

UNCLASSIFIED//FOR PUBLIC RELEASE  
MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

<b>UNITED STATES OF AMERICA</b>  <b>v.</b>  <b>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</b>	<b>AE 617D / AE 620C</b>  <b>ORDER</b>  <b>Mr. al Baluchi’s Motion to Compel</b> Communications from the International Committee for the Red Cross Concerning the Existence of an Armed Conflict 1996-2002  and  <b>Mr. al Baluchi’s Motion to Compel</b> Documents and Information Concerning the United States Pre-9/11 Law-of-War Detainees Associated with al Qaeda  <b>4 April 2019</b>
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**1. Procedural History.**

a. On 17 January 2019, Mr. Ali (a.k.a. al Baluchi) in AE 617 (AAA) moved the Commission to “compel the government to provide all communications from the International Committee of the Red Cross [(ICRC)] to the U.S. government concerning the existence and character of any armed conflict between the United States and al Qaeda from 23 August 1996 until 31 December 2002.”<sup>1</sup> The Government responded on 24 January 2019, arguing the Commission should deny the request because (1) it had carried out its responsibility to comply with applicable discovery standards, and (2) the Defense had in any event “failed to demonstrate

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<sup>1</sup> AE 617 (AAA), Mr. al Baluchi’s Motion to Compel Communications from the International Committee for the Red Cross Concerning the Existence of an Armed Conflict 1996-2002, filed 17 January 2019, para. 2.

that the requested information is relevant and material.”<sup>2</sup> Mr. Ali replied to the contrary on 31 January 2019.<sup>3</sup>

b. On 29 February 2019, Mr. Ali in AE 620 (AAA) moved the Commission to compel the Government to provide discovery on two subjects, specifically: (1) “any 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;”<sup>4</sup> and (2) “any and all 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 to subject them to law-of-war detention.”<sup>5</sup> The Government responded on 8 March 2019, asking the Commission to deny relief on the same basis as in the AE 617 series.<sup>6</sup> Mr. Ali replied to the contrary on 15 March 2019.<sup>7</sup>

c. Mr. Ali asked to orally argue both motions,<sup>8</sup> while the Government asserted no oral argument was needed, but asked to reserve an opportunity to rebut.<sup>9</sup> The parties argued both motions before the Commission on 25 March 2019.<sup>10</sup>

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<sup>2</sup> AE 617A (GOV), Government Response To Mr. Ali’s Motion to Compel Communications from the International Committee for the Red Cross Concerning the Existence of an Armed Conflict 1996-2002, filed 24 January 2019, para. 6.

<sup>3</sup> AE 617B (AAA), Mr. al Baluchi’s Reply to Government’s Response to Mr. al Baluchi’s Motion to Compel Communications from the International Committee of the Red Cross Concerning the Existence of an Armed Conflict 1996-2002, filed 31 January 2019.

<sup>4</sup> AE 620 (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, filed 25 February 2019, para. 2.

<sup>5</sup> *Id.*

<sup>6</sup> AE 620A (GOV), Government Response To Mr. Ali’s Motion to Compel Documents and Information Concerning United States Pre-9/11 Law-of-War Detainees Associated with al Qaeda, filed 8 March 2019, para. 6.

<sup>7</sup> AE 620B (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, filed 15 March 2019.

<sup>8</sup> AE 617 (AAA), para. 7; AE 620 (AAA), para. 7.

<sup>9</sup> AE 617A (GOV), para. 7; AE 620A (GOV), para. 7.

<sup>10</sup> Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 25 March 2019 from 3:19 P.M. to 4:38 P.M. at pp. 22417–57.

## 2. Law.

a. **Burden of Proof.** As the moving party in both series, Mr. Ali bears the burden of proving by a preponderance of the evidence any facts prerequisite to the relief he seeks.<sup>11</sup>

b. **Discovery.** The Rules for Military Commissions require the Prosecution to produce evidence that is “material to the preparation of the defense.”<sup>12</sup> The Government must disclose to the Defense the existence of evidence known to the trial counsel which reasonably tends to (1) negate the guilt of the accused of an offense charged, (2) reduce the degree of guilt of the accused of an offense charged, or (3) reduce the punishment.<sup>13</sup> “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>14</sup>

## 3. Analysis.

a. The discovery motions at issue here are only two of a significant number pending before the Commission that are all heavily predicated on an asserted Defense need for information regarding the existence and duration of hostilities between al Qaeda and the United States.<sup>15</sup> In each, the scope and timing of the Accuseds’ discovery rights likely will be impacted significantly by what, precisely, the Government must prove with regard to hostilities, and how they must prove it.

