know
5 what happened.

6 TC [LCDR STONE]: Well, no. They have been provided, all
7 statements by the accused, sir.

8 DC [LCDR MIZER]: No, that's not true.

9 MJ [CAPT ALLRED]: I think that's a fair request from the
10 defense. There was a black hole, and I will sustain that objection,
11 I guess, to the extent that it's an objection, arguing that he didn't
12 provide any helpful data when we don't know where he was or what he
13 provided.

14 TC [LCDR STONE]: Well, we did file a 505 motion in which the
15 statements by the accused that were taken were provided to the
16 defense.

17 MJ [CAPT ALLRED]: All right. Maybe I don't remember that.

18 DC [LCDR MIZER]: Your Honor, we haven't seen the documents.
19 We've seen unclassified summaries.

20 MJ [CAPT ALLRED]: Okay. You guys remind each other of what
21 you've shown each other over the weekend, and we can take this up
22 Monday morning when we discuss finally on the record the instructions

1 before we have closing argument. If there's still an issue, I will
2 resolve it then.

3 TC [LDCR STONE]: Your Honor, do you contemplate a hearing to
4 argue instructions? Or are you----

5 MJ [CAPT ALLRED]: Yes. I was planning to ask the members to
6 come back 9:00 or 9:30 on Monday morning. We could resume at 8:30.
7 And I plan to meet with you over the weekend, actually, as well to
8 look at the instructions in draft form and informally work out
9 differences. Sound fair enough?

10 CDC [MR. SWIFT]: Yes, Your Honor.

11 MJ [CAPT ALLRED]: 9:30 Monday morning for them, 8:30 for us?

12 CDC [MR. SWIFT]: Yes, sir.

13 MJ [CAPT ALLRED]: Okay. Good. Why don't you call the members
14 back in then?

15 **[The R.M.C. 803 session terminated and the military commission**
16 **commenced at 1027, 1 August 2008.]**

17 BAILIFF: All rise. **[All persons did as directed, and the**
18 **members entered the courtroom.]**

19 MJ [CAPT ALLRED]: Thank you. Please be seated. **[All persons**
20 **did as directed.]**

21 Members of the court, that completes the presentation of
22 the evidence from both sides in this case. What we initially

1 expected would take three weeks has taken two. So, we are a week
2 ahead of where we thought we would be.

3 At this point, I will release you for the weekend. It will
4 take me several hours to write the instructions that I will give you
5 on Monday morning with respect to the law that you must apply in this
6 case. You won't need to take notes when I read those instructions,
7 but it will probably take me an hour to read them, and then I will
8 give you a copy to take with you into your deliberations.

9 Juror number 13, you were the alternate juror as I recall.
10 At this point, you are excused from further participation in this
11 case. If you want to catch the plane home tomorrow, it appears that
12 we will be able to reassemble on Monday morning with the six primary
13 jurors. We only need five to begin and complete deliberation, so at
14 this point I think we can safely say we won't require your further
15 services. If you don't have anything going back home and you want to
16 stick around Guantanamo for another week and see how this thing
17 shakes out, I'm not sending you home. I'm excusing you, if you would
18 like to go. But you won't be included in the deliberations because
19 you are an alternate and we won't need you. But I do thank you for
20 your attention and your participation during the last two weeks the
21 presentation of evidence.

1 I would like to ask you to return to the courtroom at 9:30
2 Monday morning. Counsel and I will meet at 8:30 and we will try to
3 resolve all the final matters that might be pending.

4 When you return at 9:30, I envision giving you my
5 instructions on the law, and I will invite counsel for both sides to
6 give their closing arguments. And that will probably take a couple
7 hours, maybe, until the lunch break. I envision you being able to
8 begin your deliberations on Monday afternoon. At that point, we will
9 wait until you are ready. You take as long as you want.

10 Now, once again, since you're leaving for the weekend, I
11 would like to talk about the possibility that you might have SECRET
12 notes in your notebooks. If you're going to take those notes home
13 with you, please leave here whatever pages you've copied SECRET notes
14 on to. And if you want to leave all your notes here, they will be
15 secured by the court reporter.

16 I would ask you not to discuss the case amongst yourselves
17 or with anyone else until you have heard my instructions, you have
18 heard the arguments of counsel, and are in your deliberation room and
19 can deliberate together.

20 Are there any questions, Mr. President?

21 PRESIDENT: No, sir.

22 MJ [CAPT ALLRED]: Thank you very much. We will excuse the
23 members then until Monday morning at 9:30.

1 BAILIFF: All rise. [All persons did as directed, and the
2 members withdrew from the courtroom.]

3 [The military commission terminated and the R.M.C. 803 session
4 commenced at 1033, 1 August 2008.]

5 MJ [CAPT ALLRED]: Please be seated. [All persons did as
6 directed.]

7 Okay. I will be working on the instructions for the
8 members this weekend. And I will wait--I'm waiting for some
9 documents from both sides so I can address the motion regarding Mr.
10 Hamdan's confinement. And I propose tomorrow evening sometime that
11 we get together and have a discussion of the instructions. I will
12 try to get you a draft this evening or early in the morning to look
13 over. Okay? So why don't you just--why don't we say tomorrow at
14 1700 we will meet for discussion. Will that work? Okay. Court is
15 in recess.

16 [The R.M.C. 803 session recessed at 1034, 1 August 2008.]

17 [END OF PAGE]

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1 [The military commission was called to order at 0838, 4 August 2008.
2 All parties present when the commission recessed were once again
3 present.]

4 MJ [CAPT ALLRED]: Court is called to order. The light is
5 already flashing. Apparently I was getting too close to classified
6 information there and I needed to be reigned in a little bit.

7 Okay. During the weekend, we did a great deal of work on
8 the instructions that I will give the members this morning, had a
9 long and detailed meeting on Saturday afternoon. Both parties
10 provided very helpful and well-researched proposed instructions and I
11 have given now both parties the proposed instruction I plan to give.
12 But nobody came by this morning with final corrections or comments---
13 -

14 CTC [MR. TRIVETT]: Yes, sir.

15 MJ [CAPT ALLRED]: ----so I guess we're pretty close, but are
16 there things you want to perhaps bring to my attention before we----

17 CTC [MR. TRIVETT]: Yes, sir, there are.

18 MJ [CAPT ALLRED]: Okay.

19 CTC [MR. TRIVETT]: Specifically, the prosecution had concerns
20 about three of the instructions. The first one being the definition
21 for material support or resources.

22 MJ [CAPT ALLRED]: Uh-huh.

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1 CTC [MR. TRIVETT]: It doesn't seem to be directly from the
2 manual and neglects to include personnel, which is obviously one of
3 the important----

4 MJ [CAPT ALLRED]: Okay. Well, that might have just been a
5 scrivener's error. Let's see. It's not directly from the manual?

6 CTC [MR. TRIVETT]: Correct, sir.

7 MJ [CAPT ALLRED]: What page are we on?

8 CTC [MR. TRIVETT]: Page 11, sir. But it might--it might show
9 up prior to that, as well. But it's in the definition of material
10 support and resources.

11 MJ [CAPT ALLRED]: All right. Well, that sounds like an error
12 that can easily be corrected. Okay. Good catch. I'll change that.
13 Maybe I just didn't get it all typed in there properly. Okay. What
14 else?

15 CTC [MR. TRIVETT]: All right. In regard to the definition of
16 "in the context of and associated with armed conflict"----

17 MJ [CAPT ALLRED]: Uh-huh.

18 CTC [MR. TRIVETT]: ----we believe that the definition that's
19 put forth primarily, you know, from the defense, conflates the
20 principles of direct engagement in hostilities with that of actions
21 taken in the context of and associated with armed conflict. We
22 believe that the second standard is a far broader standard that
23 doesn't require direct participation in the hostilities or even

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1 geographic proximity to the hostilities. We think that it conflates
2 two different processes. We cite to Section 948a(A) of the Manual--
3 of the Military Commissions Act specifically, to show that Congress
4 clearly intended the two standards to be different.

5 MJ [CAPT ALLRED]: I agree that they are different. The
6 question is: What instruction is correct to give to the members? And
7 the defense proposed something that I thought was pretty close and
8 that didn't have--948a?

9 CTC [MR. TRIVETT]: Yes, sir.

10 MJ [CAPT ALLRED]: There is not a definition here of that term.
11 What changes are you proposing to the draft instruction?

12 CTC [MR. TRIVETT]: The prosecution's--the prosecution believes
13 that the members can look just at the term "in the context of and
14 associated with armed conflict." It doesn't have any specific terms
15 that have not already been defined for them, the "armed conflict"
16 being the only one that requires a definition or a legal definition.
17 They simply must make a determination that the accused's action was
18 part of a larger war effort as opposed to a direct participation in
19 the hostilities. Not every one of the accused's actions that he took
20 was necessarily part of the war effort.

21 MJ [CAPT ALLRED]: Uh-huh.

22 CTC [MR. TRIVETT]: But they must just be able to determine that
23 the ones that we have alleged, in fact, are. So we would----

1 MJ [CAPT ALLRED]: So you prefer that I give no instruction
2 other than that definition?

3 CTC [MR. TRIVETT]: Other than that--yes, sir.

4 MJ [CAPT ALLRED]: Other than----

5 CTC [MR. TRIVETT]: Other than in the context of and associated
6 with an armed conflict, "armed conflict" having been defined earlier
7 in the instructions.

8 CDC [MR. MCMILLAN]: Your Honor, the defense would offer a
9 comment if appropriate or----

10 MJ [CAPT ALLRED]: Uh-huh. Sure.

11 CDC [MR. MCMILLAN]: Your Honor, we think the instruction, as
12 set forth in your current iteration, is correct. That language was
13 purposefully chosen as an element of each of the offenses. That in
14 the context of and associated with were deliberately intended to be
15 criteria and were not wholly redundant and superfluous, and it's just
16 a standard doctrine of statutory construction not to render words
17 superfluous.

18 The authority that we cited to the Court in our proposed
19 instruction was drawn from other law of war tribunals, such as the
20 international criminal tribunal for the former Yugoslavia, the Tadic
21 case and so forth, where there is authority set out in some of the
22 reported opinions lending--elaborating on what the nexus needs to be

1 between an act and an armed conflict, and we thought that we took a
2 fairly conservative approach that gave--that gave meaning to this.

3 The--this does not set out the standard in 948a, which I
4 believe the prosecution is referring to the definition of unlawful
5 enemy combatant, which references purposefully and materially
6 supporting hostilities or engaged in hostilities. If anything, that
7 standard and that definition of unlawful combatant is a higher
8 standard that scholars recognize as direct engagement in hostilities.
9 This standard as set forth in your instruction we think is, you know,
10 it's appropriate as written for the reasons stated.

11 MJ [CAPT ALLRED]: Okay. Well, I'm inclined to leave it in
12 there. I don't know that it's wrong. I certainly don't intend to
13 give an instruction that mimics the definition of unlawful combatant.

14 CTC [MR. TRIVETT]: And certainly that's not what the government
15 is asking for, sir.

16 MJ [CAPT ALLRED]: Uh-huh.

17 CTC [MR. TRIVETT]: We simply--we cited to 948a to show that
18 there are two distinct different things. Not that you should cite to
19 948a, but the concern is that when we get into a lot of the specifics
20 of what they are supposed to or required to find, it very much
21 narrows the context of the accused's participation. We think that's
22 just an incorrect standard rule of law. If you look to what's cited
23 by the defense, one of the sources that they cite is Michael N.

1 Schmidt, "Humanitarian Law and Direct Participation in Hostilities."
2 That's one of the things that they cite.

3 MJ [CAPT ALLRED]: I read that article over the weekend and I
4 believe that that was--that was--you're right. That's a good point.
5 That--that was discussing the concept of direct participation.

6 CTC [MR. TRIVETT]: And the Prosecutor v. Tadic that they have
7 cited to specifically says they need to be satisfied that each of the
8 alleged acts was, in fact, closely related to the hostilities.
9 That's okay. That makes sense. We are comfortable with that.

10 MJ [CAPT ALLRED]: And I chose those words--uh-huh.

11 CTC [MR. TRIVETT]: But we are not comfortable with the fact
12 that there has to be some type of geographic proximity to the armed
13 conflict itself. You know, clearly, someone sending war money and
14 material from the United States to Afghanistan would be engaging in
15 actions that were in the context of and associated with an armed
16 conflict if, in fact, they were aware that the money they were
17 sending were going to be helping al Qaeda in its war against America.
18 There would be no geographic proximity at all, necessarily.

19 MJ [CAPT ALLRED]: Well, the instruction says "conduct of the
20 accused that occurs at a distance from the area of the conflict can
21 still be in the context of and associated with armed conflict as long
22 as it was closely and substantially related to hostilities."

23 CTC [MR. TRIVETT]: Yes, sir.

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1 MJ [CAPT ALLRED]: Doesn't that give you what you want?

2 CTC [MR. TRIVETT]: It does, but it seemingly contradicts
3 something earlier in the definition, sir.

4 MJ [CAPT ALLRED]: Uh-huh.

5 CTC [MR. TRIVETT]: Where it says that you may consider at a
6 place in which the armed conflict is under way. It seems to be at
7 odds with itself, the definition.

8 MJ [CAPT ALLRED]: Okay.

9 CTC [MR. TRIVETT]: Which is why we would request that that--
10 that the geographic proximity just be stricken completely because we
11 don't think it's required.

12 CDC [MR. MCMILLAN]: It appears earlier as a factor and then
13 it's qualified appropriately in your final sentence, Your Honor.

14 MJ [CAPT ALLRED]: Well, I see what you're trying to point out.
15 It does seem to be internally inconsistent----

16 CTC [MR. TRIVETT]: Yes, sir.

17 MJ [CAPT ALLRED]: If the only two criteria are the phrase "at a
18 place in which armed conflict is under way" and the last sentence,
19 which suggests that it doesn't have to be at a place in which armed
20 conflict is under way. What I intended to do is list a number of
21 criteria like I had done for the definition of armed conflict itself.
22 That would help them determine whether it took place in the context
23 of an armed conflict. Okay. Let's see.

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1 So the criteria I have drafted include whether the acts of
2 the accused occurred during the period of an armed conflict. That's
3 clearly required.

4 CTC [MR. TRIVETT]: Yes, sir.

5 MJ [CAPT ALLRED]: Okay. As defined above. "At the place in
6 which armed conflict is under way," you have a problem with that
7 language?

8 CTC [MR. TRIVETT]: Yes, sir.

9 MJ [CAPT ALLRED]: Were performed while the accused acted on
10 behalf of or under the authority of a party to the armed conflict?

11 CTC [MR. TRIVETT]: I don't think there's a concern in this case
12 about that.

13 MJ [CAPT ALLRED]: Okay. Whether they constituted or were
14 closely and substantially related to hostilities occurring during the
15 armed conflict.

16 CTC [MR. TRIVETT]: There was no problem with that either.

17 MJ [CAPT ALLRED]: Okay. So your only problem with this whole
18 sentence is "at a place in which armed conflict is under way."

19 CTC [MR. TRIVETT]: Yes, sir. Our first position would be that
20 we think they need no definitions other than the definition of armed
21 conflict to make the determination if it was in the context of and
22 associated with. But that being said, if you feel the need to give

1 them further instructions, those are the two instructions that we
2 would request be excised.

3 MJ [CAPT ALLRED]: Two?

4 CTC [MR. TRIVETT]: Well, the two: the geographic proximity
5 issues within that definition.

6 MJ [CAPT ALLRED]: Well, the second reference to geographic
7 proximity gives you the ability to argue that something that occurs
8 at a distance from the area of conflict can still be in the context
9 of. Isn't that what you want?

10 CTC [MR. TRIVETT]: Absolutely. We want the ability to argue
11 that. We feel we have the ability to argue that regardless of
12 whether or not that's in there.

13 MJ [CAPT ALLRED]: Okay.

14 CTC [MR. TRIVETT]: There's nothing incorrect about keeping that
15 in there, but two in there are----

16 MJ [CAPT ALLRED]: Okay. I'll delete then the phrase "at a
17 place in which armed conflict is under way," because there is another
18 reference to the proximity to the armed conflict that allows both
19 sides to argue their positions. Okay. What's your third comment on
20 the instructions?

21 CTC [MR. TRIVETT]: Regarding the judicial notice of the Taliban
22 ----

23 MJ [CAPT ALLRED]: Uh-huh.

1 CTC [MR. TRIVETT]: ----and whether or not that's relevant or
2 required at this point based on the fact that, at least as of now,
3 the affirmative defense is not being instructed upon.

4 MJ [CAPT ALLRED]: Well, okay. So you're saying if I don't give
5 the affirmative defense instruction that there's no need for judicial
6 notice?

7 CTC [MR. TRIVETT]: Yes, sir, seemingly. Well, it's confusing
8 if it's not related to a prior case.

9 MJ [CAPT ALLRED]: Well, I don't know. I think the defense
10 still needs the ability to argue several of their theories of the
11 case, including the possibility that Mr. Hamdan intended to deliver
12 the missiles to the Taliban, that they were a lawful fighting force,
13 and that therefore it wasn't an intent to support international
14 terrorism, which is driving missiles to the front. So I'm going to
15 leave that in there for whatever purposes it may serve, even if I
16 don't give the affirmative defense instruction. I think the defense
17 needs to have the ability to make that argument.

18 CTC [MR. TRIVETT]: Yes, sir.

19 MJ [CAPT ALLRED]: Those are the three points raised by the
20 government?

21 CTC [MR. TRIVETT]: Yes, sir.

1 MJ [CAPT ALLRED]: Well, you are absolutely right on the first
2 one. You got what you wanted on the second one and you lost on the
3 third one. I'd say that's batting pretty good. Okay?

4 CTC [MR. TRIVETT]: Yes, sir. Thank you, sir.

5 MJ [CAPT ALLRED]: Okay. Defense, what are your comments on the
6 proposed instructions?

7 CDC [MR. MCMILLAN]: Your Honor, the defense also has three
8 points that it would like to make in way of objection to the current
9 iteration of the instructions. First, we would just like on the
10 record the position of the defense that the instruction on armed
11 conflict that the defense submitted we believe is the correct one.
12 Admittedly, the instruction that's contained in this iteration goes
13 some distance, but we believe that the more complete explanation is
14 as set forth in our own. We do understand the Court is attempting to
15 balance length of instruction versus other considerations. We are--
16 we are----

17 MJ [CAPT ALLRED]: I'm trying to make it simple enough for the
18 members to understand as well. Your proposed instruction on armed
19 conflict was two single-spaced pages.

20 CDC [MR. MCMILLAN]: Our particular--that's correct, Your Honor.
21 And we think that it draws the necessary distinction. We understand
22 the Court's concern. We are particularly focused on the statement in
23 the instruction regarding statements of political leaders one way or

1 the other, which we think is not an appropriate consideration, but is
2 more likely to be the result of political propaganda and the
3 appropriate factors to see whether actual hostilities are under way.
4 We do want to just make that record.

5 MJ [CAPT ALLRED]: Well, I appreciate all the work you went to.
6 Your proposed instructions on this point were very, very thorough and
7 supported by citations to international law scholars that I've read
8 and that I respect over the weekend.

9 Okay. So I see your very first opening phrase as it's
10 referenced to objective criteria rather than to policy statements or
11 political concerns.

12 Well, I mean, in a way, this proposed instruction gives you
13 the ability to argue one of your central themes.

14 CDC [MR. MCMILLAN]: It does, your Honor.

15 MJ [CAPT ALLRED]: Which is that, the rules of engagement
16 represent a statement by one of the parties that there was no
17 conflict.

18 CDC [MR. MCMILLAN]: Absolutely correct, and for that reason,
19 we're not attempting to state that this is entirely incorrect. It's
20 --we would like to preserve on the record, however, the position that
21 we think the proposed instruction from the defense is the more
22 complete statement of the relevant considerations and focus

1 particularly on that one issue that I mentioned involving political
2 statements from leadership.

3 MJ [CAPT ALLRED]: So that's the rub then, is the political
4 statement? Clearly your proposed instruction is more complete than
5 mine, but I felt like two full pages that distinguish between
6 international and non-international armed conflict and et cetera was
7 just too much. Government response to an internal threat that was
8 more than the members needed. But let's look at the phrase that
9 particularly bothers you.

10 CDC [MR. MCMILLAN]: It appears about a little more than halfway
11 down the paragraph: "Statements of the leaders of both sides
12 indicating their perceptions regarding the existence of an armed
13 conflict, including the presence or absence of a declaration to that
14 effect." That is what we would regard as what's most troubling to
15 the defense about the instructions. We don't think that is a correct
16 ----

17 MJ [CAPT ALLRED]: You don't think those would be relevant to
18 determining whether or not there was an armed conflict in place?

19 CDC [MR. MCMILLAN]: They can be relevant in so far as they
20 indicate whether or not actual hostilities are under way, whether or
21 not they correctly state facts. But as standing alone, a statement
22 that we are at war when in fact we're not at war, I would be
23 concerned that the members might be misled or confused that a mere

1 statement that does not reflect an accurate assessment of the facts
2 could be deemed sufficient, so----

3 MJ [CAPT ALLRED]: Well, once again, this gives you the ability
4 to argue yet another of your themes. Okay. I think I'm going to
5 leave that in there as one of several criteria. And this paragraph,
6 to be honest, says the parties may argue the existence of other facts
7 and circumstances. So I want to give both sides the ability to argue
8 their theories without suggesting the correct answer to the members
9 and to give you the ability to suggest other factors. So I'll
10 overrule that objection.

11 CDC [MR. MCMILLAN]: Okay. Thank you.

12 The second objection that we have, Your Honor, is the
13 defense believes that Mr. Hamdan is entitled to the affirmative
14 defense instruction on protected status under the Third Geneva
15 Convention. We understand that the defense has a burden of
16 introducing or pointing to some evidence in the record in order to
17 raise that affirmative defense. We believe that there is some
18 evidence that has come into this record over the past two weeks
19 sufficient to establish that Mr. Hamdan was a civilian, that he had
20 authorization to accompany armed forces although, like civilian
21 contractors in modern armed forces, he didn't necessarily spend a
22 hundred percent of his time with that armed force.

1 MJ [CAPT ALLRED]: We did.

2 DC [LCDR MIZER]: Okay.

3 MJ [CAPT ALLRED]: There have been slight changes made since the
4 interpreter got their version, but I think--think they'll be able to
5 follow along pretty well.

6 BAILIFF: All rise **[all persons did as directed and the members**
7 **entered the courtroom].**

8 **[The R.M.C. 803 session terminated and the military commission**
9 **commenced at 0952, 4 August 2008.]**

10 MJ [CAPT ALLRED]: Good morning, members. Please be seated **[all**
11 **persons did as directed]**. Counsel, members of the gallery, can be
12 seated.

13 There are only six of you this morning. It looks like our
14 alternate juror decided to go back to work. That's fine. We have
15 our primary panel here.

16 Members, if you would take a moment and look at the copy of
17 the charges that was given to you at the beginning of the case, under
18 Specifications 3 and 4 of Charge II, these are specifications in
19 which the accused is charged with providing material support to
20 terrorism by transporting surface to air missiles. I have granted a
21 motion for a finding of not guilty as to that specification as
22 charged and will instruct you instead on the lesser included offense
23 of attempting to provide material support to terrorism.

1 And so as you look at the specification, please insert the
2 words "attempt to" before the word "provide" in both Specifications 3
3 and 4 under Charge II. Very good. It looks like those changes have
4 been made.

5 I'm going to read you now 19 pages of detailed
6 instructions. I will give you this copy to take with you into
7 deliberations when you retire. There's no need to try to keep this
8 all straight as we go through it.

9 Members of the Court: When you close to deliberate and
10 vote on the findings, each of you must resolve the ultimate question
11 of whether the accused is guilty or not guilty based upon the
12 evidence presented here in court and upon the instructions which I
13 will now give you. My duty is to instruct you on the law. Your duty
14 is to determine the facts, apply the law to the facts, and determine
15 the guilt or innocence of the accused. The law presumes the accused
16 to be innocent of the charges against him.

17 At the end of my instructions, you will hear an exposition
18 of the facts by counsel for both sides as they view them. Bear in
19 mind that the arguments of counsel are not evidence. Argument is
20 made by counsel in order to assist you in understanding and
21 evaluating the evidence. But you must base your determination of the
22 issues in this case on the evidence as you remember it and apply the
23 law as I instruct you.

1 During the trial, some of you took notes. You may take your notes
2 with you into the deliberation room and consult them. Your notes are
3 not a substitute for the record of trial.

4 I will now advise you of the elements of each offense
5 alleged against the accused.

6 In Specification 1 of Charge I, the accused is charged with
7 the offense of conspiracy. In order to find the accused guilty of
8 this offense you must be convinced by legal and competent evidence of
9 each of the following elements beyond a reasonable doubt:

10 The first element: Between about February of 1996 and
11 about 24 November 2001, Mr. Hamdan entered into an agreement with
12 Usama bin Laden, Ayman al Zawahiri, Sheik Said al Masri, Muhammad
13 Atef, also known as Abu Hafs al Masri, Saif al Adel or various other
14 members of al Qaeda organization, known or unknown, to commit one or
15 more of the following substantive offenses triable by military
16 commission: attacking civilians, attacking civilian objects, murder
17 in violation of the law of war, destruction of property in violation
18 of the law of war, or terrorism.

19 The second element is that Mr. Hamdan knew the unlawful
20 purpose of the agreement and joined willingly with the intent to
21 further the unlawful purpose.

22 The third element: While this agreement continued to exist
23 and while Mr. Hamdan remained a party to the agreement, Mr. Hamdan

1 knowingly committed at least one of the following overt acts for the
2 purpose of bringing about one of the objects of the agreement:
3 served as a bodyguard for Usama bin Laden; served as a driver for
4 Usama bin Laden; transported and delivered weapons, ammunition or
5 other supplies to al Qaeda members and associates; drove or
6 accompanied Usama bin Laden to various al Qaeda training camps, press
7 conferences or lectures; or received weapons training in Afghanistan.

8 The fourth element is that this conduct occurred in the
9 context of and was associated with an armed conflict. Proof that the
10 offense of attacking civilians, attacking civilian objects, murder in
11 violation of the law of war, destruction of property in violation of
12 the law of war, or terrorism actually occurred is not required;
13 however, it must be proved beyond a reasonable doubt that the
14 agreement included every element of at least one of the offenses the
15 government has alleged as objects of the conspiracy.

16 At least four of the six members must agree on the same
17 object of the conspiracy to find that that conspiracy existed. The
18 agreement in a conspiracy does not have to be in any particular form
19 or expressed in formal words. It is sufficient if the minds of the
20 parties reach a common understanding to accomplish the object of the
21 conspiracy and this may be proved by the conduct of the parties.

22 The agreement does not have to express the manner in which
23 the conspiracy is to be carried out, or what part each conspirator is

1 to play. The overt act required for this offense does not have to be
2 a criminal act, but it must be a clear indication that the conspiracy
3 is being carried out. The overt act may be done either at the time
4 of or following the agreement. The overt act must clearly be
5 independent of the agreement itself, that is it must be more than
6 merely the act of entering into the agreement or an act necessary to
7 reach the agreement.

8 You are advised that there is no requirement that all co-
9 conspirators be named in the specification or that all co-
10 conspirators be subject to trial by military commission.

