NATIONAL INSTITUTE OF MILITARY JUSTICE

MILITARY COMMISSION REPORTER

VOLUME 2

THIRD CUMULATIVE PAMPHLET
JULY 2011

AMERICAN UNIVERSITY
WASHINGTON
COLLEGE OF LAW

NIMJ
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ACKNOWLEDGMENTS

The National Institute of Military Justice (NIMJ) would like to acknowledge the support of the American University Washington College of Law. NIMJ is grateful for the generous support of the Open Society Institute, the Atlantic Philanthropies, and the JEHT Foundation, whose assistance made this project possible.

The Institute would also like to express its appreciation to Michelle M. Lindo McCluer and Jonathan E. Tracy for their invaluable contributions as Director and Assistant Director, respectively. Finally, the Institute recognizes the helpful assistance of its Program Coordinator, Irina Vayner.

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EDITORS' NOTE

The *Military Commission Reporter* seeks to include every unclassified decision, order, and ruling issued by the military commissions conducted at the U.S. Naval Base, Guantánamo Bay, Cuba, and all substantive opinions and rulings of the United States Court of Military Commission Review. This second volume encompasses cases decided after June 1, 2009. It also includes a 2008 decision from the *Hamdan* case that we received after volume 1 went to press.

NIMJ is making this volume available on-line in periodic pamphlets as decisions are released. A hard-copy version of the complete volume will be published in due course. Counsel are encouraged to send NIMJ copies of any decisions that have not been included.

Cases reproduced in this pamphlet may be cited as, for example, *United States v. Hamdan*, 2 M.C. 1 (2008).

For further information, readers are invited to visit NIMJ's Web site at www.wcl.american.edu/nimj, as well as that of the Department of Defense Office of Military Commissions at www.dod.mil/news/commissions.html.

NIMJ welcomes your comments on the *Military Commission Reporter*. Please write to us at National Institute of Military Justice, 4801 Massachusetts Avenue, N.W., Washington, D.C. 20016, or via email at nimj@wcl.american.edu.

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UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

Military Commission

July 14, 2008

RULING
ON MOTION TO DISMISS
(EX POST FACTO)
(D-012)

and

DEFENSE REQUEST
TO ADDRESS SUPPLEMENTAL
AUTHORITY ON D-012
(D-050)

Keith J. Allred
Captain, U.S. Navy
Military Judge

The Defense has moved this Commission to dismiss referred charges for lack of subject matter jurisdiction. Specifically, they claim the charges of Conspiracy and Providing Material Support for Terrorism violate the prohibition against *ex post facto* application of the law, found in the Constitution, Common Article 3 of the Geneva Conventions, and in the law of nations. The Government opposes the motion, arguing variously that the Constitution does not protect aliens held outside the United States, and that even if it does, there is ample precedent in the Law of Armed Conflict for the trial of these offenses by military commission as violations of the Law of Armed Conflict.

BURDEN OF PERSUASION

The Defense characterizes its motion as one challenging the Commission's jurisdiction, and argues that the burden should be on the Government to prove jurisdiction, in accordance with R.M.C. 905(c)(2)(B). The Government denies that this is a jurisdictional issue, and argues that the burden remains on the Defense, as moving party, in accordance with R.M.C. 905(c)(2)(A). Be-cause a military commission has narrowly constrained jurisdiction as to offenses, the Commission assigns the burden to the Government to demonstrate that the offenses with which the accused is charged were violations of the law at the time Mr. Hamdan engaged in the actions with which he is charged.

DOES THE CONSTITUTION OF THE UNITED STATES PROTECT MR. HAMDAN?

The Commission has previously determined that an alien unlawful enemy combatant held outside the sovereign borders of the United States, who has no voluntary connection to the United States other than his confinement, cannot claim the protections of the Constitution. *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007); *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) *cert. den.* 516 U.S. 913 (1995); *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 284 (D.C. Cir. 1989). In light of the Supreme Court's recent ruling, the Defense requests reconsideration and argues that the Constitution does protect detainees held in Guantanamo, and specifically Mr. Hamdan. *Boumediene v. Bush*, 533 U.S. ___ (2008) [hereinafter *Boumediene*].

In addition, the Defense points out that the *Ex Post Facto* clause of the Constitution is not a substantive protection to be claimed by individual claimants, but a substantive limitation on the power of Congress. "There is a clear distinction between…prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states. Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,'…it goes to the competency of Congress to pass a bill *of that description*." *Downes v. Bidwell*, 182 U.S. 244, 276-77 (1901). Thus, the Defense argues, whether the *ex post facto* protections of the Constitution protect aliens in Guantanamo Bay, the Constitution prohibits Congress from enacting *ex post facto* legislation. This Commission concludes that Congress is not authorized to pass *ex post facto* legislation, and thus will review the MCA prohibitions against conspiracy and material support for terrorism to determine whether they are such offenses.

To prevail on this motion, the Government must show that conspiracy and material support for terrorism were traditional violations of the law of armed conflict when he engaged in the conduct with which he is charged.

CONSPIRACY

The parties have argued this issue with commendable skill and passion. The Defense points to the plurality's holding that conspiracy is not a "clear and unequivocal" violation of the common law of war (citing *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 & n. 34); that there has been no "universal agreement and practice" establishing conspiracy as a violation of the law of war (citing *Ex Parte Quirin,* 317 U.S. 1, 30); the rejection of conspiracy as a war crime by the Nuremberg Tribunal on the ground that "[t]he Anglo-American concept of conspiracy was not a part of European legal systems and arguably not an element of the internationally recognized laws of war" (citing T. Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* 36 (1992)); an *Amicus Curiae* Brief of Specialists in Conspiracy and International Law before the Supreme Court; and the conclusion of a U.N. Special Rapporteur who concluded that conspiracy is not an offense under the laws of war (citing U.N. Doc. A/HRC/6/17/Add. 3 (Nov. 22, 2007)).

The Government responds that the Supreme Court's opinion in *Hamdan* should be read in light of the absence (at the time) of Congressional action to define violations of the law of war under its Constitutional authority to "define and punish" offenses against the laws of nations, and cites Justice Kennedy's observation that "Congress, not the Court, is the branch in the better position to undertake the sensitive task" of determining whether conspiracy is a war crime. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2809 (Kennedy, J., concurring). The Government notes that conspiracy convictions of Nazi saboteurs were upheld in *Ex Parte Quirin*, 317 U.S. 1 (1942) and *Colepaugh v. Looney*, 235 F.2d 429, 431, 433 (10th Cir. 1956), cert. den., 352 U.S. 1014 (1957). In the Pacific theater, "orders establishing the jurisdiction of military commissions in various theaters of operation provided that conspiracy to violate the laws of war was a cognizable offense." *Hamdan* at 2834 (Thomas, J., dissenting). The World War II military tribunals of several European nations recognized conspiracy to violate the laws of war as an offense triable

before military commissions, and military commissions in the Netherlands and France tried conspiracy to violate the laws of war, as did the International Military Tribunal at Nuremberg with respect to four specific types of conspiracies. *Hamdan* at 2836, n. 14 (Thomas, J., dissenting). The conspirators who assassinated Abraham Lincoln were tried and punished by a military commission for conspiracy, and an 1865 Opinion of the Attorney General declares that "to unite with banditti, jayhawkers, guerillas or any other unauthorized marauders is a high offense against the laws of war; the offence is complete when the band is organized or joined." 11 Op. Atty. Gen. at 312.

MATERIAL SUPPORT FOR TERRORISM

Once again, the question here is whether "Material Support for Terrorism," criminalized by 18 U.S.C. § 950v(25), is sufficiently well established as a violation of the law of war that exposing Mr. Hamdan to punishment for that offense is not an *ex post facto* application of the law.

For this offense, the Defense points again to the U.N. Special Rapporteur, who concluded in 2007 that terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying and conspiracy "go beyond offences under the law of war." *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 12, U.N. Doc. A/HRC/6/17/Add. 3 (Nov. 22, 2007). American military tribunals have never tried this offense, and it is not listed as a war crime in the U.S. War Crimes Act, 18 U.S.C. § 2441, or the U.S. Army's *Law of War Handbook* (2005). A Congressional Research Service report prepared for members of Congress recently concluded that "defining as a war crime 'material support for terrorism' does not appear to be supported by historical precedent."1 Nor is the offense mentioned in any of the treaties or statutes that define law of war offenses: the Hague Conventions, the Rome Statute of the International Criminal Court, nor the International Criminal Tribunals for the Former Yugoslavia, Rwanda or Sierra Leone.

In reply, the Government argues that violations of Common Article 3 (such as "violence to life and person" of those "taking no active part in hostilities") are widely considered to be war crimes and have been criminalized by the U.S. War Crimes Act, 18 U.S.C. § 2441; Providing Material Support for Terrorism and Providing Material Support for an International Terrorism Organization have been violations of federal law, with provisions made for the prosecution of extra-territorial offenses, since 1993. (18 U.S.C. § 2339A and 2339B). U.N. Security Council Resolutions 1189 and 1373 condemn terrorism and require member states to criminalize it; and the United States is a party to twelve international treaties that prohibit kidnappings, hijackings, bombings, and the killing of innocent civilians and other acts of "terrorism." In essence, the Government argues in part that because terrorism is condemned by international law, and material support for terrorism is a violation of U.S. federal law, material support for terrorism has traditionally been a crime under the law of armed conflict, or at least that Hamdan must have

1 Jennifer K. Elsea, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparisons with Previous DOD Rules and the Uniform Code of Military Justice*, 12 (CRS, updated Sep. 27, 2007), available at http://www.fas.org/sgp/crs/natsec/RL33 688.pdf.

known his conduct was not "innocent when done."

The Government offers evidence of U.S. practice during the American Civil War. An 1894 Congressional document asserted that during the war, there were "numerous rebels…that…furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents [we]re banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud, and to lay waste to the country. All such persons are by the laws of war in every civilized country liable to capital punishment." H.R. Doc. No. 65, 55th Cong. 3d Sess., 234 (1894). Likewise, Colonel Winthrop wrote that during the Civil War numerous persons were "liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by a military commission" based upon their support for unlawful combatants. Winthrop, *Military Law and Precedents,* 784.

In addition, the language of General Orders establishing the jurisdiction for military commissions during the Civil War suggests the existence of an offense similar to "providing material support for terrorism" existed during that conflict: "There are numerous rebels…that… furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several areas of the interior counties for the purpose of assisting the enemy to rob, to maraud, and to lay waste to the country. *All such persons are by the laws of war in every civilized country liable to capital punishment* (emphasis added). Numerous trials were held under this authority." *Hamdan v. Rumsfeld*, *supra*, at 817 n.9 (Thomas, J., dissenting) (quoting from H.R. Doc. No. 65, 55th Cong. 3d Sess., 234 (1894)). Thereafter Justice Thomas cites several General Court-Martial Orders in which convictions were upheld for "being a guerilla." The meaning of this term is made clear by Colonel Winthrop, who explains under his description of "Irregular Forces in War," the meaning of the term "Guerillas." The term encompasses "irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders…" Winthrop, at 783. After a discussion of these forces, which a modern reader might understand to be a description of "unlawful combatants," Winthrop continues in this vein:

> But a species of armed enemies whose employment in a military capacity was not and could not be justified were the so called "guerillas" or our late civil war. [Note 55 inserts here "Called 'guerilla-marauders' in the act of July 2, 1864, c. 215 and the 105th Article of War. They were also styled, in different localities, "bush-whackers," "jayhawkers," "regulators," etc. Prof. Leiber (inst. § 82, 84) refers to them as "highway robbers or pirates" and "armed prowlers."] These were persons acting independently, and generally in bands, within districts of the enemy's country or on its borders, who engaged in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage, and even in the ransacking of towns, from motives mostly of personal profit or revenge." Winthrop, at 783-784 and note 55.

Only in light of the further clarification provided in this footnote does the difference between the two types of Civil War "guerillas" appear. Traditional guerillas were irregu-

lar forces who supported the Confederate armed forces, and for whom the protection of prisoner of war status was sometimes claimed. Winthrop, at 783. The "guerillas" of the civil war era, i.e., those described in the numerous General Court-Martial Orders Justice Thomas refers to in *Hamdan*, at 817 n.9, were more akin to (and actually referred to as) "spies," "bridge-burners," "pirates," "highway robbers" and "guerilla-marauders." They were subject to trial by military commission, along with those who "join, belong to, act, or cooperate" with them. *Ibid*. They acted entirely without the law, "plundered the property of peaceable citizens," and usually for motives of personal profit or revenge. In modern parlance, they might be referred to as terrorists, or those who provided material support for terrorism. At least in American Civil War practice, they were subject to trial by military commission for their activities.

The Government concedes that although the offense of "providing material support for terrorism" does not appear in any international treaty or list of enumerated offenses, the *conduct* now criminalized by the MCA provision has long been recognized as a violation of the law of war. 18 U.S.C. § 950v(b)(24) defines the offense of Terrorism such that any person "who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life…" shall be punished. Intentionally killing or inflicting great bodily harm upon a protected person is clearly a violation of the law of war. Taking all this history into account, the Government argues that Congress merely *defined* as "Material Support for Terrorism" conduct that was already proscribed and subject to trial by military commission.

The evidence for both Conspiracy and Material Support for Terrorism is mixed. Absent Congressional action under the Define and Punish clause to identify offenses as violations of the law of war, the Supreme Court has looked for "clear and unequivocal" evidence that an offense violates the common law of war, *Hamdan*, at 2780 and n. 34, or that there is "universal agreement and practice" for the proposition. *Ex Parte Quirin*, 317 U.S. 1, 30 (1942). But where Congress has acted under its Constitutional authority to define and punish offenses against the law of nations, a greater level of deference to that determination is appropriate. Quoting from an opinion by the U.S. District Court for the Southern District of New York, the Government argues:

> [E]ven assuming that the acts described in 18 U.S.C. §§ 2332 and 2332a are not *widely* regarded as violations of international law, it does not necessarily follow that these provisions exceed Congress' authority under [Article I, § 8] Clause 10. Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to "define" such offenses. Hence, provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power to *define* offenses against the law of nations. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820) (Story, J.) ("Offenses …against the law of nations cannot, with any accuracy, be said to be completely ascertained and defined in

> any public code recognized by the common consent of nations… [T]herefore…there is a peculiar fitness in giving the power to define as well as to punish.") Note, Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 Cornell L. Rev. 599, 611 (1987) (Congress may define and punish offenses in the international law, notwithstanding a lack of consensus as to the nature of the crime in the United States or in the world community).

United States v. Bin Laden, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000), *criticized on other grounds* by *United States v. Gatlin*, 216 F.3d 207, 212 n.6 (2d Cir. 2000); *see also* Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 Harv. Int'l L. J. 121, 142 (2007) ("we might assume… that Congress, representing the United States' sovereign lawmaking body within the international system, has at least some leeway to aid in the development of the category of international offenses by pushing the envelope beyond where it already is").

CONCLUSION AND DECISION

In enacting the MCA, Congress asserted that "The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission… Because the provisions of the subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crime that occurred before the date of the enactment of this chapter." MCA § 950p(a),(b). Thus, Congress was clearly aware of the Constitutional limitation of its power, and indicated its sense that it had complied with that limitation. In light of Congress' enumerated power to define and punish offenses against the law of nations, and its express declaration that in doing so, it has not enacted a "new crime that did not exist before its enactment," the Commission is inclined to defer to Congress' determination that this is not a new offense. There is adequate historical basis for this determination with respect to each of these offenses.

The Government has shown, by a preponderance of the evidence, that Congress had an adequate basis upon which to conclude that conspiracy and material support for terrorism have traditionally been considered violations of the law of war.

The Motion to Dismiss for Lack of Subject Matter Jurisdiction Over *Ex Post Facto* Charges is DENIED as to both offenses.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

June 11, 2009

COMMISSION RULING
REGARDING PROSECUTION MOTION
FOR AN ADDITIONAL
120-DAY CONTINUANCE
(P-010)

Stephen R. Henley
Colonel, U.S. Army
Military Judge

1. This matter having come before the Military Commission upon Government motion to grant a second 120-day continuance in this case until 17 September 2009;1 and having considered the parties' written submissions, to include the Defense opposition;2 and for good cause shown; the Military Commission finds that the interests of justice served by continuing further substantive proceedings to allow a review of the factual and legal bases for continued detention of the above-named accused currently held at Guantanamo Bay, Cuba; to determine whether each can be transferred or released, or prosecuted for criminal conduct before a military commission or Article III court; or provided other lawful disposition consistent with the national security and foreign policy interests of the United States and the interests of justice,3 outweigh the best interests of each accused and the general public in a prompt trial.

2. That said, while Messrs. al Shibh and al Hawsawi have indicated a desire to proceed *pro se*,4 their detailed military defense counsel have raised questions regarding their competency to stand trial. As such, the Military Commission cannot resolve the representation issue until an incompetence determination hearing is held pursuant to Rule for Military Commission (R.M.C.) 909(e).5

3. While a halt to all substantive pretrial and trial proceedings pending inter-agency review of this case is warranted, deferring discovery obligations related to a competency determination, appears not. Specifically, the Government has not demonstrated to the

1 On 21 January 2009, the Military Commission granted, over objection, a Government motion to continue this case to 20 May 2009. *See* P-009, *Commission Ruling Regarding Government Motion for 120-Day Continuance*. On 14 May 2009, the Government filed this supplemental motion requesting an additional 120-day delay.

2 On 9 June 2009, Mr. Ali, proceeding in *pro se* capacity, filed a response opposing the Government's requested 120-day continuance. While filed out of time, the Military Commission finds good cause to consider the Defense response. *See* Military Commissions Rule of Court (R.C.) 3.6.b.

3 The President has tasked that the review with respect to those persons currently detained at Guantanamo Bay be completed on a "rolling basis and as promptly as possible." *See* Executive Order 13492 of January 22, 2009, "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities."

4 *Pro se* legal representation refers to the circumstance of a person representing himself or herself without a lawyer in a court proceeding. *Pro se* is a Latin phrase meaning "for oneself."

5 R.M.C. 909 provides, in pertinent part, that, after referral of charges, the military judge may conduct a hearing to determine the mental capacity of the accused. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of his case.

Military Com-mission's satisfaction why the underlying medical examinations and other investigations which must be completed prior to conducting the above referenced incompetence determination hearings cannot proceed during this period. In addition, postponing further discovery in this case required to resolve the outstanding competency questions until after 17 September 2009 will likely result in delaying the incompetence determination hearings themselves, constituting an unjustified hardship to Messrs. al Shibh and al Hawsawi and affecting all five accused and the general public's right to a prompt trial. As such, the Military Commission directs the Government to comply with its discovery obligations under the Manual for Military Commissions and take all steps necessary to complete medical examinations and reports such that the R.M.C. 909 incompetence determination hearings for Messrs. al Shibh and al Hawsawi can proceed on or about 21-25 September 2009.

4. Accordingly, the Government's motion is GRANTED. Except as provided in paragraph 5 below, all Military Commission sessions are continued to no earlier than 17 September 2009.

5. A session pursuant to R.M.C. 8036 is scheduled for 16 July 2009 in Guantanamo Bay, Cuba where the Military Commission will conduct a status conference to address any unresolved discovery matters related to the incompetence determination hearings for Messrs. al Shibh and al Hawsawi. While Messrs. Sheikh Mohammed, bin 'Attash and Ali may attend, the Military Commission will hear only from the prosecution and detailed military defense counsel for Messrs. al Shibh and al Hawsawi and only as to issues related to the R.M.C. 909 hearing. No other matters will be addressed at this session. Motions, if any, related to R.M.C. 909 hearings should be filed by 1200 (EDT) 25 June 2009, responses by 1200 (EDT) 2 July 2009 and replies by 1200 (EDT) 7 July 2009. Absent good cause shown for continued delay, said incompetence determination hearings are scheduled for 21-25 September 2009.

6. The Military Commission directs that a copy of this order be served upon each accused, the Prosecution, and all civilian and military defense counsel of record, and that it be provided to the Clerk of Court for public release. The underlying Government motion and Mr. Ali's response will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations. The Military Com-mission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused.

So ordered this 11th day of June 2009.

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6 A military judge may call the Commission into session without the presence of the members to dispose of interlocutory matters and hear motions. *See* Discussion to R.M.C. 803.

UNITED STATES OF AMERICA

v.

IBRAHIM AHMED MAHMOUD
AL QOSI

Military Commission

July 16, 2009

RULING: GOVERNMENT MOTION FOR
APPROPRIATE RELIEF
(120-DAY CONTINUANCE)
(P-002)

Nancy J. Paul
Lieutenant Colonel, U.S. Air Force
Military Judge

1. On 15 May 2009, the Government filed a Motion for Appropriate Relief, requesting that any further proceedings in the above action be delayed until at least 17 September 2009. On 22 May 2009, the Defense filed a Defense Response to Government Motion for Appropriate Relief, asking the request be denied. On 28 May 2009, the Government filed a Reply to Defense Response for Appropriate Relief. On 15 July 2009, the Defense filed a Submission of Attachments to their 22 May 2009 Defense Response. The Defense also filed a Bench Brief on the Issue of Excludable Delay on 15 July 2009. On 16 July 2009, the Government filed a Government Response to the Defense Submission of Attachments to Defense Response to Government Motion for Appropriate Relief (120-Day Continuance).

2. On 22 January 2009, the President issued Executive Order (E.O.) 13493 which directed an inter-agency Task Force to "conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." The E.O. directed the Task Force to complete its work by 21 July 2009.

3. On 23 January 2009, the Government requested a continuance until 20 May 2009. The Defense did not file an opposition to the request. On 20 May 2009, the Commission granted the continuance.

4. The review being conducted by the Task Force has yet to be finalized. However, on 15 May 2009, the SecDef published and notified Congress of five significant changes to the Manual for Military Commissions (MMC). They include proposed changes to jurisdictional issues; establishment of a right to "individual military counsel"; removal of the requirement to instruct the members regarding an accused not being subject, in some situations, to cross-examination when he offers his own hearsay statement but does not testify; prohibition of the use of statements, in some situations, obtained by cruel, inhuman or degrading treatment, regardless of when the statements were obtained; and revision of one of the rules dealing with hearsay evidence. Additionally, there remains the possibility that any charges of material support for terrorism may be dismissed.

5. The Government submits, as they did in their January 2009 continuance request, that this Motion for an additional conti-

nuance is in the best interest of justice. They argue that the continuance will serve the interests of justice and the accused, as it will permit the President and his Administration to complete a thorough review of all pending cases and of the military commissions process as a whole. They further assert that it would be inefficient and potentially unjust to both the Government and the Defense to deny the continuance.

6. The Defense requested the Government motion be denied. They argue that the Court had not excluded the previous 120-day continuance for speedy trial purposes, that the continuance has and will further interfere with the accused's ability to prepare for trial by failing to provide discovery and/or access to relevant witnesses, and that the Government will continue its obstructive tactics during any additional continuance. However, subsequent to the 22 May 2009 Defense Response, the Government did provide the Defense with over 2500 pages of discovery, as well as the contact information for two potentially relevant wit-nesses.

7. On 15 May 2006, the Defense filed a Submission of Attachments to the 22 May 2009 Defense Response to the Government Motion for Appropriate Relief (120-Day Continuance). On 16 July 2009, the Government filed a response to the Defense's request to submit attachments and asked that the Court not consider these documents. In essence, the matters submitted by the Defense in the Attachment consisted of several documents submitted to the Guantanamo Review Task Force in support of the accused's repatriation to Sudan. The submission contained, in part, letters from family members, a letter to the Secretary of State, and affidavits from the Civic Aid International Organization in Sudan. In support of their request that the charges be dismissed and the request for a continuance be denied, the Defense argues that the accused's chance at repatriation is diminished if he carries the stigma of a charged detainee. Whether the accused is a proper candidate for repatriation to Sudan is not a question to be answered by the Commission. Nor is it a compelling reason to deny the continuance. It is the responsibility of the Inter-agency Task Force, not the Commission, to review the detainee's case and make a recommendation regarding his final disposition and whether that includes repatriation to Sudan. Therefore, while the Commission did review the matters contained in the 15 July 2009 Submissions of Attachments; they were considered irrelevant in regards to the Commission's determination of whether or not to grant the requested 120-day continuance.

8. Additionally, the Defense has previously filed a Motion to Suppress statements of the accused, alleging they were the products of torture and/or coercion. The Defense has also filed a Motion to Dismiss Charge II (Material Support for Terrorism), alleging an invalid *ex post facto* law and that this offense does not properly constitute a violation of the law of war. Given the proposed extensive changes to the MCA, which include the ban on admission of statements obtained by cruel, inhuman and degrading treatment as well as the removal of the Material Support for Terrorism from those offenses chargeable under the MCA, it would be premature and injudicious for the Commission to proceed and rule on these motions at this time.

9. When the Commission granted the 26 January 2009 Government Request for a Continuance, it did so after having made a determination that the interests of justice served

by the continuance outweighed the best interests of both the public and the accused. Accordingly, that delay should be excluded when determining any time period under R.M.C. 707.

10. The Court further finds that continuing these proceedings until 17 September 2009 is in the interests of justice as well as the best interests of both the public and the accused. The continuance will allow time for the proposed changes to the military commission rules to be implemented. It would be an injustice to the accused should the Commission continue, especially given the likely extensive changes to the MCA. Additionally, there was no evidence presented that the Government requested this continuance for the purpose of obtaining unnecessary delay, or for any other inappropriate reason.

WHEREFORE, based on the above, the Government Motion for Appropriate Relief (120-Day Continuance) is GRANTED. The proceedings will be continued until 17 September 2009. The time period from 23 January 2009 to 17 September 2009 is excludable for speedy trial purposes under R.M.C. 707.

However, should the Government request a subsequent delay for the same or similar reasons as set forth in their 15 May 2009 Continuance Request, any request will be considered by the Court with increased scrutiny and skepticism.

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

Military Commission

July 23, 2009

RULING: GOVERNMENT MOTION FOR APPROPRIATE RELIEF (120-DAY CONTINUANCE)

W. Thomas Cumbie
Colonel, U.S. Air Force
Military Judge

1. On 4 April 2008, the Convening Authority referred to a military commission one Charge and six Specifications alleging that Mr. Mohammed Kamin provided material support for terrorism in violation of 10 U.S.C. § 950v(b)(25).

2. On 22 January 2009, the President issued Executive Order (E.O.) 13493 which directed an inter-agency Task Force to "conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." The E.O. directed the Task Force complete its work by 21 July 2009.

3. The review being conducted by the Task Force has yet to be finalized. However,

on 15 May 2009, the Secretary of Defense published and notified Congress of five significant changes to the Manual for Military Commissions (MMC). They include changes to jurisdictional issues; establishment of a right to "individual military counsel"; removal of the requirement to instruct the members regarding an accused not being subject, in some situations, to cross-examination when he offers his own hearsay statement but does not testify; prohibition of the use of statements, in some situations, obtained by cruel, inhuman or degrading treatment, regardless of when the statements were obtained; and revision of one of the rules dealing with hearsay evidence.

4. On 23 January 2009, the Government requested a continuance until 20 May 2009 in this case. On 30 January 2009, the Defense responded, stating that "if the Military Judge grants the government's requested relief…the defense respectfully requests the Commission establish forthwith a trial schedule and set a date for the first hearing to be held in Guantanamo Bay, Cuba, to litigate motions pending related to discovery." On 9 February 2009, the Commission granted the continuance.

5. On 15 May 2009, the Government filed a Motion for Appropriate Relief, requesting any further proceedings in the above action be delayed until at least 17 September 2009. The Government submits, as they did with their January 2009 continuance request, that this Motion for an additional continuance is in the best interest of justice. They argued that the continuance will serve the interests of justice and the accused, as it will permit the President and his Administration to complete a thorough review of all pending cases and of the military commissions process as a whole. They further assert that it would be inefficient and potentially unjust to both the Government and the Defense to deny the continuance.

6. On 18 May 2009, the Defense filed a Defense Response to the Government Motion for Appropriate Relief. In its response, the Defense agreed that an additional 120-day continuance was appropriate and further agreed that "the interests of justice are best served by allowing the government additional time to work with the Congress to revise rules governing trial by military commission to ensure additional rights and protections are afforded Mr. Kamin." However, the Defense requested a hearing to litigate the scope of the continuance and to litigate motions pending relating to discovery (D-014 through D-021). On 29 June 2009, the Commission granted the Defense request for a hearing and scheduled the hearing to be held at Guantanamo Bay on 15 July 2009.

7. At the hearing held on 15 July, the Defense significantly amended its position regarding the Government motion for a continuance. The Defense now requested that the Commission dismiss charges in this case, with prejudice. The Defense request is based on the possibility that Congress may determine that the offense of "material support for terrorism" is not an offense triable by military commissions. The Defense request is further based on statements made to the Senate Armed Services Committee by the Honorable Jeh Johnson, General Counsel, Department of Defense (AE 035) and by Mr. David Kris, Assistant Attorney General (AE 036). Both Mr. Johnson and Mr. Kris indicated that President Obama made clear that military commissions are to be used for violations of the law of war. Both expressed serious reservations as to

whether providing material support for terrorism is a traditional violation of the law of war. Both questioned whether a conviction for providing material support for terrorism would survive appellate review.

8. In its oral argument, the Defense alleges that:

> a. The Administration has shifted positions on the basic fundamental question as to whether or not the Constitution applies in Guantanamo Bay;
>
> b. The basic jurisdiction of this Commission itself is likely to change and, in fact, no longer exist as it is currently written; and
>
> c. The Task Force directed by the President's Executive Order to look at Mr. Kamin's case, and all others, is not going to give serious consideration to transfer and release, when it knows that he has had criminal charges pending for the last year.

9. The Commission finds that, if there is ultimately a shift which gives the accused more rights, that shift obviously inures to the benefit of the accused. If the proposed changes to the statute change jurisdiction significantly, the proper remedy is for the Government to withdraw and re-prefer the Charge. Finally, there is no evidence before the Commission to suggest that the task force reviewing Mr. Kamin's case is less likely to consider transfer and release because charges are pending. The Commission is confident that the task force will review Mr. Kamin's case and make a recommendation regarding disposition based on the available and admissible *evidence*.

10. The Commission finds that, while there is a possibility that Congress may determine that the offense of "material support for terrorism" will not be tried in a military commission, the law has not changed. As of today, "material support for terrorism" remains a viable offense. The Commission finds that it would be pre-mature to dismiss the charges in this case based on speculation regarding what Congress may or may not do.

11. The Commission finds that the interests of justice are served by granting the requested continuance in this case and that such interests outweigh the best interests of both the public and the accused in a prompt trial. A continuance will give Congress and the Administration time to determine whether "material support for terrorism" will remain an offense under the Military Commissions Act. Further, a continuance will allow Congress time to revise rules governing trial by military commission to ensure additional rights and protections afforded by Mr. Kamin.

12. The Commission directs the Government to continue to provide full, complete and timely discovery during the continuance.

WHEREFORE, based on the above, the Government Motion for a continuance until 17 September 2009 is GRANTED. The Defense request to dismiss the Charge and its Specifications, with prejudice, is DENIED. All time since 23 January 2009 to 17 September 2009 will be excludable for speedy trial purposes under R.M.C. 707.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

July 24, 2009

ORDER: DEFENSE MOTION
TO COMPEL DISCOVERY: NAMES OF
PSYCHIATRIC TECHNICIANS AND
CORPSMEN MENTIONED IN JTF-GTMO
MEDICAL RECORDS
(D-078)

Stephen R. Henley
Colonel, U.S. Army
Military Judge

1. Ramzi bin al Shibh was captured by Pakistani Forces in Karachi, Pakistan, on or about 11 September 2002 and transferred to Guantanamo Bay, Cuba, on or about September 2006, where he remains under the control of Joint Task Force-Guantanamo Bay personnel. Charges were sworn on 15 April 2008 and referred to trial by military commission on 9 May 2008. The accused was arraigned on 5 June 2008. On 1 July 2008, the Military Commission ordered a board convened pursuant to Rule for Military Commission (R.M.C.) 7061 to inquire into the present mental capacity of the accused and scheduled an incompetence determination hearing2 for 21 January 2009. Two Government delays have continued the hearing to begin no earlier than 21 September 2009. The Defense now moves this Commission to compel the Government to disclose contact information for all psychiatric technicians and medical corpsmen who assisted any physician in treating the accused since the accused's arrival to Guantanamo Bay in September 2006. The Government opposes the motion. Under the circumstances, the Military Com-mission finds good cause to order relief, though not the particular remedy sought by the Defense.

