MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL HADI AL IRAQI**	**AE 117** **Defense Motion** to Dismiss Charge V Due to Lack of Jurisdiction **4 May 2018**

1. Timeliness:

This motion is filed within the timeframe established by Rule for Military Commission ("R.M.C.") 905 and pursuant to Military Commissions Trial Judiciary Rule of Court ("RC") 3.7.c.

2. Relief Requested:

The Defense requests that the Commission dismiss Charge V, which alleges a charge of stand-alone conspiracy.

3. Overview:

The crime of conspiracy is not contained within the subject-matter jurisdiction that Congress may lawfully give to military commissions. Similarly, because jurisdiction for this crime properly rests in Article III courts, prosecution of stand-alone conspiracy may not be removed from the Article III judiciary and given to an Article I tribunal. Charge V should therefore be dismissed, as this Commission has no jurisdiction to hear such a charge.

4. Burden of Proof:

The defense bears the burden of persuasion as the moving party on this motion, and the standard is preponderance of the evidence. R.M.C. 905(c)(1)-(2).

5. Facts:

On 3 February 2014, charges were sworn against Nashwan al-Tamir in this Commission pursuant to the Military Commissions Act of 2009. These charges include, *inter alia*, one Specification of Conspiracy to Commit Offenses Triable by Military Commission (Charge V). The charge criminalizes an alleged agreement between Mr. al-Tamir and Usama bin Laden, among others, to engage in a number of substantive offenses; it also alleges a number of overt acts in support or furtherance of this agreement, allegations which range from "[i]n or about August 1996 . . ." in Afghanistan to "[o]n or about 29 October 2006" in Turkey. Finally, the charge omits language indicating that Mr. al-Tamir "is liable for the above alleged offense as a principal, a co-conspirator, and a participant in a common plan," language which appears in Charges II – IV. Plainly, it is a charge alleging a stand-alone conspiracy.

6. Law and Argument:

I. Congress Lacks the Power Under Article I to Bestow Military Commissions With Subject-Matter Jurisdiction Over Stand-Alone Conspiracy Prosecutions.

The jurisdiction of law-of-war military commissions is set forth in plain terms in *Ex parte Quirin*, 317 U.S. 1, 29 (1942). There, the Supreme Court held that two things must be true in order for such tribunals to constitutionally try people: (1) our courts must recognize the charged offenses "as violations of the law of war[;]" and (2) the offenses charged must not be "of that class of offenses constitutionally triable only by jury." *Id.* But when Congress made it a federal crime to conspire to commit "any offense against the United States," 18 U.S.C. § 371, it was not doing so pursuant to its power to "Define and Punish . . . Offenses against the Law of Nations," U.S. CONST. art. I, § 8, cl. 10. This is because conspiracy is not an "offense[ ] against the law of

nations[. . .] which pertain to the conduct of war." *Quirin*, 317 U.S. at 27. Rather, it is an "infamous" crime, to which one traditionally had a common law right to trial by jury. *See id.* at 40; *Mackin v. United States*, 117 U.S. 348, 354 (1886) (conspiracy charges "are infamous crimes, within the meaning of the Fifth Amendment of the Constitution"). Stand-alone conspiracy therefore does not fall within either of the subject-matter jurisdictional conditions set forth in *Quirin*.

A. The Define and Punish Clause does not give Congress the power to make stand-alone conspiracy charges triable by military commissions.

Because Congress "possess[es] no power not derived from the Constitution[,]" *Quirin*, 317 U.S. at 25, when it creates Article I military tribunals intended to punish violations of the law of war, the subject-matter jurisdiction for such tribunals must derive from Congress's power to punish offenses against the law of war. *In re Yamashita*, 327 U.S. 1, 7 (1946); *Quirin*, 317 U.S. at 28.