11 You will note that more than one overt act has been listed
12 in Specification 1. You may find Mr. Hamdan guilty of conspiracy
13 only if you are convinced beyond a reasonable doubt that he
14 personally committed at least one of the overt acts described in the
15 specification and that such act was indeed an act in furtherance of
16 the alleged agreement. Accordingly, if you find beyond a reasonable
17 doubt that Mr. Hamdan committed one or more such overt acts but not
18 all of them, your findings should reflect this by appropriate
19 exceptions.

20 At least four of the members present when the vote is taken
21 must concur that the accused committed the same overt act. Thus, you
22 may find Mr. Hamdan guilty of Specification 1 under Charge I if you
23 find beyond a reasonable doubt that he conspired to do any of the

1 following: Conspiracy to attack civilians would require you to find
2 beyond a reasonable doubt that Mr. Hamdan entered into an agreement
3 to intentionally direct attacks against the civilian population as
4 such, or against individual civilians not taking direct part in
5 hostilities; that Mr. Hamdan knew or should have known the factual
6 circumstances that established the civilian status; that Mr. Hamdan
7 knew the unlawful purpose of the agreement and joined willingly with
8 the intent to further the unlawful purpose;

9 That Mr. Hamdan committed an overt act in furtherance of
10 the agreement and that the agreement and the intended act on
11 civilians took place in the context of and was associated with an
12 international armed conflict. The intent required for this offense
13 precludes its applicability with regard to collateral damage or
14 death, damage, or injury incident to a lawful attack.

15 To find the accused guilty of a conspiracy to attack
16 civilian objects, you must find beyond a reasonable doubt that Mr.
17 Hamdan entered into an agreement to intentionally direct attacks
18 against civilian property, that is property that was not a military
19 objective; that Mr. Hamdan knew the unlawful purpose of the agreement
20 and joined willingly with the intent to further the unlawful purpose;
21 that Mr. Hamdan committed an overt act in furtherance of this
22 agreement; and that the agreement and the intended attack on civilian
23 objects took place in the context of and was associated with an

1 international armed conflict. The intent required for this offense
2 precludes its applicability with regard to collateral damage or
3 death, damage, or injury incident to a lawful attack.

4 Military objectives are those objects during an armed
5 conflict which, by their nature, location, purpose or use effectively
6 contribute to the opposing force's war-fighting or war-sustaining
7 capability and the total or partial destruction, capture, or
8 neutralization of which would constitute a definite military
9 advantage to the attacker under the circumstances at the time of the
10 attack. Civilian objects are those objects that do not qualify as
11 military objectives.

12 In order to find Mr. Hamdan guilty of conspiracy to commit
13 murder in violation of the law of war, you must find beyond a
14 reasonable doubt that Mr. Hamdan entered into an agreement to
15 intentionally kill one or more persons in violation of the law of
16 war; that Mr. Hamdan knew the unlawful purpose of the agreement and
17 joined willingly with the intent to further the unlawful purpose;
18 that Mr. Hamdan committed an overt act in furtherance of the
19 agreement; and that the agreement and the intended murder took place
20 in the context of and was associated with an armed conflict.

21 A killing violates the law of war where a combatant,
22 whether lawful or unlawful, intentionally and without justification
23 kills civilians not taking part in hostilities, military personnel

1 placed *hors de combat* by sickness, wounds or detention, or military
2 medical or religious personnel.

3 In order to find Mr. Hamdan guilty of conspiracy to destroy
4 property in violation of the law of war, you must find beyond a
5 reasonable doubt that Mr. Hamdan entered into an agreement to
6 intentionally and without consent destroy property of another which
7 is not a military objective; that Mr. Hamdan knew the unlawful
8 purpose of the agreement and joined willingly with the intent to
9 further the unlawful purpose; that Mr. Hamdan committed an overt act
10 in furtherance of the agreement; and that the agreement and the
11 intended destruction of property took place in the context of and was
12 associated with an armed conflict.

13 Military objectives and civilian objects were defined on
14 page 3. Those definitions apply to this specification as well.

15 In order to find Mr. Hamdan guilty of a conspiracy to
16 commit terrorism, you must find beyond a reasonable doubt that Mr.
17 Hamdan entered into an agreement to intentionally kill or inflict
18 great bodily harm on one or more protected persons, or to engage in
19 an act that evinces a wanton disregard for human life in a manner
20 calculated to influence or affect the conduct of government or
21 civilian population by intimidation or coercion, or to retaliate
22 against government conduct; that Mr. Hamdan knew the unlawful purpose
23 of the agreement and joined willingly with the intent to further the

1 unlawful purpose; that Mr. Hamdan committed an overt act in
2 furtherance of the agreement; and that the agreement and the intended
3 act of terrorism took place in the context of and was associated with
4 an armed conflict.

5 In order to be an act of terrorism, the act must be
6 wrongful. An attack on a military objective undertaken by military
7 forces of a state in the exercise of their official duties would not
8 constitute an act of terrorism. Protected persons are civilians not
9 taking an active part in hostilities, military personnel placed *hors*
10 *de combat* by sickness, wounds or detention, or military medical or
11 religious personnel.

12 If you have doubt that any overt act alleged in
13 Specification 1 was committed or that any overt act was committed in
14 furtherance of the alleged agreement, you may still reach a finding
15 of guilty so long as you conclude that Mr. Hamdan committed one of
16 the alleged overt acts in furtherance of the agreement, and all the
17 other elements of the offense are proved beyond a reasonable doubt,
18 but you must modify the specification to correctly reflect your
19 finding in this regard.

20 Those are the instructions with respect to Charge I,
21 Specification 1. Do you see in the specification which items are the
22 overt acts? **[Affirmative response from the members.]**

1 MJ [CAPT ALLRED]: Okay. In Specification 2 of Charge I, the
2 accused is charged with the offense of conspiracy to commit murder in
3 violation of the law of war. In order to find the accused guilty of
4 this offense, you must be convinced by legal and competent evidence
5 of each of the following elements beyond a reasonable doubt:

6 First, that on or about 24 November 2001, the accused
7 entered into an agreement to commit murder in violation of the law of
8 war;

9 Two, that Mr. Hamdan knew the unlawful purpose of the
10 agreement and joined willingly with the intent to further the
11 unlawful purpose;

12 Three, that in order to effect the object of the
13 conspiracy, Mr. Hamdan committed an overt act in furtherance of the
14 agreement by transporting one or more SA-7 surface to air missiles to
15 be ultimately used to unlawfully and intentionally kill United States
16 or coalition service members. Four, that the agreement and the
17 intended killing took place in the context of and were associated
18 with an armed conflict.

19 Proof that the offense of murder in violation of the law of
20 war actually occurred is not required. However, it must be proved
21 beyond a reasonable doubt that the agreement included every element
22 of this offense. The agreement in a conspiracy does not have to be
23 in any particular form or expressed in formal words. It is

1 sufficient if the minds of the parties reach a common understanding
2 to accomplish the object of this conspiracy. And this may be proved
3 by the conduct of the parties. The agreement does not have to
4 express the manner in which the conspiracy is to be carried out or
5 what part each conspirator is to play.

6 The overt act required for this offense does not have to be
7 a criminal act, but it must be a clear indication that the conspiracy
8 is being carried out. The overt act may be done either at the time
9 of or following the agreement. The overt act must clearly be
10 independent of the agreement itself; that is, it must be more than
11 merely the act of entering into the agreement or an act necessary to
12 reach the agreement.

13 You are advised that there is no requirement that all co-
14 conspirators be named in the specification or that all co-
15 conspirators be subject to trial by military commission.

16 The definitions associated with this offense have been
17 discussed on page four of these instructions. Those definitions also
18 apply here.

19 In Specification 1 of Charge II, the accused is charged
20 with providing material support for an act of terrorism. In order to
21 find the accused guilty of this offense, you must be convinced beyond
22 a reasonable doubt of each of the following elements:

1 First, between February 19, 1996 and November 24, 2001, the
2 accused provided material support or resources, to wit, his person
3 for training, his services as a driver and bodyguard for Usama bin
4 Laden, and his services transporting weapons or weapon systems to be
5 used in preparation for or in carrying out an act of terrorism;
6 second, that he knew or intended that the material support or
7 resources were to be used for carrying out an act of terrorism;
8 third, that the conduct took place in the context of and was
9 associated with an armed conflict.

10 In Specification 2 of Charge II, the accused is charged
11 with providing material support for an international terrorist
12 organization. In order to find the accused guilty of this offense,
13 you must be convinced beyond a reasonable doubt of each of the
14 following elements: One, between about February 1996 and November
15 24, 2001, the accused provided material support or resources, to wit,
16 his person for training, his service as a driver and bodyguard for
17 Usama bin Laden, and his services transporting weapons or weapon
18 systems to be used in support of al Qaeda, an international terrorist
19 organization engaged in hostilities against the United States.

20 Two, that he intended to provide such material support or
21 resources to al Qaeda, an international terrorist organization
22 engaged in hostilities against the United States;

1 Three, that he knew that al Qaeda was engaged in or engages
2 in terrorism;

3 And four, that the conduct took place in the context of and
4 was associated with an armed conflict.

5 In Specification 3 of Charge III, the accused is charged
6 with an attempt to provide material support for an act of terrorism
7 in violation of Section 950(t) of the Military Commissions Act. This
8 is a lesser included offense of the charged offense of providing
9 material support for an act of terrorism.

10 In order to find the accused guilty of this offense, you
11 must be convinced beyond a reasonable doubt of each of the following
12 elements:

13 First, on or about November 24, 2001, the accused did a
14 certain overt act, that is, he transported two SA-7 missiles;

15 Second, that the act was done with the specific intent to
16 commit the offense of providing material support for an act of
17 terrorism;

18 Third, that the act amounted to more than mere preparation;
19 that is, it was a substantial step and a direct movement toward the
20 provision of material support for an act of terrorism;

21 Fourth, that the act apparently tended to effectuate the
22 commission of the intended offense of providing material support for
23 terrorism, that is the act apparently would have resulted in the

1 actual commission of the offense of providing material support for
2 terrorism except for an unexpected intervening circumstance, the
3 accused's capture, which prevented the completion of that offense;

4 Fifth, that the conduct took place in the context of and
5 was associated with an armed conflict.

6 Preparation consists of devising or arranging the means or
7 measures necessary for the commission of the attempted offense. To
8 find the accused guilty of this offense, you must find beyond a
9 reasonable doubt that the accused went beyond preparatory steps, and
10 his act amounted to a substantial step and a direct movement towards
11 the commission of the intended offense.

12 A substantial step is one that is strongly corroborative of
13 the accused's criminal intent and is indicative of his resolve to
14 commit the offense. Proof that the offense of material support for
15 terrorism actually occurred or was completed by the accused is not
16 required; however, it must be proved beyond a reasonable doubt that
17 at the time of the acts, the accused intended every element of the
18 offense of providing material support for a terrorist act. The
19 elements of the attempted offense providing material support for a
20 terrorist act and definitions have been described on page 7 of these
21 instructions under Specification 1 of Charge II. They also apply
22 here.

1 In Specification 4 of Charge II the accused is charged with
2 an attempt to provide material support for an international terrorist
3 organization. In order to find the accused guilty of this offense
4 you must be convinced beyond a reasonable doubt of each of the
5 following elements:

6 First, that on or about November 24, 2001, the accused did
7 a certain overt act; that is, he transported two SA-7 missiles;

8 Second, that the act was done with the specific intent to
9 commit the offense of providing material support for an international
10 terrorist organization engaged in hostilities against the United
11 States;

12 Third, that the act amounted to more than mere preparation;
13 that is, it was a substantial step and a direct movement toward the
14 provision of material support for an international terrorist
15 organization;

16 Fourth, that the act apparently tended to effectuate the
17 commission of the intended offense of providing material support for
18 terrorism; that is, the act apparently would have resulted in the
19 actual commission of the offense of providing material support for an
20 international terrorist organization except for an unexpected
21 intervening circumstance, his capture, which prevented the completion
22 of that offense;

1 Fifth, that the conduct took place in the context of and
2 was associated with an armed conflict.

3 The definition of preparation and the other supporting
4 instructions and definitions relevant to Specification 4 appear also
5 under Specification 3 and they apply to this offense.

6 In Specification 5 of Charge II, the accused is charged
7 with providing material support for an act of terrorism. In order to
8 find the accused guilty of this offense, you must be convinced beyond
9 a reasonable doubt of each of the following elements:

10 First, between about February 1996 and November 24, 2001,
11 the accused provided material support or resources, to wit, his
12 services as a driver for Usama bin Laden, to be used in preparation
13 for or in carrying out an act of terrorism;

14 Second, that he knew or intended that the material support
15 or resources were to be used for carrying out an act of terrorism;

16 And third, that the conduct took place in the context of
17 and was associated with an armed conflict.

18 In Specification 6 of Charge II, the accused is charged
19 with providing material support for an international terrorist
20 organization. In order to find the accused guilty of this offense,
21 you must be convinced beyond a reasonable doubt of each of the
22 following elements:

1 First, between about February 1996 and November 24, 2001,
2 the accused provided material support or resources, to wit, his
3 services as a driver for Usama bin Laden to be used in support of al
4 Qaeda, an international terrorist organization engaged in hostilities
5 against the United States;

6 Second, that he intended to provide such material support
7 or resources to an international organization;

8 Third, that he knew that such organization, al Qaeda, has
9 engaged in or engages in terrorism;

10 And fourth, that the conduct took place in the context of
11 and was associated with an armed conflict.

12 In Specification 7 of Charge II, the accused is charged
13 with providing material support for an act of terrorism. In order to
14 find the accused guilty of this offense, you must be convinced beyond
15 a reasonable doubt of each of the following elements:

16 First, between about February 1996 and November 24, 2001,
17 the accused provided material support or resources to wit, his
18 services as a bodyguard for Usama bin Laden to be used in preparation
19 for or in carrying out an act of terrorism;

20 Second, that he knew or intended that the material support
21 or resources were to be used for carrying out an act of terrorism;
22 and third, that the conduct took place in the context of and was
23 associated with an armed conflict.

1 In Specification 8 of Charge II, the accused is charged
2 with providing material support for an international terrorist
3 organization. In order to find the accused guilty of this offense,
4 you must be convinced beyond a reasonable doubt of each of the
5 following elements:

6 First, between about February 1996 and November 24, 2001,
7 the accused provided material support or resources, to wit, his
8 services as a bodyguard for Mr. bin Laden to be used in support of al
9 Qaeda, an international terrorist organization engaged in hostilities
10 against the United States;

11 Second, that he intended to provide such material support
12 or resources to an international terrorist organization;

13 Third, that he knew such organization has engaged in or
14 engages in terrorism; and fourth that the conduct took place in the
15 context of and was associated with an armed conflict.

16 With respect to Specifications 1, 3, 5, and 7 of Charge II,
17 "terrorism" is defined as the intentional killing or the intentional
18 infliction of great bodily harm on one or more protected persons, or
19 intentionally engaging in acts that evince a wanton disregard for
20 human life in a manner calculated to influence or affect the conduct
21 of government or a civilian population by intimidation or coercion,
22 or to retaliate against government conduct.

1 With respect to each of the eight specifications under
2 Charge II, "material support or resources" means any property,
3 tangible or intangible, or service, including currency or monetary
4 instruments or financial securities, financial services, lodging,
5 training, expert advice or assistance, safe houses, false
6 documentation or identification, communications equipment,
7 facilities, weapons, lethal substances, explosives, personnel--
8 meaning one or more individuals who may be or include oneself--and
9 transportation, except for medicine or religious materials.

10 In order to be an act of terrorism, the act must be
11 wrongful, which means that it was undertaken without legal
12 justification or excuse. An act--an attack on a military objective
13 undertaken by military forces of a state in the exercise of their
14 official duties would not constitute an act of terrorism.

15 To convict the accused of providing material support for an
16 act of terrorism, the government must prove beyond a reasonable doubt
17 that the accused knew or intended to provide support for either the
18 preparation for or the execution of a specific act of terrorism. The
19 offense is inherently forward-looking and the accused cannot be
20 convicted for providing material support for past acts of terrorism.

21 To convict the accused of providing material support for an
22 international terrorist organization, the government must prove
23 beyond a reasonable doubt that in providing material support or

1 resources, the accused did so knowing that the material support or
2 resources could or would be utilized to further the activities of the
3 international terrorist organization and not merely the personal
4 interests of al Qaeda's individual members.

5 With respect to each of the ten specifications before you,
6 the government must prove beyond a reasonable doubt that the actions
7 of the accused took place in the context of and that they were
8 associated with armed conflict. In determining whether an armed
9 conflict existed between the United States and al Qaeda and when it
10 began, you should consider the length, duration, and intensity of
11 hostilities between the parties, whether there was protracted armed
12 violence between governmental authorities and organized armed groups,
13 whether and when the United States decided to employ the combat
14 capabilities of its armed forces to meet the al Qaeda threat, the
15 number of persons killed or wounded on each side, the amount of
16 property damage on each side, statements of the leaders of both sides
17 indicating their perceptions regarding the existence of an armed
18 conflict, including the presence or absence of a declaration to that
19 effect, and any other facts or circumstances you consider relevant to
20 determining the existence of armed conflict.

21 The parties may argue the existence of other facts and
22 circumstances from which you might reach your determination regarding
23 this issue. In determining whether the acts of the accused took

1 place in the context of and were associated with an armed conflict,
2 you should consider whether the acts of the accused occurred during
3 the period of an armed conflict as defined above, whether they were
4 performed while the accused acted on behalf of or under the authority
5 of a party to the armed conflict, and whether they constituted or
6 were closely and substantially related to hostilities occurring
7 during the armed conflict and other facts and circumstances you
8 consider relevant to this issue.

9 Counsel may address this matter during their closing
10 arguments, and may suggest other factors for your consideration.
11 Conduct of the accused that occurs at a distance from the area of
12 conflict can still be in the context of and associated with armed
13 conflict, as long as it was closely and substantially related to the
14 hostilities that comprised the conflict.

15 A number of pretrial statements by the accused have been
16 admitted into evidence through the testimony of various federal
17 agents. The defense has introduced evidence that the accused's
18 statements were obtained without any warning or advisement of a right
19 to remain silent, and that this was the result of a formal policy
20 decision not to give any such warnings. I have determined that these
21 statements were admissible in a trial by military commission without
22 such warnings. You must decide the weight or significance, if any,
23 such statements deserve under all the circumstances.

1 In deciding what weight or significance, if any, to give to
2 the accused's statements, you should consider the specific evidence
3 offered on the matter, your own common sense and knowledge of human
4 nature, and the nature of any corroborating evidence, as well as the
5 other evidence introduced in this trial.

6 Evidence may be direct or circumstantial. Direct evidence
7 is evidence which tends directly to prove or disprove a fact in
8 issue. If a fact in issue was whether it rained during the night,
9 for example, testimony by a witness that he saw it rain would be
10 direct evidence that it had rained. On the other hand,
11 circumstantial evidence is evidence which tends to prove some other
12 facts from which, either alone or together with some other facts or
13 circumstances, you may reasonably infer the existence or nonexistence
14 of a fact in issue. If there was evidence that the street was wet in
15 the morning, for example, that would be circumstantial evidence from
16 which you might reasonably infer that it rained during the night.

17 There is no general rule for determining or comparing the
18 weight to be given to direct or circumstantial evidence. You should
19 give all the evidence the weight and value you believe it deserves.

20 I have instructed you that with respect to Specifications
21 2, 4, 6 and 8 under Charge II, the government must prove beyond a
22 reasonable doubt that the accused actually intended that his support
23 be used for an international terrorist organization. Direct evidence

1 of intent is often unavailable. The accused's intent, however, may
2 be proved by circumstantial evidence, that is, by facts or
3 circumstances from which you may reasonably infer the existence of
4 such an intent.

5 In deciding this issue, you must consider all the relevant
6 facts and circumstances, including but not limited to evidence that
7 he did or did not know a particular matter at a particular time, that
8 he was or was not told of plans then being prepared, his awareness or
9 lack of it regarding what Mr. bin Laden and al Qaeda were doing, and
10 the degree of his involvement in or agreement with those plans.

11 I have instructed you that with respect to Specifications
12 1, 3, 5, and 7 under Charge II, you must be satisfied beyond a
13 reasonable doubt that the accused knew that the support he was
14 providing would be used for an act of terrorism. As with intent,
15 direct evidence of a person's knowledge is often unavailable. This
16 knowledge, like any other fact, may be proved by circumstantial
17 evidence. In deciding this issue, you must consider all relevant
18 facts and circumstances such as those you may consider with respect
19 to the issue of the accused's intent.

20 I have taken judicial notice that at all times relevant to
21 this case, the Taliban were the de facto government of Afghanistan
22 and that Taliban military personnel were serving as the regular armed
23 forces of the State of Afghanistan. I have also taken judicial

1 notice that at all relevant times Afghanistan was a signatory to all
2 four of the Geneva Conventions of 1949. This means that you are now
3 permitted to recognize and consider those facts without further
4 proof. It should be considered by you as evidence with all the other
5 evidence in the case. You may, but are not required to, accept as
6 conclusive any matter I have judicially noticed.

7 You have the duty to determine the believability of the
8 witnesses. In performing this duty, you must consider each witness'
9 intelligence, ability to observe and accurately remember, sincerity
10 and conduct in court, and prejudices and character for truthfulness.

11 Consider also the extent to which each witness is either
12 supported or contradicted by other witnesses or evidence, the
13 relationship each witness may have with either side, and how each
14 witness might be affected by the verdict. In weighing discrepancies
15 by a witness or between witnesses, you should consider whether they
16 resulted from an innocent mistake, a failure of memory, or a
17 deliberate lie.

18 Taking all these matters into account, you should then
19 consider the probability of each witness' testimony and the
20 inclination of the witness to tell the truth. The believability of
21 each witness' testimony should be your guide in evaluating testimony
22 and not the number of witnesses called.

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1 An accused may be convicted based only on evidence before
2 the Court, and not on evidence of a general criminal disposition.
3 Each offense must stand on its own, and you must keep the evidence
4 respecting each offense separate. Stated differently, if you find or
5 believe that the accused is guilty of one offense, you may not use
6 that finding or belief as a basis for inferring, assuming, or proving
7 that he committed any other offense. If evidence had been presented
8 which is relevant to more than one offense, you may consider that
9 evidence with respect to each offense to which it is relevant. For
10 example, evidence has been presented with respect to Mr. Hamdan's
11 possession of missiles. You may consider that evidence with respect
12 to each of the offenses that relate to the possession of missiles.

13 The burden is on the prosecution to prove each and every
14 element of each offense beyond a reasonable doubt. Proof of one
15 offense carries with it no inference that the accused is guilty of
16 any other offense. If you have doubt about the time, place or manner
17 in which any of the offenses described in the specifications were
18 committed, but you are satisfied beyond a reasonable doubt that the
19 offense was committed at a slightly different time or place or in a
20 particular manner which differs slightly from the exact time, place,
21 or manner in the specification, you may make minor modifications in
22 reaching your findings by changing the time, place or manner in which
23 --in which the acts described in the specification were committed,

1 provided that you do not change the nature or identity of the
2 offense.

3 As to any specification, if you have doubt that the
4 government has proven all of the times, places and manners charged in
5 the specification, you may still reach a finding of guilty so long as
6 all the elements of the offense are proved beyond a reasonable doubt,
7 but you must modify the specification to correctly reflect your
8 findings. For example, in a different context, if a young sailor
9 were accused of stealing a radio and a bike and you found that he
10 stole the bike but not the radio, you would find him guilty excepting
11 the words "the radio." If a young soldier was convicted of an
12 unauthorized absence from the 1st of July to the 10th of July and you
13 found that he returned on the 8th of July, you would find him guilty,
14 except the words "10 July," and substituting the words "8 July."

15 Understand how those might work? **[Affirmative response**
16 **from the members.]**

17 MJ [CAPT ALLRED]: I remind you that you may not infer that the
18 accused is guilty of any offense from the fact that some evidence was
19 presented in closed trial sessions. You also may not reach any other
20 inference adverse to the accused from the fact that a session of the
21 trial was closed to the public. You must evaluate open and closed
22 session evidence and witnesses using the same standards.

1 Closed trial sessions to consider classified evidence are
2 the most satisfactory method for resolving the competing needs of the
3 government for the protection of purportedly classified information
4 and the rights of the accused to a public trial. You may not hold
5 the fact that there have been closed trial sessions in any way
6 against the accused. Closed trial sessions do not erode the
7 presumption of innocence which the law guarantees to the accused.
8 You have heard the testimony of Evan Kohlmann, Geoffrey Corn and
9 Brian Williams. These are known as expert witnesses because their
10 knowledge, skill, experience, training or education may assist you in
11 understanding the evidence or in determining a fact in issue. You
12 are not required to accept the testimony of an expert witness or give
13 it more weight than the testimony of an ordinary witness. You
14 should, however, consider their qualifications as experts.

15 Only you, the members of the Court, determine the
16 credibility of the witnesses and what the facts of this case are. No
17 expert witness or other witness can testify that the period of armed
18 conflict between the United States and al Qaeda began on any
19 particular date. To the extent that you believe that Professor Corn
20 or Mr. Kohlmann testified or implied that they believe the armed
21 conflict began on a particular date, you may not consider this as
22 evidence that the armed conflict did in fact began on that date.

1 During the testimony of various witnesses who appeared
2 before you, they were asked whether they were aware of certain
3 matters counsel believed they should or might be aware of. These
4 were permissible questions. If the witness denied that they had
5 knowledge of the matters inquired into, there is no evidence before
6 you that those matters actually occurred. These questions were
7 permitted to test the basis of the witness' opinion and to enable you
8 to assess the weight to accord their testimony. You may not consider
9 the question for any other purpose.

10 You have heard evidence that before trial, various
11 witnesses made statements that may be inconsistent with their
12 testimony here in court. If you believe that an inconsistent
13 statement was made, you may consider the inconsistency in deciding
14 whether to believe that witness's in-court testimony. You may not
15 consider the earlier statements as evidence of the truth of the
16 matters contained in the prior statement. In other words, you may
17 only use them as one way of evaluating the witness's testimony in
18 court. You cannot use them as proof of anything else.

19 For example, if a witness testifies in court that the
20 traffic light was green and you heard evidence that the witness made
21 a prior statement that the traffic light was red, you may consider
22 that prior statement in evaluating the truth of the in-court

1 testimony. You may not, however, use the prior statement as proof
2 that the light was actually red.

3 You are further advised: first, that the accused is
4 presumed to be innocent until his guilt is established by legal and
5 competent evidence beyond a reasonable doubt; second, if there is a
6 reasonable doubt as to the guilt of the accused, that doubt must be
7 resolved in favor of the accused and he must be acquitted; third, if
8 there is a reasonable doubt as to the degree of guilt, that doubt
9 must be resolved in favor of the accused, in favor of the lower
10 degree of guilt as to which there is no reasonable doubt.

11 Finally, the burden of proof to establish the guilt of the
12 accused beyond a reasonable doubt is on the government. The burden
13 never shifts to the accused to establish his innocence or to disprove
14 the facts necessary to establish each element of each offense.