2. In several filings submitted to the Military Commission, the Prosecution asserts that it has provided Defense counsel with copies of all medical and mental health records pertaining to the accused since his arrival at Guantanamo Bay in September 2006, amounting to hundreds of documents. The Government has also provided Defense counsel access to at least ten physicians identified in those medical and mental health records for follow-up interview. The Defense now moves this Commission to compel the Government to disclose contact information for each psychiatric technician and medical

1 If there is reason to believe that an accused lacked mental responsibility for any offense or lacks the capacity to stand trial, the military judge may order an inquiry into the mental condition of the accused. *See* R.M.C. 706(a). When a mental examination is ordered, the board shall make separate and distinct findings as to each of the following questions: (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (B) What is the clinical psychiatric diagnosis? (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct? (D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense? R.M.C. 706(c)(2).

2 No person may be brought to trial by military commission if that person is mentally incompetent. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. R.M.C. 909(e).

corpsman who worked for any physician who treated the accused. The Defense asserts that follow-up interviews are necessary, as the physicians relied upon the technician's observations of and daily contact with the accused in preparing written reports. The Government responds that any information the technicians may provide is already contained in the medical and mental health records previously given to the Defense, and any further inquiry regarding *past* observations and impressions of the accused beyond those contained in the documentary record is not relevant to an assessment of the accused's *present* mental competency.

3. The Military Commission finds that, if a physician relied upon a technician to prepare his or her written report of the accused, some follow-up interview would be helpful to the Defense in preparing for the incompetence determination hearing, including exploring a particular technician or corpsman's recollection of behavior, demeanor and actions of the accused not reflected in the written reports and expanding on representations attributed to them by the physician.

4. In resolving this pretrial discovery issue, it is not necessary for the Military Commission to consider whether such testimony would be admissible at trial, as an accused is entitled at this stage of the proceedings to a reasonable opportunity to obtain evidence helpful to him.3 However, the Commission recognizes it must also strike the appropriate balance between this basic discovery right and materiality of the information to the sole issue currently before the Commission – the mental competency of the accused.

5. Therefore, NLT 15 August 2009, the Prosecution will facilitate access by Defense counsel to those psychiatric technicians and/or medical corpsmen used by any physician in preparing medical and mental health reports of the accused since 21 September 2008, one year before the scheduled R.M.C. 909 hearing. Consistent with paragraph 3(2) of the Military Commission's 16 September 2008 ruling in D-023, the actual names and current duty locations of these persons can be protected.

6. The Military Commission directs that a copy of this order be served upon the Prosecution and all defense counsel of record, and that it be provided to the Clerk of Court for public release. The Military Commission further directs the Clerk of Court to have this Order translated into Arabic and served upon each of the above-named accused. The underlying Defense motion and Government response will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So ordered this 24th day of July 2009.

3 *See generally United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989) (accused entitled to production of evidence if helpful to a fair resolution of the case).

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

July 24, 2009

ORDER: DEFENSE MOTION TO COMPEL DISCOVERY OF JTF MEDICAL RECORDS AND TEST RESULTS
(D-081)

Stephen R. Henley
Colonel, U.S. Army
Military Judge

1. On 31 December 2008, Defense for Mr. bin al Shibh moved to compel disclosure of all "medical examinations, tests, results and reports performed on [the accused] while he was in the custody of the Joint Task Force-Guantanamo (JTF-GTMO)."1 The Prosecution's response of 7 January 2009, ratified on the record at the 16 July 2009 Rule for Military Commission (R.M.C.) 8032 session, asserts that all medical records and test results have been produced, albeit with some substitutes as approved by the military judge, to include a CT scan, radiologic examination report, procedure worksheet-diagnostic radiology, procedure worksheet-CT scan, and a summary description by "Dr. A." The Government further asserts that additional contemporary medical and mental health records will be provided forthwith.

2. It is hereby ORDERED that the Government will provide any undisclosed JTF-GTMO medical and mental health records pertaining to the accused in its possession to Defense counsel NLT 1 August 2009.3 Defense counsel will review all records, reports, examinations, tests, and similar material produced by the Government and shall supplement D-081 NLT 15 August 2009 with a specific request for relief, if the accused's discovery request remains un-resolved.

3. The Commission directs that a copy of this order be served upon the Prosecution and all defense counsel of record, and that it be provided to the Clerk of Court for public release. The Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused. The underlying Defense motion and Government response will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So ordered this 24th day of July 2009.

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1 Ramzi bin al Shibh was captured by Pakistani Forces in Karachi, Pakistan on or about 11 September 2002 and transferred to Guantanamo Bay, Cuba on or about September 2006, where he remains under the control of JTF-GTMO personnel.

2 A military judge may call the military commission into session to give "statutory sanction to pretrial and other hearings without the presence of members concerning those maters which are amenable to disposition on either a tentative or final basis by the military judge." *See* Discussion to R.M.C. 803.

3 The Government acknowledges its continuing obligation to provide the Defense with medical and mental records of the accused's current treatment regimen. The Government will provide any such records on the 15th and 30th of each month.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

July 24, 2009

MILITARY COMMISSION ORDER
REGARDING PRO SE FILINGS
(MJ-014)

Stephen R. Henley
Colonel, U.S. Army
Military Judge

1. On 21 January 2009, the Military Commission granted, over objection, a Government motion to continue this case until 20 May 2009.1 On 14 May 2009, the Government filed a supplemental motion requesting an additional 120-day delay until 17 September 2009.2 On 11 June 2009, the Military Commission granted the Government motion, finding that the interests of justice served by continuing further substantive proceedings to allow a review of the factual and legal bases for continued detention of the above-named accused currently held in Guantanamo Bay, Cuba; and to determine whether each can be transferred or released, or prosecuted for criminal conduct before a military commission or Article III court; or provided other lawful disposition consistent with the national security and foreign policy interests of the United States and the interests of justice;3 outweighed the best interests of the accused and the general public in a prompt trial.

2. Consistent with the Military Commission's 21 January and 11 June 2009 orders, argument on all filings by Messrs. Sheik Mohammed, Ali, and bin 'Attash4 was deferred pending a determination of the status of this case by the Administration's task force review.5 However, the Military Commission concludes that further postponement in addressing several of these filings would now be contrary to the Supreme Court's directive that "the costs of delay can no longer be borne by those who are held in custody." *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008). Therefore, it is ORDERED that the Military Commission will hear argument on 21 September 2009 at Guantanamo Bay, Cuba, on the following motions: D-105 (Motion to Dismiss Military and Stand-by Counsel – Mohammed); D-109 (Motion to Compel Arabic Translation of All Commission Sessions); D-110 (Motion for Public Release of All Prior Commission Sessions); D-111 (Motion to Compel Research Supplies and Materials); D-112 (Motion to Receive Matters from Stand-by Counsel); D-113 (Motion to

1 *See* P-009, *Commission Ruling Regarding Government Motion for 120-Day Continuance*.

2 *See* P-010, *Commission Ruling Regarding Prosecution Motion for Additional 120-Day Continuance*.

3 The President has tasked that the review with respect to those persons currently detained at Guantanamo Bay be completed on a "rolling basis and as promptly as possible." *See* Executive Order 13492 of January 22, 2009, "Review and Disposition of Individuals Detained at the Guantanamo Naval Base and Closure of Detention Facilities."

4 All are proceeding *pro se*. *Pro se* legal representation refers to the circumstance of a person representing himself or herself without a lawyer in a court proceeding. "*Pro se*" is a Latin phrase meaning "for oneself." While Messrs. al Hawsawi and bin al Shibh also desire to represent themselves, both are pending R.M.C. 909 incompetence determination hearings.

5 Deferral was appropriate to ensure that the task force did not make a recommendation that would render unnecessary or otherwise inefficient further expenditure of judicial and party resources in this matter.

Dismiss Military and Stand-by Counsel – Ali); D-114 (Boycott of SJA and Commission Sessions); and D-127 (Motion to Dismiss Civilian and Stand-by Counsel – bin 'Attash).

3. The Military Commission directs that a copy of this order be served upon the Prosecution and all civilian and military defense counsel of record, and that it be provided to the Clerk of Court for public release. The Military Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused.

So ordered this 24th day of July 2009.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

August 6, 2009

RULING: DEFENSE MOTION FOR APPROPRIATE RELIEF: DISCLOSURE OF INTERROGATION TECHNIQUES APPLIED BY THE UNITED STATES DURING QUESTIONING OF RAMZI BIN AL SHIBH (D-082)

Stephen R. Henley
Colonel, U.S. Army
Military Judge

1. Detailed military defense counsel for Mr. bin al Shibh move this Military Commission to compel the Government to disclose the specific "enhanced interrogation techniques"[1] allegedly used on the accused by any U.S. government agency at any time, asserting such evidence is necessary in order to prepare for the Rule for Military Commission (R.M.C.) 909 incompetence determination hearing.[2] The Government opposes the motion.

1 Enhanced interrogation techniques (EITs), also referred to as "alternative procedures" and "harsh questioning," are terms used to describe interrogation methods allegedly used by various U.S. government agencies to extract information from some individuals captured in connection with the current overseas contingency operation.

2 No person may be brought to trial by military commission if that person is mentally incompetent. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate

2. This Military Commission is tasked by the Supreme Court with balancing the Government's "interest in protecting sources and methods of intelligence gathering" against a detainee's need "to find out or present evidence to challenge the Government's case against him," *Boumediene v. Bush*, 128 S. Ct 2229, 2269, 2276 (2008). The Military Commission finds the alternatives to full disclosure provided to the Defense by the Government, as approved by the military judge, along with witness testimony regarding post-interrogation observations of the effect of the techniques actually applied, is sufficient to prepare for the narrow issue now before the Commission, the R.M.C. 909 hearing to determine whether Mr. bin al Shibh is currently competent to stand trial by military commission.[3] In other words, evidence of specific techniques employed by various governmental agencies to interrogate the accused is not sufficiently helpful or beneficial to the Defense to overcome the classified information privilege and not essential to a fair resolution of the incompetence determination hearing in this case.

3. The Defense motion to compel disclosure of the specific interrogation techniques used or evidence of any coercive techniques applied during any interrogation of Mr. bin al Shibh, to include duration, sequencing, location, limitations, and timing of those techniques, if any, in order to prepare for the R.M.C. 909 hearing is DENIED.

4. The Commission directs that a copy of this order be served upon the Prosecution and all defense counsel of record, and that it be provided to the Clerk of Court for public release. The Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused. The underlying Defense motion and Government response will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So ordered this 6th day of August 2009.

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intelligently in the defense of the case. *See* R.M.C. 909 (e).

3 The Military Commission further finds that there is no reasonable likelihood that the requested evidence will affect the judgment of the trier of fact on the narrow issue before it, the accused's mental competency to stand trial. *See*, *e.g., United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982).

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

November 3, 2008

ORDER:
MOTION FOR ENLARGEMENT OF TIME IN WHICH TO FILE LAW MOTIONS
(D-047 & D-049)

Ralph H. Kohlmann
Colonel, U.S. Marine Corps
Military Judge

1. D-047 is a special request for relief from the Defense (bin 'Attash) for an indefinite enlargement of time to file law motions. D-049 is a joint defense special request for relief for an enlargement of time to file law motions until a date not earlier than 9 January 2009. By implication, both requests also contemplate a continuance of the established hearing date for law motions on 8 December 2008, or the scheduling of additional hearing dates for law motions filed after the previously ordered deadline.

2. D-047 is premised on claimed difficulties Mr. bin 'Attash is encountering in dealing with matters associated with his case and communicating with his standby counsel. D-049 is premised on the volume of work associated with the planned motions by the Defense.

3. The Commission has also considered the Prosecution's responses to D-047 and D-049. The Prosecution opposes the requested relief.

4. On 9 June 2008, the Commission issued the initial litigation schedule for this case. The due date for law motions was set for 11 July 2008. The hearing date for law motions was set for 28 July 2008.

5. On 1 July 2008, the Commission granted a continuance request by the Defense that enlarged the filing time for law motions to 29 August 2008. The hearing date for law motions was continued until 24 September 2008.

6. On 27 August 2008, the Commission granted a second continuance request by the Defense that enlarged the filing time for law motions to 3 November 2008. The hearing date for law motions was continued until 8 December 2008. (The Commission notes that, per its 27 August 2008 order, requests for deviations from the filing due date for law motions were required to be submitted within 7 days prior to the date established. While the Defense apparently relied on language in that order regarding coordination associated with the *transmission* of large numbers of motions, the provision in question is intended only to reduce computer problems that might be occasioned by near simultaneous transmission of large numbers of PDF files. In the future, the parties are advised to submit any requests for deviation from ordered *filing* dates in accordance with the Commission's instructions.)

7. In D-049, the Defense indicates that the several accused are prepared to file at least sixteen joint law motions not later than the ordered 3 November 2008 filing deadline. The Defense asks that they be permitted to file those motions on 3 November 2008, and

then be permitted to augment those filings with the remainder of their planned law motions at a later date.

8. With the understanding that at least sixteen joint law motions will be filed by the Defense not later than 3 November 2008, the Commission finds that the interests of justice will be best served in this case by providing the Defense additional time to prepare their additional planned law motions. It is also understood that this additional time will benefit the Defense in its preparation for other stages of the trial process.

9. The sixteen motions referred to in D-049 should be filed today in accordance with the Commission's previous order. Any other motions that are ready now should be filed today as well. Any remaining law motions, other than those pertaining to capital sentencing issues, will be due to the Commission and opposing counsel not later than 17 November 2008.

10. Any remaining law motions beyond those submitted by 17 November 2008, to include any pertaining to capital sentencing issues, will be due to the Commission and opposing counsel not later than 12 January 2008.

11. The previously scheduled hearing date for law motions of 8 December 2008 remains in place for the following purposes:

a. To receive evidence and hear oral argument re D-001 (Joint motion to dismiss for unlawful influence);

b. To address the status of the discovery process;

c. To hear oral argument on designated law motions submitted on 3 November 2008; and

d. To address other matters to be designated by future correspondence.

12. The following modifications to the trial schedule are ordered in response to the continuance request by the Defense. Pursuant to R.M.C. 707, the Commission finds that these delays serve the interest of justice, and outweigh the interest of the public and the parties in abiding by the previously ordered litigation schedule. The Commission further finds that all delay associated with this modification is the responsibility of the Defense for the purposes of R.M.C. 707 accountability.

a. 17 November 2008: Any remaining law motions other than those pertaining to capital sentencing issues will be due to the Commission and opposing counsel and other *pro se* parties.

b. 8-12 December 2008: Hearing in GTMO on matters described in paragraph 11 above.

c. 12 January 2009: All law motions pertaining to capital sentencing issues due to the military judge and opposing counsel and other *pro se* parties.

d. TBD: Hearing/s in GTMO on additional law motions.

a. TBD: Discovery Motions Due.

e. TBD: Evidentiary motions due to the military judge and opposing counsel and other *pro se* parties. In general, evidentiary motions are those which deal with

the admission or exclusion of specific or general items or classes of evidence.

Note: Defense witness requests associated with any motions should be submitted to the trial counsel in accordance with R.M.C. 703 simultaneously with the filing of the motion (or Defense response in the case of a Government motion) in question. The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

f. TBD: Hearing in GTMO re Evidentiary Motions.

g. TBD: Submission of requested group *voir dire* questions for the Military Commission Members.

Note: The military judge intends to conduct all group voir dire questioning of the members per R.M.C. 912. The military judge's group voir dire will take counsel's requested questions into account as appropriate. The military judge will also conduct the initial follow-up individual voir dire based on responses to the group questions. Counsel will be permitted to conduct additional follow-up voir dire.

h. TBD: Defense Requests for Government Assistance in Obtaining Witnesses for use on the merits. *See* R.M.C. 703.

Note: The Government response to any witness request will be due within five days of the submission of the request. Any Defense motion for production of witnesses in conjunction with a motion will be due to the court and opposing counsel within five days of receipt of a denied witness request.

i. TBD: Hearing re Witness Production Motions and any unresolved matters.

j. TBD: Assembly and *Voir Dire* for Panel Members.

k. TBD: Beginning of trial on the merits.

13. Counsel should direct their attention to the Rules of Court, R.C. 3, Motions Practice, and specifically Form 3-1, 3-2, and 3-3, for the procedures the Commission has established for this trial. All motions, responses, and replies shall comport with the terms of R.C. 3.6 in terms of timeliness. Any request for extension of any response or reply deadline associated with this hearing will be submitted before the deadline for the reply or response.

14. Requests for deviations from the timelines for hearings or for submission of motions established by this order must be submitted not later than 20 days prior to the date established, except for law motions for which requests for deviations from the due date must be submitted within 7 days prior to the date established.

Ordered this 3rd day of November 2008.

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Military Commission

June 1, 2009

ORDER
(D-107)

Patrick J. Parrish
Colonel, U.S. Army
Military Judge

1. The Commission conducted a R.M.C. 803 session at Guantanamo Bay, Cuba, on 1 June 2009.

2. Based upon the expressed desires of the accused at that session, the Commission orders the following:

a. At the request of the accused, Ms. Rebecca Snyder, CDR Walter Ruiz and Mr. Michael Paradis are relieved as counsel for the accused.

b. Although Mr. Khadr initially expressed a desire to discharge all of his defense counsel pursuant to R.M.C. 505((d)(2)(B)(i)), he also rejected exercising his right to proceed *pro se*, representing himself. The Commission will not allow him to be unrepresented by counsel during this portion of the proceedings. Therefore, at the specific request of the accused, LCDR William Kuebler is ordered to remain as detailed counsel for the accused, at least through 13 July 2009.

c. At the request of the accused, the Commission orders the Chief Defense Counsel not to interfere with communications between LCDR Kuebler and Mr. Khadr, and orders the Government to provide LCDR Kuebler with transportation to Guantanamo on scheduled flights as is reasonably appropriate to represent Mr. Khadr at least through 13 July 2009.

d. The parties are ordered to file briefs with the Commission not later than 12 June 2009 regarding the issue of what conduct constitutes "good cause" for removal of a defense counsel without the consent of the accused, whether the Chief Defense Counsel's determination of good cause is subject to judicial review, and whether or not the reassignment or permanent change of station of military defense counsel constitutes good cause.

e. A hearing is scheduled for 13 July 2009 at 0900 hours to resolve any remaining issues regarding representation of the accused, and to hear oral argument on the Government motion for a continuance through 17 September 2009.

UNITED STATES OF AMERICA
Appellee

v.

SALIM AHMED HAMDAN
Appellant

Court of Military Commission Review
Case 09-002

July 30, 2009

RULING ON APPELLANT'S REQUEST FOR EXTENSION OF TIME TO FILE BRIEF ON BEHALF OF APPELLANT

Before
BEISTER, CONN, GEISER

Appellant's Request for Extension of Time to File Brief on Behalf of Appellant received 29 July 2009, and which was not opposed by the Appellee, is GRANTED. Appellant's Assignment of Errors and Brief on Behalf of Appellant are due no later than 5:00 p.m. Eastern Time on 16 October 2009. Appellee's Reply Brief is due not later than 5:00 p.m. Eastern Time on 4 December 2009.

For the Court:
Leroy F. Foreman
Clerk of Court

UNITED STATES OF AMERICA
Appellant

v.

MOHAMMED JAWAD
Appellee

Court of Military Commission Review
Case 08-004

July 31, 2009

RULING ON MOTION TO DISMISS APPEAL AS MOOT

Before
WILLIAMS, FRANCIS, O'TOOLE

On 31 July 2009, at the direction of the Convening Authority, the charges against Mohammed Jawad were withdrawn and dismissed without prejudice. Upon consideration of the direction of the Convening Authority, the appeal of the United States is DISMISSED as moot.

For the Court:
Leroy F. Foreman
Clerk of Court

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

August 20, 2009

RULING: DEFENSE MOTION TO RECONSIDER RULING ON MOTION TO COMPEL DISCOVERY: NAMES OF PSYCHIATRIC TECHNICIANS AND CORPSMEN MENTIONED IN JTF-GTMO MEDICAL RECORDS
(D-078)

Stephen R. Henley
Colonel, U.S. Army
Military Judge

1. Ramzi bin al Shibh was captured by Pakistani Forces in Karachi, Pakistan, on or about 11 September 2002 and transferred to Guantanamo Bay, Cuba, on or about September 2006, where he remains under the control of Joint Task Force-Guantanamo Bay personnel. Charges were sworn on 15 April 2008 and referred to trial by military commission on 9 May 2008. The accused was arraigned on 5 June 2008. On 1 July 2008, the Military Commission ordered a board convened pursuant to Rule for Military Commissions (R.M.C.) 7061 to inquire into the present mental capacity of the accused and scheduled an incompetence determination hearing2 for 21 January 2009.3

2. On 22 December 2008, the Defense moved this Commission to compel the Government to disclose contact information for all psychiatric technicians and medical corpsmen that assisted any physician in treating the accused since the accused's arrival to Guantanamo Bay in September 2006. The Government opposed the motion.

3. In its 24 July 2009 order, this Commission observed that, if a physician relied upon a technician to prepare his or her written report of the accused, some follow-up interview would be helpful to the Defense in preparing for the incompetence determination hearing, including exploring a particular technician or corpsman's re-collection of behavior, demeanor and actions of the accused not reflected in the written reports and expanding on representations attributed to them by the physician. However, the Commission also recognized it must strike the appropriate balance between this basic dis-

1 If there is reason to believe that an accused lacked mental responsibility for any offense or lacks the capacity to stand trial, the military judge may order an inquiry into the mental condition of the accused. *See* R.M.C. 706(a). When a mental examination is ordered, the board shall make separate and distinct findings as to each of the following questions: (A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (B) What is the clinical psychiatric diagnosis? (C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct? (D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense? R.M.C. 706(c)(2).

2 No person may be brought to trial by military commission if that person is mentally incompetent. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. R.M.C. 909(e).

3 Two Government delays have continued the hearing to begin no earlier than 21 September 2009.

covery right and materiality of the information to the sole issue currently before the Military Commission – the *current* mental competency of the accused. The Military Commission ultimately ordered the Prosecution to facilitate access by defense counsel to those psychiatric technicians and medical corpsmen used by any physician in preparing medical and mental health reports of the accused since 21 September 2008, one year before the scheduled R.M.C. 909 hearing.

4. On 18 August 2009, the Defense moved this Commission to reconsider that part of the order limiting access to those psychiatric technicians and medical corpsmen who treated the accused since 21 September 2008, and requested the Commission now require the Government to facilitate access to any technician or corpsmen who observed and provided treatment to the accused since September 2006, the date the accused was transferred to Guantanamo Bay, Cuba. The Government opposes the motion to reconsider.

5. The Defense's additional legal precedent and argument submitted in support of its request for reconsideration is unpersuasive and does not rise to the extraordinary circumstances, manifest injustice or clear error required to warrant modifying or changing the Military Commission's original ruling.4 The Defense has not yet established the materiality of past observations and impressions of the accused by psychiatric technicians and medical corpsmen, beyond those contained in the documentary record since 21 September 2008, to an assessment of the accused's present mental competency.5 Therefore, the Defense motion for reconsideration is hereby DENIED.

6. The Military Commission directs that a copy of this order be served upon the Prosecution and all defense counsel of record, and that it be provided to the Clerk of Court for public release. The Military Commission further directs the Clerk of Court to have this Order translated into Arabic and served upon each of the above-named accused. The underlying Defense motion and Government response will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So ordered this 20th day of August 2009.

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4 A motion for reconsideration is appropriate where "the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Trans, Inc.,* 70 F.3d 255, 257 (2d Cir. 1995). A motion for reconsideration may also be granted to "correct a clear error or prevent manifest injustice." *In re Terrorist Attacks* on September 11, 2001*,* 2006 U.S. Dist Lexis 11741 (S.D.N.Y. Mar. 20 2006) (quoting *Doe v. New York City Dept of Soc. Svcs,* 709 F.2d 782, 789 (2d Cir. 1983).

5 If defense counsel can identify a particular technician or corpsman who treated or observed the accused between September 2006 and 20 September 2008, and provide a reason why that person could reasonably assist counsel in clarifying or adding to the information already provided to the Defense by a treating physician, or otherwise contained in the medical and mental health records, they may make that request.

UNITED STATES OF AMERICA

v.
KHALID SHEIK MOHAMMED, et al.

Military Commission

August 20, 2009

RULING: DEFENSE SPECIAL REQUEST FOR RELIEF AND MOTION FOR APPROPRIATE RELIEF: EXTENSION OF TIME TO SUBMIT WITNESS LIST AND INDEFINITE CONTINUANCE OF THE R.M.C. 909 HEARING UNTIL THE EXECUTIVE REVIEW IS COMPLETED AND THE LAW APPLICABLE TO TRIAL BY MILITARY COMMISSION IS SETTLED (D-131 & D-132)

Stephen R. Henley
Colonel, U.S. Army
Military Judge

1. On 5 August 2009, the Military Commission issued a pretrial order requiring the Defense to submit its proposed witness list for the Rule for Military Commission (R.M.C.) 909 incompetence determination hearing by 20 August 2009 and to submit any witness production motions by 31 August 2009. On 17 August 2009, detailed counsel for Mr. al Hawsawi filed a special request for relief seeking an enlargement of time to submit the witness list. Counsel asserts that, as the Convening Authority has not identified the forensic psychologist previously ordered produced by the Military Commission,1 the Defense will need at least one month to consult with him or her once named to adequately prepare for the scheduled 22-25 September 2009 hearing. On 18 August 2009, counsel for Messrs. al Hawsawi and bin al Shibh filed a joint motion for appropriate relief seeking a delay in the R.M.C. 909 hearings and an indefinite continuance for all commission proceedings until resolution of pending legislation in Congress amending the Military Commissions Act of 2006 and the ongoing inter-agency review of this case is complete. The Government opposes both the special request for relief and the motion for appropriate relief.

2. The Military Commission acknowledges that the evidence phase of the R.M.C. 909 hearings may not be complete by 25 September 2009. Additional sessions may be required, as circumstances dictate. Further, consistent with its orders in P-009 and P-010, the Military Commission does not anticipate issuing a ruling on either accused's competency to stand trial before the Inter-agency Task Force operating pursuant to Executive order 13492 of 22 January 2009, has made its recommendations and the Review Panel in connection with the same has made a decision as to the disposition of this case. Additionally, although amendments to the Military Commissions Act of 2006 have been proposed, none of the pending legislative changes appear to impact the R.M.C. 909 hearing and the Defense has not presented a compelling argument why the Commission should not begin hearing from witnesses and receiving documentary evidence relevant to the sole issue before it, the accused's current competency to stand trial by military commission.

3. The Defense request to extend the filing deadline for its R.M.C. 909 witness list and motions to delay the R.M.C. 909 hearing

1 *See* D-117 *Ruling (Defense Motion for Appropriate Relief: Appointment of Expert Consultants).*

and indefinitely continue all military commission sessions are DENIED. Absent extraordinary circumstances compelling further delay, the Military Commission will begin the incompetence determination hearing on 22 September 2009.

4. The Military Commission directs that a copy of this order be served upon the Prosecution and all defense counsel of record, and that it be provided to the Clerk of Court for public release. The Military Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused. The underlying Defense motion will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So ordered this 20th day of August 2009.

UNITED STATES OF AMERICA

v.

AHMED MOHAMMED AHMED HAZA AL DARBI

Military Commission

August 20, 2009

DOCKETING ORDER

James L. Pohl
Colonel, U.S. Army
Military Judge

1. On 13 February 2009, the Commission granted the Government's request for a continuance until 21 May 2009. The purpose of the continuance was to give the new Administration time to review the military commission process and individual cases.

2. On 19 May 2009, the Commission granted the Government's request for a second continuance until 24 September 2009. The purpose of the continuance was to give the new Administration additional time to complete its review of the military commission process and individual cases as well as completion of any changes to the Military Commission Act.

3. Accordingly, to ensure the orderly processing of the current pending charges against the accused and provide all parties with sufficient notice to prepare, the next hearing in this case will take place at 0900 hours on 24 September 2009 at Guantanamo Bay, Cuba.

4. Any requests for additional continuances will be addressed on the record at the hearing on 24 September 2009. No further continuance requests will be granted without a hearing, although the Commission will consider the merits of any such request at the hearing.

5. At the hearing, the Commission will:

a. Hear oral arguments on Prosecution motion P-007 – Motion to Reconsider the Military Judge's Ruling Excluding Parts 5, 6, and 7 of the Al Qaeda Plan;

b. Hear oral arguments on Defense motion D-017 – Motion to Pre-Admit the PBS Documentary, *Torturing Democracy*, and the Documentary, *Taxi to the Dark Side*.

c. Hear oral arguments on Prosecution motion P-010 – Motion for Access to the Accused for Medical and Mental Health Evaluation and for Reciprocal Discovery Concerning Accused's Physical and Mental Health.

d. Address outstanding discovery issues including but not limited to production of defense witness for motions and trial.

e. Update the trial schedule.

6. The Commission authorizes the public release of this order.

So ordered this 20th day of August 2009.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

August 24, 2009

RULING: DEFENSE MOTION FOR APPROPRIATE RELIEF: ORDER GRANTING ACCESS TO VIEW AND INSPECT CIA DETENTION FACILITIES/ MOTION TO COMPEL (BIN AL SHIBH) (D-121 & D-130)

Stephen R. Henley
Colonel, U.S. Army
Military Judge

1. Detailed military defense counsel for Mr. bin al Shibh move this Military Commission to enter orders requiring the Government to give counsel information pertaining to and an opportunity to view and inspect facilities allegedly used to detain the accused between the date of his apprehension by Pakistani military forces on or about 11 September 2002 and his transfer to the control of Joint Task Force-Guantanamo personnel in September 2006.1 The Defense argues that the information is necessary in order to prepare for the Rule for Military Commission (R.M.C.) 909 incompetence determination

1 The Military Commission previously denied a Defense motion to compel disclosure of specific "enhanced interrogation techniques" allegedly used on the accused during this period by persons working for U.S. government agencies. *See* D-082 *Ruling: Defense Motion for Appropriate Relief: Disclosure of Interrogation Techniques Applied by the United States During Questioning of Ramzi bin al Shibh.*

hearing.2 The Government opposes the motions, in part,3 asserting that, under the circumstances, evidence of specific locations where the accused was actually detained prior to September 2006 and details of the environment and setting while held there is simply not relevant to determining whether the accused is currently competent to stand trial by military commission.

2. This Military Commission is tasked by the Supreme Court with balancing the Government's "interest in protecting sources and methods of intelligence gathering" against a detainee's need "to find out or present evidence to challenge the Government's case against him," *Boumediene v. Bush*, 128 S.Ct. 2229, 2269, 2276 (2008). Assuming that any facilities used to detain the accused prior to September 2006 still exist, the physical plant and on-site conditions are not likely to be those which existed at the time of the accused's detention and an inspection of the scene now would serve little purpose to document the facility which existed at that time. Additionally, while the Commission finds some information about the circumstances of past detention is relevant to a determination of current competency,4 under the facts of this case, it is not necessary for defense counsel to view the actual situs of the accused's prior detention(s).5 Given that the Defense was previously permitted to view the location of the accused's current confinement6 and the Prosecution's apparent concession the accused suffers from a Delusional Disorder-Persecutory Type, the Military Commission concludes that the evidentiary value in inspecting detention facilities that may have housed the accused before September 2006 and information regarding the conditions while held there is de minimus and not material to the narrow issue now before it. In other words, except for paragraph 3 below, evidence of past conditions of detention and specific locations where the accused was held before September 2006 is not material to a fair resolution of the incompetence determination hearing in this case.7

3. The Defense motions for a Military Commission order compelling the Government to allow the defense counsel access to and information about any and all facilities used to detain the accused from September 2002 to September 2006, in order to prepare for the R.M.C. 909 hearing, is hereby

2 No person may be brought to trial by military commission if that person is mentally incompetent. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. R.M.C. 909(e).

