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	**AE620B (AAA)** **Mr. al Baluchi's Reply to** Government's Response to Mr. al Baluchi's Motion to Compel Documents and Information Concerning United States Pre-9/11 Law-of-War Detainees Associated with al Qaeda 15 March 2019

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

2. Law and Argument:

The military commission should compel the government to provide Mr. al Baluchi with documents and information relating to pre-9/11 U.S. law-of-war detention of individuals associated with al Qaeda,[2] including any and all documents or information relating to the U.S.

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

[2] In asserting that Mr. al Baluchi's request is overbroad, the government misrepresents it as "'any and all documents or information' demonstrating the **absence** of . . . law-of-war detention operations." AE620A (GOV) Government Response to Mr. al Baluchi's Motion to Compel Documents and Information Concerning United States Pre-9/11 Law-of-War Detainees Associated with al Qaeda at 10 (emphasis added). Had Mr. al Baluchi in fact requested 'any and all documents demonstrating the absence of law-of-war detention operations' the government might be correct in its rejoinder that such a request could reach "every document in the possession of the United States." But Mr. al Baluchi made no such request. Instead, Mr. al Baluchi requested "any all and all documents or information relating to U.S. law-of-war detention operations as they pertained to individuals associated with al Qaeda between 23 August 1996 and 11 September 2001." AE620 (AAA) Mr. al Baluchi's Motion to Compel Documents and Information Concerning the United States Pre-9/11 Law-of-War Detainees Associated with al Qaeda, Att. B. By its own terms, Mr. al Baluchi's request is limited to a closed set of documents that bear a connection to law-of-war detention of al Qaeda associated individuals. If the United States engaged in law-of-war detention operations of al Qaeda associates prior to 9/11, the closed set of responsive documents is finite. If the United States did not engage in or contemplate or plan for law-of-war detention operations of al Qaeda associates prior to 9/11, then there should be a closed set of zero responsive documents. In other words, contrary to the government's representation,

government's decision to prosecute the East Africa embassy co-conspirators in federal criminal court rather than to subject them to law-of-war detention. That discovery is relevant and material to Mr. al Baluchi's defense under at least the *United States v. Hamdan* standard for determining the existence of hostilities—the standard preferred by the government. The records Mr. al Baluchi seeks are evidence directly addressing at least three categories of information identified as relevant and material to the existence of hostilities in *Hamdan*. The records are likely exculpatory because they will tend to negate the existence of hostilities under *Hamdan*. And, even if they do not tend to negate the existence of hostilities, the records will assist Mr. al Baluchi in investigating his case and preparing his defense.

The government responded to Mr. al Baluchi's straightforward discovery request with strategic ambiguity. Although, in AE620A, the government comes close to acknowledging that it in fact detained no individuals associated with al Qaeda under the laws of war prior to the 11 September 2001 terrorist attacks,[3] it holds open the possibility that it may have detained individuals under *both* the laws of war and criminal law.[4] The government also asserts that, in

Mr. al Baluchi's request is carefully limited to information both obtainable by the government and important to Mr. al Baluchi's actual trial defense.

[3] *Id.* at 8 ("[T]he Prosecution affirmatively concedes and will stipulate that the United States did not detain any individual associated with al Qaeda solely under the laws of war between 23 August 1996 and September 11, 2001.").

[4] If the East Africa embassy co-conspirators were detained subject to both law-of-war and criminal authorities simultaneously, then the United States would have still been obligated to, *inter alia*, satisfy its responsibilities vis-à-vis them under the laws of war. Such responsibilities would have included informing the ICRC of their detention and facilitating ICRC visitation during their detention. *Cf. Red Cross Delegates Pay Their First Visit to Noriega in Prison*, N.Y. TIMES, Feb. 17, 1990. The government ought to possess records reflecting the supposed dual status of detained East Africa embassy co-conspirators. These documents must be provided to Mr. al Baluchi in discovery.