15 The term "reasonable doubt" does not mean a fanciful or
16 ingenuous doubt or a conjecture, but an honest, conscientious doubt
17 suggested by the material evidence or lack of it in the case. It is
18 an honest misgiving generated by insufficiency of proof of guilt.
19 Proof beyond a reasonable doubt means proof to an evidentiary
20 certainty, although not necessarily to an absolute or mathematical
21 certainty. The proof must be such as to exclude not every hypothesis
22 or possibility of innocence, but every fair and rational hypothesis
23 except that of guilt.

1 The rule as to reasonable doubt extends to every element of
2 each offense, although each particular fact advanced by the
3 prosecution that is not an element need not be established beyond a
4 reasonable doubt. However, if on the whole evidence you are
5 satisfied beyond a reasonable doubt of the truth of each and every
6 element, then you should find the accused guilty.

7 Bear in mind that only matters properly before the Court as
8 a whole should be considered. In weighing and evaluating the
9 evidence, you are expected to use your own common sense, your
10 knowledge of human nature and your knowledge of the ways of the
11 world. In light of all the circumstances in this case, you should
12 consider the inherent probability or improbability of the evidence.

13 Bear in mind you may properly believe one witness and
14 disbelieve several witnesses whose testimony conflicts with the one.
15 The final determination as to the weight or significance of the
16 evidence and the credibility of the witnesses in this case rests
17 solely upon you.

18 You must disregard any comment or statement or expression
19 made by me during the course of the trial that might seem to indicate
20 any opinion on my part as to whether the accused is guilty or not
21 guilty, since you alone have the responsibility to make that
22 determination. Each of you must impartially decide whether the

1 accused is guilty or not guilty according to the law I have given
2 you, the evidence admitted in court and your own conscience.

3 At this time, you will hear argument by counsel. As
4 counsel for the government has the burden of proof, the trial counsel
5 may open and close. Trial counsel's argument I am informed is
6 expected to be about an hour. Does anyone think we should take a
7 recess before we enter into a--I see several happy faces suggesting
8 that's a good idea. Why don't we take about a ten-minute recess and
9 return to hear the prosecutor's opening argument--closing argument?

10 BAILIFF: All rise **[all persons did as directed]**.

11 CTC [MR. TRIVETT]: Sir, the prosecution has one other issue to
12 bring up outside the members----

13 MJ [CAPT ALLRED]: Okay. **[The members departed the courtroom.]**
14 **[The military commission terminated and the R.M.C. 803 session**
15 **commenced at 1045, 4 August 2008.]**

16 MJ [CAPT ALLRED]: All right. Please be seated **[all persons did**
17 **as directed]**.

18 Do we have an issue to take up outside the presence of the
19 members?

20 CTC [MR. TRIVETT]: Yes, sir. In regards to the instructions
21 given--and I apologize, sir, I missed this. But in conspiracy to
22 attack civilians and conspiracy to attack civilian objects, the
23 military judge included "international armed conflict."

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1 MJ [CAPT ALLRED]: I noticed that I had that in there in a
2 couple of places and not in other places. That was----

3 CTC [MR. TRIVETT]: And I saw you corrected yourself--because
4 you had "international armed conflict" but only read "armed conflict"
5 in regard to murder in violation of the law of war.

6 MJ [CAPT ALLRED]: Okay. I can easily correct that. I noticed
7 that as I was reading along with a couple of other--okay. Why don't
8 you highlight those and I'll just correct them to the members before
9 we start your argument?

10 CTC [MR. TRIVETT]: Yes, sir.

11 MJ [CAPT ALLRED]: Anything else that I need to correct?

12 [No response.]

13 MJ [CAPT ALLRED]: Very good. Let's take a recess.

14 **[The R.M.C. 803 session recessed at 1046, 4 August 2008.]**

15 **[The R.M.C. 803 session was called to order at 1058, 4 August 2008.**

16 **All parties present when the commission recessed were once again**
17 **present.]**

18 MJ [CAPT ALLRED]: I understand there might be another comment
19 about the instructions I need to hear before we call the members back
20 in.

21 CTC [MR. TRIVETT]: Yes, sir. In regards to murder in violation
22 of the law of war, sir, and how it was instructed, under the
23 definition of when a killing violates the law of war, it's correctly

Attachment Q

1 [The R.M.C. 803 session was called to order at 0834, 28 July 2008.
2 All parties present when the commission recessed on 25 July were
3 present with the exception of the members, who were present. Mr.
4 Corn, a defense witness, was present via VTC.]

5 MJ [CAPT ALLRED]: The court's called to order.

6 Good morning. Are there any matters we need to pick up
7 before we call the members into the courtroom?

8 TC [LCDR STONE]: Yes, sir, if we may.

9 MJ [CAPT ALLRED]: Um-hum.

10 TC [LCDR STONE]: The prosecution would like to challenge this
11 witness and what he intends to say today, basically under the grounds
12 of 401, 402, 403, as well as Military Commission Rule 702, in that,
13 one, his testimony that will be offered invades the purview of the
14 military judge.

15 Secondly, it will also confuse the members and based
16 primarily on the fact that Professor Corn will--proffers that
17 operational rules of engagement is a de facto indicator of armed
18 conflict and that this is not an accepted position within the
19 international community.

20 He is--it is not--there's not scholarship on the article.
21 He personally hopes that this will be a movement to the trend and----

22 MJ [CAPT ALLRED]: Hopes, what?
23

1 TC [LCDR STONE]: That he hopes that his article will be a
2 movement to create a trend in which status-based ROE and the movement
3 to status-based ROE will be the de facto determination of armed
4 conflict. That is not the legal standard right now. It was not the
5 legal standard in *Hamdan v. Rumsfeld*, which said it was governed by
6 Common Article 3.

7 And in support of that, we would also say, his article,
8 which will be the substantial basis of his testimony, reflects this,
9 where he says on page 64, he has a proposal to adopt such standards.
10 On page 68, he suggests the adoption of a six-point Executive Order
11 to create this as a new triggering paradigm. And he recognizes on
12 page 70 that he is actually advocating for this, not that it is the
13 proposed standard on the determination of armed conflict.

14 Because of that, we feel that discussion of status-based
15 ROE from an expert in the law of war will confuse the jury. It's
16 unnecessary at this time.

17 I would also cite to the case *Speck versus Jenson*, where it
18 talks about: An attorney can't state his personal views of the law
19 which governs that verdict. And what we have here would be Professor
20 Corn advocating as an expert witness his view that status-based ROE
21 is the determination of armed conflict, in contradiction of Geneva
22 Common Article 3, as well as set forth not only by the military
23 Commission's Act but also very specifically this court's

1 determination of jurisdiction and--well, just those; Military
2 Commission's Act, *Hamdan v. Rumsfeld*, and Common Article 3 and the
3 plain language of Common Article 3.

4 So we believe he should not be allowed to testify regarding
5 his proposal for a new standard.

6 MJ [CAPT ALLRED]: Well, okay. We'll see what the defense has
7 to say to that.

8 CDC [MR. MCMILLAN]: Good morning, Your Honor.

9 MJ [CAPT ALLRED]: Good morning.

10 CDC [MR. MCMILLAN]: The prosecution is attempting to
11 re-litigate the same motion that was presented to you several months
12 ago. The proffer of testimony from Professor Corn is precisely the
13 same as it was in the motion to--at the time that the motion was
14 litigated. And there is a June 13th order with your signature on it,
15 which recognizes that the testimony that Professor Corn proposes to
16 provide, and you summarized it correctly in your order as Professor
17 Corn will testify regarding a number of objective factors tending to
18 indicate whether state of armed conflict exists, including scope,
19 intensity, duration of hostilities, whether armed groups control
20 territory, demonstrating other aspects of sovereignty, and so forth.

21 You then held that the Government must prove that the
22 actions took place in the context of armed conflict. To do so, it

1 intends to call witnesses, including expert witnesses, testifying
2 regarding facts indicating an armed conflict.

3 You wrote, quote, "Professor Corn will counter this
4 evidence with his own testimony regarding other factors suggested
5 that there was no state of armed conflict during all or part of the
6 charged period".

7 The *Hamdan v. Rumsfeld* case does not set out any authority
8 on when an arm conflict exists in any binding fashion. That was also
9 litigated earlier this year in this court.

10 Common Article 3, although I'm not able to quote it off the
11 top my head, does not purport to list out any set of criteria
12 determinative of when a state of armed conflict exists in a non-
13 international context. It sets out a set of protections, baseline
14 minimum protections that must be forwarded in that context.

15 Professor Corn will be talking about contemporary standards
16 under current international law, which are objective, pragmatic, de
17 facto conditions about when armed conflict exists. They include
18 standards you identified in your order of scope; duration and
19 intensity.

20 He also has a--an insight that one telling tool for
21 assessing the de facto objective conditions on the ground is to look
22 at Rules of Engagement, and that is--that is perfectly consistent in
23 the spirit of the international law as it currently exists, which

1 will not look to propaganda, political statements, but will look to
2 whether actual hostilities are under way.

3 Rules of Engagement are one, not the only, but one factor
4 that are indicative of what's actually happening on the ground. This
5 is not an effort by this expert on the law of war to try to promote a
6 pet theory, so----

7 MJ [CAPT ALLRED]: Well, as I remember, the motion was
8 litigated, I--I was not going to allow Professor Corn to be an expert
9 on international law. I--I will be the one who instructs the members
10 on the law.

11 And to the extent you proffer him to teach them about the
12 international law, I'm going to be reluctant to let him testify.

13 I do think it's fair for him to talk about objective
14 factors that might indicate whether or not a period of armed conflict
15 existed, including what the rules of engagement were at any
16 particular time and place.

17 CDC [MR. MCMILLAN]: The situation is unchanged from the date of
18 the June 13th letter in that regard, Your Honor.

19 MJ [CAPT ALLRED]: Okay. Well----

20 TC [LCDR STONE]: If I may have Professor Corn's article where
21 he proposes a new standard marked as the next Appellant Exhibit and
22 pushed to you for--to review those sections of----

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1 MJ [CAPT ALLRED]: ----I have not had time to review a 70-page
2 law review article this morning, with the witness standing here ready
3 to testify and the members in the next room.

4 TC [LCDR STONE]: I would just like to have it marked and--
5 marked as the next Appellant Exhibit for the record.

6 MJ [CAPT ALLRED]: What good will that do?

7 TC [LCDR STONE]: Just create the record, sir----

8 MJ [CAPT ALLRED]: ----create the record?

9 TC [LCDR STONE]: ----with regards to his--his standard of--and
10 how he intends to----

11 MJ [CAPT ALLRED]: ----Well, I don't think it makes any sense to
12 have something attached as an appellate exhibit if no one is going to
13 read it.

14 TC [LCDR STONE]: Okay.

15 MJ [CAPT ALLRED]: We might have taken this up last week. I
16 might have had time to read it.

17 What I would prefer to do, your--your objections are under
18 Rules 401, 402, 403, and what was the last one?

19 TC [LCDR STONE]: 702 with regards to the--401, 402, 403 on the
20 relevancy and the invasion and confusion of the jury--testifying to
21 invade the purview of you as the military judge to instruct on the
22 law.

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1 And then under 702, that he is--that he is really
2 effectively pushing his opinion with regards to an international
3 standard; and in doing so, it has not risen to the level of
4 international law, and that it should not be allowed to go to the
5 jury. And then that pushes back into the 403 argument, because then
6 that would then confuse them on the standard.

7 MJ [CAPT ALLRED]: Okay. Well, Rule 401 describes relevant
8 evidence.

9 TC [LCDR STONE]: Right.

10 MJ [CAPT ALLRED]: My sense is that testimony about the rules of
11 engagement and what rules of engagement were in play between 1996 and
12 2001 would be relevant to a determination of whether or not a period
13 of armed conflict existed. So I'll overrule that objection.

14 402 makes irrelevant evidence inadmissible. Because this
15 seems relevant, I don't find that to be a valid objection.

16 403 allows me to exclude relevant evidence if it would
17 confuse the members' prejudice, the issues, or waste the Court's
18 time, and I'll overrule that objection.

19 But with regard to 702, I'm not going to allow him to push
20 his opinion about an emerging international standard that he wants us
21 to adopt.

22 I'll allow him to testify about the rules of engagement,
23 what they were, when they were, what they mean. And if you have an

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1 objection during the course of his testimony if he's going too far,
2 I'll entertain that along the way. Okay?

3 TC [LCDR STONE]: Yes, sir.

4 MJ [CAPT ALLRED]: Has Professor Corn been following this, or
5 we've got the--the sound muted?

6 CDC [MR. MCMILLAN]: Professor Corn, can you hear me?

7 WIT [MR. CORN]: Yes, I've been following it, Your Honor.

8 CDC [MR. MCMILLAN]: Good morning, Professor.

9 WIT [MR. CORN]: Good morning.

10 MJ [CAPT ALLRED]: You understand the issues, Professor, and the
11 areas that counsel intend to ask you about, then?

12 WIT [MR. CORN]: Yes, Your Honor.

13 MJ [CAPT ALLRED]: Very good.

14 CDC [MR. MCMILLAN]: Your Honor, before we call in the members,
15 can I, on a technical point, make sure we have actual video that is
16 live and running? Although we have audio, it's a single, still
17 image.

18 MJ [CAPT ALLRED]: Professor Corn, could you move so we can tell
19 whether the picture on the screen is you or----

20 CDC [MR. SWIFT]: Memorex.

21 WIT [MR. CORN]: I'm waving.

22 MJ [CAPT ALLRED]: Okay. We don't have any video, apparently.

23

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1 CDC [MR. MCMILLAN]: There was an occasion where we might need
2 to reconnect the call; a few moments ago it seemed to be able to be
3 done without too much difficulty.

4 CDC [MR. SCHNEIDER]: No one has ever sat that still, with the
5 exception of Mr. McMillan, in all the years I've know him.

6 **[VTC was reconnected by the courtroom technician.]**

7 TC [LCDR STONE]: Sir, one other thing. This--Professor Corn is
8 being called by the defense, has been taken out of order.

9 MJ [CAPT ALLRED]: Thank you; I'll mention that to the members.

10 Professor Corn, are you still able to hear us?

11 WIT [MR. CORN]: **[No response.]**

12 MJ [CAPT ALLRED]: Professor, we can see you moving now. Can
13 you hear us?

14 WIT [MR. CORN]: I can hear you. Can you hear me?

15 MJ [CAPT ALLRED]: Yes. Looks like we're connected again. Are
16 we ready to call the members into the courtroom?

17 CDC [MR. MCMILLAN]: Yes.

18 MJ [CAPT ALLRED]: Bailiff, please call the members.

19 BAILIFF: All rise **[all persons did as directed and the members**
20 **entered the courtroom].**

21 **[The R.M.C. 803 session terminated and the military commission**
22 **commenced at 0850, 28 July 2008.]**

23 MJ [CAPT ALLRED]: Please be seated **[all persons did as**

1 Q [MR. MCMILLAN]: And we'll go over it in more detail in a
2 moment, sir; but very briefly, you also served for over 20 years in
3 the United States Army; is that right?

4 A [MR. CORN]: That's correct. I enlisted in the Army in 1983,
5 attended Officer Candidate School, spent five years as a tactical
6 intelligence officer, went through the funded law program, and served
7 to the 21-year point as a Judge Advocate General Corps Officer, and
8 then spent one year as a Department of Defense civilian working at
9 the Pentagon in the Office of Judge Advocate General.

10 Q [MR. MCMILLAN]: And at what rank did you retire, Professor?

11 A [MR. CORN]: Lieutenant Colonel.

12 Q [MR. MCMILLAN]: Professor, I've explained to you that one of
13 the issues in this case is the date on which an armed conflict with
14 al Qaeda began; is that correct?

15 A [MR. CORN]: Yes.

16 Q [MR. MCMILLAN]: And you've been asked by the defense to
17 testify regarding factors suggestive of whether there was or was not
18 an armed conflict under way with al Qaeda in the period prior to
19 9/11; factors indicating the existence of an armed conflict, correct?

20 A [MR. CORN]: That's correct.

21 [END OF PAGE]

22

23

1 Q [MR. MCMILLAN]: And are you able to do that based on your
2 training and experience and any investigation that you may have felt
3 was necessary?

4 A [MR. CORN]: I think I am.

5 Q [MR. MCMILLAN]: Okay. Well, let's talk a little about your
6 training and experience beginning with your undergraduate degree.
7 You received a B.A. in History from Hartwick College in New York in
8 1983; correct?

9 A [MR. CORN]: Yes.

10 Q [MR. MCMILLAN]: And what did you do after obtaining that
11 undergraduate degree?

12 A [MR. CORN]: Well, that's the point where I decided I wanted
13 to be an Army officer, and the only path for me to do that was to
14 enlist in the Army as a private and then attend Officer Candidate
15 School.

16 So in the fall of 1983, I went to basic training at Fort
17 Leonard wood, Missouri, and upon completing basic training I went to
18 Fort Benning, Georgia to attend Officer Candidate School. I
19 graduated there on June 1st, 1984 with a commission as a Second
20 Lieutenant in the MI Branch. Attended the MI officer Basic Course,
21 Basic Airborne training, and then I was assigned to the 193rd
22 Infantry Brigade (Light) in Panama.

1 I spent approximately three and a half years in Panama in
2 various positions as a tactical intelligence officer from the--what
3 is now USARSO level--I'm sorry.

4 Q [MR. MCMILLAN]: Well, let me ask you to----

5 A [MR. CORN]: Do you want me to----

6 Q [MR. MCMILLAN]: ----yeah, let me ask you to just describe
7 some of your responsibilities as a tactical intelligence officer
8 during that period of your career.

9 A [MR. CORN]: Well, a tactical intelligence officer's
10 responsibility is basically to provide the supporting commander and
11 staff with intelligence necessary for them to plan and execute their
12 missions. It's based on this concept, at least when I was trained,
13 of intelligence preparation in the battlefield.

14 It involves everything from participating in exercises
15 where you're trying to predict enemy courses of action, and assist
16 the operations officer in performing the most effective course of
17 action to recommend to the commander, to being involved in training,
18 familiarization of enemy weapons, maintenance of equipment assigned
19 to your--your personnel; a variety of issues.

20 And in Panama I was--I left Panama before Operation Just
21 Cause, but I was in Panama when the situation with General Noriega
22 deteriorated. And at that point, I was assigned to the 1st of the
23 508 Airborne Infantry Battalion, and our focus became very

1 significant real-time day-to-day threat assessment on what threats we
2 were going to confront from the Panamanian Defense Force and their
3 ostensible Cuban sponsors at that point.

4 Q [MR. MCMILLAN]: Okay. And then after leaving Panama, you
5 were accepted into the Judge Advocate General Corps; is that correct?

6 A [MR. CORN]: Well, first I attended the Intelligence Officer
7 Advanced Course. I was trained as an imagery analyst. And while I
8 was in that course, I learned that I was accepted for the funded law
9 program, and so for the next, basically three and a half years I was
10 a law student at George Washington University. I graduated in 1992
11 with a J.D., with highest honors, and then began my service as a
12 Judge Advocate General's officer by attending the JAG basic course;
13 and then my first JAG assignment was with the 101st Airborne Division
14 at Fort Campbell.

15 Q [MR. MCMILLAN]: And can you just briefly describe your duties
16 at Fort Campbell with the 101st.

17 A [MR. CORN]: I began, as most JAG officers do, as a legal
18 assistance attorney. I did that job for about five months, and then
19 I was moved to the criminal law division. Because of a personnel
20 shortage, I quickly ended up as the Chief of Criminal Law for that
21 office. And in that capacity I also was the trial counsel for the
22 Division Support Command and the 3d Brigade of the 101st Airborne
23 Division, the Rakkasan.

1 So my primary focus was on the--the disposition, processing
2 of criminal law issues, and the development of the attorneys that
3 worked in that section; but my secondary function was to be a legal
4 advisor to the brigade and the DISCOM in their training for
5 operational missions.

6 Q [MR. MCMILLAN]: Okay. And did you then go on to obtain an
7 advanced law degree?

8 A [MR. CORN]: After leaving the 101st in 1996, that summer I
9 moved to Charlottesville, Virginia, where I attended the Judge
10 Advocate Graduate Course, and I earned a Master's of Law degree with
11 an emphasis in International and Operational Law.

12 Q [MR. MCMILLAN]: And you graduated first in your class out of
13 approximately 80 military judge advocates from all branches of the
14 service; is that--is that right?

15 A [MR. CORN]: That's correct.

16 Q [MR. MCMILLAN]: And you received an award for Outstanding
17 Achievement in International Law at that time; correct?

18 A [MR. CORN]: Correct.

19 Q [MR. MCMILLAN]: So, Professor, was it at this period in your
20 career that your focus on the international law was really more
21 pronounced?

22 A [MR. CORN]: I would say that--that was the point in my career
23 where my primary focus professionally shifted from Criminal Law to

1 International Law. And following graduation, I stayed at the school
2 as a faculty member in the International Operation of Law Division
3 for three years.

4 Q [MR. MCMILLAN]: And did you teach courses--well, to whom were
5 you teaching courses at that school?

6 A [MR. CORN]: Three primary audiences. I'd say the flagship
7 program is the masters of law program. So we teach courses to all of
8 the graduate students, core courses, and then we teach--we taught
9 electives to students with a particular interest in international
10 law. I think electives I taught were advanced topics in the law of
11 armed conflict, a comparative law course, an advanced international
12 law course, and an operational law seminar.

13 We also teach the basic course, which are the new judge
14 advocates, and we teach what we call continuing legal education
15 courses, which are serving judge advocates both from the active and
16 reserve component and from the civilian component who return to the
17 school periodically for courses to enhance their expertise. And the
18 two courses we taught in that realm were a law of war workshop and an
19 operational law seminar.

20 Q [MR. MCMILLAN]: Did you publish articles on law of armed
21 conflict issues during this period?

22 A [MR. CORN]: I did. That's the point in my career where I
23 first got interested in writing, I think, in publishing, and I

1 published several articles on the law of armed conflict and I think
2 one or two on a broader national security law topics.

3 Q [MR. MCMILLAN]: You also taught as a guest lecturer in
4 schools in the United States and overseas on numerous occasions; is
5 that right?

6 A [MR. CORN]: That's correct.

7 Q [MR. MCMILLAN]: Then from 2001 to 2003, you moved on to
8 another position?

9 A [MR. CORN]: Well, after I left the JAG school, I spent a year
10 at Fort Leavenworth at the Command General Staff College. I finished
11 there in May of 2001, and was assigned as the Chief of International
12 and Operational Law for Headquarters of U.S. Army (Europe). I served
13 in that capacity from 2001 'til the summer of 2003.

14 Q [MR. MCMILLAN]: To whom were you providing legal advice in
15 that position?

16 A [MR. CORN]: We provided legal--well, the--The Judge Advocate
17 for U.S. Army (Europe), who was our boss, the Colonel that we worked
18 for, was the principal legal advisor to the Commander of U.S. Army
19 (Europe), initially General Meigs and--candidly, I can't recall who
20 replaced General Meigs; a four-star Army Commander, the Component
21 Commander for UCOM.

22 I think an equally significant aspect of that office is
23 providing what we might call technical legal support to subordinate

1 judge advocate offices that are involved in the planning or execution
2 of operations. That included 5th Corps 1st Armor Division, 1st
3 Infantry Division, and all of the forces that were deployed at any
4 given time to Kosovo, Bosnia, or Macedonia.

5 Q [MR. MCMILLAN]: Did that advice involve advising on rules of
6 engagement?

7 A [MR. CORN]: Yes.

8 Q [MR. MCMILLAN]: And a whole range of operational law issues;
9 is that fair to say?

10 A [MR. CORN]: That is correct.

11 Q [MR. MCMILLAN]: Then from 2004 to 2005, what position did you
12 hold?

13 A [MR. CORN]: From 2004 to 2005, that was after I retired from
14 the Army, I was chosen as the special assistant on law of war matters
15 to Judge Advocate General of the Army, which is dual-hatted as the
16 Chief of the Law of War Branch for the Office of the Judge Advocate
17 General in the Pentagon.

18 Q [MR. MCMILLAN]: And just very briefly, what were your chief
19 responsibilities in that position?

20 A [MR. CORN]: Well, that--that job has--to--I think to best
21 explain it, within the law of war community in the Department of
22 Defense, there was--that position has always been regarded as kind of

1 one of the--a handful of key positions for really setting DoD's law
2 of war interpretation posture.

3 It was held by many years--for many years by a great
4 colleague and a true expert in the law, W. Hayes Parks. He moved
5 over to the Department of Defense General Counsel's Office. That's
6 what opened the position, and I was fortunate enough to be selected
7 for it.

8 The range of issues that we would deal with spanned the
9 spectrum from reviewing new weapons systems and ammunition to ensure
10 compliance with the law of war, to providing technical support to
11 judge advocates who were deployed all over the world--Afghanistan,
12 Iraq and various other places, helping them resolve issues they had
13 dealing with the law of war or the law of armed conflict;
14 participating as a member of the Department of Defense Law of War
15 Working Group, which is a group that is composed of representatives
16 from all the services, periodically State Department representation,
17 General Counsel's Office, Chairman's Office.

18 And it was a group that would meet usually about once a
19 week to try and, one--one, come up with consistent positions on
20 current issues of concern related to the law of armed conflict; and,
21 two, try and take a more forward-looking view and try and anticipate
22 issues that were on the horizon and begin to formulate positions on
23 those issues.

1 Q [MR. MCMILLAN]: Okay. Thank you. Can you describe what you
2 did after leaving that position as special assistant to the Judge
3 Advocate General?

4 A [MR. CORN]: Well, my ambition had always been to teach law,
5 particularly after my experience at the JAG school. It is--it is not
6 an easy field to break into after a military career. I actually made
7 an attempt at it the year that I retired and was unsuccessful. I
8 chose to take the job, the civilian job at the Pentagon because I
9 thought it was a great position. And it was about halfway through
10 that year that I was contacted by South Texas, who expressed interest
11 in me joining their faculty. And when they came forward with the
12 offer, I decided to change positions and resign from the position at
13 the Pentagon that following summer, and since then I've been teaching
14 at the law school in Houston.

15 Q [MR. MCMILLAN]: And what are the areas of teaching and the
16 scholarly interest since you joined the law school in South Texas?

17 A [MR. CORN]: Well, teaching--my--my areas of teaching focus on
18 what I would say criminal law and national security law issues. I
19 teach the basic first semester criminal law course. I teach a class
20 on criminal procedure. I teach a course on ethics for prosecutors.

21 And the national security side, I teach a seminar in
22 national security law, a seminar on the law of armed conflict, and I
23 teach in summer programs. As a matter of fact, I just completed a

1 summer course in Galway, Ireland, on terrorism and the law. I've
2 taught a course on international law in the summer.

3 From a scholarly perspective, my scholarship has focused
4 almost exclusively on national security law and the law of armed
5 conflict.

6 Q [MR. MCMILLAN]: And over the last ten years, you've published
7 numerous Law Review articles on law of war matters; correct?

8 A [MR. CORN]: Yes.

9 Q [MR. MCMILLAN]: And you've published books or book chapters
10 on international law and law of armed conflict issues?

11 A [MR. CORN]: That's correct.

12 Q [MR. MCMILLAN]: And you've published articles, as well, on
13 whether the rules of engagement can serve as a useful tool for
14 assessing whether an armed conflict exists?