This long been the position of all three Branches of government. It has been the Executive's position at least since the time of the Civil War; then, writing on the Lincoln Assassin military commissions, Attorney General James Speed noted that because Congress has the power to define and punish "offenses" against the law of nations, as opposed to the "crimes" referred to in the Fifth and Sixth Amendments, the Define and Punish Clause must give rise to an independent power to punish violations of the laws of war. *Military Commissions*, 11 Op. Att'y Gen. 297, 309, 312 (1865); *see also Legality of the Use of Military Commissions to Try Terrorists*, 25 Op. O.L.C. 238, 244 (2001) ("Congress has authority to "define and punish . . . Offences against the Law of Nations." . . . Authorizing the use of military commissions to

enforce the laws of war – which are considered a part of the 'Law of Nations' – is certainly a permissible exercise of these authorities."). It has been the position of at least a plurality of the Supreme Court as recently as *Hamdan v. Rumsfeld*, 548 U.S. 557, 601 (2006) (plurality op.). And it is Congress's position as well. *See* Military Commissions Act of 2006, H.R. Rep. No. 109-664, Pt. 1, at 24 (2006) (the offenses enumerated in the 2006 Act are a "codification of the law of war into the United States Code pursuant to Congress's constitutional authority to 'Define and Punish ... Offences against the Law of Nations.'"); War Crimes Act of 1996, H.R. Rep. No. 104-698 (1996), at 7 (citing *Yamashita* and *Quirin* for the proposition that "[t]he constitutional authority to enact federal criminal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions [referring to the Define and Punish Clause]").

But the limitations inherent in the Define and Punish Clause are facially evident. Congress has the power to "define" offenses against the law of nations, not to "create" or "declare" them; "defining implies fidelity to the real world[.]" Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1721 (2017); *see also* 11 Op. Att'y Gen. at 299 ("To define is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to define, not to make, the laws of nations . . . ."). Importantly, that power to "define" appears nowhere else in the Constitution, and where Congress is given the plenary power to legislate in a given area, the text of the Constitution makes that clear. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 18 (Congress has the power "to make all Laws which shall be necessary and proper"). And if Congress can only "define" offenses against the law of nations, and not "make" them, it stands to reason that

the Define and Punish Clause does not allow Congress "to innovate international law. . . . Rather, the [Constitutional] Convention wanted to allow Congress to choose which international norms to incorporate and to flesh them out enough that they could stand as criminal charges." Kontorovich, 106 NW. U.L. REV. at 1702; *see also* 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614-15 (Max Farrand ed., 1937) (Madison's Notes, May 29, 1787) (comments of James Wilson) (objecting to the term "define" in the draft clause offered by Gouvenor Morris because "[t]o pretend to define the law of nations which depended on the authority of all the Civilized nations of the World, would have a look of arrogance[] that would make us ridiculous;" term nevertheless adopted but only after Morris agreed with Wilson's interpretation).

In other words, the Define and Punish Clause acts as both the sole constitutional authority for military commissions and a limitation on what offenses may be tried there. And so the Supreme Court, in reviewing the jurisdiction of law-of-war military commissions, has performed careful evaluation of the offenses charged in such tribunals, to ensure that they are in fact offenses against the law of nations (and that they do consequently fall within Congress's power under the Define and Punish Clause). *See Johnson v. Eisentrager*, 339 U.S. 763, 786-87; *Yamashita*, 327 U.S. at 14; *Quirin*, 317 U.S. at 43; *United States v. Arjona*, 120 U.S. 479, 487-88 (1887). This determination in turn requires answering two questions: whether Congress is legislating "within a reasonable interpretation of international law[,]" and whether the offense proscribed is an actual offense under the law of nations – "conduct that international law deems individually wrongful" – and not simply a crime that bears some relationship to international law or foreign affairs. Kontorovich, 106 NW. U.L. REV. at 1751; *see also Boos v. Barry*, 485 U.S.

312, 323 (1988) (the Define and Punish Clause reflects the United States government's "vital national interest in complying with international law.").

The government as well as the D.C. Circuit have already answered the first question in the negative: conspiracy as a stand-alone charge is "not an offense under the international law of war[.]" *Bahlul v. United States*, 840 F.3d 757, 759-60 (D.C. Cir. 2016) (Kavanaugh, J., concurring). If something is not an offense under international law, then when Congress declares it to be so, it is not legislating within a reasonable interpretation of international law.

Nor is "conspiracy to commit war crimes" conduct that international law deems individually wrongful. Conspiracy may be a viable *theory of* liability under international law, *see id.* at 803-04 (Wilkins, J., concurring), but it is not a *separate crime* constituting an offense against the law of nations. This is so even though the alleged object of the conspiracy may be a matter of grave international or diplomatic concern. An illustrative example of this may be found in *United States v. Bellaizac-Hurtado*, 700 F.3d 1245 (11th Cir. 2012), wherein the Eleventh Circuit ruled that the federal prohibition on extraterritorial drug trafficking was beyond the scope of the Define and Punish Clause; even though such trafficking was a matter of international concern, it was being addressed "at the domestic, instead of international, level." *Id.* at 1256, 1258.