1998, the United States made an affirmative choice to subject the East Africa embassy co-conspirators to prosecution in lieu of law-of-war detention but it refuses to provide any discovery substantiating that claim. The government offers instead that it has uncovered no records demonstrating that the United States affirmatively "determined that it lacked authority to detain the East Africa embassy bombers under the laws of war"[5]—an answer to a question that crucially may never have been asked.

The government's ambiguity is not sufficient. Because evidence or not of law-of-war detention operations is evidence or not of protracted armed violence, because evidence or not of law-of-war detention operations is evidence or not of the United States deciding to use the combat capabilities of its armed forces, and because evidence or not of law-of-war detention operations is evidence or not that U.S. leaders perceived the existence of an armed conflict, the discovery responsive to Mr. al Baluchi's requests at issue is material and it must be produced. Thus, it is insufficient for the government to almost-but-not-quite concede that it detained no al Qaeda associates under the laws of war prior to 11 September 2001. Likewise, it is insufficient for the government to merely claim, without more, that the United States made an affirmative choice to prosecute al Qaeda associated individuals in lieu of subjecting them to law-of-war detention. And neither is it sufficient for the government to respond that it found no records indicating a negative response to a question that was likely never even asked.[6]

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[5] *Id.* at 11.

[6] For anyone in the U.S. government to have asked, "does the United States have the authority to detain individuals associated with al Qaeda under the laws of war," presupposes the suggestion that there then existed an armed conflict between the United States and al Qaeda. Given the sporadic nature of violence between the United States and al Qaeda prior to the United States' 7 October 2001 invasion of Afghanistan and the absence of evidence suggesting U.S. leaders perceived the United States to be engaged in an armed conflict with al Qaeda before that point, it

Under R.M.C. 701(c), Mr. al Baluchi is entitled to records responsive to DR-397-AAA and DR-397A-AAA and those records will resolve the strategic ambiguity of the government's near concession. Likewise, they will either corroborate or refute the government's bare claims that the United States affirmatively chose to prosecute the East Africa embassy co-conspirators in lieu of holding them in law-of-war detention—a decision the government implies was made without a determination that law-of-war detention authority was legally unavailable. In particular, documents or information relating to the U.S. government's decision to prosecute the East Africa embassy co-conspirators in federal criminal court rather than subject them to law-of-war detention will resolve whether U.S. leaders were even seized of a choice between law-of-war and law-enforcement frameworks with which to address al Qaeda. If U.S. leaders did not even consider the possibility of law-of-war detention for al Qaeda associates following the East Africa embassy bombings and Operation INFINITE REACH, then that is strong evidence that U.S. leaders did not perceive the existence armed conflict between the United States and al Qaeda. Firm answers on the foregoing points, found in discovery responsive to Mr. al Baluchi's requests, will tend to either

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is extremely unlikely that anyone in the U.S. government thought to pose let alone answer the misleading question the government has concocted and, unsurprisingly, found no records negating. However, Mr. al Baluchi notes the irony of the government asking him to accept as evidence of an armed conflict its surmised answer to a question not asked in this motion series when, in the AE617 motion series, the government refuses to provide records of correspondence from the International Committee of the Red Cross (ICRC) to the United States concerning the ICRC's determination or not of the existence of an armed conflict between the United States and al Qaeda. The ICRC is charged with constantly asking whether an armed conflict exists anywhere and everywhere in the world, and generally communicating its determination to the parties involved. In contrast to the government's assertion here, the absence of ICRC communications identifying an armed conflict between the United States and al Qaeda prior to 11 September 2001 is actually both material and relevant.

buttress or rebut—and they will almost certainly rebut—the government's claim that an armed conflict between the United States and al Qaeda predated 9/11.