15 A [MR. CORN]: I would just re-characterize it a little. I've
16 published a series of articles that have attempted to--to figure out
17 how to best determine the existence of a period of armed conflict, if
18 there's an armed conflict between a state and a non-state
19 transnational group. And the ROE issue is--is part of that--that
20 scholarly exploration.

21 [END OF PAGE]

22

23

1 Q [MR. MCMILLAN]: When you say a transnational non-state group,
2 would that include a group like al Qaeda?

3 A [MR. CORN]: It would, and the--what I believe was the armed
4 conflict that existed between the United States and al Qaeda
5 beginning with the attacks of 9/11 was really the motivating
6 situation that--that pushed me to address these issues in this series
7 of articles, which, I may add, is going to be transformed into a
8 text--a textbook that's now under contract with Oxford University
9 Press.

10 Q [MR. MCMILLAN]: Professor, you've previously provided me with
11 a seven-page CV of your career; is that correct?

12 A [MR. CORN]: That's correct.

13 CDC [MR. MCMILLAN]: Your Honor, the defense has provided a copy
14 of Professor Corn's CV to the prosecution. We would like to request
15 that this be marked as the next appellate exhibit in order, Defense
16 Exhibit H.

17 MJ [CAPT ALLRED]: Defense Exhibit H or appellate exhibit?

18 CDC [MR. MCMILLAN]: Well, appellate exhibit in order.

19 MJ [CAPT ALLRED]: Very well.

20 CDC [MR. MCMILLAN]: Whichever the next one is.

21 MJ [CAPT ALLRED]: I think it's already an appellate exhibit
22 because it was attached to one of the motions, but it will be marked
23 as the next appellate exhibit in order.

1 Q [MR. MCMILLAN]: Professor, does the CV, your current CV,
2 provide a full list of your publications?

3 A [MR. CORN]: It provides a full list of current publications.
4 There's a couple more in the works after this summer that are not on
5 there, but they haven't been published yet.

6 Q [MR. MCMILLAN]: Does it also list the many speeches,
7 lectures, and presentations you've given on law of armed conflict
8 issues?

9 A [MR. CORN]: Yes.

10 Q [MR. MCMILLAN]: And does it identify other areas of education
11 and experience that we haven't spoken about here today?

12 A [MR. CORN]: Yes.

13 CDC [MR. MCMILLAN]: Your Honor, the defense would tender
14 Professor Corn's CV--well, Your Honor, the defense would tender
15 Professor Corn as an expert on law of war matters going to factors
16 suggesting whether state of armed conflict exists.

17 TC [LCDR STONE]: Quick couple of questions, sir?

18 MJ [CAPT ALLRED]: Certainly.

19 **VOIR DIRE EXAMINATION**

20 **Questions by the trial counsel:**

21 Q [LCDR STONE]: Good morning, Professor Corn. I'm Lieutenant
22 Commander Stone. We spoke----

23 A [MR. CORN]: Good morning.

1 Q [LCDR STONE]: ----a little bit earlier. I'm looking at
2 you're CV. I just want to see if I get this right. You became a
3 lawyer in 1993; is that right?

4 A [MR. CORN]: In 1992----

5 Q [LCDR STONE]: Okay.

6 A [MR. CORN]: ----I graduated from law school.

7 Q [LCDR STONE]: All right. And from 1993 through 1997, you
8 worked in the Crim-Law Division?

9 A [MR. CORN]: 1993 to 1996, I worked primarily as a trial
10 counsel and chief of criminal law at Fort Campbell, but also as a
11 brigade legal advisor to the 3rd brigade and the DISCOM.

12 Q [LCDR STONE]: And your chief international law experience was
13 for two years, between June of 2001 and 2003, while on active duty?

14 A [MR. CORN]: Chief experience--in a position that was
15 exclusively focused on the practice of international law, that is
16 correct. Of course, there were the three years of teaching the
17 subject prior to that and the operational and international law
18 aspects of being a brigade legal advisor before that.

19 TC [LCDR STONE]: We have no objection to Professor Corn being
20 an expert in the law of war, but we are still--renew the concern with
21 regards to what his testimony may be, but we can qualify him as an
22 expert.

23 We have no objections.

1 MJ [CAPT ALLRED]: Without objection, then, the Court will
2 recognize Professor Corn as an expert in the law of armed conflict
3 and specifically the rules of engagement, as an indicator, I think is
4 how you characterized it, of whether or not a state of armed conflict
5 exists.

6 I'll invite the government to object when they feel the
7 witness is straying outside his areas--area of expertise. Go ahead.

8 CDC [MR. MCMILLAN]: Thank you, Your Honor. The defense would
9 like to offer Professor Corn's CV as the next defense trial exhibit
10 in order, Defense Exhibit H.

11 MJ [CAPT ALLRED]: No--well----

12 TC [LCDR STONE]: I mean, we would----

13 MJ [CAPT ALLRED]: ----I don't think that's relevant evidence
14 with respect to the offenses that are before the Court, and we
15 recognized him as a----

16 CDC [MR. MCMILLAN]: Very well.

17 MJ [CAPT ALLRED]: ----expert and we'll just hear his testimony.

18 CDC [MR. MCMILLAN]: Very well.

19 [END OF PAGE]

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23

1 CONTINUED DIRECT EXAMINATION

2 Questions by the civilian defense counsel:

3 Q [MR. MCMILLAN]: Professor, based on your training and
4 experience that we've just reviewed, experience advising commanders
5 on law of war and on operational issues, are you able to identify
6 factors that indicate whether a state of armed conflict exists?

7 A [MR. CORN]: Well, I think the answer--the basis for that
8 answer is more than just my training and experience advising
9 commanders. It also involved my--the time I've devoted to studying
10 the law of armed conflict itself.

11 And I believe that the answer to that question is, yes,
12 that there are factors that international law establishes as relevant
13 for determining when a period of armed conflict exists, either in the
14 international sense or the non-international sense.

15 Q [MR. MCMILLAN]: So do I understand correctly, Professor, that
16 whether a state of armed conflict is deemed to exist may depend on
17 the nature of the conflict, as an international armed conflict on the
18 one hand or a non-international armed conflict on the other?

19 A [MR. CORN]: Well, I--let me try and answer that as best I
20 can. What I believe is that international law acknowledges that a
21 state of armed conflict triggers a fundamental package of rights and
22 obligations on the--for the participants in those armed conflicts.

23 The--the package that is----

1 TC [LCDR STONE]: Objection. This goes beyond his----

2 A [MR. CORN]: ----is going to be dictated----

3 MJ [CAPT ALLRED]: Just a moment, Professor. We have an
4 objection.

5 TC [LCDR STONE]: Our objection is it's--one, it's a non-
6 responsive answer, and he's actually testifying as to his opinion
7 prior to setting out what any standard may be. We would prefer that
8 he set out what the standard is to see if it comports with the law,
9 and then allow him to testify with regards to what his opinion with
10 respect to the law may be, because if he's testifying beyond that,
11 then it would be objectionable.

12 CDC [MR. MCMILLAN]: Professor--Your Honor, these are
13 foundational questions that will attempt to elicit, then, the
14 opinions for which this expert has been qualified.

15 The prosecution, of course, will have ample opportunity to
16 cross-examine, but we would respectfully request a little latitude
17 in--in establishing certain foundational issues that will allow the
18 testimony to come forth.

19 MJ [CAPT ALLRED]: I'll give you a little latitude, but I want
20 you to remember that I don't want this expert testifying about what
21 the international law is.

22 CDC [MR. MCMILLAN]: Very well.

23 MJ [CAPT ALLRED]: That invades my province.

1 CDC [MR. MCMILLAN]: Very well.

2 Q [MR. MCMILLAN]: Is it fair to say that there are different
3 factors indicating the existence of an armed conflict in
4 international conflict as opposed to a non-international conflict?

5 A [MR. CORN]: I believe that there are different analytical
6 criteria or factors that you would focus on to make that
7 determination, yes.

8 Q [MR. MCMILLAN]: Could you identify those with respect to each
9 of those two types of conflicts?

10 A [MR. CORN]: Well, as we--I'm trying to be cautious not to go
11 into territory that I think the judge has indicated I shouldn't, but
12 to frame my perspective, we start with what I would say is the basic
13 law-triggering paradigm; when two states have a dispute that results
14 in the intervention of armed forces, that is an international armed
15 conflict, and as a consequence of Common Article 2 and the customs
16 surrounding it, it brings into force the full corpus of the law of
17 armed conflict.

18 The law also acknowledges that a state can engage in an
19 armed conflict with an enemy that is not a state. That is a non-
20 international armed conflict. And--and the basis of this is Common
21 Article 3 and the custom that's emerged from it or surrounding it,
22 and it only provides that an armed conflict that's not international
23 brings into force a smaller package, if you will, of rights and

1 obligations. It does not establish a definitive or determinative--
2 determinative standard for what an armed conflict is between a state
3 and a non-state entity. It instead instructs states to focus on the
4 de facto existence of hostilities-----

5 Q [MR. MCMILLAN]: The-----

6 A [MR. CORN]: -----between two groups.

7 TC [LCDR STONE]: I would--I would object that he's going into
8 areas which have not been determined to be actually what the
9 instructions will be and it invades the purview of the jury--or the
10 judge in terms of instructing what the law will be or is for this
11 case, as opposed to what Professor Corn believes that it is.

12 CDC [MR. MCMILLAN]: Well-----

13 MJ [CAPT ALLRED]: I'm--members of the Court, as--at the
14 beginning of this trial, I indicated to you that I would instruct you
15 on what the law is at the end of all the evidence, and each of you
16 indicated you would follow my instructions as to the law.

17 At the end of the case, I will instruct you about the law
18 that you should apply in this case. In the meantime, Professor Corn
19 is trying to help you understand some of the factors that might
20 indicate whether or not there was a period of armed conflict.

21 So I will allow you to listen to his testimony even--even
22 though it may later have to be corrected by my instructions, but I
23 will give the defense some latitude.

1 I think that I'm waiting for you to get to the discussion
2 of rules of engagement, so maybe you're still laying your foundations
3 to move into that area.

4 Q [MR. MCMILLAN]: Let me move quickly to the issue of rules of
5 engagement, Professor.

6 You mentioned the term de facto, I think, pragmatic as a
7 perspective that you thought was important in assessing whether an
8 actual armed conflict exists. And I ask you to elaborate on those
9 characteristics in assessing whether such a conflict exists.

10 A [MR. CORN]: The--in my opinion, based on my understanding of
11 the law, the Geneva Convention, particularly Articles 2 and 3 of
12 those conventions, were created in large measure to ensure that the--
13 the framework of regulatory authority provided by the law of armed
14 conflict could not be avoided by de jure characterizations or
15 political manipulations. So it adopted what virtually all experts in
16 the international community acknowledge as a de facto law triggering
17 paradigm.

18 That's why in the realm of state-versus-state conflict it
19 doesn't use the phrase war. War is a legal, internationally legally
20 charged term. It uses the term armed conflict, which was intended to
21 indicate a situation of hostilities between two opposing groups.

22 In the realm of non-international armed conflict that was--
23 that was carved out, if you will, by Common Article 3 of the

1 convention, it was--it was acknowledged in the commentary that it was
2 more complicated to determine the line between peace and armed
3 conflict because you didn't have the neatness of two state forces
4 engaging in hostilities.

5 And so the commentary provided a variety of criteria--the
6 commentary is--is the--what we might call the kind of supplemental
7 reference book for the treaty provision--a variety of instructive
8 criteria to help states and other parties determine when the line
9 between peace and armed conflict had been crossed and, therefore, the
10 minimum humanitarian protections of Common Article 3 were--were in
11 force as a matter of law.

12 Q [MR. MCMILLAN]: The----

13 A [MR. CORN]: ----what the ROE issue, the genesis of the ROE
14 focus for me is based on one of those criteria. The criteria
15 establish, one of them, which was intended to be particularly
16 instructive of this threshold, was the nature of the response that
17 the government chose in the face of this threat.

18 And in the internal context, which was the predominant
19 focus of Common Article 3, it really was a very effective de facto
20 criteria, because a state is going to intuitively respond to crime
21 with its law enforcement capability, but when there's a dissident
22 group that overwhelms that capability, then the state is going to be
23 forced to resort to military power----

1 Q [MR. MCMILLAN]: How----

2 A [MR. CORN]: ----combat capability.

3 Q [MR. MCMILLAN]: Let me just----

4 A [MR. CORN]: And the commentary----

5 Q [MR. MCMILLAN]: ----Let me just stop you just to summarize,
6 if I got that correctly, Professor. In the context of a non-
7 international armed conflict, where a state is engaged or challenged
8 or threatened by a non-state entity; was it your testimony that the
9 response of the government to that threat was an important factor
10 indicating the existence of an armed conflict in that non-
11 international setting?

12 A [MR. CORN]: Well, that was my testimony, but that doesn't
13 come from me; that comes from the commentary to the--to Article 3 of
14 the Geneva Conventions that--I'm sorry, go ahead.

15 Q [MR. MCMILLAN]: Okay. And--and then under that--some general
16 heading of the response of the government, you mention that there
17 could be a law enforcement response on the one hand or a military
18 response on the other hand; correct?

19 A [MR. CORN]: Well, that's correct. And that was the threshold
20 that the--that the drafters of the Geneva Convention, Article 3, were
21 obviously or ostensibly particularly concerned with; because if it's
22 a law enforcement issue internally, at that time, it was purely a
23 matter of domestic sovereignty. If it was an armed conflict, that

1 international law would intrude in that realm. So they needed to
2 provide some criteria for making that assessment.

3 Q [MR. MCMILLAN]: And, now, how do the rules of engagement
4 factor in to this discussion about whether a government is responding
5 with a law enforcement paradigm versus a military paradigm?

6 A [MR. CORN]: Well, to answer that question, I need to give you
7 a little bit of the genesis of where this--why I focus on rules of
8 engagement. As I said----

9 TC [LCDR STONE]: ----we would object.

10 A [MR. CORN]: ----the government response----

11 TC [LCDR STONE]: His personal opinion----

12 A [MR. CORN]: ----the government response----

13 MJ [CAPT ALLRED]: What's your objection?

14 TC [LCDR STONE]: The objection is that he, under the *Speck*
15 *versus Jensen*, he's stating his personal views of the law as opposed
16 to----

17 CDC [MR. MCMILLAN]: ----He's not giving personal views of the
18 law. It's a--it's an opinion on the utility of an analytical tool to
19 assess whether or not an objective--you know, to assess an objective
20 state of affairs.

21 MJ [CAPT ALLRED]: Ask your question again because I've
22 forgotten what it was.

23

1 CDC [MR. MCMILLAN]: My question was, how do rules of engagement
2 bear on or illustrate whether the response of a government to a non-
3 state threat has opted for a criminal paradigm or, on the other hand,
4 a military response? How does the rules of engagement indicate which
5 of these paradigms has been adopted?

6 MJ [CAPT ALLRED]: Okay. I'll let him answer that question.

7 A [MR. CORN]: Okay. As I was saying, the--my focus on the
8 rules of engagement or--or my opinion on why they are a useful
9 criteria is because it adds some flesh, if you will, to the criteria
10 provided in Common Article 3 to focus on the nature of the government
11 response.

12 In a purely internal conflict, when the government uses
13 combat military forces to respond to a threat, it is a particularly
14 effective indication that the state has crossed the threshold from
15 peacetime operations to armed conflict.

16 The problem is applying that same criteria
17 extra-territorially to a transnational enemy like al Qaeda was--was
18 somewhat hollow because our armed forces and other armed forces
19 conduct peacetime extra-territorially military missions all the time.

20 So my view was, you couldn't just ask, is the government
21 deploying forces, because we deploy forces to places like Kosovo or
22 Bosnia or Haiti in a non-conflict context, and that's really not in
23 any type of dispute.

1 Q [MR. MCMILLAN]: Professor Corn, did--please correct me if I
2 misstate what I think I understood you to say, which is that in
3 looking at the government response to a challenge from a non-state
4 entity, the mere deployment of military forces, particularly forces
5 overseas, is not a sufficient indicator of whether armed conflict
6 exists because there are some deployments which are non-combat
7 operations; is that correct?

8 A [MR. CORN]: That is--that's an accurate summary. I mean, if
9 we look at the joint doctrine on military operations, there's a range
10 of military missions that fall below the threshold of armed conflict,
11 anything from a--a consensual non-combat evacuation operation,
12 counter drug missions, support to law enforcement.

13 So my focus, again, was if we're going to look at the
14 criteria of the government's use of military force to respond to a
15 situation to determine when there is a state of armed conflict
16 between a state and a non-state entity, we needed more than just
17 whether forces were deployed, and that's what led me to focus on the
18 authority that those forces have been granted to conduct that
19 mission.

20 Q [MR. MCMILLAN]: And----

21 A [MR. CORN]: And that authority, in my opinion--that authority
22 in my opinion, particularly for U.S. operations, comes in the form of
23 rules of engagement. And at its simplest level, all that I'm

1 suggesting is that to properly apply that--that criteria from the
2 Common Article 3 commentary, we have to look at more than just are
3 forces deployed. We have to look at what are those forces authorized
4 to do pursuant to that deployment, and that comes from analysis of
5 the rules of engagement.

6 Q [MR. MCMILLAN]: Okay. So you have made a distinction in your
7 writings between conduct-based rules of engagement on the one hand
8 and status-based rules of engagement on the other hand in order to
9 help assess whether the deployment of military forces has--is
10 actually indicative of a state of armed conflict; is that correct?

11 A [MR. CORN]: That is correct.

12 Q [MR. MCMILLAN]: Could you elaborate on that----

13 A [MR. CORN]: And the reason that I----

14 Q [MR. MCMILLAN]: Elaborate on that----

15 A [MR. CORN]: Yes.

16 Q [MR. MCMILLAN]: ----distinction between conduct-based rules
17 of engagement on the one hand and status-based rules of engagement on
18 the other hand.

19 A [MR. CORN]: Yes. In my opinion, I mean, of course the
20 standing rules of engagement is a complex directive and there are
21 many nuances to it, but essentially military forces operate under one
22 or two broad categories of rules of engagement.

1 If we think of rules of engagement as the shoot/don't shoot
2 criteria, if you're operating under conduct-based rules of
3 engagement, your shoot/don't shoot decision is dictated by what you
4 confront, the threat you face: Are you in a--facing an imminent
5 threat of death or grievous bodily harm to you or fellow members of
6 your force or some other person or thing that you're authorized to
7 defend?

8 Those are essentially self-defense ROE or defense of
9 other's ROE, and the authority to use deadly force under that
10 category of ROE is thoroughly consistent with a law enforcement
11 paradigm.

12 The other basic category of ROE, in my opinion, are
13 status-based ROE. Under status-based rules of engagement, the
14 shoot/don't shoot decision is not dictated by what the--the
15 trigger-puller is immediately confronting. It's dictated by a
16 determination that who he's observing falls into the status of a
17 hostile force, or enemy force, however it's characterized.

18 And, in essence, once that identification has been made,
19 then the authority exists to employ that threat with deadly combat
20 power.

21 Q [MR. MCMILLAN]: Okay. Let me stop you right there.

22 A [MR. CORN]: And from my perspective, what that indicates----

1 Q [MR. MCMILLAN]: If I--if I could, just to make sure I got
2 that piece straight. And if I understood you correctly, you were
3 indicating that conduct-based rules of engagement will allow the use
4 of deadly force against an adversary based on conduct from the
5 adversary that threatens U.S. forces; is that correct?

6 A [MR. CORN]: Yes.

7 Q [MR. MCMILLAN]: As--and on the other hand, status-based rules
8 of engagement will allow U.S. forces, if the rules of engagement are
9 written on a status grounds, then the mere identification of someone
10 who falls within the status of the enemy will allow U.S. forces to
11 initiate----

12 A [MR. CORN]: I've lost audio.

13 Q [MR. MCMILLAN]: Do you--can you hear me at this point,
14 Professor?

15 A [MR. CORN]: No, I can't hear you. I--I heard--I heard
16 everything under conduct-based but nothing under status-based.

17 Q [MR. MCMILLAN]: Okay. Can you--the status-based rules of
18 engagement allow U.S. forces to initiate the use of deadly force upon
19 making a positive ID of the adversary; is that a fair summary?

20 A [MR. CORN]: That is a fair summary.

21 [END OF PAGE]

22

23

1 Q [MR. MCMILLAN]: Okay. Is--between conduct-based rules of
2 engagement on one hand and status-based rules of engagement on the
3 other hand, which of them is more consistent with the existence of an
4 armed conflict?

5 A [MR. CORN]: Well, I believe that status-based rules of
6 engagement are a clear indicator of the existence of armed conflict
7 for a simple reason: If you are using deadly force, combat power,
8 without any individual provocation or threat from the object of that
9 attack, you are inherently invoking the principal military objective,
10 which is a principal that comes from the law of armed conflict.

11 So if you're operating under status-based ROE, those
12 status-based ROE are derived from a theory that the law of armed
13 conflict is applicable to justify the use of deadly combat power as a
14 measure of first resort and not as a measure of last resort.

15 Q [MR. MCMILLAN]: So to apply this in a hypothetical context
16 involving al Qaeda, the non-international armed conflict that is at
17 issue in this case, if conduct-based rules of engagement are in place
18 for U.S. forces at a particular time, they are not able to initiate
19 deadly force against someone identified as al Qaeda; is that correct?

20 A [MR. CORN]: The mere identification as being al Qaeda under
21 conduct-based rules of engagement I would say would not justify the
22 immediate resort to deadly force.

1 Q [MR. MCMILLAN]: On the other hand, if status-based rules of
2 engagement are in effect at a particular time, then the mere
3 identify--the mere identification of someone as al Qaeda would
4 authorize the use of deadly force and be consistent with the state of
5 armed conflict; is that correct?

6 A [MR. CORN]: That's--that's my basic opinion, yes.

7 Q [MR. MCMILLAN]: Okay. Now, are you aware of whether any
8 unclassified or declassified rules of engagement, during the period
9 1996 to September 11th, 2001, authorized status-based targeting of al
10 Qaeda personnel?

11 A [MR. CORN]: To my knowledge, the answer to that question is
12 no, and that is in large measure on the fact that you and I have
13 discussed this issue and, based on your efforts to obtain that
14 information, you haven't been able to find any.

15 Q [MR. MCMILLAN]: If you were informed--it's a hypothetical
16 question. If you were informed that there were no rules of
17 engagement for theater commands or supplemental measures prior to
18 9/11 that authorized status-based strikes against al Qaeda, what
19 would that indicate to you about whether an armed conflict with al
20 Qaeda existed prior to 9/11?

21 A [MR. CORN]: It would indicate to me that the United States'
22 political and military leadership did not believe that it was in a

1 period of armed conflict because it had not invoked the authority of
2 that law.

3 Q [MR. MCMILLAN]: Well, what about the fact that Usama bin
4 Laden issued fatwas in 1996 and 1998 purporting to declare war on the
5 United States?

6 A [MR. CORN]: Well, first off, there's a--there's a very
7 difficult question of whether or not a non-state entity can even
8 declare war, but that's beyond the scope of the discussion.

9 I think it would be one factor but certainly not a
10 dispositive factor, and it is--it seems much more with--the assertion
11 that a period of war exists seems much more of a subject that is--or
12 an assertion that is subject to hyperbole than the de facto question
13 of what was the nature of the activities conducted by the United
14 States against this organization.

15 Q [MR. MCMILLAN]: Can you think, Professor, of any other
16 instances in the contemporary period in which an individual or an
17 organization, quote, "declares war" on a sovereign state?

18 A [MR. CORN]: Well, as I--as--when we were going over the CV,
19 as I noted, I began my career in Panama and obviously I had a strong
20 interest in what happened there. The only thing that I think comes
21 close was General Noriega's assertion, I think several weeks at
22 least, or maybe a month or two before Operation Just Cause that a
23 state of war existed between the United States and the Republic of

1 Panama. And as I recall, he had that endorsed by the Panamanian
2 Legislature. But that did not alter the nature of U.S. operations in
3 Panama. They remained self-defense, conduct-based in nature and it
4 was only after other provocations combined to lead the President to
5 decide that the Noriega Regime had to be toppled that the United
6 States shifted from this peacetime self-defense paradigm to an armed
7 conflict paradigm, declared the Panamanian defense forces hostile and
8 conducted military operations against them that began on the night of
9 19 December 1989.

10 Q [MR. MCMILLAN]: So despite the existence of these provocative
11 words, the rules of engagement in place for U.S. forces would lead
12 you to believe that a state of armed conflict did not exist, at least
13 for a month or so after those provocative words from an adversary?

14 A [MR. CORN]: That's right.

15 Q [MR. MCMILLAN]: So are--is this an example of looking at the
16 sort of objective de facto conditions in order to make a
17 determination of whether a state of armed conflict exists?

18 A [MR. CORN]: I think it is an example of the significance of
19 those de facto criteria, and I think that the Federal District Court
20 in the case of *U.S. v. Noriega*, when it ruled that General Noriega
21 was entitled to status as a prisoner of war, also determined that
22 that period of arm conflict commenced on 19 December 1989, rejecting

1 the government's assertion that there was no international armed
2 conflict.

3 Q [MR. MCMILLAN]: Okay. Professor, let me ask you to speak to
4 two instances of violence directed against the United States
5 interests by al Qaeda in the period between 1996 and 9/11, and I'm
6 referring to the bombings of U.S. embassies in East Africa in 1998
7 and the attack on USS COLE in Yemen in 2000.

8 What sort of response did you see from the United States to
9 these events and how does that bear on whether, in your opinion, a
10 state of armed conflict existed with al Qaeda?

11 A [MR. CORN]: Well, as I recall, that there was an air--a
12 missile strike that was launched against territory in Afghanistan
13 following the embassy bombings, and I don't see how that could have
14 been done without the authorization to engage in status-based
15 targeting for the purpose of that mission. So I'll assume that for
16 the purposes of that mission, the armed forces were authorized to
17 invoke the principal military objective, if you will.

18 So I think for the purposes of that attack, there was an
19 armed conflict that occurred between the United States and I assume
20 al Qaeda, although without seeing the rules of engagement it's hard
21 to tell exactly who was the lawfully authorized object of that
22 attack; was it al Qaeda, was it Taliban, was it Afghanistan. But

1 I'll assume for purposes of the answer that that--that attack was a
2 period of armed conflict.

3 But that doesn't mean, in my opinion, that the armed
4 conflict persisted from that point forward indefinitely. In fact,
5 the United States has periodically asserted that an armed conflict
6 can be a very brief encounter.

7 When Bobby Goodman was shot down, the Navy pilot was shot
8 down over the Baca Valley in 1983 by Syrian forces; the U.S. position
9 was there was an armed conflict that lasted for the duration of that
10 missile shoot. It ended at the end of the missile shoot. Therefore,
11 he was a prisoner of war entitled to immediate repatriation. We
12 didn't say that, because a missile was shot, a period of armed
13 conflict continued.