3 The Government concedes that some information regarding the accused's detention before being turned over to the control of JTF-GTMO personnel on or about September 2006 is relevant to a current competency determination in this case.

4 The Defense cites *Comer v. Schriro*, 480 F.3d 960 (9th Cir. 2007) for the proposition that conditions of confinement are relevant to a competency determination. However, *Comer* involved a remand by the Ninth Circuit to the District Court to determine whether the conditions of the defendant's incarceration rendered his decision to waive his habeas appeal right involuntary.

5 *See generally United States v. Culpepper*, 834 F.2d 879, 883 (10th Cir. 1987).

6 The Military Commission previously granted a Defense request to inspect certain aspects of the current conditions of confinement at Camp 7. *See* D-41 *Ruling: Defense Motion for Appropriate Relief – View Conditions of Confinement* ("the Defense may view the accused's cell, the two adjacent cells, the recreation room, the medical room and the media room").

7 The Military Commission further finds that there is no reasonable likelihood that the requested evidence will affect the judgment of the trier of fact on the narrow issues before it, the accused's mental competency to stand trial. *See, e.g., United States v. Valenzuela-Bernal*, 458 U.S. 858, 874 (1982).

GRANTED, in part. The Government will provide the information set forth in paragraphs 6c(i-iv) of its classified *ex parte* 20 August 2009 response to D-130, a classified Defense motion to compel dated 12 August 2009, to the Defense, subject to the applicable protective orders, no later than 27 August 2009. In all other respects, the Defense motions are hereby DENIED.8

4. The Commission directs that a copy of this order be served upon the Prosecution and all defense counsel of record, and that it be provided to the Clerk of Court for review and public release. The Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused. The underlying unclassified Defense motions and Government responses will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So ordered this 24th day of August 2009.

8 The Military Commission may supplement its findings prior to authentication of the record of trial.

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

Military Commission

August 24, 2009

ORDER: INQUIRY INTO THE MENTAL CAPACITY OR MENTAL RESPONSIBILITY OF THE ACCUSED

W. Thomas Cumbie
Colonel, U.S. Air Force
Military Judge

1. After considering the Defense Request for the Military Commission to Order a New Inquiry into the Mental Health of the Accused (D-027), the Government's Response, the Defense Supplement to D-027 and the Government's response thereto, the Military Commission hereby ORDERS:

(a) That an inquiry into the mental capacity of Mohammed Kamin be conducted in accordance with Rule for Military Commissions 706;

(b) That the inquiry shall be conducted by a board consisting of two persons who are physicians or clinical psychologists. At least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall not include either COL [RE-DACTED], U.S. Army, or CAPT [REDACTED], U.S. Navy, both of whom sat on the prior R.M.C. 706 sanity board. If a Pashto-speaking physician or clinical psychologist is reasonably available within the time constraints of the

schedule set forth in paragraph 6 below, he or she should be appointed; in any event, the Government will designate a Pashto-speaking interpreter to assist the board in its inquiry. Unless ordered by this Commission, this interpreter may not disclose anything learned during the inquiry, except to defense counsel (LCDR Richard Federico, JAGC, USN; CPT Clay West, JA USAR). The Defense may choose to have its assigned interpreter present when the accused is examined, and the Government must provide reasonable notice to the Defense as to when the inquiry is to be conducted;

(c) That this evaluation shall include an opportunity for the board to meet and confer with Mr. Kamin at an appropriate location as determined by the Commander, Joint Detention Group, Joint Task Force Guantanamo. If Mr. Kamin refuses to attend the sanity board voluntarily, JTF-GTMO shall forcibly extract Mr. Kamin from his cell and compel him to attend the board;

(d) That the board convened by this order, in its evaluation, shall make separate and distinct findings as to each of the following questions:

(1) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? If so, what is the clinical diagnosis?

(2) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his conduct?

(3) Is the accused presently suffering from a mental disease or defect? If so, what is the clinical psychiatric diagnosis?

(4) Does the accused have the present ability to consult with his lawyers with a reasonable degree of cognitive understanding and does he have a rational as well as a factual under-standing of the proceedings against him? If so, does the accused have sufficient mental capacity to understand the nature of the proceedings against him (trial by commission) and to conduct or cooperate intelligently in the defense?

(e) That examinations and tests shall be conducted, if appropriate and required, to answer the questions set forth in paragraph 4, above, and a thorough review of the accused's available medical records shall also be conducted; and

(f) The Defense has requested that additional unspecified matters be considered by this board. The sanity board may, in its discretion, consider additional matters raised by the Defense, but is not required to conduct any test or review any material which the board concludes is unnecessary to answer the questions listed in paragraph 1(d) above.

2. The sanity board ordered in paragraph 1(a) above shall be completed as expeditiously as possible, consistent with a medically competent and thorough examination, to answer the specified questions. Consequently, it is FURTHER ORDERED that:

(a) Not later than 21 September 2009, the board shall prepare a summarized report consisting of only the board's ultimate conclusions as to all questions specified in paragraph 1(d). This report will be prepared in three copies. The Military Commissions Trial Judiciary Staff, trial counsel and defense counsel will be telephonically notified when this report is ready to be picked-up. At the option of the officer responsible for the summarized report, it may be faxed or e-mailed to the Military Commissions Trial Judiciary Staff, trial counsel, and defense counsel;

(b) Not later than 28 September 2009, the board shall prepare its full report. This report shall be placed into a sealed envelope and provided only to LCDR Richard Federico, JAGC, USN, and CPT Clay West, JA, USAR. The full report will NOT be faxed or e-mailed unless specifically requested by LCDR Richard Federico, JAGC, USN, or CPT Clay West, JA, USAR; and

(c) Under no circumstances will the full report, matters considered by the board during its inquiry, or any statements made by the accused to the board (or evidence derived therefrom) be disclosed to anyone other than LCDR Richard Federico, JAGC, USN or CPT Clay West, JA, USAR, without express, written authorization from the military judge or defense counsel.

3. Additionally, it is FURTHER ORDERED:

(a) That the Government shall provide Dr. [REDACTED], Ph.D., expert consultant in clinical and forensic psychiatry for the Defense, an opportunity to meet with Mr. Kamin to conduct an independent mental health examination of Mr. Kamin, provided Mr. Kamin agrees to meet with Dr. [REDACTED] voluntarily. Mr. Kamin shall not be forcibly extracted from his cell nor compelled to attend this meeting; and

(b) That the Government shall provide detailed defense counsel (LCDR Richard Federico, JAGC, USN, and CPT Clay West, JA, USAR) the opportunity to meet with Mr. Kamin prior to the examination by Dr. [REDACTED], to advise Mr. Kamin regarding the mental health examinations, provided Mr. Kamin agrees to meet with the counsel voluntarily. Mr. Kamin shall not be forcibly extracted from his cell nor compelled to attend meetings with counsel.

4. Nothing in this order shall be construed as authorizing more than one forced cell extraction of the accused, and only for purposes of the sanity board ordered in paragraph 1(a) above. The defense counsel and Dr. [REDACTED] may also attempt to meet with Mr. Kamin during the period of time he is extracted for purposes of the sanity board; however, if Mr. Kamin refuses to meet with counsel or Dr. [REDACTED], he shall not be forcibly extracted at another time for either of those purposes.

5. Telephone numbers: Military Commissions Trial Judiciary Staff: [REDACTED]; LCDR Richard Federico, JAGC, USN, Defense Counsel: [REDACTED]; CPT Clay West, JA, USAR, Defense Counsel: [REDACTED].

So ordered this 24th day of August 2009.

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN
AL BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

September 2, 2009

RULING ON APPELLANT'S MOTION TO WAIVE PAGE LIMIT

Before
WILLIAMS, CONN, THOMPSON

Appellant's Request for a waiver of the 30-page limitation for Appellant's merits brief in the above-captioned case is hereby GRANTED. Appellant's brief is not to exceed 50 pages, including tables of authorities and certificates of counsel.

For the Court:
Mark Harvey
Deputy Clerk of Court

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

September 17, 2009

COMMISSION RULING REGARDING PROSECUTION MOTION FOR ADDITIONAL 60-DAY CONTINUANCE (P-012)

Stephen R. Henley
Colonel, U.S. Army
Military Judge

1. This matter having come before the Military Commission upon Government motion to grant a third continuance in this case until 16 November 2009;1 and having considered the parties' submissions, and for good cause shown; the Military Commission finds that the interests of justice served by continuing the Rule for Military Commission (R.M.C.) 909 incompetence determination hearing2 for Ramzi bin al Shibh, currently

1 On 21 January 2009, the Military Commission granted, over objection, a Government motion to continue this case to 20 May 2009. *See* P-009, *Commission Ruling Regarding Government Motion for 120-Day Continuance*. On 14 May 2009, the Commission granted a Government motion for an additional 120-day delay to 17 September 2009. *See* P-010, *Commission Ruling Regarding Prosecution Motion for Additional 120-Day Continuance.*

2 No person may be brought to trial by military commission if that person is mentally incompetent. Trial may proceed unless it is established by a preponderance of the evidence that the accused is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature of the proceedings or to conduct or cooperate intelligently in the defense of the case. R.M.C. 909(e).

docketed for 21-25 September 2009, to allow the Administration time to determine whether he can be transferred or released, or prosecuted for criminal conduct before a military commission or Article III court; or provided other lawful disposition consistent with the national security and foreign policy interests of the United States and the interests of justice,3 outweigh the best interests of the accused and the general public in a prompt trial. As such, the unopposed government motion to continue the incompetence determination hearing for Mr. bin al Shibh to begin no earlier than 16 November 2009 is GRANTED.

2. The Government also requests the Commission "refrain from taking any actions in the case…to preserve the status quo…to the greatest extent possible" until the Attorney General, in consultation with the Secretary of Defense, has determined the appropriate forum to prosecute the above- named accused. The Prosecution asserts that defense counsel for Messrs. al Hawsawi and bin al Shibh do not object to the Government's petition to halt further proceedings in this case, to include all on-the-record sessions, until no earlier than 16 November 2009. However, as Messrs. Sheikh Mohammed, bin 'Attash and Ali are proceeding *pro se*,4 and have not yet indicated whether they, too, will join in the requested continuance, the Commission will hear argument as to this part of the motion at a session convened pursuant to R.M.C. 803 in Courtroom 2, Guantanamo Bay, Cuba, on 21 September 2009.

3. The Military Commission directs that a copy of this order be served upon each accused, the Prosecution and all civilian and military defense counsel of record, and that it be provided to the Clerk of Court for public release. The underlying Government motion will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations. The Military Com-mission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused.

So ordered this 17th day of September 2009.

3 The President has tasked that the review with respect to those persons currently detained at Guantanamo Bay be completed on a "rolling basis and as promptly as possible." *See* Executive Order 13492 of January 22, 2009, "Review and Disposition of Individuals Detained at Guantanamo Bay Naval Base and Closure of Detention Facilities."

4 *Pro se* legal representation refers to the circumstances of a person representing himself or herself without a lawyer in a court proceeding. *Pro se* is a Latin phrase meaning "for oneself". Messrs. al Hawsawi and bin al Shibh have indicated on numerous occasions a desire to also proceed *pro se*. Even if the Military Commission ultimately determines both accused are competent to stand trial, the Prosecution might still attempt to limit the accused's self-representation rights by insisting upon trial defense counsel when the accused lacks the mental capacity to conduct his own defense. *See Indiana v. Edwards*, 128 S. Ct. 2379 (2008). That issue, however, is not currently before this Commission and can be resolved only if the accused are determined competent to stand trial.

UNITED STATES OF AMERICA

v.

AHMED MOHAMMED AHMED HAZA AL DARBI

Military Commission

September 17, 2009

DOCKETING ORDER

James L. Pohl
Colonel, U.S. Army
Military Judge

1. The hearing previously scheduled for 24 September 2009 is hereby rescheduled for 23 September 2009 at Guantanamo Bay, Cuba. At the hearing, the Commission will hear oral argument regarding P-015, the Government's motion for a third continuance of all proceedings in this case.

2. The Commission authorizes the public release of this order.

So ordered this 17th day of September 2009.

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

September 21, 2009

COMMISSION RULING REGARDING PROSECUTION MOTION FOR ADDITIONAL 60-DAY CONTINUANCE AND SCHEDULING ORDER FOR 21 SEPTEMBER 2009 COMMISSION SESSION (P-012)

Stephen R. Henley
Colonel, U.S. Army
Military Judge

1. On 21 January 2009, over Defense objection, this Commission granted a Government motion for a 120-day continuance in this case. On 14 May 2009, the Commission granted, again over Defense objection, a second Government delay for an additional 120 days, but did docket a session to run 21 through 25 September 2009 to begin receiving evidence on the pending Rule for Military Commission (R.M.C.) 909 incompetence determination hearing for Mr. bin al Shibh.

2. On 16 September 2009, the Government filed a third request asking the Commission to: (1) grant an additional 60-day delay and (2) continue the scheduled R.M.C. 909 incompetence hearing to begin no earlier than 16 November 2009. The detailed defense counsel for Mr. bin al Shibh did not oppose the motion to continue the R.M.C. 909 hearing, which the Commission subsequently granted on 17 September 2009. Detailed de-

fense counsel for Messrs. bin al Shibh and al Hawsawi did not oppose the 60-day continuance. Since the Commission had not received a formal reply from the three *pro se* accused regarding the Government's third continuance request, it scheduled today's session to hear argument on this part of the Government motion. Since the subject involved a matter which affected each of the five accused, all were invited to attend. However, on 21 September 2009, the Commission received a translated filing from Messrs. Sheikh Mohammed, bin 'Attash and Ali, dated 18 September 2009, in which they stated they do not object to the 60-day continuance. Therefore, the unopposed motion for a 60-day continuance is thereby GRANTED.

3. What remains are the pending *pro se* filings which are not joined by and do not relate to Messrs. bin al Shibh and al Hawsawi. Accordingly, only the three *pro se* accused that have joined in the motions being heard,1 their standby counsel and government counsel may be present in the courtroom. In other words, because Messrs. bin al Shibh and al Hawsawi would have no right to attend this proceeding if the cases were being tried separately, they are not authorized to attend this session of the Military Com-mission. 2

4. The Military Commission directs that a copy of this order be served upon each accused, the Prosecution and all civilian and military defense counsel of record, and that it be provided to the Clerk of Court for public release. The Military Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above- named accused.

So ordered this 21st day of September 2009.

1 The *pro se* filings are: D-105 (Dismiss Military Standby Counsel and Civilian Legal Advisors – Mohammed); D-109 (Compel Arabic Translation of All Commission Sessions); D-110 (Public Release of All Prior Commission Sessions); D-111 (Compel Research Supplies and Materials); D-113 (Dismiss Military Standby Counsel and Civilian Legal Advisors-Ali); D-114 (Boycott of SJA and Commission Sessions); and D-127 (Dismiss Military Standby Counsel and Civilian Legal Advisors-bin 'Attash).

2 The privilege of attending every proceeding is never absolute. Assuming, but not deciding, that the Due Process Clause of the Fifth Amendment applies to the accused in this case, a defendant is not required to be granted the privilege of attending every hearing or session of court. *See, e.g., Kentucky v. Stincer*, 482 U.S. 730 (1987). Due process only requires that "a defendant be allowed to be present 'to the extent that a fair and just hearing would be thwarted by his absence.'" *Snyder v. Massachusetts*, 291 U.S. 97, 108 (1934). In this case, given the Commission has granted the unopposed motion for a 60-day continuance, the 21 September 2009 session will now only address motions filed by the three *pro se* accused. Accordingly, Messrs. bin al Shibh and al Hawsawi are not necessary to resolve the legal issues to be addressed; their presence would not contribute to the fairness of the proceeding; and their attendance has no reasonably substantial relation to an issue that involves them personally.

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN
AL BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

September 29, 2009

RULING ON REQUESTS FOR
EXTENSIONS OF TIME TO FILE BRIEFS

Before
WILLIAMS, CONN, THOMPSON

Appellee's Request for Extension of Time to file a responsive brief received 23 September 2009, and which was not opposed by the Appellant, is GRANTED. Appellee's Responsive Brief is due not later than 5:00 p.m. Eastern Time on 15 October 2009. On concurrence of both Government and Defense Appellate Counsel, the deadline for submission of *amicus* briefs on behalf of Appellant is hereby correspondingly extended to 5:00 p.m. Eastern Time, 15 October 2009.

For the Court:
Mark Harvey
Assistant Clerk of Court

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN
AL BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

September 29, 2009

RULING ON REQUEST TO FILE BRIEF AS
AMICUS CURIAE

Before
WILLIAMS, CONN, THOMPSON

Request of Professor Jordan J. Paust, as Counsel for *Amicus Curiae* Human Rights Committee of the American Branch of the International Law Association, to file a brief as *Amicus Curiae* (received 23 September 2009) is hereby GRANTED.

For the Court:
Mark Harvey
Assistant Clerk of Court

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

Military Commission

October 1, 2009

ORDER: EXTENSION OF TIME TO COMPLETE R.M.C. 706 EVALUATION (D-27)

W. Thomas Cumbie
Colonel, U.S. Air Force
Military Judge

1. On 31 August 2009, the Defense filed a motion requesting an extension of time for completion of the summarized R.M.C. 706 report until 2 November 2009, and for an extension of the complete R.M.C. 706 report until 9 November 2009. The Government has not responded to this motion, but the Defense motion indicates that the Government does not oppose it. In accordance with the Commission's oral approval of the extension granted at that time, the motion is GRANTED.

2. The Commission finds that delaying the proceedings until after 9 November 2009 is in the interests of justice, as well as the best interests of both the public and the accused. Accordingly, the period of this delay will be excluded from speedy trial requirements under R.M.C. 707.

3. This order and the pleadings related to it are authorized for public release pursuant to Rule 3.9 of the Rules of Court.

So ordered this 1st day of October 2009.

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

Military Commission

October 1, 2009

ORDER: GOVERNMENT MOTION FOR CONTINUANCE
(P-003)

W. Thomas Cumbie
Colonel, U.S. Air Force
Military Judge

1. On 16 September 2009, the Government filed a motion requesting a third continuance in this case, until on or after 16 November 2009, to allow the executive branch to complete its evaluation and recommendation regarding the forum for trial of this matter, as well as for Congress to enact revisions to the and for the Department of Defense to promulgate new regulations reflecting those proposed statutory changes. The Commission previously granted the Government two continuances in the interest of justice for these reasons, for the eight months since 22 January 2009. The Defense opposes this continuance, and requests dismissal of the case.

2. On 24 August 2009, the Commission granted a Defense motion for a new sanity board in this case. On 31 August 2009, the Defense requested an additional delay in the deadlines for completing the sanity board until 9 November 2009, and that motion was granted by this Commission on 29 September 2009.

3. The Commission notes that 16 November 2009, the date requested by the United States as the end date of its requested continuance, is the first available date on which proceedings could be conducted at Guantanamo Bay after the completion of the sanity board report on 9 November 2009. Thus, the Government is requesting at most a 7 day delay beyond that already approved by this Commission, and in reality is requesting no delay at all.

4. The Military Commission finds that the facts and law regarding this motion are completely articulated in the written pleadings received, that the Defense request for oral argument essentially repeats the same arguments raised by the Defense at oral argument conducted on the second continuance motion. The Commission finds that, while there is a possibility that Congress may determine that the offense of "material support for terrorism" will not ultimately be tried in a military commission, the law has not changed. As of today, "material support for terrorism" remains a viable offense under the Military Commissions Act. The Commission finds that it would be premature to dismiss the Charge in this case based on speculation regarding what Congress may or may not do. The Commission further finds that oral argument regarding this motion would not meaningfully assist the Commission in rendering a decision in this matter.

5. Accordingly, it is ORDERED that:

(a) The Government motion for a continuance until 16 November 2009 is GRANTED. The Commission finds that the requested continuance does not delay any proceedings in this case beyond the extensions of time already granted to the Defense in this case for completion of the

R.M.C. 706 reports; that the interests of justice are served by granting the requested continuance in this case and that such interests outweigh the best interests of both the public and the accused in a prompt trial.

(b) A hearing is set to decide the mental responsibility and mental capacity of the accused on 16 November 2009 at Guantanamo Bay, Cuba.

(c) The Defense motion to dismiss the Charge and its Specifications with prejudice is DENIED.

6. All time from 23 January 2009 through 16 November 2009 will be excluded from speedy trial requirements under R.M.C. 707.

7. This order and the pleadings related to it are authorized for public release pursuant to Rule 3.9 of the Rules of Court.

So ordered this 1st day of October 2009.

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

Military Commission

October 1, 2009

ORDER: MOTION TO COMPEL PRODUCTION OF DOD GENERAL COUNSEL AS WITNESS
(D-30)

W. Thomas Cumbie
Colonel, U.S. Air Force
Military Judge

1. On 28 September 2009, the Defense filed a motion requesting this Commission to compel the production of Department of Defense General Counsel Jeh Johnson as a witness to testify regarding the Government's motion for a continuance in this case until 16 November 2009. The Government opposes the motion.

2. The Commission, having granted the Government continuance (P-003), DENIES this motion as moot.

3. This order and the pleadings related to it are authorized for public release pursuant to Rule 3.9 of the Rules of Court.

So ordered this 1st day of October 2009.

UNITED STATES OF AMERICA
Appellee

v.

SALIM AHMED HAMDAN
Appellant

Court of Military Commission Review
Case 09-002

October 21, 2009

RULING ON APPELLEE'S REQUEST TO STAY APPELLATE PROCEEDINGS

Before
BIESTER, CONN, GEISER

Appellee's request of 15 October 2009 to stay appellate proceedings and filing of the Gvernment's brief is DENIED without prejudice.

For the Court:
Mark Harvey
Deputy Clerk of Court

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN
AL BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

October 27, 2009

RULING ON APPELLEE'S REQUEST TO STAY APPELLATE PROCEEDINGS

Before
WILLIAMS, CONN, THOMPSON

Appellee's request of 15 October 2009 to stay appellate proceedings and filing of the Government's brief is DENIED without prejudice. Appellee's Responsive Brief is due not later than 4:30 p.m. Eastern Time on 30 October 2009.

For the Court:
Leroy F. Foreman
Clerk of Court

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN
AL BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

October 27, 2009

RULINGS ON REQUESTS TO FILE BRIEF
AS *AMICUS CURIAE*

Before
WILLIAMS, CONN, THOMPSON

The following motions of *Amicus Curiae* to submit a brief are GRANTED:

(1) United States Intelligence Community motion filed on 26 October 2009, and brief filed on 15 October 2009.

(2) Historians, Political Scientists, and Constitutional Law Scholars motion and brief filed on 15 October 2009.

(3) Montana Pardon Project, Clemens P. Work, and University of Montana School of Law Criminal Defense Clinic motion and brief filed on 15 October 2009.

(4) National Institute of Military Justice, Human Rights Watch, Professor Stephen I. Vladeck, and Professor David S. Weissbrodt motion and brief filed on 15 October 2009.

The Historians, Political Scientists, and Constitutional Law Scholars motion filed on 15 October 2009 to exceed page limitations is DISMISSED as moot. Brief of *Amicus Curiae* meets all page limitation requirements set forth in CMCR Rules of Practice 14 and 16.

For the Court:
Leroy F. Foreman
Clerk of Court

UNITED STATES OF AMERICA

v.

KHALID SHEIK MOHAMMED, et al.

Military Commission

October 28, 2009

ORDER: DEFENSE MOTION FOR APPROPRIATE RELIEF: RELEASE OF AUDIO AND VIDEO RECORDINGS AND TRANSCRIPT OF 21 SEPTEMBER 2009 MILITARY COMMISSION SESSION (D-134)

Stephen R. Henley
Colonel, U.S. Army
Military Judge

1. On 2 October 2009, defense counsel for Mr. bin al Shibh filed a motion for appropriate relief requesting this Commission order the production of all audio and video recordings of the Military Commission session held on 21 September 2009 in Guantanamo Bay, Cuba and production of a written transcript of that session. In a 6 October 2009 response, the Government indicated it did not oppose release of the transcript once authenticated by the military judge but did oppose release of any audio recordings. The Government asserts there are no video recordings of this hearing.

2. That part of the Defense motion requesting a copy of the authenticated transcript of the 21 September 2009 Military Commission session is GRANTED. In accordance with Rule 3.9 of the Rules of Court, the Commission directs public release of pages 1245 thru 1278. As no video tape of the session apparently exists, the Defense request to release it and the court reporter audio tapes is DENIED.

3. The Commission directs that a copy of this order be served upon the Prosecution and all defense counsel of record, and that it be provided to the Clerk of Court to have this order translated into Arabic and served upon each of the above-named accused. The underlying Defense motion and Government response will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So ordered this 28th day of October 2009.

UNITED STATES OF AMERICA

v.

AHMED MOHAMMED AHMED HAZA AL DARBI

Military Commission

October 30, 2009

DOCKETING ORDER

James L. Pohl
Colonel, U.S. Army
Military Judge

1. On 13 February 2009, the Commission granted the Government's request for a continuance until 21 May 2009. The purpose of the continuance was to give the new Administration time to review the military commission process and individual cases.

2. On 19 May 2009, the Commission granted the Government's request for a second continuance until 24 September 2009. The purpose of the continuance was to give the Administration additional time to complete its review of the military commission process and individual cases, as well as completion of any changes to the Military Commissions Act.

3. On 24 September 2009, the Commission granted the Government's request for a third continuance until 23 November 2009. The purpose of the continuance was to give the Administration additional time to complete its review of the military commission process and individual cases, as well as completion of any changes to the Military Commissions Act.

4. At the 24 September hearing, the Commission set 2 December 2009 as the date for the next hearing. The Commission also set 11 January to begin the evidentiary hearing for issues relating to the treatment of the accused and the circumstances surrounding statements allegedly taken from the accused.

5. At the 2 December hearing, the Commission will:

a. Hear oral arguments on Prosecution motion P-007 – Motion to Reconsider the Military Judge's Ruling Excluding Parts 5, 6, and 7 of the Al Qaeda Plan.

b. Hear oral arguments on Defense motion P-017 – Motion to Pre-Admit the PBS Documentary, *Torturing Democracy,* and the Documentary, *Taxi to the Dark Side.*

c. Hear oral arguments on Prosecution motion P-010 – Motion for Access to the Accused for Medical and Mental Health Evaluation and for Reciprocal Discovery Concerning Accused's Physical and Mental Health.

d. If necessary, hear oral arguments on Defense motion D-024 – Notice Regarding Military Defense Counsel.

e. Hear oral arguments on Defense motion D-025 – Motion to Halt Proceedings and Dismiss for Lack of Subject Matter Jurisdiction.

f. Address outstanding discovery issues including, but not limited to, production of Defense witness for motions and trial.

g. Update the trial schedule.

6. The Commission authorizes the public release of this order.

So ordered this 30th day of October 2009.

UNITED STATES OF AMERICA

v.

MOHAMMED KAMIN

Military Commission

November 10, 2009

DOCKETING ORDER
(MJ-005)

W. Thomas Cumbie
Colonel, U.S. Air Force
Military Judge

1. On 1 October 2009, the Commission granted the Government's request for a third continuance until 16 November 2009. The purpose of the continuance was to give the Administration additional time to complete its review of the military commission process and individual cases as well as completion of any legislative changes to the Military Commissions Act.

2. In the Order granting the continuance (P-003), the Commission set 16 November 2009 as the date for the next hearing. This was predicated upon the completion of the 706 reports which, as of this date, have just been completed and provided to the Defense. In the interim, the Defense has filed a number of motions in *U.S. v. Kamin*.

3. Accordingly at the session now scheduled for 18 November 2009, the Commission will:

a. Hear an update from the Defense on their review of the 706 reports and their expectations on a 909 hearing;

b. Hear an update from the Defense on the progress of discovery efforts;

c. Hear oral arguments on D-031, Defense Motion for Appropriate Relief: An Order for Production of Discovery: Memoranda and Opinions Regarding Providing Material Support for Terrorism;

d. Hear oral arguments on D-032, Defense Motion for Appropriate Relief: Order to Require the Government to Provide Notice of Transfer;

e. Hear oral arguments on Defense Motion D-033, Defense Motion for Appropriate Relief: An Order for Production of Discovery: Photographs of JTF-GTMO Camps; and

f. Hear oral arguments on Defense Motion D-034, Defense Motion for Appropriate Relief-An Order for Production of Discovery: Contact Information for Individuals Involved in Mr. Kamin's Capture.

g. Establish the trial schedule.

4. The Commission authorizes the public release of this order.

So ordered this 10th day of November 2009.

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN
AL BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

November 10, 2009

RULING ON MOTIONS TO ATTACH, FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND APPELLEE'S MOTION FOR WAIVER OF PAGE LIMIT

Before
WILLIAMS, CONN, THOMPSON

Appellant's Appendices A through L, submitted to the Court on 1 September 2009, Appellee's Appendices A through I, submitted to the Court on 21 October 2009 and 2 November 2009, are ADMITTED. Appellant's emails submitted on 16 and 19 October 2009 are ADMITTED.

Appellee's Motion of 21 October 2009 for Waiver of Page Limitation is GRANTED.

Appellant's Motion of 30 October 2009 for Leave to File Supplemental Brief is GRANTED, insofar as the Court's review shall be limited to the issue of sentence appropriateness under the Military Commission Act of 2009.

For the Court:
Mark Harvey
Deputy Clerk of Court

UNITED STATES OF AMERICA

v.

IBRAHIM AHMED MAHMOUD
AL QOSI

Military Commission

November 20, 2009

DOCKETING ORDER
(MJ-009)

Nancy J. Paul
Lieutenant Colonel, U.S. Air Force
Military Judge

1. The Commission has previously established 2 December 2009 as the date for the next session in this case.

2. Both the Government and Defense have filed several motions in which they requested oral arguments. Accordingly, at the 2 December 2009 session, the Commission will hear oral argument on the following:

a. D-018, Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder);

b. D-019, Defense Motion to Dismiss for Lack of Jurisdiction (Common Article 3);

c. D-020, Defense Motion to Dismiss for Lack of Jurisdiction (Equal Protection);

d. D-021, Defense Motion to Dismiss for Lack of Jurisdiction (Absence of Armed Conflict);

e. D-022, Defense Motion to Dismiss all Charges for Vagueness; and

f. D-023, Defense Motion for Article 5 Status Determination, or Alternatively, Dismissal for Lack of Personal Jurisdiction.

3. On 17 November 2009, the Government requested the Defense be ordered to provide timely notice of any change, modification, amendment or supplement to any outstanding Defense motions, as several of the outstanding Defense motions concern matters of law under the Military Commissions Act of 2006, which has been repealed. Accordingly, to prevent a delay in these proceedings, it is hereby ORDERED that the Defense provide notice of any changes, modification, amendments or supplements to any outstanding Defense motions previously filed by 1700 hours on 24 November 2009.

4. Additionally, at the 2 December 2009 Session, the Commission will establish a trial schedule.

5. The Commission authorizes the public release of this Order.

UNITED STATES OF AMERICA

v.

IBRAHIM AHMED MAHMOUD
AL QOSI

Military Commission

December 3, 2009

RULING: DEFENSE MOTION FOR ARTICLE 5 STATUS DETERMINATION, OR, ALTERNATIVELY, DISMISSAL FOR LACK OF PERSONAL JURISDICTION (D-023)

Nancy J. Paul
Lieutenant Colonel, U.S. Air Force
Military Judge

On 19 December 2008, the Defense filed a motion requesting the Commission order an Article 5 status determination, or, alternatively, dismiss the charges for lack of jurisdiction. On 9 January 2009, the Government filed a response to the motion. On 14 January 2009, the Defense filed a reply to the Government's response and, on 24 November 2009, the Defense filed an addendum to their original motion. Essentially, the Defense now asserts that the Commission lacks personal jurisdiction over the Accused under the Military Commissions Act (MCA) of 2009, as it has not yet been determined that the accused is an alien unprivileged enemy belligerent. The Government opposed the original motion, arguing, in part, that the military judge may determine the accused's status at trial. No written response was provided by the Government as to the Defense amended motion. All documents submitted to the Commission, as well as arguments presented by both sides, were considered in making the following finding.