In addition to ambiguity, the government's response in AE 620A contains three notable errors that ought to be addressed. First, having consistently advocated for a totality-of-the-circumstance test for determining the existence of hostilities, the government now seeks to unilaterally choose which circumstances are *really* worthy of evidence and weight. Second, the government repeats its baseless argument concerning *res judicata* and the military commission's ruling about Mr. al Hawsawi in AE502BBBB Ruling. Third, even if the government were right about the pre-trial *res judicata* effect of 502BBBB, that ruling does not absolve the government of its hostilities-related discovery obligations because the existence of hostilities is an element of each charge Mr. al Baluchi faces and the government must demonstrate the existence of hostilities beyond a reasonable doubt at trial.

Mr. al Baluchi has been transparent about his intent to contest the existence of hostilities before and at trial; indeed, it is central to his defense. The government's refusal to provide Mr. al Baluchi with discovery of information that is relevant and material, under the government's preferred standard, concerning the existence of hostilities represents impermissible interference in his defense.

Totality of the circumstances

Throughout this litigation, the government has argued that the correct test for determining whether and when an armed conflict between the United States and al Qaeda began is that found in the panel instruction issued by Judge Allred in the *United States v. Hamdan* military commission:

> 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 [**80] 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.[7]

The *Hamdan* standard is a totality-of-the-circumstances standard, not a multi-pronged test. Instead of requiring satisfaction of each prong to determine the existence of an armed conflict, the *Hamdan* standard asks the fact finder to look at all the circumstances that may be relevant to such a determination. By their very nature, totality-of-the-circumstances tests make a wide range of information potentially relevant. In this case, while Judge Allred expressly acknowledged the relevance of "any other facts and circumstance," he also identified a handful of categories of relevant information. These categories of relevant information include information that tends to demonstrate "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 Qaida [sic] threat," and "statements of the leaders of both sides indicating their perceptions regarding the existence of an armed conflict."[8] Mr. al Baluchi requested discovery that falls within at least these identified categories.

[7] *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1278 n.54 (U.S.C.M.C.R. 2011) (quoting Allred, J.'s panel instruction in the *United States v. Hamdan* military commission), *reversed by Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).

[8] The government argues that the *Hamdan* standard only reaches "perceptions of leaders as to whether hostilities exists [as] determined through their statements." AE602A at 9 n.5. The

Rather than satisfying its discovery obligations, however, the government now takes the position that information is neither relevant nor material under the *Hamdan* totality-of-the-circumstances standard unless it *precludes* the existence of an armed conflict.[9] But the questions

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government reiterates its arbitrary position that the only leaders relevant here are Osama bin Laden, Ayman al Zawahiri, their designated spokesmen, the President of the United States, and the Secretary of Defense. *Id.* Somehow, the government concludes that the combination of the *Hamdan* "statements" category and the government's arbitrary definition of qualifying leaders means that official U.S. government decisions and decision-making documents do not reflect U.S. leaders' perceptions. The government's position here is in obvious tension with its representations before the military commission on the significance of planning documents related to Operations INFINITE REACH and INFINITE RESOLVE. *Cf.* Unofficial/Unauthenticated Transcript of 18 October 2017 at 16843-45. It is also illogical. Nevertheless, even if the government were right in arbitrarily limiting who qualifies as a leader, it is of no moment. "Perceptions of leaders as to whether hostilities exists [as] determined through their statements" is not an element; it is one example of potentially relevant information within the *Hamdan* totality-of-the-circumstances test. And, even if it were an element, the *Hamdan* standard also invites "any other facts and circumstance this commission considers relevant to the existence of armed conflict." AE602 (AAA) at 14 ("Records showing that the United States did not detain individuals associated with al Qaeda subject to the laws of war let alone plan for such detention may be extremely persuasive for the members of the U.S. armed forces, experienced with actual hostilities, who will constitute Mr. al Baluchi's panel. Certainly, these professional soldiers will recognize the incongruity of calling something "war" that is nearly devoid of the bombs, bullets, explosions, firefights, deployments, sorties, raids, checkpoints, forward operating bases, detention operations, ceasefires, and prisoner exchanges which characterize armed conflict.").