14 So I think what you have to do is ask whether the
15 authorization for status-based targeting, if it did exist for the
16 purpose of that missile shoot, was an authorization that remained in
17 force following that point. If it did, then my argument would be
18 that supports the conclusion that we were in a period of armed
19 conflict with this entity; if it didn't, then what I believe what it
20 indicates is that, for purposes of one mission, our government
21 shifted its legal authority from a law enforcement paradigm to an
22 armed conflict paradigm and then reverted back to the law enforcement
23 paradigm.

1 And as I recall from the USS COLE, the lead government
2 entity to respond to that, that incident, was the Federal Bureau of
3 Investigation under the Attorney General. Again, an indicator that
4 the government was not invoking the authority of the law of armed
5 conflict but was treating this primarily as a criminal matter.

6 Q [MR. MCMILLAN]: Are you aware of whether there was any
7 military response in the period following the attack on the COLE in
8 October of 2000?

9 A [MR. CORN]: To my knowledge, there was no combat military
10 response to any al Qaeda entity at that point.

11 Q [MR. MCMILLAN]: Now, do you believe there was a paradigm
12 shift that occurred with the 9/11 attack from what once--one
13 paradigm, criminal, to another, the military?

14 A [MR. CORN]: I--I do believe there was a shift in the nature
15 of the legal authority invoked by the United States to respond to
16 this threat; that prior to 9/11, the authority that we were
17 responding with was primarily a law enforcement authority, and that
18 after 9/11, because of the scale, the intensity, the nature of the
19 organization that we determined we were facing, the President, the
20 Congress, and ultimately the judicial branch of our government made a
21 decision to invoke the authority of the law of armed conflict to
22 justify attacking, destroying and disabling this transnational armed
23 entity.

1 And that in and of itself, I would add, is an extremely
2 controversial proposition in the international legal community. I
3 think, though, that, again, the purpose of the law of armed conflict
4 is to provide a regulatory framework for forces when they are engaged
5 in hostilities. And to deny that we--we unleashed the power of the
6 armed forces to engage in combat operations against this entity I
7 think is naive, but I think that that occurred in response to those
8 attacks.

9 Q [MR. MCMILLAN]: Professor, if--this is a hypothetical
10 question. If an examination of the Rules of Engagement at CENTCOM
11 revealed that status-based targeting against al Qaeda first appears
12 on October 2nd, 2001, what does that--how does that affect your
13 opinion as to when an armed conflict existed between the United
14 States and al Qaeda?

15 A [MR. CORN]: Well, I--obviously, based on everything I've said
16 so far, I think that is a clear indication that the United States had
17 invoked the authority of the law of armed conflict at that point in
18 time as a basis for operations against al Qaeda. It indicates that
19 we had chosen and invoked the authority to--to use military power to
20 kill members of al Qaeda as a measure of first resort.

21 And the use of military power to kill as a measure of first
22 resort is only authorized under the law of armed conflict. So it
23 indicates that that's the point where the armed conflict between

1 these--this state and this non-state indeed began. And--and at that
2 point all the obligations and responsibilities derive from that law
3 and the authority came into force.

4 Q [MR. MCMILLAN]: Are you aware of whether there was any demand
5 or ultimatum issued from the United States government to the Taliban
6 in Afghanistan in the immediate aftermath of 9/11?

7 A [MR. CORN]: Yes. There was a demand that the Taliban turn
8 over members of al Qaeda responsible for the tragic attacks of 9/11
9 so that they could be dealt with through the criminal process. There
10 was also a demand by the United Nations Security Council that all
11 states redouble their efforts to bring these individuals to justice.

12 Q [MR. MCMILLAN]: Why was that demand directed to the Taliban,
13 as opposed to some other group in Afghanistan?

14 A [MR. CORN]: I don't know that I can answer that question
15 without speculating. I--I had nothing to do with the demand. To me
16 what's significant about it is what it reflects as opposed to why it
17 was issued.

18 Q [MR. MCMILLAN]: Professor, do you have an opinion on whether
19 the Taliban were, in September of 2001, the de facto government of
20 Afghanistan?

21 A [MR. CORN]: My opinion is based on the official U.S. position
22 on this matter, and--and that's--and the United States determined
23 ultimately that was in fact the case, that the Taliban--that we were

1 engaged in an armed conflict with Afghanistan and the Taliban was the
2 governing power of Afghanistan. And I believe that's consistent with
3 Common Article 2 of the four Geneva conventions and the commentary,
4 which indicates that the fact that a state is not recognized by
5 another state should not deprive the participants in an armed
6 conflict to the benefit of this body of law.

7 Again, the emphasis is on de facto criteria of the
8 existence of--non-armed conflict and not de jure characterization.

9 CDC [MR. MCMILLAN]: Okay. Thank you, Professor. I have no
10 further questions.

11 **CROSS-EXAMINATION**

12 **Questions by the trial counsel:**

13 Q [LCDR STONE]: Good morning, Professor Corn.

14 A [MR. CORN]: Good morning.

15 Q [LCDR STONE]: Now, you testified that under Common Article 3
16 that the government response is one criteria, or one objective factor
17 to the existence of an arm conflict; correct?

18 A [MR. CORN]: No. I testified that pursuant to the commentary,
19 the ICRC commentary to Common Article 3, that that is an important
20 factor among other factors to consider, but that is not part of the
21 treaty provision itself.

22

23

1 Q [LCDR STONE]: Sure. Okay. So we're talking actually less
2 than an actual treaty; just the commentary associated with that
3 treaty?

4 A [MR. CORN]: Right, the commentary associated with that treaty
5 that is generally regarded in the community as authoritative on the
6 meaning of that provision.

7 Q [LCDR STONE]: Sure. Okay. And then you also state that with
8 regards to Common Article 3 and these objective factors, that in a
9 transnational event or a transnational entity such as al Qaeda, the
10 government response, in this case the United States, that response--
11 well, let me read it this way--more complicated and less reliable to
12 look at the government response when you're dealing with the
13 transnational military operations than you are in the state of
14 internal armed conflict; you would agree with that statement?

15 A [MR. CORN]: No. Let me--let me be clear on what I--what I
16 think I said and certainly what I meant.

17 The government response criteria is a question of which
18 power the government is responding with. Is it responding with law
19 enforcement capability or military capability?

20 What I said was I think that when you apply that criteria
21 or that factor extra-territorially, it becomes much less useful,
22 because governments use military capability routinely,
23 extra-territorially, for non-conflict missions.

1 So, therefore, you have to look at more than just the
2 question of whether the government is deploying the armed forces.
3 You have to look at what is it the armed forces are authorized to do
4 in conjunction with that deployment.

5 Q [LCDR STONE]: Now, remember your article, *Untying the*
6 *Gregorian Knot*?

7 A [MR. CORN]: I do.

8 Q [LCDR STONE]: In that article, don't you say that the
9 application of Common Article 3 factors, including government
10 response, is less reliable when you're dealing with transnational
11 actors, such as al Qaeda, than with a specific internal armed
12 conflict between--and the states?

13 A [MR. CORN]: Yes.

14 Q [LCDR STONE]: Yes? Okay.

15 A [MR. CORN]: I do say that. That's--that's the point I just
16 made, that you cannot just look at the modality the government uses;
17 you have to look at the authority the government invokes.

18 Q [LCDR STONE]: Right. Now, there are Pictay's case
19 commentaries to Common Article 3, you would agree with me that there
20 are other objective efforts----

21 A [MR. CORN]: There are----

22

23

1 Q [LCDR STONE]: ----as opposed to merely the government's
2 response?

3 A [MR. CORN]: That's correct.

4 Q [LCDR STONE]: Okay. One of these factors is certainly that
5 the transnational organization is well organized in a military sense;
6 correct?

7 A [MR. CORN]: No, that's--I don't--I don't believe that's an
8 accurate statement of the commentary because I don't think the
9 commentary ever contemplated a non-international armed conflict
10 outside the territory of the sovereign state. The mere suggestion
11 that you can have a non-international armed conflict against a trans
12 or an extra-territorial non-state actor, what some other people have
13 characterized as an internationalized non-international armed
14 conflict, is extreme controversial.

15 I don't think that it's--it's legitimate to deny the
16 potential that those type of armed conflicts exist, but I don't
17 think--and the article makes this clear--I don't think the commentary
18 ever contemplated this type of armed conflict.

19 Q [LCDR STONE]: Right. But you have testified that there are
20 objective criteria, including rules of engagement and the government
21 response, to determine the existence of an armed conflict with a
22 transnational actor; correct?

23 A [MR. CORN]: That's my thesis, yes.

1 Q [LCDR STONE]: Yes. And is it your thesis, then, that you
2 disagree with the idea that al Qaeda or the transnational actor, the
3 fact that they are a well-organized military force has nothing to do
4 with the existence of an armed conflict; is that your--is that your
5 testimony?

6 A [MR. CORN]: No, I don't think--I don't disagree with that at
7 all. I think that's an important criteria. And, as a matter of
8 fact, the article that was written prior to the one you're looking at
9 focused on the armed conflict between Israel and Hezbollah--
10 Hezbollah, in the summer of 2006. And I think that--that that was an
11 armed conflict governed by the law of non-international armed
12 conflict. And one of the factors there, in addition to the nature of
13 the Israeli response, was the military organization of Hezbollah, the
14 controlled territory and other factors.

15 Q [LCDR STONE]: All right. So you--and to summarize your
16 answer, well organized in a military sense, a factor to consider?

17 A [MR. CORN]: Yes.

18 Q [LCDR STONE]: Okay. Are you aware that al Qaeda had a
19 military committee during this time?

20 A [MR. CORN]: Yes.

21 Q [LCDR STONE]: Are you aware that they operated training camps
22 continuously in Afghanistan from 1992 through 2001?

23 A [MR. CORN]: Yes.

1 Q [LCDR STONE]: Are you aware that they had multiple levels of
2 training at those terrorist camps?

3 A [MR. CORN]: Yes.

4 Q [LCDR STONE]: Are you aware that they had a worldwide
5 recruitment operation where centers were set up in major European and
6 Arab cities?

7 A [MR. CORN]: Yes.

8 Q [LCDR STONE]: Cities such as Milan, London, Hamburg?

9 A [MR. CORN]: Yes.

10 Q [LCDR STONE]: And that these training camps with regards to
11 their well-organized structure had basic training, advanced training,
12 and training in chemical, biological weapons?

13 A [MR. CORN]: Yes.

14 Q [LCDR STONE]: And other criteria that is mentioned, would you
15 agree with, is that there is somewhat of a structure, command and
16 control environment as an objective factor; would you agree with
17 that?

18 A [MR. CORN]: Yes.

19 Q [LCDR STONE]: Okay. Are you aware that al Qaeda was
20 organized into a Shura Council of leaders?

21 A [MR. CORN]: Yes.

22

23

1 Q [LCDR STONE]: You're aware that this council was fluid and
2 that you could rise through the ranks in a fairly quick time?

3 A [MR. CORN]: Yes.

4 Q [LCDR STONE]: Are you aware that Usama bin Laden has been
5 described as a micro-manager, and had control of most command and
6 control operations?

7 A [MR. CORN]: No, I was not aware of that.

8 Q [LCDR STONE]: Okay. Another one of these criteria would be
9 that that--that that organization or entity controls territory to the
10 exclusion of others; correct?

11 A [MR. CORN]: In my opinion, that criteria was written and
12 anticipated to apply to a situation involving an internal dissident
13 group, not a transnational actor.

14 Q [LCDR STONE]: Okay. Fair enough. But, nonetheless, you are
15 aware that al Qaeda in 1992 through 1996 basically operated with
16 impunity in the Sudan and controlled various houses and areas? Are
17 you aware of that?

18 A [MR. CORN]: Well, you use the word impunity. I----

19 Q [LCDR STONE]: Well----

20 A [MR. CORN]: ----You----

21 Q [LCDR STONE]: ----beyond the reach of the Sudan government.

22 A [MR. CORN]: My understanding is they operated--they operated
23 with the consent of the Sudanese government.

1 Q [LCDR STONE]: And from 1996 to 2001, they operated as many as
2 15 or 20 different training camps to the exclusion of other
3 individuals and other organizations in Afghanistan, they controlled
4 this area of property? Are you aware of that?

5 A [MR. CORN]: I am, indeed.

6 Q [LCDR STONE]: This also included not just large training
7 camps but individual houses in which they trained on electronics and
8 explosives, IEDs; you're aware of that, as well?

9 A [MR. CORN]: Yes, I am.

10 Q [LCDR STONE]: And that they had a very extensive network of
11 document forgery, passports, in which they could move people from
12 country to country to operate and carry out terrorist attacks?

13 A [MR. CORN]: Yes.

14 Q [LCDR STONE]: Another one of the criteria or objective
15 criteria within the existence of armed conflict would be the fact
16 that there was a sustained military-type operations; right?

17 A [MR. CORN]: The criteria, as I recall, is sustained military
18 operations between the dissident group and government armed forces.

19 Q [LCDR STONE]: Okay. And the sustained operations would
20 include that he trained, does it not?

21 A [MR. CORN]: Again, my understanding of the commentary of
22 Common Article 3 is focused on the nature of the--the encounter or
23 the events occurring between the two sides in a disputes. And the

1 sustained military operation is focused on operations conducted
2 between government forces and an internal dissident group. For
3 example, the Colombian military armed--the Colombian armed forces
4 against the FARC.

5 Q [LCDR STONE]: Sure.

6 A [MR. CORN]: Not on the--what the non-state group or the
7 dissident group is doing.

8 Q [LCDR STONE]: Okay. And so--so actual engagements or
9 attacks, that's what you're talking about?

10 A [MR. CORN]: Hostilities between--hostilities between the
11 forces, yes.

12 Q [LCDR STONE]: Okay. So--and at that time, would you agree at
13 that time it dovetails into sort of the scope, duration, and
14 intensity of their actions against the government?

15 A [MR. CORN]: Their actions, being al Qaeda against our
16 government----

17 Q [LCDR STONE]: Whether the al Qaeda----

18 A [MR. CORN]: ----or the dissident group?

19 Q [LCDR STONE]: Whether the al Qaeda or the dissident group. I
20 mean, you would agree with me that----

21 A [MR. CORN]: Absolutely. Absolutely. The--the--the
22 commentary is attempting to provide a framework for assessing when
23 the government is no longer just enforcing its own law. And scope,

1 duration, and intensity of hostilities between the dissident group
2 and government forces is considered an important factor so that you
3 don't have a situation where the use of some combat power at Waco in
4 the Branch Davidian compound can be characterized as an armed
5 conflict only because the government called on military support to
6 law enforcement.

7 Q [LCDR STONE]: Certainly. And--well, let's look at a couple
8 of these engagements, military-type operations. You are aware that
9 al Qaeda founded the worldwide recruiting network in--starting
10 roughly in 1988 or '89, organized to conduct violent terrorist
11 attacks? Are you aware of that?

12 A [MR. CORN]: Yes.

13 Q [LCDR STONE]: Are you aware that their first attacks against
14 the United States occurred in 1991, in Aden, Yemen, where they were
15 attacking U.S. soldiers in--on leave on their route to Somalia? Are
16 you aware of that?

17 DC [MR. MCMILLAN]: Objection, Your Honor. These are facts not
18 in evidence and consequently is testifying by prosecution.

19 MJ [CAPT ALLRED]: No, no. He's asking the witness a question;
20 and if he's aware of it, then--then it becomes facts in evidence.
21 Overruled.

22 WIT [MR. CORN]: Yes, I am.

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1 Q [LCDR STONE]: Are you aware that al Qaeda sent operatives
2 into Somalia during our Restore Hope operation and killed our service
3 members? Are you aware of that fact?

4 A [MR. CORN]: Yes, I am.

5 Q [LCDR STONE]: Are you aware of the Bojinka plot, in which the
6 al Qaeda operatives tried to hijack planes from the Pacific and blow
7 them up over the Pacific in route to the United States in 1994?

8 A [MR. CORN]: Yes, I am.

9 Q [LCDR STONE]: Are you aware of a foiled plot by al Qaeda to
10 assassinate President Clinton in 1995 and then in 1996?

11 A [MR. CORN]: No, I was not aware of that.

12 Q [LCDR STONE]: Are you aware of a plot by al Qaeda to
13 assassinate the Pope?

14 A [MR. CORN]: Yes, I am.

15 Q [LCDR STONE]: Now, you agree that the declaration of war in
16 1996 is in and of itself one factor that you must consider to whether
17 or not an armed conflict between al Qaeda and the United States
18 existed; correct?

19 A [MR. CORN]: No, I think in my direct testimony I--I--I
20 qualified that by indicating I'm not sure what the effect of an
21 assertion of an existence of a state of war between the non-state
22 entity and the state actually is. The discussion of declaration of

1 war in the commentary refers to--is a commentary to Common Article 2.
2 But I'll concede that it--it would be something to look at.

3 Q [LCDR STONE]: And did you not testify on direct that the
4 declaration of war was a factor but not dispositive in this armed
5 conflict?

6 A [MR. CORN]: As I just said, I'll concede that it's something
7 to look at.

8 Q [LCDR STONE]: Okay. What about the 1998 fatwa in which al
9 Qaeda said, "It is the duty of all Muslims to kill Americans and
10 civilians and plunder their money wherever they may be"? Does that
11 count?

12 A [MR. CORN]: Okay. To--you're asking me does that count.
13 Count towards what, sir? If you're asking me does that count to
14 establish existence of an armed conflict, I think that much of the
15 answer to that is dictated by the nature of the threat that that was
16 perceived to be at the time.

17 One of the most complicated issues in this whole debate is
18 trying to distinguish between acts of terrorism, which are
19 predominantly considered violations of criminal law, and acts of war,
20 which occur in the context of an armed conflict.

21 And--and I won't dispute for you when you--for a second
22 that since its inception al Qaeda has been a vile terrorist
23 organization, but my perspective is at what point in time does the--

1 does the authority that the United States is invoking to respond to
2 that threat shift from use of law enforcement capability because it's
3 treating it as an act of terror, the use of combat capability because
4 it's treating it as an act of war.

5 Q [LCDR STONE]: Okay. I understand that. So the--you actually
6 agree, then, that the embassy bombings on August 6th, 1998 that
7 killed over 200 people, mostly Kenyans, would have been considered an
8 act of war and constitutes an armed conflict?

9 A [MR. CORN]: No, I don't agree with that.

10 Q [LCDR STONE]: Okay. Constitutes nonconflict----

11 A [MR. CORN]: I don't agree with that, and I don't think that--
12 I don't think--I don't think the United States treated it as an act
13 of war constituting a state of armed conflict at the time.

14 Q [LCDR STONE]: You do recognize that we launched Tomahawk
15 cruise missiles at al Qaeda during that time?

16 A [MR. CORN]: As I said in my direct testimony, I do recognize
17 that there was a missile strike, and I assume or presume that that
18 strike was pursuant to status-based authority granted by the national
19 command authorities under the rules of engagement.

20 Q [LCDR STONE]: So----

21 A [MR. CORN]: So I think there was a period--a period of armed
22 conflict as a result of that military response, but I'm not--in my

1 opinion, that period of armed conflict did not continue indefinitely
2 until 9/11.

3 Q [LCDR STONE]: Okay. You are aware with regards to these
4 objective criteria of continuing of military operations under Common
5 Article 3 of the USS SULLIVANS' plot in January of 2000, in which al
6 Qaeda tried to destroy the USS SULLIVANS on its--as it goes into the
7 Port of Aden. Are you aware of that?

8 A [MR. CORN]: I do have a recollection of that, yes.

9 Q [LCDR STONE]: That the boat sank; not The SULLIVANS, the
10 attack boat?

11 A [MR. CORN]: I don't recall. Oh, that the attack boat sank?

12 Q [LCDR STONE]: Correct, not The SULLIVANS?

13 A [MR. CORN]: That The SULLIVANS acted pursuing--right, The
14 SULLIVANS acted pursuant to the authorization to respond to a threat
15 of imminent deadly force.

16 Q [LCDR STONE]: Actually, I don't think The SULLIVANS even knew
17 about it. The boat sank before it got--right before it got into the
18 harbor.

19 You are aware of, of course, the USS COLE attack?

20 A [MR. CORN]: I am.

21 Q [LCDR STONE]: You are aware the tragic events of 9/11?

22 A [MR. CORN]: Of course.

1 Q [LCDR STONE]: You're aware of the foiled Singapore plot in
2 which al Qaeda operatives were taken down when they were targeting
3 American service members from the USS KITTY HAWK in December of '01?

4 A [MR. CORN]: No, I'm not aware of that.

5 Q [LCDR STONE]: You're not aware of that. You're aware that
6 Richard----

7 A [MR. CORN]: In December of '01, no. I'm--I'm aware of the--
8 I'm sorry, go ahead.

9 Q [LCDR STONE]: Okay. And you are aware that Richard Reed was
10 launched from--well, Richard Reed was the shoe bomber; you're aware
11 of that?

12 A [MR. CORN]: Yes, I am.

13 Q [LCDR STONE]: And that his plot was hatched or thought up and
14 began to be executed prior to the attacks of September 11th; you're
15 aware of that?

16 A [MR. CORN]: No, I'm not.

17 Q [LCDR STONE]: And are you aware that the Zacarious Moussaoui
18 follow-on plot was also in the works prior to 9/11? Were you aware
19 of that?

20 A [MR. CORN]: I think I was aware that he was--he was operating
21 al Qaeda prior to 9/11, yes.

22

23

1 Q [LCDR STONE]: Right. And he was actually arrested on August
2 20th, 2001?

3 A [MR. CORN]: That's right.

4 Q [LCDR STONE]: Okay. As we've gone through, would you agree
5 with me that, within these objective factors, we've pretty much
6 covered them all; military sense, command and control, controls
7 territory, the exclusion that they have sustained military
8 operations, and that you should look at the scope, duration,
9 intensity of a conflict to determine the existence of an armed
10 conflict, as well as the government response?

11 A [MR. CORN]: Well, I don't think you can extricate the last
12 two, sir. You say you look at the scope, duration, and intensity of
13 the government response to determine the existence of an armed
14 conflict as well as the government response. The scope, duration,
15 and intensity factor is focused on the de facto question of whether
16 there is armed conflict hostilities between the state and the
17 dissident group.

18 And, again, I'll--I'll reiterate that these factors were--
19 were written in anticipation of an internal dissident group. And the
20 reason--if you look at the commentary, the reason that the use of
21 combat power by the state is considered such critical criteria or
22 valuable criteria is because all those other factors, even
23 collectively, could still exist when you have a situation that

1 remains under the law enforcement paradigm, when you haven't crossed
2 the threshold.

3 And that's why the nature of the government response, which
4 reveals whether or not there really are intense hostilities, if you
5 will, is so significant.

6 Q [LCDR STONE]: Okay. One more. Are you also aware that our
7 response to the embassy bombings included that we put a submarine off
8 the coast and looked to attack, further attack the al Qaeda network
9 and----

10 A [MR. CORN]: As I recall, I do--I'm sorry. I do recall
11 reading that there was the possibility of a--of a special operations
12 task force strike on the base camps was contemplated and rejected by
13 the President.

14 And, again, I think that that is a significant indicator
15 that, for purposes of that response, the U.S. did engage in an armed
16 conflict against al Qaeda at that moment.

17 Q [LCDR STONE]: And that actually comes from a Madeleine
18 Albright, who was then the Secretary of State, who testified before
19 the 9/11 Commission, that they tried to look at additional
20 operational activities but they couldn't find him because Usama bin
21 Laden was effectively hidden, and they could not get tactical
22 intelligence?

23 A [MR. CORN]: Well, I recall that.

1 Q [LCDR STONE]: Okay. So----

2 A [MR. CORN]: I recall that, yes.

3 Q [LCDR STONE]: Okay. Let's----

4 A [MR. CORN]: But, again, I think that--that your question
5 exposes the dilemma. If we are going to acknowledge that we can
6 invoke the authority of the law of armed conflict and, in essence, be
7 in an armed conflict against a non-state group, where does it begin
8 and where does it end?

9 In other situations we have a much more--a much easier time
10 in determining those points. And so I think that looking at the
11 nature of the government response and how long that authority existed
12 is an important indicator to answer that very difficult question,
13 because you don't have the benefit of alternate indicators, like a
14 capitulation agreement or like a truce or an amnesty between a
15 dissident group and an armed force.

16 Q [LCDR STONE]: Okay. I have--let's see here. Let's just talk
17 really quickly about just sort of the general nature of the rules of
18 engagement. You can have both conduct and status-based rules of
19 engagement in the context of armed conflict; correct?

20 A [MR. CORN]: Yes, you can. You can have certain missions
21 conducted under conduct-based authority and others under status. I
22 mean, that's the Marine Corps concept of the three-block war.

23

1 Q [LCDR STONE]: Sure. Would you also agree with me that one of
2 the reasons you have conduct-based rules of engagement during periods
3 of hostilities is because the enemy takes steps to hide its status so
4 you have to rely on a hostile act or hostile intent before you
5 engage?

6 A [MR. CORN]: In my opinion, that's not an accurate
7 characterization of the relationship between conduct and status rules
8 of engagement in that type of complicated environment.

9 I think what's happening in Afghanistan is an example of
10 this. Essentially--and I absolutely concede that applying the
11 status-based criteria to an entity like al Qaeda, it's much more
12 complicated than applying it to the Iraqi Armed Forces, because the
13 factors that establish status may, in fact, be conduct.

14 Well, what's happened in places like Israel and Afghanistan
15 is that individuals are connected to groups because these groups
16 engage in hostile conduct. And once you establish that connection or
17 identify that connection, you have the authority to employ deadly
18 force irrespective of whether that particular individual is at that
19 moment engaging in a hostile act. So, in my mind, that's still
20 status-based rules of engagement.

21 Q [LCDR STONE]: Okay. You would certainly agree with me that
22 at times promulgation of rules of engagement is complicated?

23 A [MR. CORN]: Yes.

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1 Q [LCDR STONE]: Lots of considerations go into it?

2 A [MR. CORN]: Yes.

3 Q [LCDR STONE]: Mission roles?

4 A [MR. CORN]: Yes.

5 Q [LCDR STONE]: National planned authority roles?

6 A [MR. CORN]: Yes.

7 Q [LCDR STONE]: Threats, fear of capture?

8 A [MR. CORN]: I assume so.

9 Q [LCDR STONE]: And also you have the input from the ground
10 commanders. I mean, they get the opportunity to weigh in on what
11 rules they'll use; correct?

12 A [MR. CORN]: Yes.

13 Q [LCDR STONE]: Domestic law plays into what rules of
14 engagement are employed?

15 A [MR. CORN]: Yes.

16 Q [LCDR STONE]: Humanitarian concerns?

17 A [MR. CORN]: Yes.

18 Q [LCDR STONE]: National security policy?

19 A [MR. CORN]: Of course.

20 Q [LCDR STONE]: International law and treaty concerns always?

21 A [MR. CORN]: Yes.

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1 Q [LCDR STONE]: You would agree with me that ultimately rules
2 of engagement really affect how and under what circumstance we choose
3 to engage the enemy and not whether we are justified to engage the
4 enemy?

5 A [MR. CORN]: If you are asking me do I believe that rules of
6 engagement are ultimately a reflection authority as opposed to
7 obligation, then I think I would answer that question "yes," but I
8 also think that that oversimplifies what rules of engagement reflect.