FACTS

1. On 8 February 2008, the Convening Authority referred the charges and specifications against the accused to trial by military commission, alleging he was subject to trial by military commission as an alien unlawful enemy combatant under the Military Commission Act (MCA) of 2006.

2. On 28 October 2009, changes to the MCA were enacted, and the MCA of 2009 changed the jurisdiction of a military commission to offenses committed by an alien unprivileged enemy belligerent.

3. On 24 November 2009, the Government requested that they be allowed to amend the charges to conform with the new jurisdictional requirements of the MCA of 2009. The Commission had ruled that the Government is allowed to make a change to the charge sheet by deleting the words "alien unlawful enemy combatant" and substituting therefore the words "alien unprivileged enemy belligerent." Thus, it is likely that the Government will be alleging the accused is subject to trial by military commission as an alien unprivileged enemy belligerent.

LAW AND DISCUSSION

4. The burden is on the Government to show by a preponderance of the evidence that the accused is subject to the jurisdiction of this Commission.

5. As discussed above, 10 U.S.C. § 948c, MCA of 2009 states that military commissions have personal jurisdiction over any

alien unprivileged enemy belligerent. 10 U.S.C. § 948a, MCA of 2009, defines an unprivileged enemy belligerent as an individual (other than a privileged belligerent) who (A) has engaged in hostilities against the United States or its coalition partners: (B) has purposely and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the offense alleged. It further defines privileged belligerent as an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.

6. To date, no military commission or any other forum has found the accused to be an alien unprivileged enemy belligerent. The accused is within his rights to request such a determination. He is, in essence, properly challenging the personal jurisdiction of the Military Commission through this motion to dismiss.

7. 10 U.S.C. § 948d, MCA of 2009, states that a military commission is a competent tribunal to make a finding sufficient for jurisdiction. While the Defense asserts that the only competent authority to make such a determination is an Article 5 hearing, applying the procedures set forth in Army Regulation (AR) 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, this Commission does not concur. While AR 190-8 may provide useful guidance, that regulation is not determinative of jurisdiction in a military commission. Additionally, this Com-mission does not concur with the Government's assertion that the military judge should defer determination on the accused's status until conclusion of the presentation of the evidence at trial.

8. Under the MCA of 2009 and current commission case law, the military judge has the power and authority to hear evidence concerning and ultimately decide the accused's status and whether jurisdiction attaches. When challenged by the accused, a determination regarding personal jurisdiction should be made by the military judge prior to presentation of any evidence on the merits. In addition, under Rule for Military Commissions 201, a military commission always has the authority to determine whether it has jurisdiction.

9. The determination of an individual's combatant status for purposes of establishing a commission's jurisdiction does not preclude him from raising any affirmative defenses, nor does it obviate the Government's obligation to prove beyond a reasonable doubt the elements of each substantive offense. In other words, a pretrial finding by the military judge by a preponderance of the evidence that the accused is an alien unprivileged enemy belligerent does not eliminate the requirement for the commission members to find beyond reasonable doubt the accused's status if an element of the offense.

CONCLUSION

Wherefore, based on the above, the Defense position that an Article 5 status tribunal is a prerequisite to establishing the jurisdiction of this Commission is rejected, and the relief sought from that position is denied. The Government request that this Commission defer ruling on its personal jurisdiction over the accused until after the presentation of proof at trial is also denied. A hearing will be held 6 January 2010, at which time the Government will be required to establish personal jurisdiction of the accused by a preponderance of the evidence.

UNITED STATES OF AMERICA

v.

IBRAHIM AHMED MAHMOUD
AL QOSI

Military Commission

December 3, 2009

RULING: GOVERNMENT MOTION TO
AMEND CHARGES
(P-010)

Nancy J. Paul
Lieutenant Colonel, U.S. Air Force
Military Judge

On 24 November 2009, the Government filed a Notice to Amend Charges. On 2 December 2009, the Government orally presented this Motion, providing the Commission and Defense with the proposed Amended Charges (AE 49). All documents submitted to this Commission, as well as arguments presented by both sides, were considered in making the following finding.

FACTS

1. On 8 February 2008, two charges, each consisting of a single specification, were originally sworn against the accused alleging conspiracy and providing material support for terrorism. The offenses were referred by the Convening Authority on 5 March 2008, under the authority of the Military Commissions Act of 2006.

2. The accused was arraigned on these charges on 10 April 2008. Since then, the Commission has convened sessions on numerous occasions, including 22 May 2008, 23 July 2008, 19 November 2008, 15 July 2009, 21 October 2009 and 2 December 2009, the last session being in accordance with the Military Commissions Act (MCA) of 2009.

3. As reflected in the proposed changes, the Government seeks permission to amend the charges as follows:

a. Delete "alien unlawful enemy combatant" and substitute "unprivileged enemy belligerent";

b. Amend the acts alleged in paragraphs a through i of the original Charge I, Conspiracy, to those in paragraphs a though l of AE 49; and

c. Expand the time frame for the acts alleged in Charge I, Conspiracy, and Charge II, Providing Material Support for Terrorism, by four years, that is, from 1996 to 1992.

LAW AND DISCUSSION

4. The MCA of 2009, 10 U.S.C. § 1804(c), CHARGES AND SPECIFICATIONS, states, in pertinent part:

"SEC. 1804. PROCEEDINGS UNDER PRIOR STATUTE

-Not withstanding the amendment made by section 1802-

(1) any charges or specifications sworn or referred pursuant to chapter 47A of title 10, United States Code (as such chapter was in effect on the day before the date of the enactment of this Act), shall be deemed to have been sworn or referred

> pursuant to chapter 47A of title 10, United States Code (as amended by SECTION 1802); and
>
> (2) any charges or specifications described in paragraph (1) may be amended, without prejudice, as needed to properly allege jurisdiction under chapter 47A of title 10, United States Code (as so amended), and crimes triable under such chapter."

5. This is an issue of first impression for military commissions. However, under the guidance provided by 10 U.S.C. §948b(c), while the Uniform Code of Military Justice (UCMJ) does not, by its terms, apply to trial by military commission, the procedures for military commission are based upon the procedures applicable to general courts-martial and may be used as a reference. The Commission notes that the Rules for Courts-Martial (R.C.M) and the 2006 Rules for Military Commission (R.M.C), which is not likely to substantially change even if amended in accordance with the MCA of 2009, are substantially identical regarding changes to charges and specifications.

6. Under both R.M.C. 603 and R.C.M. 603, changes to referred charges are considered as either "minor" or "major." R.M.C. 603 states: "Minor changes in charges and specifications are any except those which add a party, offenses or substantial matter not fairly included in those previously preferred or which are likely to mislead the accused as to the offenses charged."

7. The discussion accompanying the R.M.C. 603(a) adds clarity by stating that:

> "Minor changes include those necessary to correct inartfully drafted or redundant specifications; to correct a misnaming of the accused; to allege the proper article; or to correct other slight errors. Minor charges also include those which reduce the seriousness of an offense, as when the value of an allegedly stolen item in a larceny specification is reduced, or when a desertion specification is amended to allege only unauthorized absence."

8. In contrast, R.M.C. 603(d) directs that major changes may not be made over the objection of the accused unless the charges are withdrawn and re-referred. R.M.C. 603 directs that changes or amendments to charges or specifications other than minor changes may not be made over the objection of the accused unless the charge or specification is preferred anew. The Defense has objected to the amendments proposed by the Government.

9. Each of the Government's proposed amendments must be addressed separately as their impact differs. The MCA of 2009, 10 U.S.C. §948c, states that any alien unprivileged enemy belligerent is subject to trial by military commission. Thus, the substitution of the term "unprivileged enemy belligerent" for "alien unlawful enemy combatant" is clearly jurisdictional in nature and directly authorized by the MCA of 2009. As a matter of note, the jurisdictional language and the proposed change in this regard, under the normal charging practices of the UCMJ, this change would be considered "minor" in nature.

10. However, the proposed amendments to the overt acts alleged in Charge I are more troubling in nature, as the four-year expansion of time and addition of overt acts dra-

matically change the nature of the offense alleged. When considering the distinction between "minor" and "major" amendments to charges and specifications, the military appellate system has focused on a two-pronged test used by our federal system. (*see U.S. v. Sullivan,* 42 M.J. 360; 1995 CAAF LEXIS 87; *U.S. v. Moreno,* 46 M.J. 216; 1997 CAAF LEXIS 1372; and *U.S. v. Smith*, 49 M.J. 269; 1998 CAAF LEXIS). Essentially, amendment is permitted if no new or additional offenses are charged and if the substantial rights of the accused are not prejudiced. As to the second test, *Sullivan* sets out the proposition that what must be avoided is denying the accused a chance to effectively defend himself by failing to provide notice of the charges he is facing.

11. In the case at hand, trial preparation has been ongoing for almost 2 years, numerous motions have been filed and numerous sessions have been held based on the charges referred in February 2008. In contrast, the Government now proposes expanding the time frame of the offenses alleged from five years (1996-2001) to nine years (1992-2001), as well as the general substance of the overt acts alleged in Charge I. While the basic elements of the offense conspiracy do not change, nor is a greater punishment possible, the scope of the crimes the accused must defend against will have shifted dramatically. The Government does not seek to "correct a slight error" with these amendments; rather, it seeks to fundamentally alter the charges against the accused. Therefore, the proposed changes, in regards to the overt acts alleged, are major changes which cannot be made over the objection of the accused at this point in the proceedings.

CONCLUSION

12. The proposed deletion of the words "alien unlawful enemy combatant" and substitution of the words "unprivileged enemy belligerent" in each charge is specifically authorized under the MCA of 2009 and is not only a minor change but also one needed to properly allege jurisdiction. It is therefore, allowed.

13. However, the changes proposed by the Government in regards to the overt acts alleged in Charge I and the time periods alleged in Charge I and Charge II are essentially new and additional offenses and contain substantial matters not fairly included in those previously referred. Additionally, significantly changing the charges and specifications at this juncture at this point in the Commission process brings unfair surprise to the accused.

Wherefore, based on the above, the Government's motion to amend the charges is granted, in part only. The Government may amend the charges and specifications by changing the jurisdictional basis for the charges from "alien unlawful enemy combatant" to "alien unprivileged enemy belligerent." All other proposed amendments are denied.

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN
AL BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

December 10, 2009

RULING ON REQUESTS FOR ORAL ARGUMENT

Before
CONN, THOMPSON, PRICE

The 23 September 2009 request for oral argument of the Human Rights Committee of the American Branch of the International Law Association as *Amicus Curiae* is DENIED. The parties' requests for Oral Argument are GRANTED, as to the following issues:

I. Was Appellant's communication protected by the First Amendment?

II. Did the Military Commission have jurisdiction over all of the charges and specifications?

III. Did Charge III and its Specification regarding providing Material Support to Terrorism violate the Ex Post Facto clause of the United States Constitution?

The parties are further granted leave to present arguments on the issue of sentence appropriateness. With respect to Issues I and III, the parties should not address the adequacy or legal sufficiency of the Military Judge's instructions.

Oral argument will be heard on 26 January 2010 at 10:00 A.M. Eastern Time in Courtroom 201, United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC.

For the Court:
Leroy F. Foreman
Clerk of Court

UNITED STATES OF AMERICA
Appellee

v.

SALIM AHMED HAMDAN
Appellant

Court of Military Commission Review
Case 09-002

December 23, 2009

RULING ON REQUESTS FOR ORAL ARGUMENT, TO ADMIT APPELLANT'S REPLY BRIEF, AND TO ADMIT BRIEFS OF *AMICUS COUNSEL*

Before
CONN, GEISER, BRAND

Appellant's request of 8 December 2009 for leave to file a reply brief is GRANTED. Appellant's request of 8 December 2009 for oral argument is GRANTED, as to the following issues:

I.

Whether the sole offense of which Appellant was convicted: material support for terrorism, under 10 U.S.C. §950u, is a violation of the law of war?

II.

Whether Appellant's conviction violates *ex post facto* law?

Leave for the following to submit a brief as *Amicus Curiae* is GRANTED:

(1) National Institute of Military Justice, motion filed 4 December 2009, and brief filed 4 December 2009.

(2) Constitutional Law Scholars, brief filed 4 December 2009.

(3) Professors Geoffrey Corn and Victor Hansen, brief filed 4 December 2009.

Request of 4 December 2009 of National Institute of Military Justice as *Amicus Curiae* to participate in oral argument is DENIED.

Oral argument will be heard at 2:00 P.M. Eastern Time on January 26, 2010, in Courtroom 201, United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC.

For the Court:
Mark Harvey
Deputy Clerk of Court

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Military Commission

December 16, 2008

RULING: DEFENSE MOTION FOR APPROPRIATE RELIEF FOR PRODUCTION OF WITNESSES
(D-095, 096, 097, 098, 099, 100, 101, 102, and 103)

Patrick J. Parrish
Colonel, U.S. Army
Military Judge

1. The Defense requests the Commission order the production of certain witnesses as set out in the Defense motions D-095 through D-103. The Government opposes the production of all of the witnesses except for those requested in D-096 and D-103.

2. The Commission rules as follows on the production of the witnesses which the Government opposes:

a. D-095:

1. The Government will make arrangements for Soldier #2 to testify on the merits.

2. The motion to produce [REDACTED] is denied. The Defense has not provided a sufficient proffer of his testimony to show that he is relevant and necessary.

b. D-096: The Government has agreed to make arrangements for Soldiers #3, #5, and #7 to testify.

c. D-097:

1. The Government will make arrangements for [REDACTED] to testify subject to paragraph 3 below.

2. The motion to produce [REDACTED] is denied. The Defense has not provided a sufficient proffer of his testimony to show that he is relevant and necessary.

d. D-098: The Government will make arrangements for [REDACTED] to testify subject to paragraph 3 below.

e. D-099: The motion to produce [REDACTED] is denied. The Defense has not provided a sufficient proffer of his testimony to show that he is relevant and necessary.

f. D-100: The Government will make arrangements for [REDACTED] to testify.

g. D-101: The Government will make arrangements for [REDACTED] to testify subject to paragraph 3 below.

h. D-102: The motion to produce Navy [REDACTED] is denied. The Defense has not provided a sufficient foundation for [REDACTED] proffered testimony.

i. D-103: The Government has agreed to make arrangements for the testimony of [REDACTED].

3. The defense counsel apparently have not talked to [REDACTED] in order to verify

that each will testify in accordance with the Defense's proffer. The defense counsel did not ask for assistance from the trial counsel to talk to any of these witnesses after their efforts to contact each witness was unsuccessful. The defense counsel must contact each of these witnesses to verify that the witness' testimony will be consistent with the proffered testimony. The defense counsel may ask the trial counsel for assistance in contacting these witnesses. The defense counsel must respond in writing to the Commission no later than 9 January 2009 advising the Commission that it has contacted each witness and verified the proffered testimony or explain why those efforts have been unsuccessful. Failure to do so may result in the Commission not requiring the Government to make arrangements for a witness' testimony at trial.

So ordered this 16th day of December 2008.

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Military Commission

July 16, 2009

ORDER

Patrick J. Parrish
Colonel, U.S. Army
Military Judge

1. The Government requests the Commission grant an additional 120-day continuance of these proceedings until 16 September 2009. The Defense opposes the request and submits that all charges should be dismissed. See P-012.

2. On 22 January 2009 the President issued Executive Order 13493, establishing a Special Interagency Task Force on Detainee Disposition ("Detention Policy Task Force" or "Task Force") "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." The Task Force has not yet completed its comprehensive review. However, changes to the rules which govern the Military Commissions are expected.

3. Mr. Khadr advised the Commission at the R.M.C. 803 session on 15 July 2009 that he has retained civilian counsel. The Chief Defense Counsel conditionally approved the admission of the retained civilian counsel into the pool of qualified defense. The retained civilian defense counsel has been advised to start the process to obtain the necessary security clearance. See Appellate Exhibit 209.

4. As the Commission ordered at the R.M.C. 803 session on 15 July 2009, LCDR Kuebler remains on the case as a detailed military defense counsel, for now. Mr. Khadr and his retained civilian defense counsel may ask the Commission to revisit the issue of the accused excusing LCDR Kuebler after it is determined the civilian defense counsel meets all of the qualifications under Regulation for Trial by Military Commissions, paragraph 9-5b1. LCDR Kuebler will have reasonable access to communicate with Mr. Khadr and the government will provide LCDR Kuebler with transportation to Guantanamo on scheduled flights as is reasonably appropriate to perform his duties as a detailed defense counsel.

5. The Commission finds in light of the ongoing review by the Task Force and Mr. Khadr retaining civilian defense counsel that:

a. The 120-day continuance in these proceedings previously granted by the Commission was in the interests of justice.

b. The request for an additional 120-day continuance in these proceedings is in the interests of justice.

c. It is in the interests of justice to provide Mr. Khadr's retained civilian defense counsel a reasonable time to obtain the appropriate security clearance in order to prepare for trial.

6. Accordingly:

a. The request by the Government for an additional 120-day continuance until 16 September 2009 is granted.

b. The delay between the original request for a continuance on 21 January 2009 and 16 September 2009 is excluded when determining whether any time period under R.M.C. 707(a) has run.

So ordered this 16th day of July 2009.

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Military Commission

October 7, 2009

ORDER

Patrick J. Parrish
Colonel, U.S. Army
Military Judge

1. The Government requests the Commission grant an additional 60-day continuance of these proceedings until 16 November 2009. Mr. Khadr's recently retained civilian counsel is in the process of reviewing the discovery in this case and do not oppose the request.

2. On 22 January 2009 the President issued Executive Order 13493, establishing a Special Interagency Task Force on Detainee Disposition ("Detention Policy Task Force" or "Task Force") "to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice." The Task Force has not yet completed its comprehensive review.

3. The Commission finds in light of the ongoing review by the Task Force and Mr. Khadr retaining civilian defense counsel that the request for an additional 60-day continuance in these proceedings is in the interests of justice.

4. Accordingly:

a. The request by the Government for an additional 60-day continuance until 16 November 2009 is granted.

b. The delay between the original request for a continuance on 21 January 2009 and 16 November 2009 is excluded when determining whether any time period under R.M.C. 707(a) has run.

So ordered this 7th day of October 2009.

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Military Commission

May 3, 2010

ORDER: GOVERNMENT MOTION FOR APPROPRIATE RELIEF TO COMPEL MENTAL HEALTH EXAMINATION OF THE ACCUSED

Patrick J. Parrish
Colonel, U.S. Army
Military Judge

1. The Government filed a motion for the Commission to enter an order compelling the accused to undergo a mental health examination by a Government forensic psychiatrist and clinical psychologist. The Defense opposes the motion. See P-023. The Commission has considered the briefs filed by the parties and the oral argument.

2. The Defense is contesting the admissibility of the accused's statements obtained during interviews alleging, *inter alia*, they are: the product of torture; involuntary; unreliable; and do not serve the interest of justice. *See* D-094, *Supplemental Defense Motion*. In support of its motion to suppress the Defense is offering the testimony of [REDACTED] a clinical psychologist, and [REDACTED] a psychiatrist. The proffered testimony clearly places the accused's mental state at issue surrounding the accused's statements being offered by the Government.

3. [REDACTED] and [REDACTED] interviewed and evaluated the accused, each spending over 100 hours with the accused. (See the Declaration of [REDACTED] and letter from [REDACTED] attached to P-023). The accused certainly is entitled to contest the admissibility of any of his pretrial statements; however, he may not do so without consequences. A consequence is that, to the extent the accused may have a privilege against self-incrimination, the accused waives any such privilege when he seeks to introduce his experts' testimony and their evaluations.

4. The Government has the burden of proof by a preponderance of the evidence that the accused's statements are admissible. *See* Military Commission Rule of Evidence 304(d)(1), M.M.C. The Government has the right to attempt to rebut evidence presented by the Defense. The Government is not fairly able to address the allegations of the Defense without similar access to the accused. The requested evaluation is analogous to the situation wherein the Defense asserts lack of mental competence as a defense. In such a case, the Government has the right to access to the accused to conduct its own evaluation. In *United States v. Babbidge*, 40 C.M.R. 39 (C.M.A. 1969) the court ruled "[w]hen the accused opened his mind to a psychiatrist in an attempt to prove temporary insanity, his mind was opened for a sanity examination by the Government." *Id.* at 44. In this case, when the accused opened his mind to his Defense experts, he opened his mind for a similar evaluation by Government experts. The Commission ordered an evaluation of the accused under the provisions of Rule for Military Commission (R.M.C.) 706 on 14 August 2008. The accused provided minimal cooperation. The board which conducted the mental evaluation was able to address only

the basic questions concerning the accused's competence. The accused certainly did not cooperate with the R.M.C. 706 mental evaluation to the same extent he cooperated with the Defense experts. Thus, the prior R.M.C. 706 evaluation is not an adequate substitute for the requested evaluation because it did not address the current issue before the Commission.

5. The Commission orders the following:

a. The motion requesting an order compelling the accused to undergo a mental health examination by a Government forensic psychiatrist and clinical psychologist similar to the mental health examination conducted by the Defense experts as detailed in the affidavits submitted by the Government psychologist and psychiatrist attached to P-023 is granted.

b. The Government request to conduct this evaluation prior to the Defense experts testifying during the suppression motion is granted.

c. The Government request for a continuance after the presentation of its evidence at the suppression motion is granted for a period of 4 weeks.

d. The Defense will notify the Commission and the Government in writing not later than 7 May 2010 whether the accused will cooperate in the Commission-ordered evaluation.

e. The Government experts may not start the evaluation of the accused until after the Defense complies with paragraph 5d of this order. The 4 week period for the Government to complete its requested evaluations starts on 10 May 2010.

So ordered this 3rd day of May 2010.

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Military Commission

July 8, 2010

SCHEDULE ORDER

Patrick J. Parrish
Colonel, U.S. Army
Military Judge

1. The Commission held a telephonic R.M.C. 802 conference with counsel on 7 July 2010. We discussed issues concerning representation of the accused. The Commission will hold a hearing on 12 July 2010 at 0900 at Guantanamo Bay, Cuba, to discuss this and other issues with the accused. The detailed military defense counsel will be present at that hearing. The civilian counsel currently representing the accused are excused from the hearing based on the representation in D-117.

2. At the request and urging of the Government, the Commission will not order any experts to be present to testify during the continuation of the suppression hearing currently scheduled to start on 12 July 2010. If it becomes necessary for experts to testify for the purpose of the suppression hearing, the Commission will schedule a date for that purpose. In the event the experts are required to testify at a future suppression hearing, counsel need to be aware that may very well cause the current trial date to be moved.

3. So ordered this 8th day of July 2010.

UNITED STATES OF AMERICA

v.

NOOR UTHMAN MUHAMMED
Military Commission

July 9, 2010

ORDER: DEFENSE MOTION FOR APPOINTMENT OF EXPERT CONSULTANT (D-023)

Moira D. Modzelewski
Captain, U.S. Navy
Military Judge

1. On 18 June 2010 the Defense requested the Commission order the appointment of Dr. [REDACTED] to the defense team as an expert consultant in the field of clinical psychology and order that he be authorized to perform up to at least 200 hours of services for the Defense. The Government opposes this request.

2. Noor has been in the custody of the United States since March 2002. During his detention in Pakistan, Bagram and Guantanamo he has been interrogated numerous times: some of these statements are likely to be offered into evidence by the Government. He also complains of [REDACTED]. These complaints, as well as his cultural, linguistic, and religious background are relevant, especially if the case proceeds to sentencing. The Commission finds that expert assistance in the form of clinical psychology would be beneficial to the Defense in preparation of its case on the merits and sentencing, if the case reaches the sentencing phase.

3. The Commission is mindful that the Defense has specifically requested Dr. [REDACTED]; however, the Defense has not shown a necessity for such a specific request. Accordingly, the request is granted in part and denied in part. The Government will appoint an expert who is comparably qualified as the requested expert in the field of clinical psychology with similar qualifications to work for the Defense. If the Government is unable to find such a comparably qualified expert, the Government will appoint Dr. [REDACTED] to work for the Defense. Any such expert appointed to work for the Defense will be a member of the Defense team.

4. The Government will comply with this order no later than 26 July 2010.

So ordered this 9th day of July 2010.

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Military Commission

July 29, 2010

RULING: DEFENSE MOTION TO COMPEL THE PRODUCTION OF WITNESSES (D-118)

Patrick J. Parrish
Colonel, U.S. Army
Military Judge

1. The Defense requests the Commission compel the production of certain witnesses for trial on the merits. The Government opposes this motion in part. The Government waived oral argument. The Defense waived oral argument for all witnesses except as to Professor [REDACTED].

2. The Commission's ruling is as follows:

a. Mr. [REDACTED]: The motion to produce Mr. [REDACTED] is granted. However, he may testify via video-telephone conference (VTC).

b. Interrogator #1: The motion to produce Interrogator #1 is granted. Interrogator #1 will testify in-person unless the Government justifies his testimony via VTC in accordance with R.M.C. 703(c)(3).

c. Interrogator #2: The motion to produce Interrogator #2 is granted. Interrogator #2 will testify in-person unless the Government justifies his testimony via VTC in accordance with R.M.C. 703(c)(3).

d. Mr. C: During the suppression hearing Mr. C testified that he never heard or witnessed any abuse of the accused. Mr. C. testified that personnel generally were more friendly to the accused than other detainees because of the accused's age. Most of the testimony of Mr. C concerns the alleged treatment of detainees other than the accused.

The accused, in his affidavit, makes a number of allegations concerning his treatment at the hands of interrogators. The Commission admitted the accused's affidavit for the sole purpose of the suppression hearing pursuant to Military Commission Rule of Evidence 104(a). The Commission will give it, along with all the other evidence, the weight the Commission believes it deserves when it rules on the suppression motion. However, the Commission has not admitted the accused's affidavit for the merits portion of the trial.

It appears the Defense believes Mr. C. would be able to help corroborate the allegations the accused makes through testimony of how detainees other than the accused were treated. If the accused's allegations of mistreatment are before the court members in an admissible form of evidence, Mr. C's testimony becomes relevant and necessary. Until the allegations the accused makes in his affidavit are before the court members in an admissible form of evidence, the Commission finds Mr. C's testimony is not relevant or necessary.

Accordingly, the Government will make arrangements for the testimony of Mr. C. However, the Commission will not order Mr. C to testify in-person or via VTC until the accused's allegations in his affidavit are before the court members in an admissible form of evidence.

e. Soldier #2: The motion to produce Soldier #2 is granted. Soldier #2 will testify in-person unless the Government justifies his testimony via VTC in accordance with R.M.C. 703(c)(3).

f. Soldier #3: The motion to produce Soldier #3 is granted. Soldier #3 will testify in-person unless the Government justifies his testimony via VTC in accordance with R.M.C. 703(c)(3).

g. Soldier #5: There are numerous witnesses testifying on what happened during and after the firefight in July 2002. The testimony of Soldier #5 is cumulative. The motion to produce Soldier #5 is denied.

h. Soldier #7: The motion to produce Soldier #7 is granted. Soldier #7 will testify in-person unless the Government justifies his testimony via VTC in accordance with R.M.C. 703(c)(3).

i. Soldier #8: There are numerous witnesses testifying on what happened during and after the firefight in July 2002. The testimony of Soldier #8 is cumulative. The motion to produce Soldier #8 is denied.

j. [REDACTED] The Defense has not talked to Mr. [REDACTED]. The Defense has not proffered the substance and circumstances of the statements the accused made to Mr. [REDACTED] which would allow the Commission to determine if they are exculpatory and admissible under Military Commission Rule of Evidence 803. The motion to produce Mr. [REDACTED] is denied.

k. Interrogator #3: The motion to produce Interrogator #3 is granted. Interrogator #3 will testify in-person unless the Government justifies his testimony via VTC in accordance with R.M.C. 703(c)(3).

l. Dr. [REDACTED]: The testimony of this witness relates solely to sentencing and would be admissible under R.M.C. 1001(c)(1)(B). The Defense has not shown how the in-person testimony of this witness is necessary under R.M.C. 1001(e)(2). If there is a sentencing hearing, the Government will arrange for the testimony of Dr. [REDACTED] via VTC.

m. Professor [REDACTED]: The Defense did not waive oral argument for the production of this witness and did not waive calling this witness for the purpose of this motion. The Commission finds that an evidentiary hearing and oral argument would not be helpful for the determination of this motion. *See* R.M.C. 905(h). The Defense is certainly entitled to argue to the Commission what it believes the law is and may cite authority as it deems appropriate as is done in any brief submitted to the Commission. The Commission instructs the court members as to the law. The court members are required to follow the law as the Commission instructs, not as a law professor opines. The motion to produce Professor [REDACTED] is denied.

n. Dr. [REDACTED]: It is not clear that the Defense has talked to Dr. [REDACTED] in order to have a sufficient basis to provide a synopsis of her expected testimony. The Defense has not explained how the testimony of Dr. [REDACTED] is necessary to its case. The motion to produce Dr. [REDACTED] is denied.

So ordered this 29th day of July 2010.

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Military Commission

August 3, 2010

RULING: GOVERNMENT MOTION FOR APPROPRIATE RELIEF TO AMEND THE CHARGES AND SPECIFICATIONS
(P-028)

Patrick J. Parrish
Colonel, U.S. Army
Military Judge

1. The Government requests to make certain amendments to the Charges and Specifications to conform to the Military Commissions Act (MCA) of 2009. The Defense opposes the motion. Both sides waived oral argument.

2. The MCA of 2009 provides that "any charges and specifications…may be amended, without prejudice, as needed to properly allege jurisdiction under chapter 47A of title 10, United States Code (as so amended), and crimes triable under such chapter." 10 U.S.C. § 1804(c).

3. Substituting the word "hostilities" for the phrase "armed conflict" in the specifications of Charges I, II, IV, and V and inserting the phrase "while in the context of and associated with hostilities" in the specification of Charge III are changes authorized by section 1804(c)(2) of the MCA of 2009. The amendments are not major changes in violation of Rule for Military Commission 603.

4. The motion to make the requested amendments is granted.

So ordered this 3rd day of August 2010.

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Military Commission

August 17, 2010

RULING: SUPPRESSION MOTIONS
(D-094 & D-111)

Patrick J. Parrish
Colonel, U.S. Army
Military Judge

1. The Defense moves to suppress certain statements made by the accused as set out in its briefs submitted in support of D-094. The Defense alleges such statements are the product of torture, involuntary, unreliable, do not serve the interest of justice, and are fruit of the poisonous tree. Their admission, the Defense alleges, is prohibited under § 948r of the Military Commissions Act of 2009 (MCA) and Military Commissions Rule of Evidence (M.C.R.E.) 304. The Defense also moves to suppress the videotape found at the compound where the firefight occurred as set out in its brief submitted in support of D-111. The Defense alleges the videotape was found only as a result of statements obtained improperly from the accused. The Government opposes both motions.