[9] For example, the government asserts that

> to argue the absence of law of war detention operations "make[s] the existence of . . . an armed conflict less likely," is equally as unpersuasive as arguing that the absence of armored personnel carriers makes an armed conflict less likely; especially where a country can engage in hostilities through a broad range of other capabilities, such as in air, sea, and cyberspace. Simply put, the absence of law-of-war detention operations is not probative of either the presence or absence of hostilities between the United States and al Qaeda. In either case, where law-of-war detention is not a pre-requisite to hostilities, and may or may not even occur during the course of a non-international armed conflict, information regarding its absence is neither relevant nor material to the establishment of hostilities and may only serve to mislead the ultimate fact-finder.

AE620A (GOV) at 7.

of whether evidence is probative or dispositive are conceptually distinct. And, more to the point, under a totality-of-circumstances test, *no single factor or piece of evidence could be dispositive.*

To take the government's hypothetical, had the United States used armored personnel carriers to engage al Qaeda in clashes, the government would hold that up as material evidence of the existence of an armed conflict between the United States and al Qaeda, just as it holds up Operation INFINITE REACH as evidence of the existence of an armed conflict. Indeed, had the United States used armored personnel carriers to engage al Qaeda, its argument for the existence of an armed conflict would dramatically improve given that the United States used force against al Qaeda only once, in a minutes-long bombardment of a handful of targets, prior to 9/11. But neither Operation INFINITE REACH nor the hypothetical deployment of armored personnel carriers are or would be dispositive under the *Hamdan* standard.

Nevertheless, the non-dispositive quality of any given fact under the *Hamdan* totality-of-the-circumstance does not deprive such facts of their materiality. Although the absence of armored personnel carrier alone does not disprove the existence of a pre-9/11 armed conflict between the United States and al Qaeda, the United States' failure to use armored personnel carriers combined with, *inter alia*, its failure to use tanks, its failure to use infantry, its failure to use fixed wing aircraft, its failure to use rotary wing aircraft, and its failure to use *any* weapons against al Qaeda on all but one out of 1,845 days between 23 August 1996 and 10 September 2001 all suggest the absence of an armed conflict between the United States and al Qaeda prior to 11 September 2001. Even though none of the foregoing factors are dispositive, each is relevant and material to Mr. al Baluchi's defense that there were no pre-9/11 hostilities between the United States and al Qaeda. Similarly, although the absence of pre-9/11 U.S. law-of-war detention of al Qaeda associates is

not itself dispositive, it is one more feature, common to armed conflicts in general, that is missing from the United States' putative pre-9/11 armed conflict with al Qaeda. In combination with the other missing features, otherwise common to armed conflict, the absence of law-of-war detention operations suggests the absence of an armed conflict. It is, therefore, an exculpatory fact.

Moreover, there is little doubt that, had the United States engaged in law-of-war detention operations of al Qaeda associates before 9/11, the government would point to the existence of those detention operations as proof of the existence of an armed conflict. Well it should. The *Hamdan* standard specifically suggests fact finders consider evidence of "whether there was protracted armed violence between governmental authorities and organized armed groups" and evidence of "whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaida [sic] threat." As Mr. al Baluchi previously briefed, evidence of the existence or not of detention operations is evidence that addresses both the existence or not of "protracted armed violence" and the United States' usage or not of its armed forces combat capabilities against al Qaeda.[10]

The government cannot advocate for the *Hamdan* totality-of-the-circumstances test for the existence of hostilities, on the one hand, and disclaim its discovery obligations with respect to anything but dispositive and fully exonerating information within its possession, on the other.