Conspiracy as a stand-alone crime therefore does not fall within the category of "offenses against the law of nations" that Congress may properly define and punish. And because the authority to prosecute cases in the military commissions comes from the Define and Punish Clause, and that clause alone, crimes that fall outside of the ambit of the clause are not

prosecutable in military commissions. Congress lacked the power to authorize an Article I tribunal to prosecute the crime found in Charge V, and so the charge must be dismissed.

B. Stand-alone conspiracy is a crime triable only by jury.

Apart from requiring that the offenses charged be within Congress's power to define and punish offenses against the law of nations, *Quirin* also noted that military commissions may not try offenses "constitutionally triable only by a jury." 317 U.S. at 29. In analyzing this issue, the *Quirin* Court noted the distinction between "crimes" (as that term is used in the Fifth and Sixth Amendments) and "offenses," the latter of which have never entailed a jury trial right. *Id.* at 39-40; 11 Op. Atty. Gen. at 312-13 ("Infractions of the laws of nations are not denominated *crimes*, but *offenses*. . . . *Offenses* against the laws of war must be dealt with and punished under the Constitution as the laws of war, they being a part of the law of nations, direct; *crimes* must be dealt with and punished as the Constitution, and laws made in pursuance thereof, may direct."). The Court went on to analogize law of war offenses to "petty offenses," which were also not considered "crimes" at common law and consequently are outside the textual scope of Article III. *Quirin*, 317 U.S. at 39-41 (citing, *inter alia*, *Callan v. Wilson*, 127 U.S. 540, 549 (1888)).

Therefore, the Supreme Court ruled, "offenses against the law of war" were not "'crimes' and 'criminal prosecutions'" within the meaning of Article III because they, like "petty offenses," were "not triable by jury at common law." *Id*. at 40. Yet the stand-alone offense of conspiracy is the paradigmatic case of an "infamous crime" that was triable only by jury at common law. *See, e.g.*, *Callan*, 127 U.S. at 548-49; *Mackin*, 117 U.S. at 354 (conspiracy charges "are infamous crimes, within the meaning of the Fifth Amendment of the Constitution"). But as *Quirin* makes clear, conspiracy cannot simultaneously be *both* a crime that falls within the

common law right to a jury trial in an Article III court *and* an offense prosecutable in Article I military commissions. Charge V, because it alleges a crime that is "constitutionally triable only by a jury," therefore is outside the subject-matter jurisdiction of this Commission, and it must be dismissed.

II. Removing the Prosecution of Stand-Alone Conspiracy From Article III Courts Violates the Separation of Powers.

Regardless of whether Congress has the power under Article I to "define" a new crime of conspiracy under the Define and Punish Clause, diverting the prosecution of stand-alone conspiracy to a law-of-war military commission infringes upon the judiciary's powers under Article III. That act of diversion therefore violates the separation of powers, and Charge V must also be dismissed on that basis.

As a general principle, Article I tribunals, such as military commissions, are tribunals of tightly constrained powers. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 852-53, 856 (1986); *Runkle v. United States*, 122 U.S. 543, 556 (1887). Moreover, the Supreme Court has "strictly construed" Congress's Article I § 8 powers, particularly when those powers are being used to confer jurisdiction on non-judicial tribunals, because "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts." *Reid v. Covert*, 354 U.S. 1, 21 (1957) (plurality). Article III requires "high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Trust*, 514 U.S. 211, 239 (1995).