2. The Commission has considered the briefs, the witnesses' testimony, all the other evidence offered during the suppression hearing, and the oral arguments and finds as follows:

a. The accused engaged in a firefight with U.S. forces in Khost, Afghanistan, on 27 July 2002. The accused was severely wounded during the course of the firefight and was captured after the firefight ended. The U.S. forces treated the accused at the scene and transported him to Bagram Airfield, Afghanistan, where U.S. medical personnel operated on the accused and saved his life. The accused received world class medical care from the time he was captured and continues to receive the same world class medical care throughout his detention.

b. The accused was 15 years old at the time of his capture. The accused received limited formal education and received some home schooling prior to his capture; however, the accused speaks several languages, including English. The accused speaks English well enough that he did not need an interpreter to communicate effectively with U.S. forces, U.S. medical personnel, or any other U.S. personnel. At times the accused would volunteer to help translate for U.S. personnel and other detainees.

c. The accused alleges in his affidavit that he was mistreated while he was in the hospital in Bagram. The overwhelming credible evidence is that the accused was not mistreated while he was in the hospital in Bagram. The accused was treated professionally and humanely during his entire stay in the hospital in Bagram which included more than one surgery for the wounds he suffered during the firefight. An ophthalmologist, Dr. [REDACTED], flew to Bagram from Kuwait for the sole purpose of operating on the accused's eyes. Dr. [REDACTED] detected no signs of abuse or mistreatment of the accused. The accused made no complaints to her of any mistreatment. There is no evidence which in any way supports the accused's allegations of mistreatment while he was a patient at the Bagram Hospital. Detainees were not allowed to be interrogated while hospitalized without approval by a doctor and then interrogators were only allowed to ask basic identifying information. There is no credible evidence this rule was violated.

d. Interrogator #2 interviewed the accused at Bagram one time on 12 August 2002. The accused had been medically cleared to be interviewed. That interview lasted about 90 minutes and was in the afternoon. The accused was not wearing a hood over his head. No dogs were present during the interview. The accused was on a stretcher during the interview. The accused appeared to be tired at one point, but he never companied about being in pain. The accused appeared to understand what was happening. No one yelled at, threatened, or otherwise abused the accused during the interview. The accused gave a false name and said he was from Pakistan. The accused said nothing about being a Canadian citizen. The accused talked about being on a mission as a translator. The accused was not abused in any way during that interview.

e. Mr. "M", a combat medic, was the noncommissioned officer in charge for medical care for detainees at the Bagram detention facility from 17 August 2002 to late February 2003. Mr. "M" met the ac-

cused while performing his duties as a medic. The detainees received the same level of medical care as U.S. and allied military forces. Mr. "M" regularly changed the dressing on the accused's wounds. He saw the accused at least twice each day. The accused's wounds on his chest and back appeared to be healing quickly. The accused was very cooperative and volunteered to help with translation with other detainees because the accused spoke English very well. He never saw any indication that the accused was mistreated when his bandages were changed. The accused never complained to him about any mistreatment. The accused exhibited no signs of fresh wounds or that he was forced to urinate on himself as he alleges in his affidavit. Mr. "M" saw no signs the accused had been physically abused. He did not think the accused was physically unfit to be interrogated. The Commission specifically finds no evidence which supports the accused's allegations he was medically mistreated while at the Bagram detention center or elsewhere.

f. Mr. "M" saw the accused handcuffed to a bar in the sally port of his cell one time. The accused's hands were slightly above eye level with a hood on his head. The accused seemed stressed but did not complain about being in any pain. The accused said this treatment was unfair and he was no longer willing to help with translation with other detainees. There is no evidence that accused made any statements to any interrogator in response to being handcuffed in the sally port of his cell. Mr. "M" saw the accused on the day he was to be transported to GTMO. The accused looked emotional and scared. The accused told Mr. "M" that what he had been told about the Americans was wrong, implying that he had been told American forces would mistreat him.

g. Mr. [REDACTED] was an interrogator who worked at the Bagram detention center while the accused was detained there. He was present during the normal in-process screening of the accused at the Bagram hospital, but he was not present during any interrogations of the accused. There is no evidence the accused was threatened or in any way mistreated during the normal in-process screening. Mr. [REDACTED] talked to the accused several times after the accused had been released from the hospital and was being held at the detention facility, though this was not during any interrogations of the accused. The accused seemed like a typical 15-year-old. Mr. [REDACTED] had a soft spot for the accused and would provide him with books, magazines, and drinks. Mr. [REDACTED] said that people were generally friendlier with the accused then other detainees because of the accused's age. The accused never mentioned anything to Mr. [REDACTED] about being threatened, abused, or mistreated.

h. Interrogator #17 worked at the Bagram detention facility from the fall of 2002 to early 2003. He did not interrogate the accused, and he did not witness any interrogation of the accused while the accused was at the Bagram detention center. He did not talk to anyone about the accused while the accused was at the Bagram detention center, though he knew the accused was a young detainee

from Canada. The interrogators took precautions with younger detainees so no one would take advantage of them. He thought the accused was somewhat immature in the way he communicated and because of his interest in car magazines. Interrogator #17 remembers two specific interactions with the accused while at the Bagram detention center. While a doctor was treating the accused, the accused asked questions and seemed in good spirits. Another time Interrogator #17 remembers seeing the accused and the accused started a conversation with him. The accused seemed more Westernized than the other detainees. Interrogator #17 said that guards looked out for the accused because of his age and wounds. It appeared to him the accused became healthier as time passed. He never saw the accused crying, shackled, or wearing a hood over his head. He never heard of any allegations of abuse towards the accused.

i. Interrogator #1 was the lead interrogator for the accused while the accused was at the Bagram detention center. He interrogated the accused 20-25 times. He always interrogated the accused in an interrogation room. He never interrogated the accused in the hospital. He used a "fear up" technique as a last resort with the accused. It is a technique used to attempt to raise the fear level of the detainee. He, at times, used a harsh tone of voice with the accused by yelling and cursing at the accused if he caught the accused in what he thought were lies. The accused told him he did not like the cursing and stopped talking to Interrogator #1 at one point because of the cursing. Interrogator #1 one time "got into the accused's face" by yelling at him and flipping a bench so it made a loud noise. The "fear up" technique included the use of stress positions on detainees who were healthy enough to endure that technique. Interrogator #1 never used the stress position technique on the accused. He never inflicted pain on or tried to injure the accused. He never used any dogs while interrogating the accused.

j. During one of the interrogations, Interrogator #1 told the accused a fictitious story about a detainee, an Afghan male, who lied to interrogators and was sent to a U.S. prison for lying. There were "big, black guys" in the prison. The Afghan male was a kid away from home who they could not protect. The Afghan male got hurt when the "big, black guys" raped him in the showers. This fictitious story was unsuccessful in obtaining information from the accused. The "fear up" technique was also not successful in obtaining information from the accused.

k. Interrogator #1 used other types of techniques on the accused, such as "love of freedom" and "pride/ego down." These were attempts to gather information through appealing to a person's desire to go home or implying that he was not really an important person and attempting to get him to talk about the people who really were important. He also used a "fear of incarceration" as a technique. It was used in an attempt to gain cooperation in order to return to a normal life rather than being detained. These techniques did not amount to torture or abuse of the accused.

l. Guards would move detainees, to include the accused, with a hood over their heads. However, Interrogator #1 never interrogated the accused while he had a hood over his head. Interrogator #1 never threw cold water on the accused. He never bound the accused's hands to the ceiling and made him stand. He never made the accused carry heavy water bottles. He never used bright lights with the accused. He never tied a bag over the accused's head. He never pulled or yanked the accused off a stretcher.

m. The accused never told Interrogator #1 that there was a videotape (Appellate Exhibit (AE) 188 remarked as AE 230) in the house where the firefight took place. However, Interrogator #1 eventually obtained a copy of the videotape found in the house where the firefight took place. After he showed that videotape to the accused, the accused appeared somewhat shaken. The accused said that "the Americans know all." There was a dramatic change to the accused's cooperation after he saw the videotape. It was the use of the videotape which was successful in obtaining information from the accused rather than the other techniques used by Interrogator #1.

n. FBI Special Agent [REDACTED] and Interrogator #11 interviewed the accused several times together from 1 October 2002 to 11 November 2002 at Guantanamo Bay, Cuba (hereinafter referred to as GTMO). Interrogator #11 had the lead during those interviews.

o. Two of the interviews by SA [REDACTED] and Interrogator #11 took place while the accused was in the Fleet hospital shortly after his arrival at GTMO. At the Fleet Hospital the accused was on a gurney wearing a typical hospital gown in a typical hospital ward setting. Interrogator #11 always received medical clearance prior to interviewing the accused at the Fleet hospital. Neither Interrogator #11 nor SA [REDACTED] ever threatened, yelled at, or otherwise used any coercive techniques when talking to the accused at the hospital or any other location.

p. The other interviews took place in the normal interview rooms. The accused never wore a hood during any of the interviews. The interviews took place during the day, never at night, and there were no multiple interviews on the same day. The interview might last an hour but never more than 5 or 6 hours. Interrogator #11 and SA [REDACTED] engaged in relaxed conversation with the accused. The accused was always willing to talk. The accused did not appear disoriented and exhibited no signs of distress. The accused never complained of any prior mistreatment at the hands of U.S. personnel. He never complained about any threat of being raped.

q. Guards escorted the accused to the interview rooms in shackles. The accused was not wearing a hood over his head. During the interview the accused had on leg shackles but no hand shackles. No loud noise was made and no music was played. No dogs were used. No threats were made. No stress positions were used. No loud voices were used. The tone was conversational. They offered the ac-

cused water and snacks. The accused said he attended schools but was also homeschooled. The accused never mentioned any issues with nightmares or problems with sleeping. Neither SA [REDACTED] nor Interrogator #11 learned of the allegations of abuse the accused had made until each read the accused's affidavit long after each had interviewed the accused.

r. The accused provided much detail, particularly about the firefight, normally in a narrative fashion. He was fairly certain about the time on a couple of occasions because he remembered looking at his watch during the firefight. If Interrogator #11 was incorrect when she summarized what the accused said, he would correct her. The only mention he made of his eye was that the medical personnel were trying to fix it. He did not complain of pain in his eye.

s. The accused told Interrogator #11 that he lied to interrogators at Bagram until they showed him videotape found at the scene of the firefight. He said the Americans were smart and had caught him in lies so he started to tell the truth.

t. FBI Special Agent [REDACTED] interviewed the accused at Camp Delta, GTMO, in January and February of 2003. The first interview was on 6 January 2003 in an interview in one of the trailers at Camp Delta. Each room was approximately 12' x 15' with no exterior windows. Each room could be observed through observation glass. The temperature was comfortable. The accused had on ankle shackles which were bolted to the floor, but his hands were not restrained. The accused was not wearing a hood over his head during any of the interviews. SA [REDACTED] did not yell, threaten, or otherwise abuse the accused. The accused did not appear to be tired and he never mentioned or complained about any prior treatment by any interrogator at any location. The accused mentioned he had some discomfort with an injury but he did not indicate he was in pain. The accused talked freely about the firefight which led to his capture. The accused asked for some books. The interview, which lasted a couple of hours, ended cordially.

u. SA [REDACTED] next saw the accused on 16 January 2003. He learned the accused was having some problems at Camp Delta and went to see him. The accused was in a trailer and seemed to be crying. He tried to talk to the accused, but the accused would not acknowledge his presence. He did not know why the accused was acting as he was. SA [REDACTED] left shortly thereafter and went to the hospital in an effort to obtain medical treatment for the accused.

v. SA [REDACTED] next saw the accused on 3 February 2003 along with SA [REDACTED] from the Naval Criminal Investigative Service (NCIS) in the same type of interview room as on 6 January 2003. The temperature was comfortable. The accused had on ankle restraints which were bolted to the floor, but his hands were not restrained. The accused talked about his family, the travels he experienced with his family, and his experience with land mines. At one point the accused asked why SA [REDACTED]

had not come by to see him more recently.

w. Mr. [REDACTED] was an NCIS agent who interviewed the accused at GTMO approximately a dozen times between 20 November 2002 and 10 December 2002. Guards would bring the accused in the interview room with his legs and hands shackled with no hood over his head. Once in the interview room, the guards removed the accused's handcuffs. The guards would connect the leg shackles to a bolt in the floor. Mr. [REDACTED] did not use any loud noise or music during the interviews. The interview room was a normal-sized room with no windows, a one-way mirror, and several chairs. During each interview Mr. [REDACTED] was accompanied by an FBI agent. A DOD intelligence officer was present during the first two interviews. The interviews lasted 1-4 hours, and there were never multiple interviews on the same day. The interviews never occurred late at night. He offered the accused food and drink. No one yelled at, threatened, or otherwise abused the accused. The accused told Mr. [REDACTED] that he was told in the past that he was going to be tortured, not that he had been tortured. The accused provided no other details about that. The accused did not appear to be afraid of any torture while he was being interviewed. The accused talked freely about obtaining false identification cards because he needed the false identification cards to travel. The accused spoke about receiving some basic training concerning land mines and various types of weapons. The accused spoke freely in detail about the firefight during which he was injured. The accused seemed very comfortable during the interviews. The accused sent an unprompted letter to Mr. [REDACTED] after Mr. [REDACTED] left GTMO which is reflected in Appellate Exhibit 257. The accused's letter to Mr. [REDACTED] does not indicate any signs of fear of Mr. [REDACTED] or anyone else and does not indicate any mistreatment of the accused by anyone.

x. FBI Special Agent [REDACTED] interviewed the accused approximately 12 times at GTMO from November 2002 through December 2002. His partner during the interviews was an NCIS agent. Guards brought the accused into the interview room for each interview. Each time the accused had on handcuffs and leg irons. The accused wore orange prison garb and had no hood over his head. The handcuffs were removed once the accused was in the room. His leg irons were attached to a bolt in the floor. No one yelled at, threatened, or otherwise mistreated the accused during any of the interviews. No dogs were in the interview room. No loud noise was used during the interviews. The interview room was a typical room with a table and chairs. There was a window to an observation room. SA [REDACTED] offered the accused food and water. He occasionally brought the accused food from McDonald's after he learned the accused liked that type of food. All the interviews occurred during the day and no interview lasted more than several hours. The accused appeared to become more relaxed with SA [REDACTED] as time passed. The accused provided details in a narrative format about: obtaining false

identification documents to travel, training in land mines, and some basic training in use of various types of weapons. The accused said his father selected him for mine laying missions because of his language skills. The accused provided details about the firefight in which he was captured. The accused made no mention of the torture or mistreatment alleged in his affidavit. The accused talked very little about his time at the Bagram detention facility. The interviews stopped whenever the accused indicated he wanted to stop.

y. The accused alleged in his affidavit that he was mistreated while he was being weighed. The videotape of the accused being weighed, Appellate Exhibit 278, clearly shows the accused was not abused or mistreated in any way by any of the guards.

3. In support of this motion, the Defense submitted an affidavit signed by the accused. The Defense characterizes the accused as a child with limited formal education. The Defense offered no evidence to explain how the affidavit was prepared. The Defense presented no evidence that the accused understands the significance of an affidavit and how it is to be used by the Commission during the suppression motion. The Commission presumes the affidavit was prepared by a defense counsel, at least in part, for the purpose of litigating the suppression motion.

a. The accused has an absolute right not to testify. However, the accused effectively became a witness and placed his credibility at issue by submitting his affidavit during the suppression hearing. Cross-examination is a widely and long-recognized method of assessing a witness' credibility. The accused chose not to face the crucible of cross-examination. Thus, the ability of the Commission to assess the accused's credibility is limited. The Commission affords little weight to the accused's affidavit, particularly in light of the lack of corroboration for the allegations in the affidavit.

b. The accused, in his affidavit, alleges he told certain investigators what they wanted to hear. However, the accused conveniently neglects to specify what it is he allegedly told these investigators. The Defense argues the accused was boxed into certain statements he made to the interrogators without specifically identifying what those statements were. While there is evidence Interrogator #1 told the accused a fictitious story about an Afghan male in a U.S. prison, there is no evidence such a story coerced or in any way caused the accused to make any incriminating statements at any time. There is no credible evidence the accused was boxed into saying anything to any interrogator. As such, the Commission finds the statements the accused made to Interrogator #11 and FBI and NCIS agents in non-threatening settings were not tainted by any previous statements the accused may have made.

c. The accused developed a good rapport with Interrogator #11 and the NCIS and FBI agents who interviewed him. The accused never complained to them about any prior mistreatment. The accused wrote an unprompted letter to one of the NCIS agents which undermines any allegations of mistreatment.

d. The Government witnesses were subjected to the crucible of cross-examination. Each Government witness was forthright and exceedingly more credible than the accused's affidavit.

4. The relevant part of the Military Commission Rule of Evidence (M.C.R.E.) 304(a)(2) provides: A statement of the accused may be admitted in evidence in a military commission only if the military judge finds –

> (A) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
>
> (B) that –
>
> > (ii) the statement was voluntarily given.

a. The test for determining whether the statement was voluntary is prescribed in M.C.R.E. 304(a)(4): in determining for the purposes of (a)(2)(B)(ii) whether the statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:

> (A) the details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities;
>
> (B) the characteristics of the accused, such as military training, age, and education level; and
>
> (C) the lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

b. The accused's statements being offered are detailed. The accused provided his answers to questions in a narrative form, rather than answering leading questions. The accused's statements being offered certainly possess probative value. While the accused was 15 years old at the time he was captured, he was not immature for his age. The accused had sufficient training, education, and experience to understand the circumstances in which he found himself.

c. There is no credible evidence the accused was ever tortured as that term is defined under M.C.R.E. 304(b)(3), even using a liberal interpretation considering the accused's age. While Interrogator #1 told the accused a story about the rape of an Afghan youth in an American prison, there is no evidence that story caused the accused to make any incriminating statements then or in the future. In fact, the credible evidence is that the accused started to make incriminating statements only after he learned the Americans found the videotape at the compound where the firefight took place which shows the accused and others making improvised explosives and placing them along the roadside at night. No statement offered against the accused was derived from, the product of, or connected to any story Interrogator #1 told the accused.

d. The Commission concludes that, under the totality of the circumstances, the

statements offered against the accused are reliable, possess sufficient probative value, were made voluntarily, are not the product of torture or mistreatment, and whose admission is in the interest of justice.

6. There is no evidence the accused made any statement to anyone about the existence of a videotape found at the scene of the firefight. There is no evidence to support the defense allegation that the commander made a decision to search the compound where the firefight occurred as a result of intelligence information obtained from the accused. The evidence is clear, and the Commission finds, the commander's decision to search the compound where the videotape was found was independent of and not derived from any interrogation of the accused. The videotape is not the "fruit of the poisonous tree" as there is no "poisonous tree."

7. The Commission finds the Government has met its burden to show the admissibility of the statements and videotape by a preponderance of the evidence. *See* M.C.R.E. 304(d)(1).

8. Accordingly, the motions to suppress the accused's statements and the videotape are denied.

So ordered this 17th day of August 2010.

UNITED STATES OF AMERICA
Appellee

v.

SALIM AHMED HAMDAN
Appellant

Court of Military Commission Review
Case 09-002

January 24, 2011

RULING: APPELLANT'S MOTION TO DISQUALIFY

Before
BRAND, CONN, GALLAGHER, HOFFMAN, PERLAK, SIMS1

On September 14, 2010, the Court received Appellant's motion to disqualify Judge O'Toole and Judge Thompson from sitting as appellate judges in the case of *United States v. Hamdan*. Judge O'Toole2 and Judge Thompson subsequently recused from further participation in this case.

ORDERED, the motion is DENIED as moot.

Upon *sua sponte* motion to reconsider the case of *United States v. Hamdan en banc,* and upon the motion having passed by unanimous vote of all judges eligible to participate, it is

1 Judges D. O'Toole, E. Price, and C. Thompson took no part in the decision in this Order, having recused from further participation in this case.
2 Judge O'Toole's Memorandum of Recusal is attached to this Order.

ORDERED, that the case of *United States v. Hamdan* shall be considered by the Court sitting *en banc.*

For the Court:
Mark Harvey
Deputy Clerk of Court

UNITED STATES OF AMERICA
Appellee

v.

SALIM AHMED HAMDAN
Appellant

Court of Military Commission Review
Case 09-002

January 21, 2011

MEMORANDUM OF RECUSAL

Chief Judge (acting) Daniel E. O'Toole

For the reasons set forth in the Memorandum of Recusal filed today in the case of *United States v. al Bahlul*, I recuse myself.

UNITED STATES OF AMERICA
Appellee

v.

SALIM AHMED HAMDAN
Appellant

Court of Military Commission Review
Case 09-002

January 21, 2011

MEMORANDUM OF RECUSAL

Chief Judge (acting) Daniel E. O'Toole

On September 16, 2010, Appellant filed a motion seeking to disqualify Acting Chief Judge Daniel E. O'Toole from participating in this appeal because he is not presently serving on his Service Court of Criminal Appeals as Appellant asserts is required by the Military Commissions Act of 2009, and the Regulation for Trial by Military Commissions.

For the reasons set forth *infra*, I recuse from consideration of the motion to disqualify, and from participation in the review of this case on appeal.

Introduction

Motions to disqualify or to recuse a judge are ordinarily referred to that judge for resolution. Rules of Practice for the USCMCR, Rule 24. The instant motion, however, does not allege a lack of impartiality or bias, rather it asserts I am no longer a judge of my Service Court of Criminal Appeals (CCAs), and that I am, therefore, disqualified from continued service as a judge in this case. That is a wholly different category of challenge than is anticipated by the Rules of Practice for referral to the judge at issue. The precedent for this Court in such a circumstance is for that judge to recuse from consideration of his own legitimacy. *United States v. Khadr*, 77 F. Supp. 2d 1212 (U.S.C.M.C.R. 2007). I find that precedent to be both persuasive and prudent. I, therefore, recuse from the consideration of the pending Motion to Disqualify.

Before moving to address my continuing role in the review of this case on appeal, I pause to inform the record to make clear the basis for my recusal.1

Assignments from 2007 to present

On May 8, 2007, I was assigned to the Court of Military Commission Review (CMCR) as an appellate military judge pursuant to the Military Commission Act of 2006 (2006 MCA). At the time I took the oath of appointment to the CMCR on August 1, 2007, I was simultaneously serving as an appellate military judge on the Navy-Marine Corps Court of Criminal Appeals (NMCCA). In April 2008, I became Chief Judge of the NMCCA. The following July 2009, I was selected to be the first Chief Judge of the Department of the Navy (CJDON). On September 1, 2009, the Judge Advocate General of the Navy (JAG) signed a superseding appointment directing me to assume the duties of CJDON. Thereafter, the Deputy Secretary of Defense, acting for the Secretary, approved my assignment as Deputy Chief Judge of the USCMCR, effective December 31, 2009. Appendix A. Chief Judge Williams then resigned

1 Though the reasons for recusal are typically not disclosed, due to the unique circumstances of this case, as further described *infra*, I find it appropriate to do so.

from the USCMCR, and I became Acting Chief Judge.

Chief Judge of the Department of the Navy

The departmental responsibilities of the Chief Judge of the Department of the Navy (CJDON) are outlined in JAG Notice 5450, Mission and Function of Assistant Judge Advocate General, Chief Judge of Department of the Navy, dated May 24, 2010.2 Appendix B. The CJDON reports directly to the Navy J as the senior supervisory jurist in the department, and the reporting senior for the judges of the NMCCA, and the Chief Judge, Navy-Marine Corps Trial Judiciary. To comply with Article 66 of the Uniform Code of Military Justice, which precludes "members" of a Service CCA from serving as reporting senior (or rating officer) of other CCA members, the CJDON is not assigned as an appellate military judge on the NMCCA. The CJDON remains available to be detailed as presiding judge of general courts-martial, or assigned as Chief Judge of the NMCCA at the discretion of the Navy JAG, and is explicitly bound by the American Bar Association 2007 Code of Judicial Conduct. JAG Notice 5450.

The new position of CJDON is unique among the Services. It requires a competitive flag board selection, because it anticipates designation in the third year of service as Assistant Judge Advocate General of the Navy (AJAG) for a minimum period of 12 months. 10 U.S.C. § 5149(b). Similar to the Commander of the U.S. Army Legal Services Agency (USALSA), who traditionally has also served as the Chief Judge of the Army Court of Criminal Appeals, JAG Notice 5450 describes the dual role of the CJDON as the AJAG. Briefly stated, the AJAG is a leadership position within the Department of the Navy and in the Navy JAG Corps community. The role of CJDON is a judicial role, including direct oversight of the NMCCA. When performing duties that are not judicial in nature, those duties are discharged with the approval of the Navy JAG.

JAG Notice 5450 provides that the CJDON may not serve as the reporting senior for any judge with whom such duty constitutes a judicial encumbrance or conflict. As the regulation specifically anticipates service by the CJDON on the USCMCR, it prohibits reporting on any USCMCR judges with whom CJDON would serve. In such event, the Navy JAG remains the reporting senior of those judges.

Assignment to the USCMCR

Appellant does not challenge my qualifications at the time of my initial assignment to the CMCR in 2007. As previously noted, at that time, I was an appellate military judge on my Service's CCA, and I met all statutory qualifications for assignment to the CMCR. Thereafter, on December 2, 2009, then Chief Judge Williams recommended that I be appointed Deputy Chief Judge of the renamed U.S. Court of Military Commission Review (USCMCR). Appendix A, TAB A. This nomination specifically anticipated that Chief Judge Williams would leave the Court and that the Deputy Chief Judge would succeed him as Acting Chief Judge, until a permanent successor was named. Chief Judge Williams' nomination letter specifically noted that the Secretary of the Navy had approved the competitive board results of my selection as the AJAG and CJDON. The memorandum relat-

2 JAG Notice 5450 is available at www.jag.navy.mil/library/notices/5450.pdf.

ing my nomination to the Deputy Secretary of Defense included my biography, which also indicated selection as CJDON and the associated change in my status. Appendix A, TAB B. On December 21, 2009, the Deputy Secretary of Defense, acting for the Secretary, approved my additional assignment as Deputy Chief Judge of the USCMCR effective December 31, 2009. Appendix A. Chief Judge Williams then resigned, and I have since served as the Acting Chief Judge.

2006 Military Commissions Act (2006 MCA)

Appellant's challenge pertains to my change in status on September 1, 2009, upon designation as Chief Judge, Department of the Navy. On that date, the governing statute was the 2006 MCA under which I was assigned, not the 2009 MCA, which had yet to be enacted.

Two provisions of the 2006 MCA address establishment of the CMCR and assignment of CMCR appellate judges. Subsections 950f(a) and (b) of the MCA provide:

> (a) *Establishment*.—The Secretary of Defense shall establish a Court of Military Commission Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing military commission decisions under this chapter, the court may sit in panels or as a whole in accordance with rules prescribed by the Secretary.
>
> (b) *Appellate Military Judges*.—The Secretary shall assign appellate military judges to a Court of Military Commission Review. Each appellate military judge shall meet the qualifications for military judges prescribed by section 948j(b) of this title or shall be a civilian with comparable qualifications. No person may serve as an appellate military judge in any case in which that person acted as a military judge, counsel, or reviewing official.

Under these statutory provisions, the CMCR, once established, must be "composed of one or more panels of not less than three appellate military judges." The term "appellate military judges" in this context refers not to a Service CCA judge, but to those judges assigned to and sitting on panels of the CMCR. This construction is supported by the immediately following use of the term. The Secretary is directed to assign "appellate military judges," each of which shall meet the qualifications for a "military judge," or "be a civilian with comparable qualifications." The term "appellate military judges" refers to the judges assigned to and sitting on panels of the CMCR, and it includes both military and civilian judges.3 There is no requirement in these provisions for simultaneous CCA service. The statute does, however, provide for several post-assignment disqualifying circumstances. These include conflicts potentially encountered in specific cases (having served as military judge, counsel or reviewing authority). These do not include the circumstance in which a military judge is not, or is no longer, assigned to a Service CCA. Pro-

3 The April 27, 2010, version of the *Manual for Military Commissions* (*MMC*) defines "appellate military judge" more narrowly, limiting this term to commissioned officers of the armed forces who are appellate judges. R.M.C. 103(a)(2). *See also* R.M.C. 1201(b)(5) (composition of USMCR panels).

vided none of the disqualifying circumstances are present in a particular case, the qualifications that must be met by military judges are incorporated by reference from 2006 MCA § 948j(b), and include the following:

> (b) *Qualifications.*—A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under section 826 of this title (article 26 of the Uniform Code of Military Justice) as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.

These qualifications do not include a requirement that a judge of the CMCR simultaneously serve on a Service CCA, or continue to so serve after assignment to the CMCR. Since I have, at all times, continued to meet all of the enumerated statutory qualifications, and do not have a disqualification related to any case presently pending adjudication before the Court, it follows that designation as CJDON, resulted in no statutory disqualification of my preceding CMCR assignment under the 2006 MCA.4

4 The 2009 MCA became effective on October 28, 2009, including a specific provision for the continuation of appellate military judges initially assigned under the 2006 MCA. Act Oct. 28, 2009, P.L. 111-84, Div A, Title XVIII, § 1804, 123 Stat. 2612, provides that any appellate military judge or other duly appointed appellate judge on the Court of Military Commission Review pursuant to chapter 47A of title 10, United States Code [10 USCS §§ 948a et seq.] (as in effect on the day before the date of the enactment of this Act), shall be deemed to have been detailed or appointed to the United States Court of Military Commission Review pursuant to chapter 47A of title 10, United States Code [10 USCS §§ 948a et seq.] (as so amended).

Regulations

On January 18, 2007, the Secretary of Defense approved the Manual for Military Commissions (MMC), including Rule for Military Commissions (R.M.C.) 1201(b)(1). That rule reiterates the statutory qualifications of the 2006 MCA, and requires each Judge Advocate General to nominate four appellate military judges meeting those statutory qualifications. The use of the term "appellate military judges" follows the statutory usage, and so should be read as identifying the position on the CMCR for which the nominee is intended, rather than the position in which a nominee is presently serving.

As the Appellant correctly points out, however, the Regulation for Trial by Military Commission (RTMC), promulgated by the Secretary of Defense on April 27, 2007, addresses a number of matters, including establishment of the CMCR, qualifications of military appellate judges, the composition of the Court, and the nominating process. RTMC ¶ ¶ 25-2a and b track, and in part quote, the 2006 MCA provisions for the establishment and qualifications of judges.5 It is RTMC ¶

5 **25-2. ESTABLISHING THE CMCR**

a. *Establishing the court.* The Secretary of Defense shall establish a Court of Military Commission Review (CMCR). The Court shall be composed of one or more panels and each such panel shall be composed of not less than three appellate military judges (s*ee R.M.C. 1201).*

b. b. *Qualifications.* In accordance with 10 U.S.C. § 948j(b), a military appellate judge "shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under section 826 of this

25-2c that first references the composition of the CMCR as composed of CCA judges.

> 25-2c. *Appellate military judges*. The CMCR will consist of judge advocates who are currently certified and detailed as appellate military judges of the services' Courts of Criminal Appeals (CCAs), or civilians of comparable qualifications. Each Judge Advocate General will nominate four appellate military judges for duty as appellate judges on the CMCR. Appellate military judges serving on the CCAs will serve as appellate judges on the CMRC as long as their tour of duty continues with their respective service Court of Criminal Appeals. When a military judge serving on a CCA is reassigned from the CCA, the service Judge Advocate General will nominate a replacement appellate military judge for duty as an appellate judge on the CMCR. The Secretary of Defense shall appoint military judges to the CMCR from among appellate military judges nominated by each Judge Advocate General and from civilians of comparable qualifications designated by the Secretary.

While the composition of the court is described as including current Service CCA judges, the regulation does not include such service on a CCA as one of the enumerated qualifications. *See* ¶ 25-2b. All qualifications are reiterated from the 2006 MCA and R.M.C. 1201(b)(1). The question then becomes whether a judge, fully qualified and properly assigned to the CMCR under the 2006 MCA and the R.M.C.s promulgated by the Deputy Secretary of Defense, but then assigned to judicial duties other than as a Service CCA judge, has become ineligible to continue to serve as a member of the Court without further action by the Secretary. The regulations do not describe how the Court's composition and nomination procedures relate to the enumerated qualifications, in general, or specifically to the continuing qualification of a CMCR judge; neither is the reference to the composition of the Court explicitly identified as a self-executing disqualification of a fully qualified and properly assigned judge of the CMCR. Ultimately, the answer to the question posed is not explicitly addressed by the current regulations. However, we need not speculate on the position of the Deputy Secretary of Defense. After being notified of my selection as Assistant Judge Advocate General and assumption of duty as Chief Judge of the Department of the Navy, the Deputy Secretary assigned me additional duties on the USCMCR as the Deputy Chief Judge. *Cf. Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (agency's interpretation of own regulation accorded substantial deference and courts will reject only if agency interpretation violates the Constitution, a statute, or is "plainly erroneous or inconsistent with the regulation.") (1945).6

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title (article 26 of the Uniform Code of Military Justice) as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member" or a civilian with comparable qualifications. No person may serve as an appellate military judge in any case in which that person acted as a military judge, counsel or reviewing officer, in that case.