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<sup>11</sup> Rule for Military Commissions (R.M.C.) 905(c)(1)-(2).

<sup>12</sup> R.M.C. 701(c)(1).

<sup>13</sup> *United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010).

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., AE 510 (AAA), UNCLASSIFIED NOTICE of Mr. al Baluchi's Motion to Compel Information Relating to Operation INFINITE REACH, filed 25 September 2017; AE 512 (AAA), UNCLASSIFIED NOTICE: Defense Motion to Compel Information Related to OPERATION INFINITE RESOLVE, filed 12 October 2017; AE 514 (AAA), UNCLASSIFIED NOTICE Mr. al Baluchi's Motion to Compel Information Regarding Political Military Plan, filed 20 September 2017; AE 557 (KSM), Defense Motion To Compel Discovery Regarding the attack on the USS Cole, filed 9 February 2018.

b. The Commission has determined hostilities existed at the time of the charged offenses for purposes of personal jurisdiction over all five Accused.<sup>16</sup> Apart from personal jurisdiction, the existence of hostilities is potentially placed at issue by 10 U.S.C. § 950p(c)—which states that “[a]n offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities.” The U.S. Court of Military Commission Review (U.S.C.M.C.R.) has found 10 U.S.C. § 950p(c) to establish an element common to all offenses tried by Military Commission.<sup>17</sup>

c. The precise contours of the proof requirements associated with 10 U.S.C. § 950p(c) will drive resolution of the various pretrial discovery motions referenced above, as well as significant procedural questions at trial. Accordingly, in the interest of efficient and just resolution of the motions pending before the Commission and general trial of the case, the Commission will direct the parties to brief and argue specific questions regarding that subject. As the resolution of AE 617 (AAA) and AE 620 (AAA) likely will be impacted by the responses, those motions will be deferred until the directed briefing and argument is complete.

4. **Ruling.** Mr. Ali’s motions to compel discovery (AE 617 (AAA) and AE 620 (AAA)) are **DEFERRED** pending completion of the briefing and argument directed below.

#### 5. **Order.**

a. The parties will brief on the following specified issues:

(1) Whether (a) proof of *existence* of hostilities (as opposed to *nexus* to hostilities)<sup>18</sup> is a component of the common substantive element established by 10 U.S.C. §

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<sup>16</sup> AE 502BBBB Ruling, Defense Motion to Dismiss for Lack of Personal Jurisdiction Due to the Absence of Hostilities, dated 25 April 2018, para. 6.a(3); AE 502FFFF Ruling, Mr. al Baluchi’s Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction, dated 3 April 2019, para. 3.a.

<sup>17</sup> *U.S. v. al-Nashiri*, 191 F.Supp.3d 1308, 1322 (U.S.C.M.C.R. 2016) (characterizing the 10 U.S.C. § 950p(c) “required nexus to hostilities” as “an element of the charges.” *Id.* (emphasis removed)).

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

950p(c); and (b) if so, whether this Commission is bound to use the same member instruction used in *United States v. Hamdan*<sup>19</sup> and *United States v. Bahlul*.<sup>20</sup>

(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.

(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.

(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.<sup>21</sup>

b. Each party (both the Government and the various Accused) will file its brief with the Commission **not later than 19 April 2019**. If any of the Accused so elect, they may file a consolidated brief or briefs. Responsive pleadings are not required.

c. The parties will present oral argument in support of their briefs at the 29 April – 3 May 2019 session.

So **ORDERED** this 4th day of April, 2019.

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K. A. PARRELLA  
Colonel, U. S. Marine Corps  
Military Judge

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<sup>19</sup> 801 F.Supp.2d 1247, 1278 fn.54 (U.S.C.M.C.R. 2011).

<sup>20</sup> 820 F.Supp.2d 1141, 1190 (U.S.C.M.C.R. 2011).

<sup>21</sup> See, e.g., *U.S. v. Hernandez-Fundora*, 58 F.3d 802, 810-812 (2d. Cir. 1995), *cert. denied*, 515 U.S. 1127 (1995).