"Res judicata"

There is no basis for the government's argument that AE 502BBBB Ruling regarding Mr. al Hawsawi precludes, as *res judicata*, Mr. al Baluchi's ability to contest the existence of hostilities

[10] AE620 (AAA).

for personal jurisdiction purposes.[11] Setting aside the misuse of the term *res judicata*, which requires a final judgment, the inapplicability of the military commission's ruling in AE 502BBBB to Mr. al Baluchi is no mere technicality.[12] The military commission explicitly bifurcated its proceedings concerning its personal jurisdiction over Mr. al Baluchi and Mr. Hawsawi.[13] Consequently, Mr. al Baluchi was not a party to most of the litigation giving rise to AE 502BBBB. The military commission correctly and intentionally limited the portion of AE 502BBBB relevant here to Mr. Hawsawi in contradistinction to Mr. al Baluchi. As a matter of law, then, the government cannot assert *res judicata* or any other legal barrier to preclude Mr. al Baluchi from contesting hostilities for personal jurisdiction purposes.[14]

Although AE 502BBBB represents the military commission's ruling with respect to Mr. Hawsawi, its exclusion of Mr. al Baluchi means that the reconsideration standard cited by the government also does not apply here. Mr. al Baluchi's pre-trial personal jurisdiction litigation ordered by the military commission remains pending and the military commission has taken no evidence with respect to its personal jurisdiction over Mr. al Baluchi. As a result, Mr. al Baluchi need not demonstrate "a change in the facts or law or . . . inconsisten[cy] with case law not previously briefed"[15] in order to pursue his defense concerning the absence of hostilities. Indeed,

[11] *See* AE502EEEE (AAA) Defense Reply to Government Response to Mr. al Baluchi's Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction.

[12] AE 620A at 5 ("[I]t may be technically correct that the [military commission] has not applied its legal conclusion regarding hostilities to Mr. [al Baluchi's] jurisdiction challenge . . . .").

[13] AE502QQQ Ruling; AE502BBBB Ruling at 19-20.

[14] *See Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

[15] AE 108AA at 2.

Mr. al Baluchi could not request reconsideration of AE 502BBBB's personal jurisdiction determination if he wanted to, because only one section applies to him.

Interference with Mr. al Baluchi's defense

The government's refusal to provide Mr. al Baluchi with the discovery he sought through DR-397-AAA and DR-397A-AAA represents impermissible interference in his defense preparation. Even if the government were right and the military commission's ruling in AE 502BBBB resolved the hostilities issue with respect to Mr. al Baluchi for pre-trial personal jurisdiction purposes, at trial, the government must still prove the existence of hostilities beyond a reasonable doubt as an element of every charge.

Mr. al Baluchi has been transparent in identifying his hostilities defense as a core feature of his defense both before and at trial. In either setting, the government's failure to carry its burden in proving the existence of hostilities would be dispositive. Even if the military commission's ruling in AE 502BBBB applied to Mr. al Baluchi, the government must still convince the eventual military commission panel members of the existence of hostilities beyond a reasonable doubt. Consequently, even if AE 502BBBB applied to Mr. al Baluchi, that ruling alone would not eliminate the government's burden, hostilities as a defense for Mr. al Baluchi, nor the government's obligation to provide Mr. al Baluchi with the material discovery related to the existence or absence of hostilities that he requests. It is thus no answer for the government to refuse to provide discovery unless Mr. al Baluchi satisfies the standard for reconsideration, even if that standard were relevant in this instance.

In this case, Mr. al Baluchi has requested discovery that directly addresses non-exclusive factors identified in the government's preferred standard for determining the existence of

hostilities. That alone makes the discovery Mr. al Baluchi requested relevant. Further, the discovery Mr. al Baluchi requested is helpful to his preparation of a defense because it will at least help him investigate his case but, more likely and more importantly, the discovery he requested will be exculpatory because it will tend to negate the government's lightly supported argument that hostilities between the United States and al Qaeda predated 9/11. In light of the government's recalcitrance, the military commission ought to compel it to produce records responsive to DR-397-AAA and DR-397A-AAA or otherwise clearly articulate, without caveat or ambiguity, that no such records exist.

3. <u>Attachments</u>:

A. Certificate of Service

Very respectfully,

//s//
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Attachment A

CERTIFICATE OF SERVICE

I certify that on the 15th day of March, 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