

AE617/AE620
Briefing on Specified Issues
Counsel for Mr. al Baluchi

(1) Whether (a) proof of *existence* of hostilities (as opposed to *nexus* to hostilities)¹⁸ is a component of the common substantive element established by 10 U.S.C. § 950p(c); and (b) if so, whether this Commission is bound to use the same member instruction used in *United States v. Hamdan*¹⁹ and *United States v. Bahlul*.²⁰

¹⁸ By “nexus to,” the Commission means “in the context of and associated with,” as stated in 10 U.S.C. § 950p(c).

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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.

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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 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.

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With respect to each of the ten specifications 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 United States and al Qaeda, 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 United States decided to employ the combat capabilities of its armed forces to meet the al Qaeda 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 and circumstances you consider relevant to 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.**

(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.

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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.

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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.

(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.

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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.

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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.

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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.

(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.²¹

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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.