To that end, then, Congress may not delegate the power "to serve as a neutral adjudicator in a criminal case" to executive branch tribunals. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481

U.S. 787, 816 (1987) (Scalia, J., concurring); *see also Stern v. Marshall*, 564 U.S. 462, 502 (2011); *Reid*, 354 U.S. at 21. Adjudicating such cases, particularly ones which entailed a jury trial right at common law, implicates the "essential attributes of judicial power." *Stern*, 564 U.S. at 495; *see also Blair v. United States*, 250 U.S. 273, 280 (1919); *United States v. Johnson*, 258 F.3d 361, 370 (5th Cir. 2001) (whenever an Article I court "encroaches upon a district court's exclusive felony trial domain, Article III concerns move to the forefront."). This is the case regardless of the legal status of the parties before the court. *Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

Because they can easily blur distinctions between the executive and judicial branches and (as here) call upon executive branch officials to adjudicate crimes triable by jury at common law, military tribunals – and military commissions in particular – therefore raise "separation-of-powers concerns of the highest order." *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring); *Bahlul v. United States*, 767 F.3d 1, 35 (D.C. Cir. 2014) ("Even when confronted with the exigencies of war, '[the Court] cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system.'" (Rogers, J., concurring in part and dissenting in part) (quoting *Stern*, 564 U.S. at 502).

The tightrope between what does and does not violate the separation of powers is successfully walked by the court-martial system, but only because of Congress's explicit grant of authority to regulate the "land and naval Forces." U.S. CONST. art. I, § 8, cl. 14. This gives Congress the power to create tribunals with exclusive personal jurisdiction over American service-members, *Reid*, 354 U.S. at 22; *Solorio v. United States*, 483 U.S. 435, 438-39 (1987);

the jurisdiction of courts-martial and Article III courts are therefore "entirely independent of each other[,]" see Dynes v. Hoover, 20 How. 65, 97 (1857).

But the persons made subject to trial via the Military Commissions Act are very definitely not members of America's "land and naval Forces." Rather, the law purports to reach any alien who has engaged in hostilities against the United States. 10 U.S.C. §§ 948a(7), 948c. Because their *personal* jurisdiction is not limited in such a way as to avoid separation-of-powers concerns, as courts-martial jurisdiction is, law-of-war military commissions therefore must avoid the Constitution's judicial trial requirements by limiting their *subject-matter* jurisdiction. "The critical distinction is the nature of the offense. . . . Offenses triable by the laws of war are not within the constitutional protections attached to criminal trials." 25 Op. O.L.C. at 254-55.

In other words, law-of-war military commissions, in order to be constitutional, may not try "crimes," which fall within Article III and the Fifth and Sixth Amendments. They may only try "offenses" against the law of nations, within the meaning of the Define and Punish Clause. As noted above, this offense/crime distinction has been recognized since at least the Civil War. 11 Op. Atty. Gen. at 312-13, and it was the basis of the Supreme Court's holding in *Quirin*, 317 U.S. at 39-40. And in the same way that the "land and naval Forces" exception establishes a closed set of defendants, the Define & Punish Clause establishes a closed set of offenses, thereby preventing the political branches from blurring the distinctions between what they may hear and what only the courts of law are empowered to hear and decide.

But Congress, in criminalizing "conspiracy to commit war crimes," is not proscribing an actual "offense against the law of nations." *See supra* Part I. Rather, it has simply enacted a new federal "'crime' within the meaning of the third article of the Constitution[.]" *Callan*, 127 U.S. at

548. Indeed, "conspiracy" has been recognized as falling within the confines of Article III jurisdiction, and has carried a right to trial by jury, since the 19th century. Even assuming, therefore, that Congress has the power to criminalize "conspiracy to commit war crimes," the "crime" of stand-alone conspiracy entails a right to jury trial in an Article III court, even though the object of the conspiracy – the war crimes, or offenses against the law of nations – may not.

Charge V thus alleges that Mr. al-Tamir committed a crime that plainly falls within the jurisdiction of Article III courts. But granting Article I tribunals the power to hear, decide, and punish such crimes impermissibly infringes upon the principles of separation of powers. In order to avoid such a constitutional violation, this Court should dismiss Charge V.

7. **Oral Argument:**

The defense requests oral argument on this motion.

8. **Witnesses:** None.

9. **Conference with Opposing Counsel:** The prosecution objects to the relief requested.

10. **Attachments:**

A. Certificate of Service, dated 4 May 2018

Respectfully submitted,

//s//
BRENT RUSHFORTH
Pro Bono Counsel

//s//
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//s//
ADAM THURSCHWELL
Assistant Defense Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on **4 May 2018**, I caused **AE 117 Defense Motion** to Dismiss Charge V Due to Lack of Jurisdiction to be filed with the Office of the Military Commissions Trial Judiciary, and I served a copy on Government counsel of record.

//s//
Adam Thurschwell
Assistant Defense Counsel