9 I think rules of engagement also reflect the authority that
10 the state invoked. And when you issue status-based rules of
11 engagement, you are essentially authorizing the use of deadly force
12 as a measure of first resort, which means you are invoking the law of
13 armed conflict. When you operate outside that context, you have not
14 invoked the authority of the law of armed conflicts. Could you? I
15 don't know.

16 Q [LCDR STONE]: Sir----

17 A [MR. CORN]: What I'm focused on is the question of have you.

18 Q [LCDR STONE]: Right. Under any operation, according to DoD
19 policy, is conducted in accordance with the law of war and
20 international obligations; correct?

21 A [MR. CORN]: No. DoD policy states that during the conduct of
22 military operations, as a matter of policy, the armed forces of the
23 United States will comply with the law of armed conflict. It doesn't

1 say that during any military operation the armed forces of United
2 States can invoke the authority after the law of armed conflict. We
3 operated--we operate today in Bosnia and Kosovo. We follow the
4 principles of the law of armed conflict, but our forces are not
5 employing combat power as a measure of first resort; they use it as a
6 measure of last resort.

7 Q [LCDR STONE]: Sure. But that is a--that is in accordance
8 with the law of war, hostile act, hostile intent----

9 A [MR. CORN]: No, it is not in accordance with the law of war.
10 No, hostile act and hostile intent suggests that you don't have an
11 enemy you're fighting, that you have to wait for somebody to pose a
12 threat to you. The first principle of the law of armed conflict is
13 the principle of military necessity, which allows you to take all
14 measures necessary that are legal to bring about the consummation of
15 your enemy. That's the source, the fundamental source of authority
16 for status-based targeting, because the opponent is a military
17 objective.

18 [END OF PAGE]

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1 Q [LCDR STONE]: You have testified that with regards to the
2 implication of Common Article 2, Common Article 3, the objective
3 factors, your theory with regards to status-based ROE as an
4 indication of government response, that there is a dilemma with
5 regards to transnational actors; correct? Would you agree with that
6 premise? That's pretty much what your law article says about it;
7 right?

8 A [MR. CORN]: That's--that's correct.

9 Q [LCDR STONE]: Okay. Are you aware that Congress actually
10 answered that dilemma in the Military Commissions Act?

11 A [MR. CORN]: I'm aware that Congress passed the Military
12 Commissions Act that said, if you can establish an element of proof
13 that conduct occurred in the context of an armed conflict, then it's
14 considered by Congress to be a war crime subject to the jurisdiction
15 of the military commission. But it's--as my understanding is that--
16 that to convict somebody of a war crime you have to establish as a
17 matter of fact that the conduct occurred in that context.

18 [END OF PAGE]

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1 Q [LCDR STONE]: I'm going to summarize your testimony again.
2 Under your theory, an armed, hostile, militarily trained force that
3 is not a state actor, that declares war against a country and its
4 citizens and then begins a multi-year campaign to attack and kill
5 that country's citizens through a series of long-planned attacks and
6 openly admits that it is at war with that country, in your opinion,
7 that group is not engaged in armed conflict; is that your testimony?

8 DC [MR. MCMILLAN]: Objection, Your Honor.

9 A [MR. CORN]: Well----

10 DC [MR. MCMILLAN]: Misstates the testimony. And perhaps I'm
11 saved by the final question. It wasn't at all an accurate statement
12 of the Professor's testimony.

13 MJ [CAPT ALLRED]: Well, the Professor is free to disagree if he
14 thinks it inaccurately summarizes his testimony, but it's a fair
15 question. Please, Professor, go ahead.

16 A [MR. CORN]: No, I do not believe that accurately summarizes
17 my testimony, and the reason is because we know from history that all
18 those criteria, all those factors you just rattled off have been in
19 existence for--with organizations that this country and other
20 countries have treated as terrorist organizations and responded to
21 under a law enforcement paradigm for decades. I mean, you could be
22 talking about Hamas, you could be talking about Hezbollah. You could
23 be talking, if you take away the transnational component, about the

1 Provisional IRA. And states did not traditionally treat those
2 activities as--as the existence of a period of armed conflict.

3 That is a fairly radical, new development in the realm of
4 the law of armed conflict, that somebody like al Qaeda can be engaged
5 in an armed conflict against the United States.

6 It's the U.S. position, and I think it's the right position
7 because I think what we're doing against al Qaeda in many situations
8 is, in fact, armed conflict because we are invoking the authority of
9 the law of war to seek them out, kill them, destroy them, capture
10 them and detain them.

11 But I don't believe that it means everything we do against
12 al Qaeda falls under that umbrella, and I don't believe that just
13 because al Qaeda had that capability prior to 9/11 that it meant that
14 we were in a period of armed conflict. And the reason I say that is
15 because that is not the perception that our national leadership had
16 at that time.

17 Q [LCDR STONE]: Okay. So when they kill us, it's not armed
18 conflict; only when we respond does it become an armed conflict?

19 A [MR. CORN]: When we respond with the use of combat power
20 under the authority of the law of war, it is a de facto indicator
21 that our national leadership has determined that the nature of the
22 threat and the nature of the activity the enemy is conducting against
23 us are no longer properly treated as a law enforcement problem but

1 have risen to the level of armed conflict, yes, that's what I
2 believe.

3 TC [LCDR STONE]: Thank you, sir.

4 MJ [CAPT ALLRED]: Okay. We've been on the record for nearly
5 two hours, and if this is going to be a prolonged redirect----

6 DC [MR. MCMILLAN]: Very short.

7 MJ [CAPT ALLRED]: Okay.

8 DC [MR. MCMILLAN]: Two questions.

9 MJ [CAPT ALLRED]: Very good. Very good. Professor Corn, are
10 you okay for a few more minutes before taking a break?

11 WIT [MR. CORN]: Absolutely, sir.

12 MJ [CAPT ALLRED]: Thank you.

13 **REDIRECT EXAMINATION**

14 **Questions by the civilian defense counsel:**

15 Q [MR. MCMILLAN]: Professor Corn, Commander Stone went through
16 a list of plots and plans and events and he listed those plots and
17 plans and events as he discussed one of the objective factors
18 indicating whether armed conflict exists, namely whether sustained
19 military operations are occurring between the state on the one hand
20 and the non-state entity on the other hand. Do you recall that on
21 cross?

22 A [MR. CORN]: Yes, I do.

23

1 Q [MR. MCMILLAN]: Were there sustained military operations
2 between the United States and al Qaeda during the periods covered by
3 that long list of plots and plans and operations?

4 A [MR. CORN]: Well, I think one or two of them he mentioned
5 occurred after 9/11, and for those I would say they occurred in the
6 context of sustained military operations; but prior to 9/11, I don't
7 think--and, again, I think the ROE refers this to us--I don't think
8 the United States was engaged in sustained armed conflict, combat
9 operations against this enemy.

10 I think we treated this enemy predominantly as a terrorist
11 threat subject to our law enforcement response capability. The FBI
12 was the lead agency in responding to the threat. And after 9/11, the
13 government, I think properly and legitimately, made the determination
14 that the stakes had been raised. The nature of the threat had--maybe
15 it was something we should have recognized earlier and we didn't, but
16 for whatever reason we recognized that at that point that it--that
17 the best and most effective means to respond to it was the use of
18 combat capability under the paradigm of the law of armed conflict.

19 [END OF PAGE]

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1 Q [MR. MCMILLAN]: Okay. Thank you. Last question. Counsel
2 for the government described certain organizational characteristics
3 of al Qaeda, such as a military committee and its running of training
4 camps in Afghanistan, which go to another objective criteria for the
5 existence of armed conflict, namely whether the non-state entity has
6 some quasi sovereign attributes or state-like attributes; is that
7 correct? Do you recall that?

8 A [MR. CORN]: Well, my understanding was he discussed them both
9 from the perspective of that factor but also from the perspective of
10 command and control capability.

11 Q [MR. MCMILLAN]: Okay. And he was asserting that al Qaeda did
12 have command and control capabilities; is that fair? Okay.

13 A [MR. CORN]: Yes.

14 Q [MR. MCMILLAN]: Okay. And my question to you is, are you
15 aware that through the late 1990s, up to and including the period
16 after 9/11, al Qaeda was aligned with the Taliban internally in
17 Afghanistan----

18 TC [LCDR STONE]: Objection, leading.

19 Q [MR. MCMILLAN]: ----against the Northern Alliance?

20 MJ [CAPT ALLRED]: Overruled.

21 A [MR. CORN]: I'm aware that the Taliban and al Qaeda were
22 operating at some points for what we might call concurrent
23 objectives. I also believe al Qaeda had its own agenda on other

1 points, and which is one of the reasons I believe it is legitimate
2 and appropriate to conclude that after 9/11 our armed conflict was
3 not only with the Taliban but was with the distinct entity of al
4 Qaeda.

5 Q [MR. MCMILLAN]: Okay. And the command and control elements
6 that al Qaeda possessed were deployed during the late '90s up to----

7 TC [LCDR STONE]: Objection, he's testifying. Ask a non-leading
8 question.

9 Q [MR. MCMILLAN]: Are you aware of whether the command and
10 control capabilities that al Qaeda possessed----

11 MJ [CAPT ALLRED]: Well, what--this sounds like a leading
12 question. Why don't you ask him it in a non-leading question; what
13 he knows about their command and control capabilities?

14 Q [MR. MCMILLAN]: My question, Professor, goes to what
15 capabilities of al Qaeda were directly against the Northern Alliance
16 among those that the prosecutor described as relevant categories
17 indicating the existence of an armed conflict?

18 A [MR. CORN]: My understanding is that the situation in
19 Afghanistan almost slipped the notion of an associated militia group
20 on its head that in many aspects of the armed conflict, the internal
21 armed conflict between the Taliban and the Northern Alliance, al
22 Qaeda actually provided command and control capability for Taliban
23 forces. We would normally expect the opposite, that the Taliban was

1 the armed forces and al Qaeda at best was a militia group fighting
2 with them subject to their command and control.

3 What my understanding is in many situations it would be
4 inverse; that the al Qaeda military capability was being used as a
5 force multiplier, if you will, for Taliban operations against the
6 Northern Alliance.

7 DC [MR. MCMILLAN]: Okay. Thank you very much. I have no
8 further questions.

9 TC [LCDR STONE]: No re-cross.

10 MJ [CAPT ALLRED]: Thank you, Professor Corn, for your
11 testimony.

12 Let me just ask the members for a moment if they have any
13 questions for you.

14 Members, are there any questions for Professor Corn?

15 MEMBERS: **[No response.]**

16 MJ [CAPT ALLRED]: Apparently not. We thank you for taking a
17 break from your trip to Madrid, or wherever you are, and wish you
18 well. We'll excuse you as a witness. Okay.

19 WIT [MR. CORN]: Thank you very much.

20 **[The witness was excused and the VTC ended.]**

21 MJ [CAPT ALLRED]: Time for a recess. We will----

22 BAILIFF: All rise **[all persons did as directed and the members**
23 **withdrew from the courtroom].**

1 MJ [CAPT ALLRED]: Why don't we come back in 15 minutes?

2 [The military commission recessed at 1035, 28 July 2008.]

3 [The military commission came to order at 1053, 28 July 2008.]

4 MJ [CAPT ALLRED]: Okay. Please be seated [all persons did as
5 directed].

6 The members have returned to the courtroom.

7 TC [MR. TRIVETT]: Sir, the government calls Mr. Evan Kohlmann.

8 MJ [CAPT ALLRED]: Evan Kohlmann.

9 **EVAN F. KOHLMANN, Civilian was called as a witness for the**
10 **prosecution and testified under oath as follows:**

11 **DIRECT EXAMINATION**

12 **Questions by the civilian trial counsel:**

13 Q [MR. TRIVETT]: For the record, please state your name,
14 spelling your last.

15 A [MR. KOHLMANN]: Yes, my name is Evan F. Kohlmann,
16 K-o-h-l-m-a-n-n.

17 Q [MR. TRIVETT]: Mr. Kohlmann, what do you do for a living?

18 A [MR. KOHLMANN]: I'm an international terrorism consultant.

19 Q [MR. TRIVETT]: And can you please explain briefly to the
20 members what that is?

21 A [MR. KOHLMANN]: Yes. I conduct research on international
22 terrorist organizations on behalf of a variety of clients. I then

1 take that information, produce analysis, produce documentation, and I
2 provide that information to, again, a variety of clients.

3 Q [MR. TRIVETT]: And do you do any work for any television
4 networks?

5 A [MR. KOHLMANN]: Yes, I do. I work on behalf of NBC, MSNBC as
6 an on-air terrorism consultant and analyst.

7 Q [MR. TRIVETT]: What's your educational background?

8 A [MR. KOHLMANN]: I have a BSFS, which is a Bachelor in Science
9 and Foreign Service from the Edmond A. Walsh School of Foreign
10 Service at Georgetown University. I also have a certificate in Islam
11 and Muslim-Christian Understanding from the Center for Islam and
12 Muslim-Christian Understanding at Georgetown University. And I also
13 have a J.D. or a juris doctorate, a law degree, from the University
14 of Pennsylvania law school.

15 Q [MR. TRIVETT]: And what was your major in college?

16 A [MR. KOHLMANN]: My major was international politics with a
17 focus on international security studies, particularly international
18 security studies in the Middle East and Muslim world.

19 Q [MR. TRIVETT]: Now, you mentioned that you had a certificate
20 in Islam. Will you please explain for the members what that is
21 comprised of?

22 A [MR. KOHLMANN]: Georgetown University has a separate center
23 within the School of Foreign Service, which is known as the Center

Attachment R

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 104</p> <p>Government Response To Defense Motion to Dismiss Because The Convening Authority Exceeded His Power In Referring This Case To A Military Commission</p> <p>13 September 2012</p>
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1. Timeliness

This response is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

2. Relief Sought

The government respectfully requests the Commission to deny the defense motion to dismiss.

3. Overview

The defense motion to dismiss should be denied for three reasons: (1) whether the offense was committed in the context of and associated with hostilities is a common element of fact that the government must prove at trial; (2) these charges properly were referred because the Convening Authority found reasonable grounds to believe they were committed in the context of and associated with hostilities; and (3) the existence of hostilities is an objective question of fact for the members.

4. Burden of Proof

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

Abd Al Rahim Hussayn Muhammad Al Nashiri ("accused") is a Saudi Arabian citizen and senior member of al Qaeda. He is charged with multiple offenses under the Military Commissions Act of 2009 ("2009 M.C.A.") for violations of the law of war, which were committed in the context of and associated with hostilities between the United States and al Qaeda. These charges relate to the accused's alleged role in planning and executing attacks on USS COLE (DDG 67) on 12 October 2000, and *MV Limburg* on 6 October 2002, and an attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000. The attack on USS COLE (DDG 67) occurred while it was refueling in Aden, Yemen. This attack killed 17 U.S. sailors, injured at least 37 others, and caused significant property damage. The attack on *MV Limburg*, a civilian oil tanker, occurred in or around the coast of Al Mukallah, Yemen. This attack killed one civilian crewmember, caused significant property damage, and resulted in a large oil spill. The government alleges that these attacks were attempts to strike the United States on behalf of al Qaeda. The government also alleges that these attacks were committed in the context of and associated with hostilities between the United States and al Qaeda.

On 23 August 1996, Usama bin Laden issued a public "Declaration of War Against the Americans Occupying the Land of the Two Holy Places," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula. *See* Usama bin Laden, Declaration of War Against the Americans Occupying the Land of the Two Holy Places (Aug. 23, 1996).

In about March 1997, in an interview with CNN, Usama bin Laden promised to drive Americans away from all Muslim countries. *See* CNN Interview with Osama bin Laden at 2, *available at* <http://11.findlaw.com/news.findlaw.com/cnn/docs/binladen/binladenintvw-cnn.pdf>. Usama bin Laden also warned the United States of the deadly consequences if it did not leave the Arabian Peninsula: "So if the U.S. does not want to kill its sons who are in the army, then it has to get out." *Id.* at 5. Usama bin Laden also indicated he could not guarantee the safety of U.S. civilians because they voted to elect America's political leaders and, therefore, were responsible for the consequences of U.S. foreign policy. *Id.* at 2.

On 23 February 1998, Usama bin Laden and others, issued a fatwah (a purported religious ruling) claiming that it was God's order and an individual duty for every Muslim to "kill the Americans and plunder their money wherever and whenever they find it." See World Islamic Front, Statement (Feb. 23, 1998), *available at* <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>. The fatwah directed all Muslims to kill Americans and their allies, be they civilian or military. *Id.*

On 25 May 1998, Usama bin Laden publicly announced the formation of the "International Islamic Front for Jihad Against the Jews and the Crusaders." Three days later, on 28 May 1998, in an interview with ABC News in Afghanistan, Usama bin Laden reiterated the February 1998 fatwah's call for killing Americans, stating: "We do not differentiate between those dressed in military uniforms and civilians; they are all targets in this fatwah." ABC News Interview with Usama bin Laden at 2, *available at* <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/prosecution/AQ00081T.pdf>. Usama bin Laden further stated that if his demands were not met, al Qaeda would send to the United States coffins containing the corpses of American troops and American civilians. *Id.* at 5.

On 29 May 1998, Usama bin Laden issued a statement entitled, "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting the Jews and Crusaders," in which Usama bin Laden stated "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God." See CNN, Timeline: Osama Bin Laden, Over the Years (May 2, 2011), *available at* http://articles.cnn.com/2011-05-02/world/bin.laden.timeline_1_bin-laden-group-osama-bin-king-abdul-aziz-university/3?s=PM:WORLD (quoting International Islamic Front for Fighting the Jews and Crusaders, The Nuclear Bomb of Islam (May 29, 1998)).

On 7 August 1998, al Qaeda engaged in coordinated attacks against U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. These attacks killed 224 people, including Americans, and injured thousands more. *United States v. Ghailani*, 761 F. Supp. 2d 167, 185-86 (S.D.N.Y. 2011) ("These bombings killed over two hundred people, injured and maimed

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thousands, and did tremendous damage to the embassies themselves. Two hundred and thirteen individuals perished in Nairobi. Eleven died in Dar es Salaam. Approximately 4,000 people were injured by the bombing in Nairobi, while 85 were injured in Dar es Salaam.”). The attacks also caused significant property damage to the two U.S. embassies. *Id.*

On 20 August 1998, in response to these attacks, U.S. armed forces struck terrorist training camps in Afghanistan and a suspected chemical weapons laboratory in Khartoum, Sudan. *See* Permanent Rep. of the United States to the U.N., Letter from the Permanent Rep. of the United States of America to the President of the Security Council of the United Nations, 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.”); President William J. Clinton, Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 Pub. Papers 1460 (Aug. 20, 1998); 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). The United States also contemplated and prepared to launch follow-on military operations. *See* Nat’l Comm’n on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 120-21 (2004) [hereinafter 9/11 Commission Report], *available at* <http://www.9-11commission.gov/report/911Report.pdf>.

On 3 January 2000, al Qaeda attempted to armed attack the USS THE SULLIVANS (DDG 68) near Aden, Yemen. On 12 October 2000, al Qaeda attacked the USS COLE (DDG 67) while it was refueling in Aden, Yemen. This attack killed 17 U.S. sailors, injured at least 37 others, and caused significant property damage.

On 11 September 2001, al Qaeda continued its attacks against the United States. In coordinated attacks, terrorists from that organization hijacked four commercial airliners and used them as guided missiles to attack prominent U.S. targets, including the World Trade Center and the Pentagon. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds

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of millions of dollars in property, and severe damage to the U.S. economy. *See* 9/11 Commission Report 4-14 (2004).

On 18 September 2001, Congress passed, and the President of the United States signed, the Authorization for Use of Military Force (“AUMF”), Pub. L. No. 107-40, 115 Stat. 224 (2001). Among other things, the AUMF authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” al Qaeda. *Id.* On 7 October 2001, acting pursuant to the AUMF, the President ordered U.S. Armed Forces to begin military operations in Afghanistan, where he determined that the Taliban was harboring members of al Qaeda. *See* Permanent Rep. of the United States to the U.N., Letter from the Permanent Rep. of the United States of America to the President of the Security Council of the United Nations, U.N. Doc. S/2001/946 (Oct. 7, 2001). In addition, on 13 November 2001, the President issued a military order that authorized trial by military commission of noncitizens he had reason to believe were or had been members of al Qaeda; those who had engaged in, aided or abetted, or conspired to commit international acts of terrorism against the United States; and those who had harbored others covered by the military order. *See* President George W. Bush, Mil. Order, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001) (“International terrorists, including members of al Qaeda, 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 that requires the use of the United States Armed Forces.”).

On 6 October 2002, al Qaeda attacked MV *Limburg*, a civilian oil tanker, off the coast of Al Mukallah, Yemen. This attack killed one civilian crewmember, caused significant property damage, and resulted in a large oil spill.

In October 2006, Congress enacted the Military Commissions Act of 2006 (“2006 M.C.A.”), which provided statutory authority for military commissions, limited their jurisdictional scope, and provided significant procedural rights for an accused. In October 2009,

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Congress amended the 2006 M.C.A. to provide greater procedural protections to detainees tried by military commission (“2009 M.C.A.”).

On 28 September 2011, capital charges were referred against the accused. The Commission arraigned the accused on 9 November 2011.

6. Law and Argument

An offense enumerated in the 2009 M.C.A. is only triable by military commission “if the offense is committed in the context of and associated with hostilities.” 10 U.S.C. § 950p(c) (the “hostilities element”). The government has alleged in every charge that the accused committed his offenses in the context of and associated with hostilities. The 2009 M.C.A. defines “hostilities” as “any conflict subject to the laws of war,” which apply during “armed conflict.” 10 U.S.C. § 948a(9). A military commission convened under the 2009 M.C.A. has “jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter . . . whether such offense was committed before, on, or after September 11, 2001.” 10 U.S.C. § 948d.

The defense argues that the Convening Authority could not have found that the offenses charged took place in the context of and associated with hostilities, and, therefore, the referral was defective. This untenable request should be denied for three reasons. First, whether the offense was committed in the context of and associated with hostilities is a common element of fact that the government must prove at trial. Second, these charges properly were referred because the Convening Authority found reasonable grounds to believe they were committed in the context of and associated with hostilities. Third, the existence of hostilities is an objective question of fact for the members.

I. Whether the Offense Was Committed in the Context of and Associated with Hostilities Is a Common Element of Fact the Government Must Prove at Trial

The requirement that offenses must be “committed in the context of and associated with hostilities” is a common element of fact that the government must prove to the members at trial. It is a fundamental principle of statutory construction that individual clauses in a statute should be read in context, not in isolation. *See Dada v. Mukasey*, 554 U.S. 1, 16 (2008) (“In reading a

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statute we must not look merely to a particular clause, but consider [it] in connection with it the whole statute.”) (citing *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)) (internal quotation marks omitted); *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850) (“[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”). Here, the hostilities requirement is in a provision called, “Common Circumstances,” which is contained in subchapter VIII of the 2009 M.C.A., called “Punitive Matters.” See 10 U.S.C. § 950p(c). This “Punitive Matters” subchapter broadly lists the triable offenses, the elements of those offenses, and the different forms of criminal liability. See 10 U.S.C. § 950p (definitions, construction of certain offenses, common circumstances); 10 U.S.C. § 950q (principals); 10 U.S.C. § 950r (accessory after the fact); 10 U.S.C. § 950s (conviction of lesser offenses); 10 U.S.C. § 950t (crimes triable by military commission). By placing the hostilities requirement in the punitive matters section, which lists the offenses and their elements, Congress intended to make the hostilities requirement a common element of fact for all the triable offenses.

If Congress wanted the hostilities element to be approached as a threshold jurisdictional requirement, it could have included it in the statute’s “Jurisdiction of military commissions” section. That section, however, does not mention any hostilities requirement:

A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, sections 904 and 906 of this title (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war, *whether such offense was committed before, on, or after September 11, 2001*, and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized under this chapter. A military commission is a competent tribunal to make a finding sufficient for jurisdiction.

10 U.S.C. § 948d (emphasis added). Instead, the statute explicitly gives this Commission jurisdiction to try offenses committed “before, on, or after September 11, 2001.” *Id.*

The *Hamdan* commission (convened under the 2006 M.C.A.) agreed that the hostilities nexus was a question of fact for the members. See *United States v. Hamdan*, AE 190, Ruling on Motion *in Limine* (Transportation Services) and Start of Hostilities (D-033 & D-016) at 2 (May

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13, 2008) (“[T]he existence o[f] a state of armed conflict before 2001 is clearly a question of fact for the members to decide. Evidence bearing upon the issue may be offered by either side, and the Commission will instruct the members appropriately before they retire to deliberate.”). The Commission ruled that because the “Government must prove, as an element of each offense,” that the accused’s offenses “were significantly related to a period of armed conflict,” the “members should hear and decide that matter.” *Id.*

Because the hostilities requirement is an element of the crime, the only discernible basis for the defense motion to dismiss is that the Convening Authority improperly referred these charges.¹

II. The Convening Authority Properly Referred the Charges Because He Found Reasonable Grounds To Believe They Were Committed in the Context of and Associated with Hostilities

The Convening Authority properly referred these charges to this Commission. The Convening Authority may only refer charges to a military commission if he finds, or is advised by his Legal Advisor, that there are “reasonable grounds to believe that an offense triable by a military commission has been committed and that the accused committed it, and that the

¹ AE 104 is not properly read as a challenge to the Commission’s subject-matter jurisdiction. But even if the defense does file an appropriate motion to dismiss for lack of subject-matter jurisdiction, the Military Judge would have to determine whether the charged offenses are among those Congress authorized for trial, nor whether those offenses were committed in the context of and associated with hostilities. As argued above, the hostilities nexus is to be treated at trial as a common element of fact, rather than a threshold jurisdictional requirement. Because every charge here is an enumerated offense under the 2009 M.C.A., a motion to dismiss for lack of subject-matter jurisdiction in this case would fail.

AE 104 also does not challenge this Commission’s personal jurisdiction. The 2009 M.C.A. states that “[a]ny alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.” 10 U.S.C. § 948c. An unprivileged enemy belligerent is one who “has engaged in hostilities against the United States or its coalition partners; has purposefully and materially supported hostilities against the United States or its coalition partners; or was a part of a) Qaeda at the time of the alleged offense under this chapter.” 10 U.S.C. § 948a(7). By referring this case, the government made a *prima facie* showing for personal jurisdiction. *See United States v. Khadr*, 717 F. Supp. 2d 1215, 1235 (U.S.C.M.C.R. 2007) (“We find that this facial compliance by the Government with all the pre-referral criteria . . . combined with an unambiguous allegation in the pleadings that Mr. Khadr is ‘a person subject to trial by military commission as an alien unlawful enemy combatant,’ entitled the military commission to initially and properly exercise *prima facie* personal jurisdiction over the accused until such time as that jurisdiction was challenged by a motion to dismiss for lack thereof, or proof of jurisdiction was lacking on the merits.”). There is no plausible way to read AE 104 as challenging this Commission’s personal jurisdiction and, as such, the government does not address that issue in this response.