6 The Secretary has provided a hierarchy of regulatory structure, of which the RTMC is the bottom tier. RTMC 1-1 provides "This Regulation for trial by military commission (hereinafter Regulation) prescribes policies and provisions for administration for military commissions and implements the Manual for Military Commissions, United States, 2007 (M.M.C.). . . . In case of any conflict between this Regulation and the rules and procedures

Structural Protection for the Independence of the UCMCR Judges

The Appellant buttresses his argument for disqualification by expressing concern that a USCMCR judge who is not simultaneously a Service CCA judge represents a breach of judicial independence. The structural protections that Appellant contends are at risk are, in fact, preserved in the regulatory structure for the Chief Judge of the Department of the Navy. The CJDON is qualified, certified and available to be detailed to preside over general courts-martial and military commissions, and in all matters is required by the 2007 Model Code of Judicial Conduct to remain impartial and independent. JAG Notice 5450. The CJDON is the senior supervisory jurist of the department, meeting the requirements of Article 26(c) of the Uniform Code of Military Justice to be "assigned and directly responsible to the Judge Advocate General, or his designee, of the [respective] armed force . . . perform[ing] duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General, or his designee." The 2009 MCA further protects the CJDON, as a judge of the USCMCR, from unlawful influence. 10 U.S.C. § 949b(b).

Thus, I remain within the statutory and regulatory protections for military judges, and I am explicitly charged with remaining impartial and ensuring judicial independence. The judges with whom I serve on the USCMCR are also protected by JAG Notice 5450, which provides that, in any case in which I, as CJDON, would be in conflict with any other judge for whom I serve as reporting senior, the JAG serves as reporting senior. As a result, I do not now serve, and have never served, as the reporting senior for any judge on the USCMCR. Additionally, while there are a range of administrative duties associated with my current position, including serving as Chair of the Judicial Screening Board (composed of multiple senior Navy and Marine Corps judge advocates who vote independently on nominees), and as Rules Counsel for complaints of judicial misconduct, none of those duties have, as yet, raised a conflict in the cases presently pending before this Court. However, as my participation over the past year in matters of judicial policy and management are manifest in specific cases in the future (if, in fact, any duty creates a conflict), and in the event I am designated as the Assistant Judge Advocate General of the Navy later this year, there will be a more challenging landscape upon which to identify and avoid potential conflicts. Those *prospective* conflicts, however, are not present now, in the cases pending before this Court. Thus, in all aspects, the judicial independence of USCMCR judges, including this judge, has been assured.

Recusal Considerations

It is not for me to determine the ultimate validity of my continued service on this Court. Rather, when subject to a challenge such as in the Motion to Disqualify, it is my responsibility to balance all of the factors

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prescribed by the M.C.A. and M.M.C., the latter two will always be controlling over this Regulation." *Id.* at ¶ 1-1a. Furthermore, "[t]his Regulation is not intended to, and does not, create any substantive right enforceable by any party." *Id.* at ¶ 1-1b. While it should not be disputed that a party has standing to contest a judge's statutory qualifications, there appears to be no such right to challenge the Secretary's action under the RTMC, particularly when such action is consistent with the superior MCA and MMC.

bearing on recusal, and to ensure that my actions promote the public trust and ensure the greatest possible public confidence in this Court's independence, impartiality, integrity, and competence. Preamble ABA Model Code of Judicial Conduct 2007.

Even if the Court were to resolve the pending motion favorably to my continuing service on the Court, that would be less than acceptable to me. From a practical perspective, resolving this collateral issue will take a significant amount of the time and attention from the Court that could, and should, be spent in resolving the substantive and historic issues presented on appeal. Additionally, this collateral matter would then join the list of alleged errors advanced for further review, either in the regular course of appeal, or perhaps pursuant to an extraordinary writ. This would distract subsequent reviewing courts. While these practical impacts are worthy of consideration, by far the more weighty is the impact on the public perception of the integrity of the Court and its future judgment in this case. Though I am firmly convinced that my judicial qualifications have, at all times, met the statutory requirements, and that, in view of the action of the Deputy Secretary of Defense, there is no regulatory impediment to my continued service on the Court in these cases, the public perception of this new and unique intermediate appellate court is deserving of the utmost sensitivity.

In considering recusal, I have carefully considered the standards used by the federal courts in reviewing violations of the recusal statute (28 U.S.C. § 455) when there is no indication of actual bias. Among these, the promotion of public confidence in the integrity of the judicial process is an important public policy. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988). That public policy can take on heightened importance under unique circumstances. For example, then Judge Andrew Effron (now Chief Judge of the Court of Appeals for the Armed Forces) was confronted at oral argument with the unique circumstance of a colleague judge seemingly raising an issue of Judge Effron's recusal. In exercising discretionary recusal, Judge Effron noted, "[w]hen the issue of recusal is interjected into the proceedings, a judge must decide whether he or she has become part of the problem, rather than part of the solution. The judge involved then must decide whether the circumstances warrant recusal as a matter of discretion, even if not required as a matter of law." *United States v. Gorski*, 48 M.J. 317, 324 (C.A.A.F. 1997) (citations omitted).

The federal district judge presiding over sentencing in *United States v. Black*, 490 F. Supp. 2d 630 (E.D.N.C. 2007), also faced a unique circumstance elevating the concern for public confidence. The case involved the guilty plea of the former North Carolina Speaker of the House to charges related to soliciting and accepting cash from chiropractors, intending to reward them with connections with the business of state government. In this context, the defendant, Black, challenged the judge, asserting *inter alia* that the judge's prior role as a lawyer in a state redistricting matter showed a bias against Black's party affiliation. The judge found no merit in these or other assertions, and determined recusal was not required as a matter of law. The judge nevertheless recused as a matter of discretion "to promote the public confidence in the administration of justice." *Id.* at 669. *See also United States v. Bobo*, 323 F. Supp 2d. 1238, 1242-43 (N.D. Ala. 2004) (judge,

second cousin of current governor, presiding over high profile trial of former governor, recused in order to mitigate distrust of decisions of all branches of government viewed as "dangerous to our evolving experiment in self-governance through a representative democracy").

In considering recusal, I am also mindful that, under military principles, including those applicable to military commissions, a judge should interpret and apply the grounds for recusal broadly, but should not recuse unnecessarily. R.M.C. 902(d)(1). Discussion. *See also United States v. McIlwain*, 66 M.J. 312, 314 (C.A.A.F. 2008) (citing *United States v. Wright*, 53 M.J. 136, 141 (C.A.A.F. 1999)). Though these principles apply most directly to situations of alleged bias at trial, they are nonetheless instructive regarding the invocation of discretionary recusal under other circumstances.

The military commission process by any measure is a unique circumstance meriting heightened consideration of the public confidence. I have exhaustively and carefully balanced my responsibility not to recuse unnecessarily, with the countervailing considerations. I have weighed heavily the public's perception of the pending case and of this Court, in the greater context of the military commission process. The disposition of this case, one of the first two military commission convictions to be reviewed on appeal, will chart historic precedent regarding the jurisdiction of military commissions, as well as potentially delineating for further review the breadth and reach of Constitutional protections in the framework of what has been referred to by some as "asymmetric warfare." Under these circumstances, and even assuming judgment in favor of my continuing on this Court, I am unwilling to permit the distraction of a collateral issue related to the legitimacy of one judge, and by extension, the legitimacy of the USCMCR, to intrude into the time and resources of this Court. I am equally unwilling to contribute to anything less than full public confidence in the integrity of the military commission process, and the legitimacy of this Court as it renders its first substantive rulings.

Conclusion

For the foregoing reasons, and with the utmost confidence in the integrity, intellect, and industry of my colleagues, I recuse from consideration of the Appellant's Motion to Disqualify, and in the consideration of this case on appeal.

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN
AL BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

January 24, 2011

RULING: APPELLANT'S MOTION TO DISQUALIFY AND EN BANC CONSIDERATION

Before
BRAND, CONN, GALLAGHER, HOFFMAN, PERLAK, PRICE, SIMS1

On September 16, 2010, the Court received Appellant's motion to disqualify Judge O'Toole and Judge Thompson from sitting as appellate judges in the case of *United States v. al Bahlul*. Judge O'Toole2 and Judge Thompson subsequently recused from further participation in this case.

ORDERED, the motion is DENIED as moot.

Upon *sua sponte* motion to reconsider the case of *United States v. al Bahlul en banc*, and upon the motion having passed by unanimous vote of all judges eligible to participate, it is

ORDERED, that the case of *United States v. al Bahlul* shall be considered by the Court sitting *en banc.*

For the Court:
Mark Harvey
Deputy Clerk of Court

1 Judges D. O'Toole and C. Thompson took no part in the decisions in this Order, having recused from further participation in this case.
2 Judge O'Toole's Memorandum of Recusal is attached to this Order.

UNITED STATES OF AMERICA
Appellee

v.

ALI HAMZA AHMAD SULIMAN
AL BAHLUL
Appellant

Court of Military Commission Review
Case 09-001

January 25, 2011

RULING: SPECIFIED ISSUES AND ORAL ARGUMENT

Before
BRAND, CONN, GALLAGHER, HOFFMAN, PERLAK, PRICE, SIMS1

Upon consideration of the record of trial and pleadings of the parties and *amicus curiae*, the following issues are specified and oral argument is ordered:

I. Assuming that Charges I, II, and III allege underlying conduct (e.g., murder of protected persons) that violates the law of armed conflict and that "joint criminal enterprise" is a theory of individual criminal liability under the law of armed conflict, what, if any, impact does the "joint criminal enterprise" theory of individual criminal liability have on this Court's determinations of whether Charges I through III constitute offenses triable by military commission and whether those charges violate the *Ex Post Facto* clause of the Constitution? *See, e.g.*, *Hamdan v. Rumsfeld,* 548 U.S. 557, 611 n. 40 (2006).

II. In numerous Civil War and Philippine Insurrection cases, military commissions convicted persons of aiding or providing support to the enemy. Is the offense of aiding the enemy limited to those who have betrayed an allegiance or duty to a sovereign nation? *See Hamdan v. Rumsfeld*, 548 U.S. 557, 600-01, n. 32, 607, 693-97 (2006).

ORDERED, that the Appellant's brief on the specified issues is due on February 24, 2011, and the Appellee's brief on the specified issues is due on March 11, 2011.

Oral argument on the specified issues will be heard at 10:00 A.M. Eastern Time on March 17, 2011, in Courtroom 201, United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC.

For the Court:
Mark Harvey
Deputy Clerk of Court

1 Judges D. O'Toole and C. Thompson took no part in the decisions in this Order, having previously recused themselves from participation in this case.

UNITED STATES OF AMERICA
Appellee

v.

SALIM AHMED HAMDAN
Appellant

Court of Military Commission Review
Case 09-002

June 24, 2011

OPINION

Before
BRAND, CONN, HOFFMAN, SIMS,
GALLAGHER, PERLAK, ORR[1]
Appellate Military Judges

Captain Keith J. Allred, JAGC, U.S. Navy was the military commission judge.

Joseph M. McMillan argued the cause for appellant. With him on the briefs were *Harry H. Schneider, Jr., Charles C. Sipos, Adam Thurschwell,* and *Captain Michael G. Thieme, U.S. Air Force*.

Francis A. Gilligan argued the cause for appellee. With him on the briefs were *Captain John F. Murphy, JAGC, U.S. Navy* and *Captain Edward S. White, JAGC, U.S. Navy*.

Briefs of *amici curiae* urging reversal were filed for the National Institute of Military Justice by *Marc A. Goldman* and *Michelle M. Lindo McCluer*; for Professor Dr. Terry D. Gill and Dr. Gentian Zyberi by *Michael R. Doyen*, *Gregory D. Phillips*, and *David C. Lachman*; for Constitutional Law Scholars by *Kimball R. Anderson* and *John A. Sholar, Jr.,* with the assistance of Law Student Contributors: *Kenneth Burden, Andrew Linenberg, Amy Pahlka-Sellars,* and *Neha Sinha* (Rutgers University School of Law-Camden); for Professors Geoffrey S. Corn and Victor M. Hansen by *Sylvia H. Walbolt*. Brief of *amici curiae* urging recusal of two judges was filed for the National Institute of Military Justice by *Eugene R. Fidell, Michelle M. Lindo McCluer*, and *Jonathan E. Tracy*.

PER CURIAM:

Appellant was convicted, contrary to his pleas, of five specifications of providing material support for terrorism, in violation of the Military Commissions Act of 2006, 10 U.S.C. § 950v(b)(25), at a military commission convened at U.S. Naval Station Guantanamo Bay, Cuba. The military commission sentenced him to 66 months confinement, and the convening authority approved the findings and sentence. Under our review authority,[2] we have carefully considered the record and the various pleadings, briefs, and oral arguments of the parties and *amici*. We find appellant's assignments of error and pleadings, to include his filing on granted

[1] Acting Chief Judge O'TOOLE and Judges THOMPSON, PRICE, BIESTER, and GREGORY recused themselves from participation in appellant's case. Judge GEISER retired from the Court. Judges GALLAGHER, HOFFMAN, PERLAK, and SIMS joined the Court on November 30, 2010. Judges ORR and GREGORY joined the Court on March 17, 2011. After the recusals and retirement, and the new judges joined the Court, the judges re-voted and again decided to consider appellant's case *en banc*. All judges not recused from the Court attended the oral argument on March 17, 2011, and were either present for or listened to the recording of the oral argument on January 26, 2010.

[2] We have jurisdiction under the *Military Commissions Act of 2006* §§ 950c(a) and 950f (2006 M.C.A.) and Manual for Military Commissions (M.M.C.), Rules for Military Commissions (R.M.C.) 1111 and 1201(c) (Jan. 18, 2007).

issues,[3] to be without merit, and we affirm the findings and sentence.

I. STATEMENT OF FACTS

The record establishes and the military commission found that appellant joined and became a member of al Qaeda, a well-established terrorist organization, with the knowledge that al Qaeda has engaged in and engages in terrorism. He had the intent to join in al Qaeda's purposes, and he subsequently took actions to further al Qaeda's goals and purposes.[4]

As early as 1989, Usama bin Laden associated with al Qaeda's Shura Counsel, especially the leader of the Egyptian Islamic Jihad Movement, Dr. Ayman al-Zawahiri, and Omar Abdel Rahman, the Blind Shaykh. Rahman was "the joint spiritual leader of the two leading terrorist organizations in Egypt, the Islamic Jihad and Al-Gama at al-Islamiyya."[5] Al Qaeda, a military organization, has been involved in various violent activities directed against U.S. civilian and military personnel since at least 1991. "In December 1991, Islamic militants launched a failed bomb attack at a hotel in Aden, Yemen targeting 100 U.S. soldiers who were staying there en route to peacekeeping duties in nearby Somalia." The 1991 Aden bombing, which killed two tourists, was "in response to a 'fatwah,' or religious edict, issued on behalf of [al-Qaeda] in late 1991 – which condemned the presence of U.S. military peacekeepers as an attempt to colonize the Muslim world."

In late 1992, bin Laden led meetings of terrorists at al Qaeda guesthouses in Khartoum, Sudan. Al Banshiri, al Qaeda's chief military commander, told al Qaeda members that al Qaeda hoped the United States would become involved in the civil war in Somalia so "that we make a big war with them." Bin Laden announced to 30-40 al Qaeda members in late 1993 that "the American army now they came to the Horn of Africa, and we have to stop the head of the snake . . . the snake is America, and we have to stop them. We have to cut the head and stop them." In 1993, al Qaeda's leaders sent al Qaeda Shura Council member Mohammed Atef (a.k.a. Abu Hafs al Masri) to Somalia to organize and train for an attack upon U.S. forces. In October 1993, Somali militiamen used rocket-propelled grenades to shoot down two U.S. Blackhawk helicopters over Mogadishu. Eighteen U.S. military personnel and numerous militiamen were killed in the ensuing street battle. Shortly thereafter, Abu Hafs spoke with al Qaeda members in the Sudan and stated, "everything happening in Somalia, it's our responsibility . . . the al Qaeda group, our group."

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[3] *See* n. 7, *infra*.

[4] *See* Findings of Guilty for Specifications 2, 5, 6, 7, and 8 of Charge II, *infra* pp. 7-8.

[5] The quotations in the Statement of Facts regarding the conflict between al Qaeda and the United States are from the video "The al Qaeda 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. Descriptions of al Qaeda's violent campaign against the United States in various decisions by federal courts are consistent. *See e.g., In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 103-05 (2d Cir. 2008); *United States v. Rahman*, 189 F.3d 88, 105-11 (2d Cir. 1999) (describing conspiracy resulting in the bombing in 1993 of the World Trade Center); *United States v. Salameh*, 152 F.3d 88, 107-08 (2d Cir. 1998) (same); *United States v. Yousef*, 327 F.3d 56, 79-83 (2d Cir. 2003) (describing the conspiracy from August 1994 to January 1995 to bomb United States commercial airliners in Southeast Asia). *See also The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (2004), which describes additional linkage between al Qaeda attempted bombings and bombings of U.S. citizens in the mid-1990s.

In January 1996, Rahman was convicted in U.S. federal court of conspiracy for inspiring the February 1993 bombing of the World Trade Center. *United States v. Rahman*, 189 F.3d 88, 103 (2d Cir. 1999). In early 1996, Mohammed bin Attash, a close associate of bin Laden, convinced appellant that he should go from his home in Yemen to Tajikistan for Jihad. Bin Attash gave appellant a false passport and an airline ticket to fly from Yemen to Pakistan. Appellant stayed in guest houses in Pakistan, and then he went to Afghanistan. Once in Afghanistan, appellant spent 30-40 days at Al Farouq, an al Qaeda training camp. While there, appellant received training on a variety of weapons, including AK-47s, machine guns, pistols, and rockets. After training, appellant became a driver for an al Qaeda guest house where he ferried people and supplies between Al Farouq and the guest houses. Shortly thereafter, appellant was introduced to bin Laden, gained his trust, and became a primary driver for him. Appellant was trained on convoy techniques and standard operating procedures to engage in if one of bin Laden's compounds came under attack. In addition to serving as bin Laden's driver, appellant also served as his body guard. All body guards and drivers were armed.

During this period as bin Laden's personal driver and body guard, appellant pledged *bayat*, or "unquestioned allegiance" to bin Laden. The *bayat* extended to bin Laden's campaign to conduct jihad against Jews and crusaders and to liberate the Arabian Peninsula from infidels; however, appellant reserved the right to withdraw his *bayat* if bin Laden undertook a mission with which he did not agree. The record does not reveal any instance where appellant exercised this prerogative and refused to support an al Qaeda mission or declined to obey bin Laden's orders.

Appellant, on numerous occasions, delivered requests for logistical support, including weapons and ammunition, to al Qaeda's logistical officer and subsequently delivered the military supplies to the Panjshir Valley. Appellant also delivered bin Laden's orders for military supplies. Appellant repeatedly attended anti-Western lectures given by bin Laden. This began with his own training at an al Qaeda training camp and continued throughout his association with bin Laden, including driving him to training camps and other meetings.

In August 1996, bin Laden issued a video which included a "declaration of war" against the Americans who were occupying land in the Arabian Peninsula (1996 Jihad Declaration). Bin Laden's 1996 Jihad Declaration encouraged the killing of American soldiers in the Arabian Peninsula, and he called upon Muslims everywhere to carry out operations to expel Americans and non-Muslims from the Arabian Peninsula by use of "explosions and jihad" stating:

> My Muslim Brothers of The World: Your brothers in Palestine and in the land of the two Holy Places are calling upon your help and asking you to take part in the fighting against the enemy—your enemy and their enemy—the Americans and the Israelis. They are asking you to do whatever you can, with one['s] own means and ability, to expel the enemy, humiliated and defeated, out of the sanctities of Islam.

In February 1998, bin Laden held a press conference in Afghanistan and announced the founding of the "World Islamic Front

Against Jews and Crusaders." "Bin Laden and his colleagues signed a joint fatwah requiring all Muslims able to do so to kill Americans—whether civilian or military—anywhere they can be found and to 'plunder their money.'" Bin Laden issued a declaration called "The Nuclear Bomb of Islam" which included the statement, "it is the duty of Muslims to prepare as much force as possible to terrorize the enemies of God." On August 7, 1998, al Qaeda operatives detonated truck bombs outside the American Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing 257 people, including 12 Americans, and wounding thousands more. Before the bombings of the U.S. Embassies in Nairobi and Tanzania in 1998, appellant knew that a terrorist attack outside of Afghanistan targeting Americans was going to take place. Bin Laden did not know how the U.S. would react, so bin Laden left his compound in Kandahar the day after the attacks and went to Kabul for 10 days. In 1998, appellant drove bin Laden to a press conference related to the 1998 East African Embassy bombings. While there, appellant met al-Zawahiri. On August 20, 1998, the United States retaliated, sending tomahawk missiles and striking "terrorist training camps in Afghanistan and a suspected chemical weapons laboratory in Khartoum, Sudan." Shaykh Omar Abdel Rahman responded from inside his American jail cell by urging new recruits to join the cause and issuing a new fatwah, saying, "Oh, Muslims everywhere! Cut the transportation of their countries, tear it apart, destroy their economy, burn their companies, eliminate their interests, sink their ships, shoot down their planes, kill them on the sea, air, or land. Kill them when you find them, take them and encircle them. . . ."

In October 2000, al Qaeda operatives exploded a bomb alongside the USS COLE, "killing 17 American sailors, wounding 39 others, and causing nearly $250 million in damage. The COLE operation came at the direction and urging of Usama bin Laden, Abu Hafs Al Masri, and other senior [al-Qaeda] leaders." At the time of the USS COLE bombing, appellant was in Yemen. He believed that due to his close association with bin Laden, he might be apprehended, so he made arrangements to return to Afghanistan. Appellant knew that the scope of bin Laden and al Qaeda's operations included terrorist attacks targeting Americans outside of Afghanistan.

Appellant drove bin Laden in a convoy in August 2001 to a large gathering with 150-200 attendees, mostly Egyptian Islamic Jihad members and al Qaeda members. After the dinner, al-Zawahiri and bin Laden announced that the Egyptian Islamic Jihad and al Qaeda were merged. Subsequently, appellant drove bin Laden to meetings with al-Zawahiri and drove in convoys with both bin Laden and al-Zawahiri.

Al Qaeda's actions achieved worldwide infamy when, on September 11, 2001, 19 men recruited by al Qaeda hijacked four commercial airliners on the east coast of the United States and crashed one into the Pentagon in Washington, D.C., and two into the World Trade Center towers in New York. The fourth aircraft crashed in Pennsylvania after the passengers attacked the hijackers.

Seven to ten days before September 11, 2001, bin Laden told appellant they were evacuating the compound because an operation was about to take place. Two days prior to the operation, appellant took bin Laden to Kabul, where they stayed until just after the

9/11 attack. The day after the attack, at dinner, bin Laden confirmed that he was responsible for the 9/11 operation. Subsequently, appellant drove bin Laden to Lahore, a military camp with numerous tunnels and structures for hiding. After a week hiding there with bin Laden, appellant continued to transport bin Laden around Afghanistan, changing locations every few days to help bin Laden escape retaliation by the United States. Shortly after 9/11, appellant drove bin Laden and al-Zawahiri to a camp outside of Kabul where bin Laden made a video talking about Jews, Americans, and jihad.

Congress passed the Authorization for Use of Military Force resolution (AUMF) one week after the September 11, 2001 terrorist attacks. Pub. L. No. 107-40, 115 Stat. 224 (2001). 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 the terrorist attacks." *Id*. The President ordered the armed forces to Afghanistan "to subdue al Qaeda and quell the Taliban regime that was known to support it." *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004). Subsequently, United States and allied armed forces engaged in military operations in Afghanistan, where appellant was seized on November 24, 2001.

II. CHARGE AND SPECIFICATIONS WITH GUILTY FINDINGS

Appellant was convicted of two types of providing material support for terrorism. First, he provided material support for carrying out an act of terrorism. Second, he provided material support to an international terrorist organization. *See* 2007 M.M.C., Part IV, ¶¶ 6(25)bA and 6(25)bB. The five specifications of which he was convicted begin with identical language:

> 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 l996 to on or about November 24, 2001, in context of or associated with an armed conflict—

The specifications continue with individualized allegations as follows:

> Specification 2: [Hamdan] 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[6]:
>
> 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;

[6] Although Specification 2 of Charge II alleges that appellant committed at least one of four alleged acts, the findings worksheet for this specification indicates the members found appellant guilty of all four alleged acts, including that he "[t]ransported 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." AE 320 at 5-6. After review of the entire record, we are independently convinced beyond a reasonable doubt that appellant committed all four of the acts alleged in Specification 2 of Charge II. *See* 2009 M.C.A. § 950f(d).

c. Served as Usama bin Laden's armed body guard 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 5: [Hamdan did] 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: [Hamdan did] 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: [Hamdan did] 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 body guard he was protecting the leader of al Qaeda and facilitating communication and planning used for acts of terrorism.

Specification 8: [Hamdan did] 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 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.

III. PROCEDURAL HISTORY

In late 2001, militia forces in Afghanistan captured appellant, and on November 24, 2001, they turned him over to the U.S. military. In 2002, the U.S. military transported him to a military detention facility in Guantanamo Bay, Cuba, where he was held until he was transferred to Yemen in November 2009.

On July 3, 2003, the President declared appellant eligible for trial by military commission on unspecified charges pursuant to the President's Military Order of November 13, 2001. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155 (D.D.C. 2004). On July 13, 2004, the Appointing Authority referred to trial by military commission one charge with one specification of conspiracy with bin Laden and other "members and associates of the al Qaeda organization, known and unknown, to commit" the offenses of "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terror-

ism." Charge Sheet and Referral, Allied Papers.

On April 6, 2004, appellant filed a petition for mandamus or habeas corpus in the U.S. District Court for the Western District of Washington. *Id.* On July 8, 2004, the Ninth Circuit directed that all habeas cases from Guantanamo "should be heard in the District Court of the District of Columbia." *Id.* at 156 (citing *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004)). On September 2, 2004, appellant's case was docketed in the District Court of the District of Columbia. *Id.* On November 8, 2004, the District Court stayed appellant's military commission trial until the Department of Defense complied with various requirements of the Court. *Id.* at 173-74. On July 15, 2005, a D.C. Circuit panel unanimously reversed the District Court. *Hamdan v. Rumsfeld*, 415 F.3d 33, 44 (D.C. Cir. 2005). On November 7, 2005, the Supreme Court granted certiorari. *Hamdan v. Rumsfeld*, 546 U.S. 1002 (2005).

On June 29, 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld,* 548 U.S. 557, 635 (2006), that the military commission system then in existence violated Article 36, Uniform Code of Military Justice (UCMJ) and the Geneva Conventions, and that appellant was entitled to the protections of Common Article 3 of the Geneva Conventions (Common Article 3). *See* pp. 11-12 *infra* (discussing Supreme Court decision and quoting Common Article 3). Subsequently, Congress passed the 2006 M.C.A., which President Bush signed into law on October 17, 2006. Remarks on Signing the Military Commissions Act of 2006, 42 *Weekly Comp. Pres. Doc.* 1831-33 (Oct. 17, 2006). The 2006 M.C.A. established a revised system of military commissions, which limited jurisdiction to alien unlawful enemy combatants (AUECs). 2006 M.C.A. § 948c. *See* n. 48, *infra*. (defining the term AUEC).

On May 10, 2007, the convening authority referred to trial by military commission one charge each of conspiracy and providing material support for terrorism, citing violations of 10 U.S.C. §§ 950v(b)(28) and 950v(b)(25). Appellant again asked the District Court to stop his trial. On July 18, 2008, the District Court declined to stop his trial, acknowledging the new landscape of military commissions after enactment of the 2006 M.C.A. *Hamdan v. Gates*, 565 F. Supp. 2d 130, 136-37 (D.D.C. 2008).

Appellant pleaded not guilty to the two charges. Although the military commission found appellant not guilty of conspiracy and three specifications of providing material support for terrorism, he was found guilty of five specifications of providing material support for terrorism.

On August 7, 2008, the military commission sentenced appellant to 66 months of confinement, and the military commission judge awarded confinement credit of 61 months, seven days. In late November 2008, appellant was transferred to his native Yemen for the remaining few weeks of confinement. Appellant's Brief at 3. In January 2009, Yemeni authorities released appellant. *Id.* On July 16, 2009, the convening authority approved appellant's conviction and sentence.

IV. ISSUES

Appellant urges this court to vacate the findings and sentence of the military commission for three reasons. First, he contends the military commission, established pur-

suant to Congress's Article I power to "define and punish . . . Offenses against the Law of Nations," lacked subject matter jurisdiction over the offense of providing material support for terrorism, because it is not a violation of the international law of war. Second, he argues his conviction for that offense is the result of an *ex post facto* prosecution prohibited by both the U.S. Constitution and international law, because 10 U.S.C. § 950v(b)(25) was signed into law on October 17, 2006, several years after the alleged conduct in the charges occurred. Third, he claims that the 2006 M.C.A. violates the Constitution by making aliens, but not citizens, subject to trial by military commission. Our Court also granted appellant's motion to be heard on two issues relating to appellant's second argument,[7] and appellant continued to maintain that his prosecution was barred because the offenses were *ex post facto*.

V. MILITARY COMMISSION PROCEDURES

In light of its predicate application of Common Article 3,[8] in 2006 the Supreme Court determined the Presidentially-directed structure for appellant's original trial in 2004 was inconsistent with the limitations imposed by Congress pursuant to Article 36, UCMJ, 10 U.S.C. § 836,[9] and was therefore illegal.

[7] The two granted issues are as follows:

> I. Assuming that the charges allege underlying conduct that violates the law of armed conflict and that "joint criminal enterprise" is a theory of individual criminal liability under the law of armed conflict, what, if any, impact does the "joint criminal enterprise" theory of individual criminal liability have on this Court's determinations of whether the charged conduct constitutes an offense triable by military commission and whether the charges violate the Ex Post Facto Clause of the Constitution? *See, e.g. Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n. 40 (2006).
>
> II. In numerous Civil War and Philippine Insurrection cases, military commissions convicted persons of aiding or providing support to the enemy. Is the offense of aiding the enemy limited to those who have betrayed an allegiance or duty to a sovereign nation? *See Hamdan v. Rumsfeld*, 548 U.S. 557, 600-01, n. 32, 607, 693-97 (2006).

[8] Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364 states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

[9] The Hamdan Court included the version of Article 36, UCMJ, then in effect:

> (a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations

Hamdan, 548 U.S. at 620-25. The Court considered the President's authority to convene appellant's military commission without specific statutory authority to prosecute the charged offense, and addressed the jurisdictional basis of military commissions stating:

> Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution unless some other part of that document authorizes a response to the felt need. And that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war.[10]

The *Hamdan* Court, quoting Chief Justice Chase in *Ex parte Milligan*, emphasized the limits on the President's authority to convene military commissions without more specific statutory authorization stating:

> But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

Id. at 591-92 (quoting *Ex parte Milligan*, 71 U.S. 2, 139-40 (1866); citation omitted). The Court found appellant's initial military commission substantially deviated from regular court-martial practice, and the record lacked an adequate demonstration that procedures more similar to courts-martial were not practicable. *Id.* at 622 & n. 50, 624. Article 36, UCMJ, required either uniformity or justification for variation from UCMJ procedures, rendering those military commissions variations illegal. *Id.* at 625. Distinguishing the pre-enactment of the UCMJ precedent which supported military commissions like appellant's, the Court noted, "Prior to the enactment of Article 36(b), [UCMJ,] it may well have been the case that a deviation from the rules governing courts-martial would not have rendered the military commission illegal. Article 36(b), however, imposes a statutory command that must be heeded." *Id.* at 625 n. 54 (internal citations, quotation marks, and emphasis omitted).

Justice Breyer suggested the President seek Congressional authorization for military commissions when those procedures are inconsistent with the UCMJ, stating, "Indeed, Congress has denied the President the legislative authority [under Article 36, UCMJ] to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary." *Id.* at 636 (Breyer, Kennedy, Souter, and Ginsburg, JJ., concurring).

> which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

Hamdan, 548 U.S. at 620.

[10] *Hamdan*, 548 U.S. at 591 (citing *Ex parte Quirin*, 317 U.S. 1, 26-29 (1942); *In re Yamashita*, 327 U.S. 1, 11 (1946); internal citations omitted)).

In response, Congress passed the 2006 M.C.A., and President Bush signed the Act into law. On October 28, 2009, President Obama signed into law the 2009 M.C.A.[11] With the enactment of the 2009 M.C.A., two different Presidents and two different Congresses have spoken on the issue of how military commissions should be conducted. After vigorous Congressional debate, the 2009 M.C.A did not change the jurisdiction of military commissions nor did it eliminate the offense of providing material support for terrorism. *Compare* 2006 M.C.A. §§ 948d, 950v(b)(25) *with* 2009 M.C.A. §§ 948d, 950t(25). The 2006 and 2009 M.C.A.s broadly conformed commission procedures to those under the UCMJ, with several exceptions.[12]

Current structure of military commissions is similar to trials in U.S. district courts and courts-martial. The duties of a military commission judge, who is required to have the same qualifications as a trial judge at courts-martial, include deciding pretrial motions and other issues of law and instructing the military commission about the elements of offenses. 2006 M.C.A. §§ 948j(b), 949d, and 949l; Article 26, UCMJ. The accused automatically receives assigned military counsel, who is required to have the same qualifications as military defense counsel at courts-martial, and the accused may be represented by civilian counsel. 2006 M.C.A. §§ 948k(c) and 949c(b); Article 27, UCMJ. The members detailed to a military commission act as the "jury" for findings and sentencing, and they are required to have the same qualifications as all-officer courts-martial panels, "those active duty commissioned officers, who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament." 2007 M.M.C., Rule for Military Commissions 502(a)(1); MMC (2008), Rule for Courts-Martial 502(a)(1). *See also* M.C.A. § 948i(b); Article 25, UCMJ.

The merits phase of a military commission trial begins with opening statements, and the Government and accused have opportunities to present their cases. Next, both sides make their closing arguments, the military commission judge instructs the commission members about the elements of the offenses, evidentiary matters, and burden of proof. Then the members decide, in closed session, whether the Government has proven the guilt of the accused beyond a reasonable doubt. If the accused is found guilty of any specification, the commission members specify the sentence in a manner similar to trials by court-martial. The accused's rights at a military commission are briefly listed at n. 171, *infra*.

After a trial resulting in a finding of guilty, the record is reviewed by the convening authority, the U.S. Court of Military Commission Review, and the U.S. Court of Appeals for the District of Columbia Circuit. 2006 and 2009 M.C.A. §§ 950b, 950f, and 950g. The Supreme Court may review by writ of certiorari the final judgment of the United States Court of Appeals for the District of Columbia Circuit. 2006 and 2009 M.C.A. § 950g(e).

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[11] *See* http://www.whitehouse.gov/the-press-office/-remarks-president-signing-national-defense-authorization-act-fiscal-year-2010.

[12] Section 948b(d) of the 2006 and 2009 versions of the M.C.A. explicitly excluded applicability of Articles 10, 31(a), 31(b), 31(d), and 32, UCMJ, to military commission proceedings and 2006 M.C.A. Section 4(a), Conforming Amendments, limited Articles 21, 28, 48, 50a, 104, and 106, only to the extent provided by the M.C.A.

VI. STANDARD OF REVIEW

We review the military commission judge's decision whether the military commission had subject matter jurisdiction *de novo* because jurisdiction is a question of law.[13] We also consider appellant's challenges to the constitutionality of the 2006 M.C.A. under a *de novo* standard of review.[14] We must ensure that findings of guilty are correct in law and fact and the sentence is appropriate.[15] We review factual sufficiency *de novo* applying a proof beyond reasonable doubt standard.[16] Our Court is required to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses." 2009 M.C.A. § 950f(d). We also review the sentence to ensure appellant is "sentenced only for the offense or offenses of which he has been found guilty. A proper sentence is one tailored to the particular accused member and the nature and seriousness of the offense."[17]

VII. PROVIDING MATERIAL SUPPORT FOR TERRORISM AS A LAW OF WAR OFFENSE

A. Authority to Define Law of War Offenses

Appellant contends that Congress exceeded its authority in violation of the Constitution's Define and Punish Clause, art. I, § 8, cl. 10, when Congress established providing material support for terrorism as an offense in the 2006 M.C.A.[18] We disagree. Provided their actions are taken respecting the Constitution, the President and the Congress have broad discretion when acting during an ongoing conflict in the areas of war powers, foreign relations, and aliens.[19] Nothing in the current appeal serves to challenge the outer limits of the Congress's authority under the Constitution's Define and Punish Clause.

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[13] *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008); *United States v. Khadr*, 717 F.Supp.2d 1215, 1220 (USCMCR 2007).

[14] *United States v. Carta*, 592 F.3d 34, 42 (1st Cir. 2010) (citing *United States v. Rene E.*, 583 F.3d 8, 11 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1109, 175 L. Ed. 2d 921 (2010)); *United States v. Weatherly*, 525 F.3d 265, 273 (3d Cir. 2008) (citing *United States v. Singletary*, 268 F.3d 196, 198-99 (3d Cir. 2001)); *Anderson v. Milwaukee County*, 433 F.3d 975, 978 (7th Cir. 2006) (citing *Weinberg v. City of Chicago*, 310 F.3d 1029, 1035 (7th Cir. 2002)) (stating "any questions of constitutional law [are reviewed] under the *de novo* standard of review").

[15] 2009 M.C.A. § 950f(d). The 2006 M.C.A. § 950f(d) limited our review to "matters of law." We "apply the law in effect at the time [we render our] decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Landgraf v. USI Film Products*, 511 U.S. 244, 249 (1994) (citing *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974)). We choose to apply the 2009 M.C.A. in lieu of the 2006 M.C.A. standard of review because it is more protective of the accused and manifests Congressional intent that we utilize the same standard of review for factual sufficiency and sentence appropriateness as the service courts of criminal appeals use under Article 66, UCMJ, 10 U.S.C. 866, to review courts-martial convictions and sentences.

[16] *See United States v Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002) (discussing standard of review under Article 66, UCMJ, for factual sufficiency).

[17] *United States v. Cantrell*, 44 M.J. 711, 714 (A.F.C.C.A. 1996) (citing *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Mamaluy*, 10 U.S.C.M.A. 102, 27 C.M.R. 176 (1959)).

[18] U.S. Const., Art. I, § 8, cl. 10 states Congress shall have Power "to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."

[19] The Supreme Court stated, "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Demore v. Kim*, 538 U.S. 510, 522 (2003) (citing *Mathews v. Diaz*, 426 U.S. 67, 81 n. 17 (1976) and quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-15 (2003) (foreign affairs); *Quirin*, 317 U.S. at 26-28 (discussing constitutional sources of war powers).

1. War Powers

The Government has broad powers to safeguard the United States under the Constitution in time of war. In addition to the Define and Punish Clause, the Supreme Court listed nine constitutional sources relevant to authorizing military commissions to support the nation's war-fighting efforts.[20] One constitutional source of authority for appellant's military commission stems from the Constitution's War Powers. In 1948, the Supreme Court emphasized the nation's war powers include:

> the power to wage war successfully. . . . Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.

Lichter v. United States, 334 U.S. 742, 767 n. 9 (1948) (citations omitted).

"From the very beginning of its history [the Supreme Court] has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." *Ex parte Quirin*, 317 U. S. 1, 27-28 (1942). Like the law of nations, the law of war must adapt to changing circumstances to be effective. This requirement was recognized during the trials of Nazi war criminals after World War II:

> The sources of international law which are usually enumerated are (1) customs and practices accepted by civilized nations generally, (2) treaties, conventions, and other forms of interstate agreements, (3) the decisions of international tribunals, (4) the decisions of national tribunals dealing with international questions, (5) the opinions of qualified text writers, and (6) the diplomatic papers. These sources provide a frame upon which a system of international law can be built but they cannot be deemed a complete legal system in themselves. Any system of jurisprudence, if it is to be effective, must be given an opportunity to grow and expand to meet changed conditions. The

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[20] In *Ex parte Quirin*, 317 U.S. 1, 25-26 (1942) the Court stated:

> Congress and the President, like the courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its preamble, is to "provide for the common defence." As a means to that end, the Constitution gives to Congress the power to "provide for the common Defence," Art. I, § 8, cl. 1; "To raise and support Armies," "To provide and maintain a Navy," Art. I, § 8, cl. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14. Congress is given authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11; and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," Art. I, § 8, cl. 10. And finally, the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18. The Constitution confers on the President the "executive Power," Art. II, § 1, cl. 1, and imposes on him the duty to "take Care that the Laws be faithfully executed." Art. II, § 3. It makes him the Commander in Chief of the Army and Navy, Art. II, § 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, § 3, cl. 1.

> codification of principles is a helpful means of simplification, but it must not be treated as adding rigidity where resiliency is essential. To place the principles of international law in a formalistic strait-jacket would ultimately destroy any effectiveness that it has acquired.[21]

Using its authority to define and punish offenses against the law of nations, Congress approves, within constitutional limitations, jurisdiction of military commissions to try persons for offenses against the law of war. *Quirin*, 317 U.S. at 26-31. An important tool of the military command, military commissions are "an institution of the greatest importance in a period of war and should be preserved." *Madsen v. Kinsella*, 343 U.S. 341, 353 n. 20 (1952) (quoting S. Rep. No. 229, 63d Cong., 2d Sess. 53, 98-99 (1914) (reporting testimony of Brig. Gen. Enoch M. Crowder to the House Committee on Military Affairs in 1912 and to the Sen. Subcommittee on Military Affairs, *Revision of the Articles of War*, Feb. 7, 1916, vol. I, 40-41)). As Colonel Winthrop, the "Blackstone of Military Law,"[22] explained:

> [I]n general, it is those provisions of the Constitution which empower Congress to "declare war" and "raise armies," and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law. *The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war.*[23]

More recently, the Supreme Court reemphasized the necessity for the Judiciary to refrain from review of "issues aris[ing] in the context of ongoing military operations conducted by American Forces overseas. . . [being] cognizant that 'courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.'" *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (quoting *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988)). For example, the Supreme Court declined to permit habeas intervention, over the objection of the executive branch, in an Iraq court case involving a U.S. citizen held by U.S. forces stating:

> The Judiciary is not suited to second-guess such determinations —determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in

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[21] *See* 11 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* at 1235 (1950) (NMT Tribunals). The 15-volume record of the NMT Tribunals is available at http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminals.html. The 42-volume record of the Trial of the Major War Criminals before the International Military Tribunal at Nuremberg, Nov. 14, 1945 to Oct. 1, 1946 is available at http://www.loc.gov-/rr/frd/Military_Law/NT_major-war-criminals.html.

[22] *Hamdan*, 548 U.S. at 597 (Stevens, Souter, Ginsburg, and Breyer, JJ., concurring) (referring to Winthrop's *Military Law and Precedents* as "[t]he classic treatise penned by Colonel William Winthrop, whom we have called the 'Blackstone of Military Law.'" (quoting *Reid v. Covert*, 354 U.S. 1, 19 n. 38 (1957) (plurality opinion)). "All parties agree that Colonel Winthrop's treatise accurately describes the common law governing military commissions." *Id.* at 598.

[23] William Winthrop, *Military Law and Precedents* 831 (2d ed. 1920) (1920 Winthrop) (first alteration in original; second alteration added).

this area. *See* The Federalist No. 42, p. 279 (J. Cooke ed. 1961) (J. Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations"). In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is. As Judge Brown noted, "we need not assume the political branches are oblivious to these concerns. Indeed, the other branches possess significant diplomatic tools and leverage the judiciary lacks."[24]

Although "deference does not mean abdication," the Supreme Court has consistently refrained from interfering in congressional decisions made pursuant to the national security clauses.[25] "[J]udicial deference to [a] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker v. Goldberg,* 453 U.S. 57, 70 (1981). Similarly, the political branches' determination of the United States' obligations under international law is a determination about the conduct of American foreign policy.[26]

[24] *Munaf v. Geren*, 553 U.S. 674, 702-03 (2008) (citation omitted).

[25] *Rostker v. Goldberg,* 453 U.S. 57, 70 (1981). *See also e.g., Weiss v. United States*, 510 U.S. 163, 177 (1994); *Egan*, 484 U.S. at 527-34 (declining to review the President's authority as Commander in Chief to "classify and control access to information bearing on national security").

[26] Congress made special findings about the importance of international relations in the fight against terrorism. *See* pp. 23 to 24, *infra*.

2. Foreign Affairs

Defining and enforcing the United States' obligations under international law implicitly require the making of extremely sensitive policy decisions. Such decisions will inevitably color our relationships with other nations. Decisions of this nature "are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility. . . ." *Finzer v. Barry,* 798 F.2d 1450, 1458-59 (D.C. Cir. 1986) (citation omitted), *affirmed in part and reversed in part*, *Boos v. Barry*, 485 U.S. 312 (1988). Under the "political question" doctrine, courts should abstain from cases where there "is found a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Article II of the Constitution establishes that the "President has the lead role . . . in foreign policy" and the "vast share of responsibility for the conduct of our foreign relations." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414-15 (2003) (citations omitted; internal quotation marks omitted). The President's constitutional function "uniquely qualifies him to resolve the sensitive foreign policy decisions that bear on compliance" with international agreements. *Medellin v. Texas*, 552 U.S. 491, 523-24 (2008) (citations omitted; internal quotation marks omitted). The United States Government's interpretation, construction and application of treaty provisions and responsibilities are "entitled to great weight." *Id.* at 513 (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982)); *see also Kolovrat v. Ore-*

gon, 366 U.S. 187, 194 (1961). In addition, the President "has a degree of independent authority to act" in foreign affairs. *Am. Ins. Ass'n*, 539 U.S. at 414 (citation omitted).

Justice Jackson described the President's authority for executive action when national security relating to foreign affairs is an issue and Congress has provided express authorization stating:

> [The President's authority] is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. [An action] executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.[27]

There is no dispute that "the United States has a vital national interest in complying with international law. The Constitution itself attempts to further this interest by expressly authorizing Congress 'to define and punish . . . . Offenses against the Law of Nations.' U.S. Const., Art. I, § 8, cl. 10." *Boos v. Barry*, 485 U.S. 312, 323 (1988). "[T]he Constitution authorized Congress to derive from the often broadly phrased principles of international law a more precise code. . . [to comply] with rules governing the international community." *Finzer,* 798 F.2d at 1455.

There is judicial precedent for the proposition that Congress's authority is not restrained "by principles of customary international law in its ability to legislate in respect of extraterritorial conduct." *United States v. Yousef*, 327 F.3d 56, 109 n. 44 (2d Cir. 2003) (citing *The Nereide*, 13 U.S. 388 (1815)). Congress has constitutional authority to "manifest [its] will" to establish a rule not necessarily reflective of customary international law "by passing an act for the purpose." *Id.* at 109 (quoting *The Nereide*, 13 U.S. at 423). "[S]ubsequently enacted statutes . . . preempt existing principles of customary international law—just as they displaced prior inconsistent treaties" and "no enactment of Congress can be challenged on the ground that it violates customary international law." *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988). Further, courts are required to defer to Congress's "unambiguous exercise" of its power to grant jurisdiction to agencies or to courts, and that is true even if such an exercise might be argued to "exceed the limitations imposed by international law." *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d

[27] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring; citations omitted). Justice Jackson's opinion in *Youngstown* has been frequently quoted, including in *Hamdan*, 548 U.S. at 638, 680, as a clear expression of the Government's power to regulate conduct in matters of national security. *See e.g.*, *Kiyemba v. Obama*, 555 F.3d 1022, 1026-29 (D.C. Cir 2009) (discussing authority of courts to order release of detainees in the United States), *vacated due to change in status of petitioners*, 130 S. Ct. 1235 (Mar. 1, 2010); *Kiyemba v. Obama*, 561 F.3d 509, 522 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (discussing wartime authority of Executive Branch in connection with detainees and holding "the U.S. Government may transfer Guantanamo detainees to the custody of foreign nations without judicial intervention -- at least so long as the Executive Branch declares, as it has for the Guantanamo detainees, that the United States will not transfer 'an individual in circumstances where torture is likely to result.'") (citing *Munaf*, 128 S. Ct. at 2226)).

1300, 1323 (D.C. Cir. 1980) (citation omitted). We will not assume the scope of this principle to be so expansive as to contravene the precedence of U.S. law as provided for by the Constitution.

In this case, Congress and the President seek to protect our Nation's interests in ensuring compliance with the law of war and adherence to the law of nations, including customary international law, through adjudication and punishment of particular crimes against the law of war. The nature of questions concerning the jurisdiction of a military commission to prosecute specific war crimes authorized by statute "requires us to proceed with circumspection" to avoid "adjudicating issues inevitably entangled in the conduct of our international relations."[28]

The protective principle in international law provides a basis for jurisdiction of offenses occurring outside the United States. Recently, the courts have discussed the constitutional authority of Congress to establish and punish drug traffickers apprehended outside U.S. territorial waters under the Maritime Drug Law Enforcement Act (MDLEA).[29] The Supreme Court noted that Congress may constitutionally operate under a broader inherent authority when acting to protect national interests. *Youngstown*, 343 U.S. at 637. This is so even in instances where the act occurs outside the territory of the United States. In a challenge to the constitutionality of the MDLEA to prosecute non-citizen defendants captured on the high seas, the 1st Circuit Court noted:

> Under the protective principle of international law, Congress can punish crimes committed on the high seas regardless of whether a vessel is subject to the jurisdiction of the United States. Under the protective principle, [a] state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law

[28] *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citation and internal quotation marks omitted). In *Ex parte Vallandigham*, 68 U.S. 243 (1864), the Court quoted an order prepared by Francis Leiber, LL.D., later approved by President Lincoln, which illustrated the Government's view in 1863 that the scope of military commission jurisdiction could be controlled by statute stating:

> It is affirmed in these instructions that military jurisdiction is of two kinds. *First, that which is conferred and defined by statute*; second, that which is derived from the common law of war. Military offences, under the statute, must be tried in the manner therein directed; but military offences, which do not come within the statute, must be tried and punished under the common law of war.

Id. at 248-49 (internal quotation marks and citations omitted; emphasis added). Historically, the jurisdiction for military commissions arose from two sources, "the first is exercised by courts-martial, while cases which do not come within the 'rules and regulations of war,' or the jurisdiction conferred by statute or court-martial, are tried by military commissions. These jurisdictions are applicable, not only to war with foreign nations, but to a rebellion. . . ." *Id.*

[29] *See* 46 U.S.C. §§ 70503-70507. *Compare United States v. Vilches-Navarrete*, 523 F.3d 1, 21-22 (1st Cir. 2008) *and United States v. Tinoco*, 304 F.3d 1088, 1106-11 (11th Cir. 2002) *with United States v. Perlaza*, 439 F.3d. 1149, 1159-60, 1167 (9th Cir. 2006). *See also Morrison v. National Australia Bank*, 561 U.S. ___, 130 S. Ct. 2869, 2877-78, 177 L. Ed. 2d 435 (2010) ("[U]nless a contrary intent appears, [legislation of Congress] is meant to apply only within the territorial jurisdiction of the United States. This principle represents a canon of construction, or a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate. When a statute gives no clear indication of an extraterritorial application, it has none." (citations and internal quotation marks omitted)).

> of states that have reasonably developed legal systems.

United States v. Vilches-Navarrete, 523 F.3d 1, 21-22 (1st Cir. 2008) (Lynch, J., concurring in judgment) (quotation marks and citations omitted). More specifically, in dealing with a direct challenge to the constitutionality of the 1990 Antiterrorism Act for murder of U.S. nationals outside the United States, a Federal District Court made the following observation, which provides some authority for concluding the Define and Punish Clause does not limit prosecution of extraterritorial conduct connected to terrorism:

> [E]ven assuming that the acts described in [the Antiterrorism Act] are not widely regarded as violations of international law, it does not necessarily follow that these provisions exceed Congress's authority under [Article I, Section 8,] Clause 10. Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to "define" such offenses. Hence, provided that the acts in question are *recognized by at least some members of the international community as being offenses against the law of nations,*[30] *Congress arguably has the power to criminalize these acts pursuant to its power to define offenses against the law of nations.*[31] *See United States v. Smith,* 18 U.S. (5 Wheat.) 153, 159, 5 L. Ed. 57 (1820) (Story, J.) ("Offenses…against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations… Therefore…, there is a peculiar fitness in giving the power to define as well as to punish.").[32]

There is no constitutional prerequisite of universal, international, or scholarly unanimity before Congress may act to subject appellant to trial before a military commission for his support of bin Laden and al Qaeda in the unlawful conflict they are waging against the United States.[33]

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[30] And this would appear to be the case. *See* [Christopher L.] Blakesley, *Extraterritorial Jurisdiction* [in M. Cherif Bassiouni (ed.), INTERNATIONAL CRIMINAL LAW] 72, 70 [(2d ed. 1999)] (noting that terrorist violence includes "wanton violence against innocent civilians," and that this offense is "condemned by virtually all domestic law"); *id.* at 73 ("All nations condemn, prosecute and punish terrorist violence, when perpetrated against them or their nationals.").

[31] *See also* Steven R. Swanson, *Terrorism, Piracy, and the Alien Tort Statute*, 40 Rutgers L. J. 159, 217 (2008) (discussing treaties and agreements and concluding, "[a] close look at the international community's attempts to define and punish terrorism over the last 50 years, and more specifically since the historical attacks on the United States in 2001, shows that there is almost unanimous agreement that terrorist acts constitute an international crime on the same level that piracy did in the eighteenth century. . . . The courts should recognize that today's terrorists are much the same as pirates of old. . . .").

[32] *United States v. Bin Laden*, 92 F. Supp. 2d 189, 220-21 (S.D.N.Y. 2000) (emphasis added) (citing Note, Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 Cornell L. Rev. 599, 611 (1987) ("Congress may define and punish offenses in international law, notwithstanding a lack of consensus as to the nature of the crime in the United States or in the world community.").

[33] Our superior court has noted, "[t]he international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts." *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (citing *Restatement (Third) of Foreign Relations Law of the United States* § 111(3)-(4) (1987)). *See also id.* at 884 (Williams, J., concurring in part and concurring in the judgment) ("Whatever the appropriate role of the laws of war in determining what powers the President derived from the AUMF, it cannot be to render unlawful the President's use of force in Afghanistan in the fall of 2001—which the Supreme

B. Defining Terrorism and Providing Material Support for Terrorism

1. U.S. Domestic Terrorism Offenses—Title 18

Congress passed prohibitions against terrorism in 1996, including providing material support for terrorism under 18 U.S.C. §§ 2339A and 2339B. Congress made specific findings emphasizing the importance of combating terrorism under multiple specific powers, interests, and concerns. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301, 110 Stat. 1247, note following 18 U.S.C. §2339B (Findings and Purpose), and § 324, 110 Stat. 1255, note following 18 U.S.C. 2339A (Findings) (Apr. 24, 1996). *See also Holder v. Humanitarian Law Project*, 561 U.S. ___, 130 S. Ct. 2705, 2712, 2724-26, 2729, 2733, 2735; 177 L. Ed. 2d 355 (2010) (citing provisions from Congress's specific findings in § 301). Congress described the purpose and made the following specific findings for AEDPA § 301:

> (a) **Findings**. The Congress finds that—(1) international terrorism is a serious and deadly problem that threatens the vital interests of the United States; (2) the Constitution confers upon Congress the power to punish crimes against the law of nations and to carry out the treaty obligations of the United States, and therefore Congress may by law impose penalties relating to the provision of material support to foreign organizations engaged in terrorist activity; (3) the power of the United States over immigration and naturalization permits the exclusion from the United States of persons belonging to international terrorist organizations; (4) international terrorism affects the interstate and foreign commerce of the United States by harming international trade and market stability, and limiting international travel by United States citizens as well as foreign visitors to the United States; (5) international cooperation is required for an effective response to terrorism, as demonstrated by the numerous multilateral conventions in force providing universal prosecutive jurisdiction over persons involved in a variety of terrorist acts, including hostage taking, murder of an internationally protected person, and aircraft piracy and sabotage; (6) some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States, or use the United States as a conduit for the receipt of funds raised in other nations; and (7) foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.
>
> (b) **Purpose**. The purpose of this subtitle [for full classification, consult USCS Tables volumes] is to provide the Federal Government the fullest possible basis, consistent with the Constitution, to prevent persons within the United States, or subject to the jurisdiction of the United States, from providing material support or resources to foreign organizations that engage in terrorist activities.

In AEDPA § 324, the Congress found that:

Court has repeatedly acknowledged was permitted under the AUMF." (citing *Boumediene v. Bush,* 553 U.S. 723, 732-34 (2008)).

> (1) international terrorism is among the most serious transnational threats faced by the United States and its allies, far eclipsing the dangers posed by population growth or pollution; (2) the President should continue to make efforts to counter international terrorism a national security priority; (3) . . . the President should undertake immediate efforts to develop effective multilateral responses to international terrorism as a complement to national counter terrorist efforts; [and;] (4) the President should use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens . . . .

All of those same necessary concerns, plus the necessity to successfully prosecute the ongoing conflict, are present in the 2006 M.C.A.'s codification of the offense of providing material support for terrorism under § 950v(a)(25).

Providing material support for terrorism (18 U.S.C. §§ 2339A, 2339B) was the basic model for the 2006 M.C.A. offense bearing the same name.[34] On September 13, 1994, Congress enacted 18 U.S.C. 2339A. Title 18 U.S.C. 2339A was amended on April 24, 1996 to read:

> (a) OFFENSE.—Whoever, within the United States, provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 351, 831, 842(m) or (n), 844(f) or (i), 956, 1114, 1116, 1203, 1361, 1362, 1363, 1366, l751, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, or 2340A of this title or section 46502 of title 49, or in preparation for, or in carrying out, the concealment from the commission of any such violation, shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) DEFINITION.—In this section the term, "material support or resources" means currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.[35]

On April 24, 1996, Congress enacted 18 U.S.C. § 2339B, "Providing material support or resources to designated foreign terrorist organizations," which included extraterritorial jurisdiction and provided:

> (a) PROHIBITED ACTIVITIES.—(1) Unlawful conduct.—Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support or resources to a foreign terrorist organization, or at-

[34] Providing material support to terrorism under the M.C.A. reflects a law of war violation in existence before appellant's crimes, which were committed from 1996 through 2001. The offense of providing material support for terrorism under the M.C.A. is narrower than the Title 18 offense. The Title 18 offense includes conduct unassociated with an armed conflict and it includes defendants who are not unlawful enemy combatants or unprivileged belligerents.

[35] War Crimes Act of 1996, Pub. L. No. 104-132, Title III, Subtitle B, § 323, 110 Stat. 1255. (1996).

> tempts or conspires to do so, shall be fined under this title or imprisoned not more than 10 years, or both.[36]

Al Qaeda was not designated as a "foreign terrorist organization" as required for 18 U.S.C. 2339B(a) until October 8, 1999.[37]

Under U.S. domestic law, members of al Qaeda have violated federal statutes relating to terrorism. Title 18 U.S.C. § 2331(1) defines "international terrorism" to be activities that:

> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
>
> (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and
>
> (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

On April 24, 1996, Congress enacted the AEPDA of 1996, 18 U.S.C. § 2332b, "Acts of terrorism transcending national boundaries." AEPDA includes extraterritorial jurisdiction under 18 U.S.C. § 2332b(e) for violations of 18 U.S.C. § 2332b(a), which now provides:

> (a) PROHIBITED ACTS.—
>
> (1) OFFENSES.—Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)—
>
> [(b)—listing jurisdictional basis for U.S. prosecution]
>
> (A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or
>
> (B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States; in violation of the laws of any State, or the United States, shall be punished as prescribed in subsection (c).
>
> (2) Treatment of threats, attempts and conspiracies. Whoever threatens to commit an offense under paragraph (1), or attempts or conspires to do so, shall be punished under subsection (c).

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[36] Pub. L. No. 104-132, Title III, Subtitle A, § 303(a), 110 Stat. 1250 (1996).

[37] U.S. Dep't of State, 1999 Report Index: Foreign Terrorist Organizations (1999), http://www.state.gov/s/ct/rls/rpt/fto/2682.htm). This technical designation does not control prosecution for providing material support for terrorism under M.C.A. 2006. *See* n. 34, *supra*.

Section 2332b(g)(5), defines the term "Federal crime of terrorism" to mean an offense that—"(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," and this definition is included in numerous offenses listed in § 2332b(g)(5)(B), several of which are particularly relevant to al Qaeda's attacks upon U.S. citizens, diplomatic personnel, and facilities.[38]

2. Congressional Finding that Providing Material Support for Terrorism is a Traditional Law of War Offense

The 2006 M.C.A. § 950p defines preexisting violations of the law of war in its "Statement of substantive offenses" as follows:

> (a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.
> (b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

After several witnesses discussed the issue of whether the M.C.A. offense of providing material support for terrorism could be retroactively applied to AUECs,[39] Congress decided the M.C.A. offense was a recognized law of war violation. The 2009 M.C.A. § 950p(d) states:

> (d) EFFECT.—The provisions of this subchapter codify offenses that have traditionally been triable by military commission. This chapter does not establish new crimes that did not exist before the date of the enactment of this subchapter, . . . but rather codifies those crimes for trial by military commission. Because the provisions of this subchapter codify offenses that have traditionally been triable

[38] 18 U.S.C. § 2332b(g)(5)(B) (listing the following sections under Title 18: § 32 (destruction of aircraft or aircraft facilities), § 844(f)(2) or (3) (arson and bombing of Government property risking or causing death), § 844(i) (arson and bombing of property used in interstate commerce), § 930(c) (killing or attempted killing during an attack on a Federal facility with a dangerous weapon), § 956(a)(1) (conspiracy to murder, kidnap, or maim persons abroad), § 1114 (killing or attempted killing of officers and employees of the United States), § 1116 (murder or manslaughter of foreign officials, official guests, or internationally protected persons), § 1361 (government property or contracts), § 1992 (terrorist attacks and other acts of violence against railroad carriers and against mass transportation systems on land, on water, or through the air), § 2155 (destruction of national defense materials, premises, or utilities), § 2156 (national defense material, premises, or utilities), § 2332 (certain homicides and other violence against United States nationals occurring outside of the United States), § 2332b (acts of terrorism transcending national boundaries), § 2332f (bombing of public places and facilities), § 2339 (harboring terrorists), § 2339A (providing material support to terrorists), § 2339B (providing material support to terrorist organizations), § 2339C (financing of terrorism), and § 2339D (military-type training from a foreign terrorist organization)).

[39] *See e.g.,* Sen. Comm. on Armed Services, *Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War*, 111th Cong., 1st Sess. 9, 12, 20-21, 53, 103-05, 121-23, 140-54 (July 7, 2009). H.R. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the Comm. on Jud., *Proposals for Reform of the Military Commissions System*, 111th Cong., 1st Sess., H.R. Doc. 111-26 at 13, 31, 90-91, 109, 121-23 (July 30, 2009) (H.R. Doc. 111-26); H.R. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the Comm. on Jud., *Legal Issues Surrounding the Military Commission System*, 111th Cong., 1st Sess., H.R. Doc. 111-18 at 34-38 (July 8, 2009).

> under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment of this subchapter, as so amended.