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specification alleges an offense.” R.M.C. 601(d)(1). To refer a charge, the Convening Authority must be convinced by the evidence that there are reasonable grounds to believe every element of that charge. And he must make such a determination independently and free from influence. *See* R.M.C. 601 and 104. In this case, the defense does not claim that the Convening Authority failed to follow the proper procedure or to review the evidence. In fact, after reviewing the evidence presented, the Convening Authority declined to refer sworn charges VII and VIII, both of which related to the destruction of property in violation of the law of war. The defense nonetheless argues that the Convening Authority somehow exceeded his authority in referring the remaining charges.

The defense motion does not claim that the charges fail to allege a nexus to hostilities, or that the facts alleged foreclose the existence of such a nexus. Rather, it claims that the Convening Authority could not have found reasonable grounds to believe that each offense was committed in the context of and associated with hostilities because, in the defense’s view, hostilities did not exist at the time and place of the alleged offenses. In effect, the defense asks this Commission to reach into the Convening Authority’s purview and reevaluate the Convening Authority’s determination that reasonable grounds existed to support the hostilities element. By referring these charges, the Convening Authority necessarily determined that there were reasonable grounds to believe that each charge was committed in the context of and associated with hostilities. The defense provides no legal basis for reconsidering this determination.

This Commission should decline the defense’s novel request to reevaluate the Convening Authority’s referral of charges. The government is aware of no case where a military judge dismissed a properly referred charge at court-martial simply because the military judge disagreed with the Convening Authority’s determination that reasonable grounds existed to support that charge. Similarly, the government could not find a single case where a federal judge dismissed an indictment because the defense argued the government would not be able to prove a disputed factual element at trial. Just like certain federal crimes that require an interstate nexus as an element, a military commission under the 2009 M.C.A. may only try substantive offenses with a

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nexus to hostilities. However, there is no authority in either system for the defense to move for dismissal based solely on its claim that the government will not be able to prove the hostilities or interstate commerce nexus at trial. Rather, so long as the charge or indictment alleges that nexus, the defense cannot challenge the adequacy of proof for that allegation before the prosecution has presented its evidence at trial. See *United States v. Costello*, 350 U.S. 359, 409 (1956) (“[A]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for a trial on the charge on the merits.”); accord *United States v. Moore*, 563 F.3d 583, 586 (7th Cir. 2009); *United States v. Todd*, 446 F.3d 1062, 1068 (10th Cir. 2006); *United States v. Hickey*, 367 F.3d 888, 894 (9th Cir. 2004); *United States v. Salman*, 378 F.3d 1266, 1268 (11th Cir. 2004).

Once the grand jury or convening authority sends a case to trial, the remedy for the defense claim that the government lacks evidence on an element is to obtain a directed verdict or an acquittal at trial. Instead, the defense seeks to have the Commission intrude into the Convening Authority’s deliberative process and reconsider his otherwise valid determination. The charges in this case clearly allege that the offenses were committed in the context of and associated with hostilities, and the Convening Authority has found that the government’s evidence establishes reasonable grounds to believe the same. Because there is no basis in law for this Commission to reevaluate the Convening Authority’s reasonable-grounds determination, the defense motion to dismiss should be denied.

III. The Existence of Hostilities Is an Objective Question of Fact for the Members

Although the defense motion has no basis in law and should be denied outright, it also fails on the merits. The defense argues that “the recognition of hostilities . . . is a political act that must be decided by the political branches” and that the Convening Authority therefore has no authority to “countermand the decisions of the political branches” AE 104 at 6, 8. The defense then claims that because the offenses allegedly were committed when there was no political recognition of hostilities in Yemen, the Convening Authority did not have the power to

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refer these charges. *See* AE 104. There are at least three major problems with the defense's argument.

First, the defense's focus on the recognition of hostilities specifically in Yemen is misplaced. *See* AE 104 at 8 (“[T]he earliest date on which the political branches officially recognized hostilities in any sense *in Yemen* was September 19, 2003.”) (emphasis added). The government does not argue, and does not intend to prove, that hostilities, within the meaning of the 2009 M.C.A., existed between the United States and Yemen during the relevant timeframe. The defense seems to argue that separate conflicts existed and continue to exist between the United States and al Qaeda in different geographical locations. To the contrary, al Qaeda is a transnational terrorist organization that has committed, and plans to commit, violent acts against American people and interests throughout the world. As the military judges in *Hamdan* and *Al Bahlul* instructed the members:

Conduct of the accused that occurs *at a distance from the area of 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.

United States v. Hamdan, 801 F. Supp. 2d 1247, 1279 n.54 (U.S.C.M.C.R. 2011) (quoting *Hamdan* Tr. 3752-53) (emphases added). This instruction is consistent with U.S. historical practice. During World War II, for instance, hostilities existed between Germany and the United States. Nonetheless, battles that occurred at a great distance from either nation—such as in North Africa—still were unarguably in the context of and associated with those hostilities, as were offenses committed outside a theater of active military operations. *See Ex parte Quirin*, 317 U.S. 1, 38 (1942) (finding that individuals properly may be subject to trial by military commission even if “they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations”). The government will prove at trial that hostilities existed between the United States and al Qaeda, and that the charged offenses were all committed in the “context of and associated with” those hostilities. That is all that the 2009 M.C.A. requires.

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Second, the defense purports to argue that the recognition of hostilities is a “political question,” but in fact argues that the existence of hostilities in Yemen must be decided by the Military Judge on an incomplete record consisting only of selected contemporaneous statements made by political figures. See AE 104 at 5-6 (stating that the existence of hostilities “is a political act that must be decided by the political branches”). The defense cites no support for its position, which fundamentally misunderstands the 2009 M.C.A. and ignores binding U.S.C.M.C.R. precedent. Under the statute and the caselaw, the duration and scope of the hostilities between the United States and al Qaeda is an objective factual element that the members must resolve at trial after receiving an instruction on the proper legal standard. See *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1189 (U.S.C.M.C.R. 2011) (stating that “the determination whether the hostilities in issue satisfy [the hostilities nexus] is objective in nature and generally relate to the intensity and duration of those hostilities.”); *Hamdan*, 801 F. Supp. 2d at 1278-79 (affirming the conviction because the military judge “properly instructed” the members on hostilities, and that the members “found beyond a reasonable doubt that this requirement was met”).² Along the same lines, international criminal tribunals applying the law

² The full text of the military judge’s instruction reads:

With respect to each of the ten specifications [of material support] before you, the government must prove beyond a reasonable doubt that the actions of the accused took place in the context of and that they were associated with armed conflict. In determining whether an armed conflict existed between the U.S. and AQ and when it began, you should consider the length, duration, and intensity of hostilities between the parties, whether there was protracted armed violence between governmental authorities and organized armed groups, whether and when the U.S. decided to employ the combat capabilities of its armed forces to meet the AQ threat, the number of persons killed or wounded on each side, the amount of property damage on each side, statements of the leaders of both sides indicating their perceptions regarding the existence of an armed conflict, including the presence or absence of a declaration to that effect, and any other facts or circumstances you consider relevant to determining the existence of armed conflict. The parties may argue the existence of other facts and circumstances from which you might reach your determination regarding this issue. In determining whether the acts of the accused took place in the context of and were associated with an armed conflict, you should consider whether the acts of the accused occurred during the period of an armed conflict as defined above, whether they were performed while the accused acted on behalf of or under the authority of a party to the armed conflict, and whether they constituted or were closely and substantially related to hostilities occurring during the armed conflict and other facts and circumstances you consider relevant to this issue. Counsel may address this matter during their closing arguments, and may suggest other factors for your consideration. Conduct of the accused that occurs at a distance from the area of

of war also repeatedly have held that the existence of hostilities is an objective question of fact.³ Although not binding on this Commission, these international cases lend support to the U.S.C.M.C.R.'s holdings in *Hamdan* and *Al Bahlul* that the existence of hostilities is not a political question in the context of a military-commission trial, but a question of fact for the members to determine. In this case, the members will decide at trial, upon consideration of the totality of the circumstances, whether these offenses were committed in the context of and associated with hostilities between the United States and al Qaeda.

Third, none of the four cases cited in the defense motion actually supports the defense position that the existence of hostilities is a "political question" in the context of a military commission. The defense relies most heavily on *Baker v. Carr*, where the Supreme Court held that a challenge to a state-apportionment statute under the Fourteenth Amendment's Equal Protection Clause was justiciable. 369 U.S. 186 (1962). In considering (and rejecting) the respondent's claim that the challenge infringed on a nonjusticiable political question, the Court "analyze[d] representative cases [and] infer[red] from them the analytical threads that make up the political question doctrine." *Id.* at 211. One such area of cases concerned the duration of hostilities. The Court explained that it generally would refuse "to review the political departments' determination of when or whether a war has ended." *Id.* at 213. This judicial deference to the political branches, however, "is primarily a function of the separation of

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.

Hamdan, 801 F. Supp. 2d at 1278 n.54 (quoting *Hamdan* Tr. 3752-53).

³ For example, in *Prosecutor v. Tadić*, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") rejected the defense argument that "there was no armed conflict at all in the region where the crimes were allegedly committed." Case No. IT-94-I-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 65 (2 Oct. 1995). Instead of relying on contemporaneous political determinations, the ICTY found that an armed conflict exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Id.* at ¶ 70; see also *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement ¶¶ 619-26 (2 Sept. 1998) (not requiring a contemporaneous political determination before assessing that an "armed conflict" exists for the purposes of triggering war crimes liability); *Juan Carlos Abella v. Argentina*, Case 11,137, Report No. 55/97, Inter-Am. Commission on Human Rights, OEA/Ser.L/V/II.98, Doc. 6 rev. (18 Nov. 1997) (determining that an engagement of Argentina's armed forces with organized, armed militants that lasted thirty hours and resulted in casualties and property destruction was an armed conflict under international law without requiring a formal contemporaneous political determination).

powers.” *Id.* at 210. In this case, there is no separation-of-powers concern. Congress and the President, through the 2009 M.C.A., created a system of military commissions to try violations of the law of war and expressly made the nexus to hostilities an element of each offense. In so doing, far from removing the determination of the existence of hostilities from the purview of the Commission, Congress and the President actually empowered the members to decide whether the government has proven the hostilities element beyond a reasonable doubt in each case. As in any criminal trial, the members will be asked to weigh the evidence against the legal standards on which they are instructed, and to make a determination as to guilt or innocence. Therefore, *Baker* actually cuts against the defense argument that the political branches must decide the existence of hostilities, and instead supports the government’s position that the existence of hostilities is an objective, fact-based inquiry, best left to members.

The three other cases cited by the defense are no more supportive of the defense position than *Baker*. In *The Protector*, 79 U.S. (12 Wall.) 700 (1872), the Supreme Court granted a motion to dismiss because the appellant exceeded the five-year limitations period for the filing of his appeal. Because the limitations period was tolled during the Civil War, the Court had to decide when the war started and how long it lasted. In a three-page opinion, the Court decided that the war began in Alabama on 19 April 1861, when the President proclaimed an intended blockade, and the war ended on 2 April 1866, when the President proclaimed “the war had closed.” *Id.* at 702. The Court itself acknowledged, however, that it only chose those dates “[i]n absence of more certain criteria, of equally general application” *Id.* at 702. Here too, the members can look to the totality of circumstances to decide whether a given offense was committed in the context of and associated with hostilities. The last two cases cited by the defense, *Ludecke v. Watkins*, 335 U.S. 160 (1948), and *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), arose in the habeas context and concerned the determination of the end of declared war or hostilities. They do not concern how a member’s panel, in a military commission, should determine whether a given offense was committed in the context of and associated with some pending or historical hostilities, even absent the controlling political determinations referenced in

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those cases. In *Ludecke*, the Attorney General ordered the petitioner removed from the United States as an alien enemy, and the petitioner filed a petition for a writ of habeas corpus. The Supreme Court affirmed the denial of the writ because Congress gave the President summary and unreviewable power to order the removal of enemy aliens during a declared war, and because the declared war between the United States and Germany had not yet terminated. Similarly, in *Al-Bihani*, the D.C. Circuit affirmed the denial of the petitioner's habeas petition and deferred to the executive's determination that the war against the Taliban and al Qaeda was ongoing. An actual declaration of war or hostilities, however, is not at issue in this Commission. At issue here is whether the members may decide whether certain offenses were committed in the context of and associated with hostilities, prior to a formal authorization of military force. Nothing in either *Ludecke* or *Al-Bihani* supports the defense argument that this role of the members, as created by the 2009 M.C.A., should be displaced by the cherry-picked statements offered by the defense. *See* AE 104 at 6.

The defense provides no legal support for its argument that the existence of hostilities is a political question in the context of a military commission. The 2009 M.C.A. and binding U.S.C.M.C.R. precedent establish that the existence of hostilities is an objective question of fact for the members to decide. The defense motion to dismiss, therefore, should be denied.

7. Conclusion

For the foregoing reasons, the Commission should deny the defense motion to dismiss.

8. Oral Argument

The defense has requested oral argument, and the government joins this request.

9. Witnesses

The government has no witnesses at this time.

10. Additional Information

The government has no additional information.

II. Attachments

A. Certificate of Service, dated 13 September 2012.

Respectfully submitted,

//s//

Anthony W. Mattivi
CDR Andrea Lockhart, JAGC, USN
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Filed with TJ
13 September 2012

Appellate Exhibit 104A (al-Nashiri)
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Filed with TJ
19 April 2019

Appellate Exhibit 617F (AAA)
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CERTIFICATE OF SERVICE

I certify that on the 13th day of September 2012, I filed **AE 104, Government Response To Defense Motion To Dismiss Because The Convening Authority Exceeded His Power In Referring This Case To A Military Commission**, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//

Anthony W. Mattivi
Trial Counsel
Office of the Chief Prosecutor
of Military Commissions

Filed with TJ
13 September 2012

Attachment A
Page 1 of 1

Appellate Exhibit 104A (al-Nashiri)
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Filed with TJ
19 April 2019

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Attachment S

1 [The R.M.C. 803 session was called to order at 0942, 7 February,
2 2008.]

3 MJ [CAPT ALLRED]: Court's called to order. All parties present
4 when the court last recessed are once again present. As near as I
5 can tell, it looks like we have two new representatives on the
6 government side. Counsel, would you introduce yourselves and state
7 your qualifications and status as to oath, please?

8 APROS [MR. OLDHAM]: Your Honor, my name is Andrew Oldham. I
9 have been detailed to the Military Commission by the Chief
10 Prosecutor. I'm qualified to serve under R.M.C. 503, and I have
11 previously been sworn in accordance with R.M.C. 807. I have not
12 acted in any manner that might tend to disqualify me in this
13 proceeding. I am a civilian attorney with the Department of Justice.

14 MJ [CAPT ALLRED]: Thank you.

15 APROS [MR. GOLDSTEIN]: Your Honor, I am Jordan Goldstein. I
16 have been detailed to this Military Commission by the Chief
17 Prosecutor. I am qualified to serve under R.M.C. 503 and have been
18 previously sworn in accordance with R.M.C. 807. I have not acted in
19 any manner that might tend to disqualify me in this proceeding. I'm
20 a civilian attorney with the Department of Justice.

21 [The court reporter was present, was detailed to the commission by
22 the convening authority and was previously sworn.]

1 I hope I didn't just create an additional appellate issue
2 for the defense, but nonetheless if you do what the defense is
3 telling you, sir, which is why I don't think I am, they want you to
4 eliminate every known material support specification except for that.

5 And that, sir is a sword that Quiroz was not designed to
6 be. If it does not survive, the will of the American people has just
7 been thwarted and the jury's determination would then become moot.

8 MJ [CAPT ALLRED]: Okay. I appreciate your argument and I
9 understand your position. I should tell counsel that I have found
10 all of the briefs on all of the motions very well done and I'll go
11 back and study them some more. That's for sure where we need to go.

12 Mr. Swift, you're jumping up.

13 ADDC [MR. SWIFT]: I'm next, sir.

14 MJ [CAPT ALLRED]: Okay. Is this the combatant immunity motion,
15 D015?

16 ADDC [MR. SWIFT]: *Res Judicata*, I believe, is first, sir. D-
17 016, sir.

18 **[Defense paralegal and counsel set up laptop at podium.]**

19 ADDC [MR. SWIFT]: And if I might, as Mr. McMillan did, have the
20 PowerPoint published to the courtroom, sir? It contains no new
21 evidence, simply cites and places briefs or by points.

22 MJ [CAPT ALLRED]: You don't have as nice a background as he
23 had. This is a very plain white background.

1 ADDC [MR. SWIFT]: I'm working off the white board, sir.

2 MJ [CAPT ALLRED]: Okay.

3 ADDC [MR. SWIFT]: It's just a plain, stark argument.

4 MJ [CAPT ALLRED]: You can publish it to the--go ahead.

5 **[The court reporter published the contents to the gallery.]**

6 ADDC [MR. SWIFT]: Sir, since I reported to the military
7 commissions back in March of 2003 we've been having an argument. And
8 the argument was, when did this start of hostilities begin? All
9 parties agree, I believe agree, that the start of hostilities is
10 necessary for the crime to be within the jurisdiction of this
11 military commission.

12 And it goes back to Winthrop. It's not been seriously
13 contested. From the beginning, that was what our positions against
14 the conspiracy charge against Mr. Hamdan who was originally brought
15 to the first military commission.

16 We challenged the military commission based on three ideas.
17 That was personal jurisdiction, subject matter jurisdiction, was it
18 properly constituted? Over the course, different courts would look
19 at it different ways.

20 When I got to the District Court in DC, which originally
21 ruled that the commission did not have jurisdiction, it based it on
22 two ideas, personal jurisdiction in that there hadn't been an Article

1 5 tribunal, something we basically finally worked through, and he's
2 had his Article 5 tribunal within the findings of this court.

3 The other one was that it wasn't properly constituted. It
4 had to follow the UCMJ. It had to comply with Article 36. It
5 abstained on the question of whether the charges were within the
6 jurisdiction of the Court, having found that Mr. Hamdan was neither
7 personally within, and the court wasn't properly constituted.

8 It could have stopped at the time of personal jurisdiction,
9 but it understood that the "Constituted" issue was going to be raised
10 immediately thereafter if you went to an Article 5 tribunal.

11 At the DC circuit, they reversed the earlier decision.
12 They found that a), the Judge's personal jurisdiction decision was
13 not correct. They gave great deference to the President and found
14 that the President's determination was sufficient, and they noted
15 that the commissions, interestingly enough, could be the Article 5
16 tribunal though they noted that the alternative.

17 They agreed also, and part of why they found that the
18 Article 5 wasn't there, was that there was a separate conflict with
19 al Qaeda and therefore the ideas of Common Article 3 and how the
20 Court would be constituted implicated on this idea of a separate
21 conflict and, in fact, they pointed out in two quotes from it that
22 they disagreed with the--they pointed out that the District Court had
23 disagreed with the President's view of Common Article 3, apparently

1 because the Court thought that we were not engaged in a separate
2 conflict with al Qaeda distinct with the conflict from the Taliban.

3 And they went on to find, there, that Mr. Hamdan was
4 captured in Afghanistan in November of 2001, but the conflict with al
5 Qaeda arose before then in other regions including this country in
6 September 11, 2001.

7 In other words, and I was there, they bought the government
8 theory that there had been a long-time war with al Qaeda and this
9 eliminated the subject matter concern. In fact, to clear the hurdles
10 to go forth, they had agreed that it had to be properly constituted
11 dummy head as subject matter jurisdiction, and you had to have
12 personal, so they'd found all 3--declare the orders.

13 Subsequently the Supreme Court granted cert. and it asked
14 the question--one of the questions we granted on--was whether the
15 petitioner and others similarly situated for war crimes in the war on
16 terror, which was this larger idea duly authorized by all of the
17 regulations.

18 The court in its majority opinion, this is that section of
19 the opinion that was joined by Justice Kennedy--everything but 5,
20 reversed the DC circuit and found that for the commission to be
21 properly constituted, that it had to comply with the UCMJ Article 36,
22 and that it had to, via Article 21 in the offenses that by statute or
23 by Law of War may be tried by the military commission, that Common

1 Article 3 had come in via Article 21. This was particular to Justice
2 Kennedy. He spent a great deal of time here.

3 All Justices, not just the majority, all Justices agreed
4 that a court-martial--some did not think a court-martial was
5 necessary--but all Justices found that a court-martial would be
6 properly constituted. In other words they'd answered, "What does a
7 properly constituted court look like?"

8 Earlier this morning the government spent time talking
9 about how they had invited Congress--the Court had invited Congress--
10 to change. And it should be noted that in each of the plurality
11 opinions that this is what they're talking about changing; Article 36
12 and potentially Article 21 and the portions here.

13 But certainly Article 36, that had basically required at
14 least, if not a court-martial, something very, very close to a court-
15 martial, including for instance Article 31b, the military Miranda
16 etc.

17 Thereafter, of course, Congress passed the M.C.A., but
18 before doing, it's important to stop and look at what the plurality
19 did--because the plurality reversed also on the idea that the charges
20 were prior to hostilities. And that conspiracy is not a war crime.

21 Now, we dealt with "conspiracy is not a war crime" this
22 morning, but I'd like to deal with the most fundamental element,
23 "prior to hostilities" now. There was some argument that the Court

1 didn't reach this. As I suggested in my reply brief, I don't think
2 you have to go any farther than Justice Thomas to answer that
3 question. Justice Thomas was very clear. He was very--he agrees
4 with the government's theory and he felt that he--the government had
5 wrongly--or the court--had wrongly decided this.

6 So there's a question that comes up. Let's say for a
7 moment, and I think this is the best way to look at what was the
8 binding effect of the Court's hearing, "What would have happened if
9 they hadn't passed the M.C.A., and instead, a court-martial had been
10 brought into being?" Also a statutory creature; equally viable,
11 still equally viable.

12 Certainly nothing in the Supreme Court's decision, and the
13 majority said that couldn't happen. Now, there we look at Article
14 18, which wasn't talked about a lot because we weren't at a court-
15 martial and it says courts-martial's simolay (phonetic)--it's
16 referenced in 21 shall have jurisdiction to try those who are subject
17 to the Law of War. That same test--the exact same test--now just put
18 to different forms. One under the Geneva was mandatory for POWs or
19 for our soldiers, the other one, not mandatory commissions available.

20 By the plurality decision, the charges that were against
21 Mr. Hamdan could not have been brought to a court-martial. He had
22 four votes. Now, he did not have the majority votes, but as we
23 explained at the holding of the case, as it went back down, the

1 plurality had said that his crimes were not within that definition.
2 The definition was no different in article 21. So he would not have
3 been before a court-martial is based on those charges.

4 Now, you note in my motion I don't address the Kandahar
5 battle because, based on the plurality's holding that would have been
6 within the zone of the war. But on the charges that went up, which
7 have been largely replicated again, only now adding in material
8 support alleging the same actions, they would not have been viable
9 before court-martial.

10 So the question is, based on those four folks, does the
11 passage of the M.C.A. somehow change the jurisdiction of Article 18
12 and 21 to open it up? And I agree; Congress could have applied this
13 in *res Judicata*. If the statute has changed, it doesn't apply. Now
14 we need to look and see; did Congress change it?

15 And I would note here that in the subsequent proceedings,
16 that the court did dismiss--the District Court and that is on appeal
17 at the DC Circuit--but it dismissed it without reaching any of the
18 Court's order. It dismissed it based on, it believed reading the
19 M.C.A., it longer had jurisdiction.

20 Now, my point here--the next point is--but 905g brings the
21 Hamdan decision, this portion of the plurality decision that was
22 finally reached through Mr. Hamdan back to life. Because, while the
23 M.C.A. took away the District Court's ability to enforce that, R.C.M.

1 905g, which is identical as we pointed out in our brief, to the res
2 *Judicata* ideas, and the area that I highlighted----

3 **[Mr. Swift referred to published PowerPoint slide]**

4 ADDC [MR. SWIFT]: ----seems directly to say, with a big sign,
5 "Hamdan" brought back to life the effect of the decision unless, of
6 course, Congress changed the jurisdiction. Unless, of course,
7 Congress now changed that you no longer needed a war crime or somehow
8 these didn't fall--the statutes--within the common Law of War. One
9 of the requirements, of course, being a war.

10 But that's not what Congress did. Congress got in their
11 subject matter jurisdiction for the crimes and said, "traditionally
12 been triable by military commissions."

13 Now, certainly we are at Winthrop here. Certainly we're in
14 the history. In fact, their traditional history is the military war
15 crimes commission, which is this is clearly what this is, has not
16 tried crimes that occurred outside the zone of hostilities. And in
17 fact, that's shown in the charges against Mr. Hamdan. They allege
18 hostilities.

19 Now I'm sure the government has and will continue to point
20 out that the overall jurisdiction has this portion that says
21 "...committed by an alien unlawful enemy combatant before on or after
22 September 11, 2001."

1 I have three points here; one, I readily admit Mr. Hamdan's
2 decision was a plurality and that the government and other persons
3 that we'd asked them to decide from Mr. Hamdan and others similarly
4 situated with regards to when the war started; they only decided to--
5 regards to Mr. Hamdan that's what happened.

6 But there are other similarly situated persons and
7 certainly Congress, aware that it was a plurality decision--the
8 Hamdan decision was the impetus to this--didn't statutorily decide to
9 take away or give effect to the plurality decision to make it
10 mandatory--to give an opportunity to the government to argue this
11 again. Just not in this case because of the *res Judicata* provision
12 that comes in to Mr. Hamdan's benefit.

13 Secondly, even here one needs to also remember that
14 military commissions and this creation of it is not, as Senator
15 McCain pointed out, only for the war against al Qaeda.

16 It's for all conflicts and many war crimes have no
17 statutory--statute of limitations. They can be brought at any time.
18 It's been involved in countless conflicts, so it's quite possible
19 that Congress didn't want to restrict and say well this is only the
20 al Qaeda court in fact they went to pains to say "no, this will be
21 for all."

22 And so where we are articulating those common-law war
23 crimes and if the commission is constructed to meet all of the

1 international requirements, there is no problem with using it.
2 Though, again, I don't think that the on, before or after September
3 11th necessarily controls or says Congress was saying anything to the
4 alternative or deference of that.

5 And lastly, it would be dangerous to construe the--the
6 portion to say that Congress can declare war retroactively. War
7 could exist in two different states. War can exist on declared war,
8 which we can either argue whether the AMF was or not or is etc., or
9 *de facto* of war. De Facto is facts--the law applied to facts and
10 determination there, which is a determination of judicial function;
11 not Congress's function.

12 So Congress would be, they the judicial free asset
13 (phonetic), to walk in on the plurality and say, "no you got it wrong
14 and I'm reversing your decision." Again, if we can read the statute
15 in such a way as we don't even come to that issue, which is easy to
16 do; we shouldn't do it.

17 So we come to the end of it and we find that Mr. Hamdan in
18 these charges, which require in the charges against him, the
19 conspiracy charge that al Qaeda was engaged in hostilities listing
20 the exact same facts that had been determined by the court as a
21 matter of law in the plurality not the constitute--a war or armed
22 conflict and then associated with armed conflict without listing any
23 new facts necessarily requires that this Court respect that decision

1 in Mr. Hamdan's case and dismiss that conduct that occurred before
2 September 11.

3 While in determining personal jurisdiction as this Court
4 ruled in December we can escape this issue because we dealt only
5 inside what no one on the defense certainly argued was not clearly
6 international armed conflict. We now find ourselves in a position
7 where we must address it when it comes to the charges against him.

8 And at this case, it's not again a hard question for this
9 Court, it's not a hard question--it would be extraordinarily hard--we
10 would point in legal authority after *Hamdan* to the *al Mari* decision,
11 which again rejected the course of conduct, separate war with al
12 Qaeda and found that Mr. al Mari for acts very similar to those that
13 are alleged against Mr. Hamdan was not a combatant.

14 But we need not finish that argument here; in fact it would
15 not be appropriate for us to do so at this point the dictates of *res*
16 *Judicata* decide that this issue, decided for Mr. Hamdan that in the
17 Supreme Court he won something for himself, requires that we dismiss
18 these charges.

19 Thank you and I'll answer any questions Your Honor has.

20 MJ [CAPT ALLRED]: I'd like you to respond to what I think will
21 be the government's argument, which is that a 4-3 decision with two
22 judges not participating has to be *res Judicata* only with respect to
23 the narrowest issue on which they agree, which is that the Court

1 wasn't properly constituted or that it wasn't statutorily--properly
2 authorized, or some issue narrower than the beginning date of the war
3 and whether or not conspiracy were----

4 ADDC [MR. SWIFT]: I would respond first in that there isn't a
5 plurality decision that the court was not properly constituted. That
6 was the majority decision. Justice Kennedy joins----

7 MJ [CAPT ALLRED]: Okay.

8 ADDC [MR. SWIFT]: Justice Stevens in all but the five. We then
9 come to the 4-3-1. My response on it is as a matter of law of the
10 case that it doesn't set precedent for any other case; however, it
11 does reverse the DC Circuit. And one thinks about this in the
12 context of what would have happened had it gone down. Was the fact
13 that it was 4-3-1--? The word "plurality" means nothing because that
14 portion is the only portion of the plurality opinion. That's just to
15 say that Justice Kennedy's very clear to what he joined--and this is
16 the only section he doesn't--is that this portion is decided on a
17 necessary element subject matter jurisdiction that was clearly before
18 the court. It was essential to the dissent's position that's why
19 they're in the dissent. And it's that they do not have the votes.

20 And while Mr. Hamdan has four votes here that was enough
21 because in a 4-3-1 and I pointed out similarly what had happened in
22 the law of the case in the context of a Fourth Amendment search would

1 we have gotten a 4-4-1 where actually we had a tie and only one
2 justice joining on a limited grounds?

3 But when we went down; we didn't just apply Justice
4 Scalia's test. We applied the plurality test. The plurality test
5 was what was applied in his case. Now that did not become law. That
6 was not the binding law of the United States and one daresay that it
7 probably isn't the binding law of the United States now.

8 But in reversing the District, in reversing the DC--or
9 excuse me the Ninth Circuit in that case we applied something which
10 only had four votes and that became the binding, law as I pointed
11 out, and how the court dealt with that case. And similarly, that's
12 the case with Mr. Hamdan.

13 I mean we can argue that, "Oh well, he only got four votes,
14 only got four votes, than were going to use Justice Scalia's one vote
15 test." And that's essentially what the government's arguing for.
16 "We're going to use the Justice Kennedy one vote test."

17 All--we have seven Justices who agreed that the start of
18 the war was critical to this analysis. For our one side three on the
19 other. That's the decision. We were well aware that if we went in
20 and got a 4-4 tie we'd lose. A 4-4 tie, DC Circuit's opinions hold
21 absolutely. So if we'd had a 4-4 tie on this issue the DC Circuit's
22 opinion would have become law. There was no 4-4 tie. It was
23 reversed.

1 MJ [CAPT ALLRED]: How would you respond to Justice Thomas'
2 argument that Congress clearly intended when it passed the Military
3 Commissions Act to hold responsible those who had planned and
4 executed the attacks against--the September 11 attack. In other
5 words, to try cases that occurred before September--try offenses that
6 occurred before September 11.

7 ADDC [MR. SWIFT]: It was actually in the sense here not
8 particularly answered, but we had an answer to that question. If it
9 had been asked in the court--looking at Nuremberg and what was
10 traditionally available, I would agree it's not charged here and we
11 still haven't--maybe there's a theory under which we would hold Mr.
12 Hamdan responsible for 9/11. We cite 9/11 a lot; we haven't charged
13 him with killing anyone. We haven't charged him directly with
14 participating in it or planning at.

15 Nuremberg recognized an exception. Nuremberg recognized
16 the exception for the planning etc. of these acts outside of the war
17 for the leaders; that where the leaders--where you would have the act
18 conducted at the start of hostilities such as 9/11 as the Court
19 found. But the leaders would be responsible for that even though
20 they did not conduct it. So my view on it is, is that under a lot
21 of--under a--the theory that the government has put forth of, I
22 believe I'm blanking for a moment, Your Honor, "enterprise
23 liability."

1 In enterprise liability theory, wherein you show that Mr.
2 Hamdan or any other person was integral to the parts of that attack
3 they are liable on the day of the attack. I would disagree with
4 Justice Scalia that it meant and we did disagree, we briefed it and
5 quite frankly, Your Honor, we won. That prior to that, other than
6 the outside those limited circumstances that would be any ability to
7 charge.

8 But again my point is Sheik Khalid Mohammad is not sitting
9 here. He may well decide these questions, but this court need not.
10 Mr. Hamdan is here. Now if the government chooses instead to come
11 with a charge that says that Mr. Hamdan through enterprise liability-
12 -he was sufficiently involved in the planning, the preparation and
13 the carrying out of that attack to be considered a member of that
14 attack, then they would bring it within the jurisdiction of the Law
15 of War as the plurality decided it in Mr. Hamdan's case.

16 But they've charged exactly the same facts that the
17 plurality found would not do that. That were all outside of the
18 relevant conflict. That did go----

19 MJ [CAPT ALLRED]: Let me stop you for just a moment, can I?

20 ADDC [MR. SWIFT]: Yes sir.

21 MJ [CAPT ALLRED]: The charge--or the specification under the
22 charge of conspiracy alleges that Mr. Hamdan conspired with Usama bin
23 Laden. I mean the leaders essentially the charges--the government

1 has charged that he has or was a part of that inner circle that
2 planned the attacks including an attack of September 11. Is that not
3 a matter for trial?

4 ADDC [MR. SWIFT]: Well if--if we're going to restrict the jury
5 to evidence that shows that he was in fact part of the inner circle;
6 that he was in on the planning and that will be instructed to the
7 jury as what they have to find. That he knew and was part of the
8 planning of the 9/11 attack; that he materially contributed to the
9 9/11 attack--and I've seen all the discovery--but if that's what
10 we're going to instruct the jury on----

11 MJ [CAPT ALLRED]: You're prepared to go to trial on that issue-
12 ---

13 ADDC [MR. SWIFT]: I'm prepared to go to trial on that, sir. I
14 don't think that's what the government's charging. I think the
15 government is charging a broad-based conspiracy in which he had after
16 knowledge of 9/11, some idea that he was in a terrorist organization,
17 but no specific knowledge of any particular attack and no particular
18 role in any attack other than maybe having driven Usama bin Laden to
19 it.

20 Now they're free to charge conduct after 9/11, and we're
21 not seeking the dismissal of all, though one of the difficulties with
22 the charge sheet is it's so general that certainly if we put on
23 "starting on September 11th" and moving forward we can--and the

1 government has things that they want to fashion inside that they can
2 do so. But I don't read the charge sheet in any way in its general
3 allegations to be that specific conspiracy. Now if the--Judge if we
4 reform it to that portion----

5 MJ [CAPT ALLRED]: I'm just reading what's on the charge sheet.
6 I don't know what the evidence will be, but from the conspiracy
7 specification it appears to allege that he was part of that inner
8 circle. Maybe not.

9 Let me turn to my final question. Which branch of
10 government do you think is charged with determining when hostilities
11 begin?

12 ADDC [MR. SWIFT]: I believe ultimately outside of a declared
13 war that that ultimately falls to the Court, because it's an
14 application of facts and law for the purposes in of determining
15 judicial power while you're determining jurisdiction. Because if it
16 doesn't, if it falls and I'll--if I can, I'll try and supplement this
17 with a couple of cases, the *Texas Oil Fill* case being the most
18 important after the prize cases. But that it falls into the judicial
19 branch to make these decisions, otherwise we fall to the part where
20 Congress is free to expand or the President to expand irrespective of
21 the facts.

22 War exists in two different stems, one which is almost
23 passé. And that is, the declaration of war which puts all parties on

1 notice that you're at war, or facts that are such that constitute a
2 war, but in the ultimate part if it's to Congress to make that
3 decision then you would violate even the parts of the M.C.A. and
4 R.C.M. that say that this court is to determine its statutory--its
5 subject matter and jurisdiction. Because you would simply say well
6 actually Congress determines that.

7 MJ [CAPT ALLRED]: Okay. I appreciate your argument thank you
8 very much.

9 ADDC [MR. SWIFT]: Thank you.

10 MJ [CAPT ALLRED]: Who's arguing this one for the government?

11 PROS [LTC BRITT]: Your Honor, at this time, I would like to ask
12 the court on behalf of the prosecution team for a brief recess
13 perhaps if we could have a quick one.

14 MJ [CAPT ALLRED]: Quick, there's no such thing as a quick break
15 around here.

16 PROS [LTC BRITT]: I've been informed that it would take 10
17 minutes, no more.

18 MJ [CAPT ALLRED]: Okay. Let's see if we can take a recess for
19 10 minutes.

20 **[The R.M.C. 803 session recessed at 1510 hours, 7 February 2008.]**

21 **[The R.M.C. 803 session was called to order at 1522 hours, 7 February**
22 **2008.]**

23 MJ [CAPT ALLRED]: Please be seated. The court's called to

1 order. Let's see where were we, I think the government was going to
2 argue the DC Circuit--I'm sorry *res Judicata* motion.

3 APROS [MR. GOLDSTEIN]: Yes, sir.

4 MJ [CAPT ALLRED]: All right.

5 APROS [MR. GOLDSTEIN]: Once again sadly no slides.

6 The accused raises as an affirmative defense the claim that
7 the specifications in counts one and two relating to conduct prior to
8 11 September 2001 must be dismissed because the Supreme Court has
9 conclusively determined that those actions occurred outside the
10 period of hostilities between the United States and al Qaeda. As I
11 will explain in a moment, because the accused has failed to carry his
12 burdens of proof and persuasion the motion to dismiss must be denied.

13 Regardless of who bears the burdens, in addition the motion
14 it should be denied. Ultimately the accused's claim comes down to
15 the any factual statement made by plurality in a habeas case, must
16 bind those same parties in any other litigation notwithstanding that
17 the factual statement was not adopted by a majority of the Court, was
18 not part of the Court's holding defined as the position taken by the
19 members who concurred in the judgment on the narrowest grounds.

20 And third, that the statement in question was irrelevant
21 even to the plurality's own conclusion. Let's look at exactly what
22 was said in *Hamdan* on pages 2777 and 2778. The plurality discussed,
23 "Whether the system of military commissions then at issue was

1 authorized under the AUMF which the plurality described as the Act of
2 Congress on which the government relies for exercise of its war
3 power, and thus for its authority to convene military commissions."
4 That's quoting from the plurality.

5 Because, according to the plurality, it was the AUMF that
6 would have given the President authority to convene a system of
7 military commissions, the question for the plurality was, "What
8 period did that authorization cover?"

9 The plurality appears to have determined that the AUMF only
10 authorized the convening of military commissions with respect to
11 offenses committed on or after 9/11 that is; the 11 September 2001
12 date was relevant to the plurality not because it defined the period
13 of hostilities per se, but because it defined the relevant period of
14 hostilities under the AUMF. And under the plurality's reasoning, the
15 use of military commissions circumscribed by the terms of the AUMF.

16 I would just note in passing at this point that the non-
17 precedential plurality's interpretation of the AUMF is somewhat
18 absurd, since it would mean that Congress under the AUMF had not
19 authorized the President to prosecute Usama bin Laden for his role in
20 9/11 with respect to his pre-9/11 acts. That interpretation is at
21 odds with the backwards looking language of the AUMF. In any event,
22 the plurality's determination, if it was a determination, has,
23 regardless of its merits, been overtaken by events.

1 Congress in the M.C.A. broadly defined the scope of
2 hostilities between the United States and al Qaeda as occurring prior
3 to September 11, 2001. Section 948d(a), which I discussed earlier
4 today, in the M.C.A. Congress wrote, "A military commission under
5 this chapter shall have jurisdiction to try any offense made
6 punishable by the Law of War when committed by an alien unlawful
7 enemy combatant before, on or after September 11, 2001." And in
8 addition in section 950p, Congress recognized that military
9 commissions try violations of the Law of War.

10 When you put that together, by defining the commission's
11 jurisdiction as including acts prior to 11 September 2001, Congress
12 necessarily made clear that it considered hostilities to have
13 likewise commenced prior to that 11 September 2001 date.

14 It's difficult to conceive of anything less amenable to
15 judicial review than the joint defining by the Legislative and
16 Executive branches of the federal government of when war has begun.
17 Congress made clear, in the M.C.A. that U.S. hostilities with al
18 Qaeda and the Taliban began prior to 9/11.

19 To the extent the plurality in Hamdan reached a contrary
20 determination it did so in the context of interpreting Congress'
21 intent under the AUMF, which was expressly grounded in the 11
22 September 2001 attacks. That analysis has since been mooted by an
23 enactment of the M.C.A., which makes clear that Congress was

1 concerned with a far broader scope of hostilities--that is--
2 hostilities before, on or after 11 September 2001.

3 As we argued in our pleadings, the plurality's entire
4 discussion of conspiracy failed to command the assent of a majority
5 of the Justices and therefore is not binding with respect to Mr.
6 Hamdan and the United States. Since only the judgment of Hamdan has
7 preclusive affect with respect to Mr. Hamdan, which judgment does not
8 include any of the plurality's discussion of conspiracy. And I
9 would, for example, refer Your Honor to Ex Parte Discount Foods,
10 which is a case we emailed yesterday afternoon. In any event, the
11 plurality's musings regarding the commencement of hostilities with al
12 Qaeda were clearly dicta.

13 Even had its conclusions with respect to conspiracy status
14 as a violation of the Law of War been adopted by the entire Court,
15 the plurality's objection to trying the accused for conspiracy was
16 simple; it believed that conspiracy was not a violation of the Law of
17 War--and I think that's what counsel recently said--and therefore was
18 not triable by a Law of War military commission. However, it's very
19 clear from reading Justice Stevens' opinion that he was not claiming
20 that conspiracy was somehow a violation of the Law of War after 9/11,
21 but not before. Had that been the point, the date of hostilities
22 might have been relevant.

1 Rather, the plurality's objection to trying the accused for
2 conspiracy was much simpler. The plurality believed that conspiracy
3 was not a violation of the Law of War. The commencement of
4 hostilities with al Qaeda, whether in 2001 or 1996 or some point in
5 between, was irrelevant to the plurality's determination that
6 conspiracy was not a violation of the Law of War.

7 Black's dictionary defines dicta as, "[A] judicial comment
8 made while delivering a judicial opinion that is unnecessary to the
9 decision of the case and therefore not precedential."

10 The statement by the plurality regarding the date
11 hostilities commenced with al Qaeda were relevant to the plurality's
12 determination if determination it was--to determine if conspiracy was
13 not a violation of the Law of War.

14 Accordingly, its statements regarding the date hostilities
15 began were dicta. I will also note that the accused in his reply
16 brief states that Solicitor General Clement, during the oral
17 arguments in the Hamdan case, "...conceded that the armed conflict with
18 Al Qaeda began on September 11, 2001."--I'm quoting or trying to
19 quote as close as I can from the replied motion at page 1----

20 MJ [CAPT ALLRED]: I remember that comment.

21 APROS [MR. GOLDSTEIN]: I have listened to the oral arguments
22 and reviewed the transcripts of General Clement's presentation in
23 Hamdan. And I honestly don't understand what the defense is talking

1 about. The closest I've been able to find is General Clement's
2 statement that, "I think the events of 9/11 speak to the fact that
3 this is a war in which the Laws of War are involved." Since the
4 accused doesn't provide any citation to what portion of the oral
5 argument he's referring to, we're at a bit of a loss as to how to
6 respond.

7 I will, however, say that the Solicitor General's statement
8 that, "...the events of 9/11 speaks to the fact that this is a war," in
9 no way undermines the government's position that this war began
10 earlier. 9/11 was not the start of hostilities, it was rather that
11 point beyond which it was difficult to disagree that we were indeed
12 at war with a dangerous enemy. Nothing in General Clement's
13 presentation undermines the government's position that the war with
14 al Qaeda began some time before 9/11 notwithstanding that the
15 existence of that ongoing war was dramatically and tragically
16 illustrated on that day.

17 Returning to the (inaudible) motion, the accused's argument
18 appears to be that dicta and plurality opinion is binding law of the
19 case for the litigants in that case. Now, that can't be right.
20 Courts resolve particular cases and controversies. They do not
21 resolve all possible disputes between litigants until the end of
22 time. Under Article 3, the Court, including the Supreme Court is
23 limited to deciding only those issues before it. Even a unanimous

1 Court, to say nothing of a plurality, cannot fill its opinion with
2 dicta and expect that a subsequent court will consider itself bound,
3 rather to the extent any law of the case exists here; it can exist
4 only with respect to conclusions essential for the Court's holding.

5 Here whether hostilities with al Qaeda commenced in 2001,
6 1996 or at some point in between was irrelevant to the *Hamdan*
7 plurality's statement or its determination that conspiracy was not a
8 violation of the Law of War. The accused is attempting to
9 disaggregate the Court's factual findings, if that's what it was,
10 from the Court's role in adjudicating particular issues, and that
11 doesn't make any sense.

12 The Supreme Court's decision in *Hamdan* was not intended to
13 be an encyclopedia of the War of al Qaeda. It was a decision
14 intended to resolve particular legal issues between the parties, in
15 this case, whether conspiracy was a violation of the Law of War.
16 Some facts were relevant to that determination and some facts were
17 not. Those facts that were irrelevant, such as whether hostilities
18 commenced in 2001 or 1996 cannot have preclusive affect either on
19 these litigants or on any others, because the plurality's statements
20 regarding the commencement of hostilities with al Qaeda were
21 irrelevant to the ultimate conclusion regarding conspiracy status
22 under the Law of War. It was dicta; therefore had no *res Judicata*
23 affect.

1 With respect to our other arguments on *res Judicata*, we're
2 content to rest on our briefs. And we urge the commission to deny
3 this motion and I'm happy to take any questions at this point.

4 MJ [CAPT ALLRED]: Well you just used the term "sometime before
5 9/11" as the start date of hostilities, but in your specification
6 you've alleged a conspiracy that began in 1996. Does this commission
7 have to determine what the start date was and preclude evidence of
8 the accused's acts before that start date?

9 APROS [MR. GOLDSTEIN]: Well, the government would certainly--I
10 guess agrees with the defense that military commissions try
11 violations of the Law of War, in other words try offenses committed
12 in the context of armed conflicts. It's the government's position
13 that this period of armed conflicts included all events in the dates
14 alleged so that would be part of the Court's determination, but the
15 government's position is that this case goes forward because the
16 period of armed conflict includes all the offenses and dates alleged,
17 in other words, from February 1996 through November 24, 2001.

18 MJ [CAPT ALLRED]: Is it the government's position that the
19 conflict with al Qaeda began at a different time than the conflict
20 with the Taliban, and that these are two separate conflicts?

21 APROS [MR. GOLDSTEIN]: I don't know if the government has taken
22 a position in terms of whether the dates of those are co-terminus.
23 They might well not be. I mean, the government's charging indicates

1 that the armed conflict from which these offenses arose was ongoing.
2 But the conflict with Al Qaeda and the Taliban need not have occurred
3 at the same time and there's no requirement of that under the M.C.A.
4 or just logically.

5 MJ [CAPT ALLRED]: Let me--let me ask you to respond to this and
6 I'll give the defense a chance if they'd like to do it as well. The
7 Supreme Court was trying to--I guess I don't have a very well-
8 formulated question. I'll wave off on that I guess.

9 APROS [MR. GOLDSTEIN]: But again, we advanced a number of
10 different arguments for why there is no *res Judicata* effect, but I
11 think the simplest one is that even if the plurality is taken on its
12 own terms. Even if he had commanded the assent of all nine of the
13 Justices, just accepting that, which it obviously he did not; it
14 determined that conspiracy was not a violation of the Law of War.

15 Government concedes that that is the determination
16 plurality makes, and disagrees vigorously with it. That
17 determination was not based on whether hostilities began in 1996 or
18 2002. There is nothing in Justice Stevens' opinion that would in
19 anyway suggest that that date is a relevant one. To the extent that
20 the plurality sort of goes off on a detour and has other facts in its
21 opinion that are not essential to its conclusions, that might well be
22 interesting, but that certainly cannot have preclusive effect.
23 Plurality cannot put dicta in and give preclusive affect that is not

1 relevant to its conclusions even if it actually had some sort of
2 binding effect, which it did not.

3 MJ [CAPT ALLRED]: Well I appreciate your argument. Thank you.

4 APROS [MR. GOLDSTEIN]: Thank you.

5 MJ [CAPT ALLRED]: I'll read your briefs carefully in the case
6 decided and try to work through this one as well.

7 We're making pretty good progress. Are we ready for the
8 next one?

9 ADDC [MR. SWIFT]: Yes, Your Honor.

10 **[Defense paralegal and counsel set up laptop at podium.]**

11 ADDC [MR. SWIFT]: A matter of house-keeping, Your Honor. With
12 regards, and understanding where your questions are going in the
13 event we of course argued you don't need to, but in the event that
14 you find something we both agree on. You find that it's not *res*
15 *Judicata* you're not bound in your decision. We would--if Your Honor
16 wants briefs on when the war started irrespective of *res Judicata*,
17 what authorities and all hold--there's a lot out there--and would
18 invite us to brief, we would be willing to do so on that subject. It
19 was not directly in mind because I was arguing it as a matter of
20 procedure, but both sides do agree----

21 MJ [CAPT ALLRED]: The thought--the thought did occur to me that
22 maybe September 1 or some period before 9/11, but I don't know how
23 far before might be the time when the attack was forming, so that the

1 period of hostilities clearly began, you know, at some vague date
2 before September 11. I don't know----

3 ADDC [MR. SWIFT]: Your responding----

4 MJ [CAPT ALLRED]: You're welcome.

5 ADDC [MR. SWIFT]: ----to add to your----

6 MJ [CAPT ALLRED]: Submit your supplemental briefs on that if
7 you----

8 ADDC [MR. SWIFT]: ----certainly.

9 MJ [CAPT ALLRED]: ----like. I guess I don't know----

10 ADDC [MR. SWIFT]: ----actually, it's some case law----

11 MJ [CAPT ALLRED]: ----if I have to decide when the conflict
12 began so that the specification reads not 1996 but 1998 or 1999 or--
13 or not. Well let's see how that *res Judicata* motion works out and
14 then maybe we can take up----

15 PROS [LTC BRITT]: Your Honor, if I could just speak for a brief
16 bit on that. We'd like to decline the opportunity to brief this
17 issue, because we don't believe that resolution of that particular
18 point is necessary for your determination in our case.

19 MJ [CAPT ALLRED]: You know I think that's true.

20 PROS [LTC BRITT]: And the reason is, is we're simply contending
21 that Mr. Hamdan entered into the ongoing conspiracy as of the date
22 alleged. And that----

23 MJ [CAPT ALLRED]: February '96.

1 PROS [LTC BRITT]: Yes, sir. And therefore hostilities were
2 ongoing as of that date whether or not hostilities were going
3 previously and as of what date the hostilities commenced is not
4 relevant to your determination.

5 MJ [CAPT ALLRED]: What happened in February of 96 that
6 represented the beginning of hostilities?

7 **[Prosecution counsel conferred.]**

8 MJ [CAPT ALLRED]: Let me whisper to counsel.

9 PROS [LTC BRITT]: Yes, sir. Thank you. I think we can
10 adequately address the--the Court's question. In February of 1996,
11 that was essentially the date when Mr. Hamdan entered Afghanistan,
12 and therefore that would be the date that we contend that he joined
13 the ongoing hostilities which were taking place. So that's the
14 significance of us choosing that particular date.

15 MJ [CAPT ALLRED]: Okay.

16 ADDC [MR. SWIFT]: We would really like to brief that if the
17 court finds not *res Judicata*, the war started with Mr. Hamdan by him
18 entering Afghanistan at a time--I would like to brief that, Your
19 Honor. And whether that's within the jurisdiction of this court?

20 MJ [CAPT ALLRED]: I don't think the government said Mr. Hamdan
21 started the war when he crossed into Afghanistan. I think they
22 allege that there was an ongoing conspiracy he joined on that date.

23 PROS [LTC BRITT]: Yes, sir. That's correct.

1 MJ [CAPT ALLRED]: Were there hostilities? Had there been an
2 attack prior to February of '96?

3 PROS [LTC BRITT]: Our position would be there had been several
4 attacks prior to that and I think that part of our case is developing
5 what constituted hostilities at that time, but I don't, I don't----

6 MJ [CAPT ALLRED]: Here's what I would like to--well, you're
7 welcome to file any supplemental brief you'd like to if the
8 government wants to respond it may, if it wants to decline then
9 that's fine too.

10 Now I lost my thought here. Okay. I'm sorry they got away
11 from me, maybe it will come back later. Okay. Are you going--do you
12 have anything else before we turn to the next motion?

13 PROS [LTC BRITT]: No, sir. Just once again, I believe that
14 would be our evidence at trial. The hostilities were ongoing and
15 we're prepared to prove that, that in February of 1996, that's when
16 Mr. Hamdan came into Afghanistan and joined the ongoing hostilities.
17 And we will prove that with competent evidence before this Court.

18 MJ [CAPT ALLRED]: This is the question that just escaped me and
19 now it's come back. Whether the existence of a state of war is a
20 question for the jury or not? Whether it will be an element that
21 you'll have to prove or whether that's a legal question that has to
22 be resolved. In other words, when I end up instructing the members
23 at the end of the evidence what the elements of the offense are, will

1 it include the element that these were, you know, connected to a
2 period of hostilities?

3 ADDC [MR. SWIFT]: The defense's position, Your Honor, is that
4 it's a matter of law and you need look no further than Winthrop and
5 that it is a subject matter jurisdictional question which doesn't go
6 to the jury.

7 It admittedly has elements of fact in it and when I was
8 thinking about what to do with it, it did seem that if we moved on it
9 would be a more natural for the next hearing where we would have
10 factual hearings, if the government intends to put forth, similar to
11 the question of whether those factual personal jurisdictions and then
12 there's the question of factual subject matter jurisdiction, but we
13 contend that where the court determines its subject matter
14 jurisdiction, that's not a question for the jury to decide. It's a
15 question for the military judge to decide because the existence of
16 hostilities is ultimately the application of law to fact and within
17 the providence of the Court.

18 MJ [CAPT ALLRED]: Okay. Well, we'll cross that bridge when we
19 get to it, I guess. We're ready to talk about combatant immunity.

20 ADDC [MR. SWIFT]: Yes, Your Honor. Again, if I could have these
21 published to the gallery.

22 MJ [CAPT ALLRED]: You may.

23 **[The court reporter published the slides to the gallery.]**