3. The M.C.A. and Providing Material Support for Terrorism

The 2006 and 2009 versions of the M.C.A. contained identical language concerning the offense of providing material support for terrorism. *Compare* 2006 M.C.A. § 950v(b)(25) *with* 2009 M.C.A. § 950t(25). The 2007 M.M.C.[40] has drawn the elements for this offense from Section 950v(b)(25) of the 2006 M.C.A., which reads:

> (25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.—
>
> (A) OFFENSE. Any person subject to this chapter [10 USCS §§ 948a *et seq.*] who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24) [of this section]),[41] or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter [10 USCS §§ 948a *et seq.*] may direct.
>
> (B) MATERIAL SUPPORT OR RESOURCES DEFINED.— In this paragraph, the term "material support or resources" has the meaning given that term in section 2339A(b) of title 18.[42]

4. M.M.C.'s List of Elements for Appellant's Specifications

Appellant was convicted of Specifications 5 and 7 of Charge II, providing material support for *an act of terrorism*. The 2007 M.M.C., Part IV, ¶ 6(25)bA, lists the particular elements as follows:

> A. (1) The accused provided material support or resources to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24));[43]

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[40] The Defense Secretary's Forward for the 2007 M.M.C. states that it is "adapted from" the 2005 Manual for Courts-Martial (MCM) "to comport with" the 2006 M.C.A. The 2007 M.M.C. "applies the principles of law and rules of evidence in trial by general courts-martial" so far as "practicable or consistent with military or intelligence activities, and is neither contrary to nor inconsistent with" the 2006 M.C.A. *Id.*

[41] 2006 M.C.A. § 950v(b)(24) ("TERRORISM.—Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct.").

[42] 18 U.S.C. § 2339A(b) (stating, "Definitions. As used in this section—(1) the term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials."). The definition of "material support or resources" in the 2007 M.M.C., Part IV, ¶ 6(a)25c is taken verbatim from 18 U.S.C. § 2339A(b)(1), and was provided to the military commission as part of the military commission judge's instructions prior to findings. Tr. 3751.

[43] *See* M.M.C., Part IV, ¶ 6(a)(24)a. The military commission judge, at Tr. 3750, properly defined the term "ter-

(2) The accused knew or intended that the material support or resources were to be used for those purposes;[44] and

(3) The conduct took place in the context of and was associated with an armed conflict.[45]

Appellant was convicted of Specifications 2, 6, and 8 of Charge II, providing material support for *an international terrorist organization.* The 2007 M.M.C. in Part IV, ¶ 6(25)bB, lists the particular elements as follows:

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;[46]

(3) The accused knew that such organization has engaged or engages in terrorism; and

(4) The conduct took place in the context of and was associated with an armed conflict.

b. *Elements*.[47] The elements of this offense can be met either by meeting (i) all

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rorism," in accordance with the 2006 M.C.A. § 950(b)(24) and 2007 M.M.C., Part IV, ¶ 6(a)(24)a.

[44] The military commission judge properly instructed the military commission of the *mens rea* requirement for providing material support for an act of terrorism as follows:

> To convict the accused of providing material support for an act of terrorism, the government must prove beyond a reasonable doubt that the accused knew or intended to provide support for either the preparation for or the execution of a specific act of terrorism. The offense is inherently forward-looking and the accused cannot be convicted for providing material support for past acts of terrorism.

Tr. 3751.

[45] The military commission judge properly instructed the military commission on this element. We recognize that Justices Thomas, Scalia, and Alito's dissent in *Hamdan*, defers 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. 548 U.S. at 684, *but see id.* at 599-600 (Stevens, Souter, Ginsburg, and Breyer, JJ., concurring) (not questioning "the Government's position that the war commenced with the events of September 11, 2001," but not necessarily agreeing that the conflict began before that date) (noting the *Prize Cases*, 67 U.S. at 635, cited by Justice Thomas in his dissent, are "not germane to the analysis"). *See also Prize Cases*, 67 U.S. at 668. ("[I]t is none the less a war, although the declaration of it be 'unilateral.'"). The military commission had additional information not presented to the Supreme Court through the testimony and the video, "The al Qaeda Plan." *See* n. 5, *supra*.

[46] The military commission judge properly instructed the military commission of the *mens rea* requirement for providing material support to an international terrorist organization in regard to elements two and three as follows, "Two, that he intended to provide such material support or resources to al Qaeda, an international terrorist organization engaged in hostilities against the United States; [and] Three, that he knew that al Qaeda was engaged in or engages in terrorism." Tr. 3744-45. *See also* Tr. 3749-50. The military commission judge also explained:

> To convict the accused of providing material support for an international terrorist organization, the government most prove beyond a reasonable doubt that in providing material support or resources, the accused did so knowing that the material support or resources could or would be utilized to further the activities of the international terrorist organization and not merely the personal interests of al Qaeda's individual members.

Tr. 3751-52.

[47] *See United States v. Vilches-Navarrete*, 523 F.3d 1, 20 (1st Cir. 2008) (Congress enjoys latitude in determining what facts constitute elements of a crime which must be tried before a jury and proved beyond a reasonable doubt and which do not. *See, e.g., Staples v. United States*, 511 U.S. 600, 604, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) (noting that the "definition of the elements of a criminal offense is entrusted to the legislature, particularly in the

of the elements in A, or (ii) all of the elements in B, or (iii) all of the elements in both A and B.

5. Criminal Intent and Wrongfulness

It is not appellant's conduct in isolation that constitutes a law of war violation triable by military commission. Rather, it is his knowledge, intent, and conduct, in support of terrorism, and in the specific context of a conflict triggering application of U.S. treaty obligations per Common Article 3, which make it cognizable under the 2006 M.C.A. In enacting the 2006 M.C.A., Congress circumscribed the capacity of the military to unilaterally interpret the law of war and craft law of war offenses and punishments in connection with al Qaeda and terrorism offenses. The charges at bar are not the exercise of fiat or expediency by the executive branch; they are the product of closely prescribed statutes of limited application encompassing the peculiarities of the modern geopolitical environment.

First, the 2006 M.C.A. strictly limited jurisdiction of military commissions to AUECs,[48] as defined under the 2006 M.C.A. §§ 948a(1)(A) and 948a(3).[49] Our Court explained in 2007:

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case of federal crimes, which are solely creatures of statute" (second and third citation omitted)).

[48] Sections 948c, 948d(a), and 948d(c) of the 2006 M.C.A. limit jurisdiction of military commissions convened under the M.C.A. to AUECs. 10 U.S.C. § 948c reads, "[a]ny alien unlawful enemy combatant is subject to trial by military commission under this chapter." 10 U.S.C. § 948d(a) and (c) state, respectively:

> (a) JURISDICTION. — 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.
>
> * * *
>
> (c) DETERMINATION OF UNLAWFUL ENEMY COMBATANT STATUS DISPOSITIVE.—A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter.

The 2009 M.C.A. § 948a(7) replaced the term "unlawful enemy combatant" with the term "unprivileged enemy belligerent." *See Ex parte Quirin*, 317 U.S. 1, 31 (1942) (Unlawful combatants are subject "to trial and punishment by military tribunals for acts which render their belligerency unlawful."). The 4th Circuit explained why the term "unlawful enemy combatant" is not preferred in connection with the hostilities in Afghanistan:

> In *Hamdan*, the [Supreme] Court held that because the conflict between the United States and al Qaeda in Afghanistan is not "between nations," it is a "'conflict not of an international character'" — and so is governed by Common Article 3 of the Geneva Conventions. *See* 126 S. Ct. at 2795; *see also id.* at 2802 (Kennedy, J., concurring).
>
> Common Article 3 and other Geneva Convention provisions applying to non-international conflicts (in contrast to those applying to international conflicts) simply do *not* recognize the "legal category" of enemy combatant. *See* Third Geneva Convention, art. 3, 6 U.S.T. at 3318. As the International Committee of the Red Cross -- the official codifier of the Geneva Conventions -- explains, "an 'enemy combatant' is a person who, either lawfully or unlawfully, engages in hostilities for the opposing side in an *international* armed conflict;" in contrast, "[i]n non-international armed conflict combatant status *does not exist*." Int'l Comm. of the Red Cross, Official Statement: The Relevance of IHL in the Context of Terrorism, at 1, 3 (Feb. 21, 2005), http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/terrorismihl-210705 (emphasis added).

al-Marri v. Pucciarelli, 534 F.3d 213, 233 (4th Cir. 2008), *vacated sub nom. al-Marri v. Spagone*, ___ U.S. ___, 129 S. Ct. 1545, 173 L. Ed. 2d 671 (2009). For purposes of appellant's case, we apply the definition for "unlawful enemy combatant" in the 2006 M.C.A. *See* n. 49, *infra*.

[49] The 2006 M.C.A. § 948a(1)(A)(i) defines the term "unlawful enemy combatant" 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

> This critical determination of "lawful" or "unlawful" combatant status is far more than simply a matter of semantics . . . . [U]nder the well recognized body of customary international law relating to armed conflict, and specific provisions of GPW III, lawful combatants enjoy "combatant immunity" for their pre-capture acts of warfare, including the targeting, wounding, or killing of other human beings, provided those actions were performed in the context of ongoing hostilities against lawful military targets, and were not in violation of the law of war. *See Johnson v. Eisentrager*, 339 U.S. 763, 793 (1950) (Black, J. dissenting) ("Legitimate 'acts of warfare,' however murderous, do not justify criminal conviction . . . . It is no 'crime' to be a soldier . . . .") (citing *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942)) ("Mere membership in the armed forces could not under any circumstances create criminal liability. . . ."); [*United States v.*] *Lindh*, 212 F.Supp.2d [541, 553 (E.D. Va. 2002)] (citing Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 Case W. Res. J. Int'l L. 205, 212 (1977)).

United States v. Khadr, 717 F.Supp.2d 1215, 1221 (USCMCR 2007) (internal footnote omitted). Lawful enemy combatants and those lawfully aiding or providing material support to lawful enemy combatants receive various privileges under international law, including combatant immunity. *Id.* The M.C.A. incorporates the necessity that the accused must be an unlawful combatant to emphasize the requirement of wrongfulness.[50] In addition, the military commission members must determine that appellant's conduct was wrongful—that is in furtherance

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(including a person who is part of the Taliban, al Qaeda, or associated forces)

. . . ." The 2006 M.C.A. § 948a(2) defines the term "lawful enemy combatant" to be a person who is:

> (A) a member of the regular forces of a State party engaged in hostilities against the United States; (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

The 2006 M.C.A. § 948a(3) defines the term "alien" to mean "a person who is not a citizen of the United States." Winthrop defines the term, "enemy" to include "not only civilians, soldiers, &c., but also persons who, by the laws of war, are outlaws—as 'guerillas' and other freebooters." 1920 Winthrop, *supra* n. 23, at 631 (citation omitted). *See also* 2008 MCM, Part IV, ¶ 23c(1)(b), *referred to by* 2008 MCM, Part IV, ¶ 28c(2) (stating the 2008 MCM term "enemy" includes "organized forces of the enemy in time of war, any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades, and includes civilians as well as members of military organizations. 'Enemy' is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and all the citizens of the other.").

[50] *See* Elements, *supra* at pp. 28-29. (M.M.C., Part IV, ¶¶ 6(25)bA(3) and 6(25)bB(4)). The term "wrongfully" is frequently used in court-martial practice. *See* 2008 MCM, Part IV (numerous paragraphs reference the term "wrongful" or "wrongfulness"). The concept of wrongfulness is also explicit in military commission practice. *See e.g.*, 2007 M.M.C., Part IV, ¶¶ 6(12)b(1), 6(21)(b)(1), 6(21)c(3), 6(22)b(1). The 2007 M.M.C. also recognizes an inherent or implied element of wrongfulness. For example, in the offense "Terrorism" the M.M.C. does not include wrongfulness in the elements of the offense but notes in the comments, "The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties." 2007 M.M.C., Part IV, ¶ 24c(2). *See also* Military Commission Instruction (MCI) No. 2, which addresses the requirement of wrongfulness in various paragraphs.

of an act of terrorism, and not legitimate warfare undertaken by a lawful combatant.[51]

Second, the conduct took place in the context of and was associated with an armed conflict.[52] The Supreme Court emphasized the importance of this requirement.[53] The military commission judge properly instructed,[54] and the military commission found beyond a reasonable doubt that this requirement was met.

Third, appellant had the requisite criminal intent and knowledge. The military commission judge properly instructed about these elements, *see* pp. 28-29, *supra*, and the military commission found these requirements were met.

The acts were committed by an AUEC in the context of an armed conflict with the requisite knowledge and intent. Accordingly, we find they constitute clear law of war violations per the 2006 M.C.A.

6. Findings of the Military Commission Judge

At trial, the military commission judge considered various U.N. Security Council Resolutions against terrorism, referenced in the domestic criminal offense of providing

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[51] The military commission judge properly instructed the commission about this necessity, stating:

> In order to be an act of terrorism, the act must be wrongful, which means that it was undertaken without legal justification or excuse. An act—an attack on a military objective undertaken by military forces of a state in the exercise of their official duties would not constitute an act of terrorism.

Tr. 3751.

[52] *See* Elements, *supra* at pp. 28-29. (M.M.C., Part IV, ¶¶ 6(25)bA(3) and 6(25)bB(4)).

[53] *See Hamdan*, 548 U.S. at 599-600 (Stevens, Souter, Ginsburg, and Breyer, JJ., concurring); *id.* at 683-88 (Thomas, Scalia, and Alito, JJ., dissenting). "As explained in the text, the law of war permits trial only of offenses 'committed within the period of the war.'" *Id.* at 599 n. 31 (citing *Quirin*, 317 U.S. at 28-29; 1920 Winthrop, *supra* n. 23, at 837) (Stevens, Souter, Ginsburg, and Breyer, JJ., concurring).

[54] The military commission judge properly instructed the members concerning this element of the offense as follows:

> With respect to each of the ten specifications [of providing material support for terrorism] 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 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 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.

Tr. 3752-53.

material support for terrorism in Title 18 of the U.S. Code. *See* AE 263. He also discussed records about "guerilla-marauders," "bushwhackers," and "jayhawkers" dating from the American Civil War. *See* AE 263 at 4-5. The military commission judge quoted Winthrop's description of these "armed prowlers":

> These were persons acting independently, and generally in bands, within districts of the enemy's country or on its borders, who engaged in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage, and even in the ransacking of towns, from motives mostly of personal profit or revenge.

Id. at 4 (quoting 1920 Winthrop, *supra* n. 23, at 783-84). *See* p. 57, *infra* (quoting *Lieber's Instructions* 26-27 (Articles 82 and 84)). He equated the conduct of these marauding bands with terrorism, "[i]n modern parlance, they might be referred to as terrorists, or those who provided material support for terrorism." AE 263 at 5. He concluded "that Congress 'had an adequate basis' to conclude that providing material support for terrorism has "traditionally been considered [a violation] of the law of war," and he denied appellant's *ex post facto* motion to dismiss. *Id.* at 6.

C. Criminalization of Analogous Global Conduct

Even though Congress concluded the offense of providing material support for terrorism has "traditionally been triable under the law of war or otherwise triable by military commission," that conclusion is not due absolute deference by this court. "It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803). We have an independent responsibility to determine whether appellant's charged conduct existed as well-recognized criminal conduct.

We, like the military commission judge, consider international and domestic sources of law[55] for pre-existing examples of criminalization under the law of war of conduct similar to that for which appellant was convicted. In addition to those sources discussed from pp. 22 to 26, *supra*, we look to international conventions and declarations, international tribunals, and other U.S. precedent associated with armed conflict.

1. International Conventions and Declarations

"Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." *Restatement (Third) of Foreign Relations Law of the United States* § 102(2) (Am. L. Inst. 1987). "International agreements" establish duties and responsibilities for the state parties and can be evidence of customary international law "when such agreements are intended for adherence by states generally and are in fact widely accepted." *Id.* at § 102(3). We are concerned here with a specific subset of this body of law, the laws or customs of war. Colonel Winthrop described in his influential treatise, *supra* n. 23, at 42, the manner of application of "Laws or Customs of War" stating:

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[55] *See e.g.*, Title 18 terrorism statutes at pp. 22 through 26, *supra*.

> These are the rules and principles, almost wholly unwritten,[56] which regulate the intercourse and acts of individuals during the carrying on of war between hostile nations or peoples. While properly observed by military commanders in the field, they may often also enter into the question of the due administration of justice by military courts in cases of persons charged with offences growing out of the state of war. Such laws and customs would especially be taken into consideration by *military commissions* in passing upon offences in violation of the laws of war.

In 1949, four separate international conventions were adopted to address the needs of (1) wounded and sick in the field; (2) wounded, sick, and shipwrecked at sea; (3) prisoners of war; and (4) civilians.[57] The Geneva Conventions articulated various positive and negative duties towards each of these groups. Common Article 3 to the Geneva Conventions of 1949 requires humane treatment of persons taking no active part in the hostilities and prohibits violence against such persons.[58] Numerous antiterrorism treaties or conventions predate appellant's offenses.[59]

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[56] One of the earliest international restrictions on warfare was the Hague Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV*, Respecting the Laws and Customs of War on Land* (Oct. 18, 1907), *ratified by the United States* Feb. 23, 1909, *entered into force* Jan. 26, 1910, *for the United States*, 36 Stat. 2277. Article 23 of these regulations is violated when innocent civilians (protected persons) are unnecessarily killed.

[57] *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Aug. 12, 1949), entered into force Oct. 21, 1950, for the United States Feb. 2, 1956, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 (No. 970); *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* (Aug. 12, 1949), entered into force Oct. 21, 1950, for the United States Feb. 2, 1956, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85 (No. 971); *Geneva Convention (III) Relative to the Treatment of Prisoners of War* (Aug. 12, 1949), entered into force Oct. 21, 1950, for the United States Feb. 2, 1956, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 (No. 972); *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (Aug. 12, 1949), entered into force Oct. 21, 1950, for the United States Feb. 2, 1956, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 (No. 973); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (Geneva, June 8, 1977), 1125 U.N.T.S. 3 (No. 17512); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)* (June 8, 1977), 1125 U.N.T.S. 609 (No. 17513), 16 I.L.M. 1442, entered into force for UN July 12, 1978 (Geneva, June 8, 1977). Protocol I has 170 state parties and 5 state signatories. Protocol II has 165 state parties and 4 state signatories. The United States signed Protocols I and II on December 12, 1977; however, the United States has not ratified either Protocol. *See also Kadic v. Karadzic*, 70 F.3d 232, 243 n. 7 (2d Cir. 1995) (listing signing and effective dates for four Geneva Conventions*).* The four Geneva Conventions have 194 state parties. The International Committee of the Red Cross (ICRC), International Humanitarian Law—Treaties and Documents webpage contains a current list of nations that have signed and ratified various international humanitarian treaties. http://www.icrc.org. The UN website is the source for the UN "entry into force," state signatories, and state parties information in this decision, http://treaties.un.org/Home.aspx?lang=en.

[58] *Kadic*, 70 F.3d at 243 (quoting Common Article 3). Subsequent protocols to protect civilians were adopted by many nations. *See e.g., Protocol II*, Article 13, *supra* n. 57 ("Article 13. *Protection of the civilian population*. 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances. 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. 3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.").

[59] *See, e.g.*, (1) *International Convention for the Suppression of the Financing of Terrorism* (New York, Dec. 9, 1999) (*1999 Financing Convention*), 2178 U.N.T.S. 197, 39 I.L.M. 270, G.A. Res. 54/109, entered into force for

Congress made violation of Common Article 3 a war crime under the War Crimes Act of 1996.[60] The Rome Statute for the International Criminal Court and the War Crimes Act of 1996, have explicitly referenced the standards for grave breaches of the Geneva Conventions in defining war crimes.[61] For example, the *1971 Terrorism and Extortion Convention*[62] provides that the contracting States:

> [U]ndertake to cooperate among themselves by taking all the measures that they may consider effective, under their own laws, and especially those established in this convention, prevent and punish acts of terrorism, especially kid-

the UN Apr. 10, 2002, ratified on June 26, 2002 and entered into force for the U.S. July 26, 2002 (signatories: 132; parties: 174); (2) *International Convention for the Suppression of Terrorist Bombings* (New York, Dec. 15, 1997) (*1997 Bombing Convention*), 37 I.L.M. 249, G.A. Res. 52/164, entered into force for the UN May 23, 2001, ratified June 26, 2002 and entered into force for the U.S. July 26, 2002 (signatories: 58; parties: 164); (3) *Convention on the Marking of Plastic Explosives for the Purpose of Detection* (Mar. 1, 1991), 30 I.L.M. 726, 2122 U.N.T.S. 359 ratified or accessed by the U.S. Apr. 9, 1997, entered into force for the U.S. and UN June 21, 1998 (parties: 147); (4) *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf* (Rome, Mar. 10, 1988), 27 I.L.M. 685, 1678 U.N.T.S. 304, entered into force for the UN Mar. 1, 1992, ratified or accessed by the U.S. Dec. 6, 1994, entered into force for the U.S. Mar. 6, 1995; (5) *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (Rome, Mar. 10, 1988), 27 I.L.M. 668, 1678 U.N.T.S. 221, entered into force for the UN Mar. 1, 1992 (parties: 157); (6) *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* (Montreal, Feb. 24, 1988), 27 I.L.M. 627, 1589 U.N.T.S. 474, entered into force for the UN Aug. 6, 1989, ratified or accessed by the U.S. Oct. 19, 1994, entered into force for the U.S. Nov. 18, 1994 (parties: 171); (7) *Convention on the Physical Protection of Nuclear Material* (Vienna, Oct. 26, 1979), 18 I.L.M. 1419, 1456 U.N.T.S. 1987 (No. 24631), ratified or accessed by the U.S. Dec. 13, 1982, entered into force for the U.S. and UN Feb. 8, 1987 (signatories: 44; parties: 145); (8) *International Convention Against the Taking of Hostages* (New York, Dec. 17, 1979) (*1979 Hostage Convention*), G.A. Res. 34/146, U.N. Doc. A/34/46, 1316 U.N.T.S. 205 (No. 21931), entered into force for the UN June 3, 1983, ratified or accessed by the U.S. Dec. 7, 1984, entered into force for the U.S. Jan. 6, 1985 (signatories: 39; parties: 168); (9) *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents* (New York, Dec. 14, 1973) (*1973 Protected Persons Convention*), 28 U.S.T. 1975, 1035 U.N.T.S. 167 (No. 15410), ratified or accessed by the U.S. Oct. 26, 1976, entered into force for the U.S. and UN Feb. 20, 1977 (signatories: 25; parties: 173); (10) *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* (Sept. 23, 1971) (*1971 Aviation Convention*), 24 U.S.T. 565, 974 U.N.T.S. 177 (No. 14118) ratified or accessed by the U.S. Nov. 1, 1972, entered into force for the U.S. and UN Jan. 26, 1973 (parties: 188); (11) *Convention for the Suppression of Unlawful Seizure of Aircraft* (The Hague, Dec. 16, 1970), 22 U.S.T. 1641, 860 U.N.T.S. 105 (No. 12325), ratified or accessed by the U.S. Sept. 14, 1971, entered into force for the U.S. and UN Oct. 14, 1971 (parties: 185); (12) *Convention on Offenses and Certain Other Acts Committed on Board Aircraft* (Tokyo, Sept. 14, 1963), 20 U.S.T. 2941, 704 U.N.T.S. 219 (No. 10106), ratified or accessed by the U.S. Sept. 5, 1969, entered into force for the U.S. and UN Dec. 4, 1969 (parties: 185). *See* U.S. Dept. of State, *A List of Treaties and Other International Agreements of the United States in Force on January 1, 2010. See also* Young, *infra* n. 85, at 34 n. 52, 103 (noting United Nations Secretary General's identification of 12 global and 9 regional treaties addressing international terrorism and listing the 12 global treaties as well as numbers of signatory, ratification, accession, and succession states for each treaty).

[60] Aug. 21, 1996, P.L. 104-192, § 1, 110 Stat. 2104. *See* 18 U.S.C. § 2441(d) (listing Common Article 3 grave breaches and stating that Common Article 3 violations are a serious breach of international law and a war crime). *See e.g.*, *Kadic,* 70 F.3d at 242-43; *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 5-8 (D.D.C. 1998).

[61] *Rome Statute of the International Criminal Court* (Rome Statute), art. 126, U.N. Doc. A/Conf.183/9, July 17, 1998, 2187 U.N.T.S. 90. United States terrorism laws under Title 18 are described in more detail at pp. 22-26, *supra*.

[62] The *Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance* (Feb. 2, 1971) (1971 Terrorism and Extortion Convention), 27 U.S.T. 3949; T.I.A.S. 8413, *entered into force*, Oct. 16, 1973, *for the United States*, Oct. 20, 1976.

> napping, murder, and other assaults against the life or physical integrity of those persons to whom the state has the duty according to international law to give special protection, as well as extortion in connection with those crimes.

Similarly, the *1971 Aviation Convention*, *supra* n. 59, asserts criminal liability for both hijackers and their accomplices. Other conventions follow this scheme.[63] In 1994, the UN General Assembly solemnly declared:

> 1. The States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism, as *criminal* and unjustifiable, wherever and by whomever committed . . . ;
>
> 2. Acts, methods and practices of terrorism constitute a *grave violation* of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society;
>
> 3. *Criminal acts* intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them[.][64]

The *1994 Terrorism Declaration* urged action "to ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts. . . ." § I5(b), *supra* n. 64.

Describing terrorism as a crime of international significance, the treaties oblige the parties to criminalize various facets of terrorism in their domestic criminal codes and to cooperate amongst themselves to prevent and punish acts of terrorism. The *1997 Bombing Convention*, *supra* n. 59, has 58 signatories and 164 state parties. It adopted broad language similar to providing material support for terrorism. In Article 2, ¶ 2, this Convention provides criminal liability for any person who:

> (a) Participates as an accomplice in an offence . . . ; (b) Organizes or directs others to commit an offence . . . ; or (c) In any other way contributes to the commission of one or more offences . . . by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

Similarly, the *1999 Financing Convention*, *supra* n. 59, provides, "Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that

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[63] *1973 Protected Persons Convention*, *supra* n. 59; *1979 Hostage Convention, supra* n. 59.

[64] *Declaration on Measures to Eliminate International Terrorism of 1994*, G.A. Res. 49/60, U.N. Doc. A/RES/49/60 (Dec. 9, 1994) (*1994 Terrorism Declaration*), § I.1-3. (emphasis added).

they should be used . . . in full or in part, in order to carry out" violent terrorism-type offenses or offenses "within the scope and defined in" one of the nine UN Conventions or Protocols listed in the *1999 Financing Convention's* Annex. *Id.* at Article 2, ¶ 1. *See also*, *id.* at Article 2, ¶¶ 3-5. This language is of particular significance to our analysis insofar as it seeks to criminalize conduct falling within the definition of providing material support for terrorism articulated in the M.C.A.

Gradually, regional conventions focused on combating terrorism began to encourage member states to broaden their application of criminal liability.[65] Forty-six member countries of the Council of Europe ratified or accessed a treaty supporting the extradition of those who commit or support terrorist acts, and recognized kidnapping, hostage taking, bombing, attempts, and "participation as an accomplice" in such activity.[66] If the suspected terrorist is not extradited, a State shall "submit the case, without exception whatsoever and without undue delay, to its competent authorities for the purpose of prosecution." *Id.* at Art. 7. More recently, the South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism, (Nov. 4, 1987) was signed by representatives from Bangladesh, India, Nepal, Bhutan, Maldives, Pakistan, and Sri Lanka.[67] Under Article I, it listed as cognizable crimes various terrorism-related offenses, including attempt, conspiracy, aiding, abetting, accomplice, and counseling, when connected to multiple UN Conventions or other violent-terrorism-type offenses. Articles II-VIII urge members to facilitate extradition and prosecution.

These conventions occurred in the context of the United Nations Security Council's condemnations of international terrorism and its supporters. At a Security Council meeting on January 31, 1992, "at the level of Heads of State and Government, the Council expressed its deep concern over acts of international terrorism, and emphasized the need for the international community to deal effectively with all such criminal acts."[68] In 1998, the Security Council adopted Resolution 1189 "[s]trongly condem[ning] the terrorist bomb attacks in Nairobi, Kenya and Dar-es-Salaam, Tanzania on August 7, 1998 which claimed hundreds of innocent lives, injured thousands of people and caused massive destruction to property." *Id.* at ¶ 1. It "calls upon all states

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[65] Hans Corell, United Nations Under Secretary General for Legal Affairs, *The International Instruments Against Terrorism: The Record So Far and Strengthening the Existing Regime* 5-6 (June 3, 2002) (listing regional conventions including, the Organization of American States' adoption of the *Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance* (1971), the League of Arab States' adoption of the *Arab Convention on the Suppression of Terrorism* (April 22, 1988), the Organization of the African Unity (OAU) adoption of the *Convention on the Prevention and Combating of Terrorism* (July 14, 1999), the *Treaty on Cooperation among the States of the Commonwealth of Independent States in Combating Terrorism* (1999), and the *Convention of the Organization of the Islamic Conference on Combating International Terrorism* (1999). www.un.org/law/counsel/english/remarks.pdf .

[66] *The European Convention on the Suppression of Terrorism* (Strasbourg, Jan. 27, 1977), entered into force Aug. 4, 1978, registered by the Secretary General of the Council of Europe May 30, 1979, 1137 V.N.T.S. 1-17828, Art. I and Status Chart.

[67] SAARC Regional Convention on Suppression of Terrorism, Nov. 4, 1987, on deposit with Sec'y Gen'l, So. Asian Assoc. for Regional Coop., is the source for the information in the remainder of this paragraph. 2219 V.N.T.S. 179.

[68] S.C. Res. 1189, U.N. Doc. S/RES/1189 (Aug. 13, 1998), Preamble (citing Note by President of the Security Council, S/23500 (Jan. 31, 1992) at 3).

and international institutions to cooperate" and provide assistance "to apprehend the perpetrators of these cowardly criminal acts and to bring them swiftly to justice." *Id.* at ¶ 3. Finally, it urges "all States to adopt . . . effective and practical measures . . . for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators." *Id.* at ¶ 5. In the same year, the Security Council expressed its concern in Resolution 1214 about "the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and the planning of terrorist acts, and *reiterating* that the suppression of international terrorism is essential for the maintenance of international peace and security." S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998), Preamble (emphasis in original). It demanded "that the Taliban stop providing sanctuary and training for international terrorists and their organizations." *Id.* at ¶ 13.

Although the approach of various nations towards punishment of terrorism-related offenses varies, prosecution of such offenses has been encouraged by the United Nations Security Council and treaties. *See* n. 59, *supra*. We are satisfied that international conventions and treaties provided an additional basis in international law that appellant's charged conduct in support of terrorism was internationally condemned and criminal.

2. International Criminal Tribunals

In 1993, the United Nations Security Council established the first of the modern international tribunals - the International Criminal Tribunal for the former Yugoslavia (ICTY) - as an *ad hoc* court to prosecute crimes committed during the period of armed conflict in the former Yugoslavia.[69] The Security Council's mandate limited ICTY jurisdiction to those areas of international humanitarian law which were "beyond any doubt" part of customary international law.[70] Consequently, the subject matter jurisdiction of the Yugoslavia Tribunal was limited to:

> the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907, the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and the Charter of the International Military Tribunal of 8 August 1945.[71]

Since the first hearing in 1994, the ICTY has indicted 161 individuals, completed trials on 125 persons, and 36 proceedings are ongoing.[72] Defendants range from common soldiers to generals and Prime Minister Slobodan Milosevic. *Id.*

International law also recognizes joint criminal enterprise (JCE) as a theory of criminal liability. At appellant's trial, the military commission judge granted a defense motion and excepted the JCE language from appel-

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[69] Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, *reprinted in* 32 I.L.M. 1203 (1993).

[70] The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 34 U.N. Doc. S/25704 (1993).

[71] *Id. See* Hague Convention, *supra* n. 56; Geneva Conventions, *supra* n. 57; IMT Charter, *infra* n. 149; *The Convention on the Prevention and Punishment of the Crime of Genocide* (Dec. 9, 1948) (*Genocide Convention*), 78 U.N.T.S. 278, entered into force Jan. 12, 1951, for the United States Feb. 23, 1989. The Genocide convention has 141 state parties and one state signatory.

[72] ICTY webpage, http://www.icty.org.

lant's conspiracy specification, of which he was acquitted. The deletion of these words and the ultimate finding on this specification, however, do not forestall this court in this or future cases from considering JCE as a recognized theory of criminal liability for purposes of determining whether an appellant's conduct was prohibited and historically punishable as a law of nations offense.[73] Our focus here is on whether the international community considered appellant's actions to be criminally punishable when he provided material support to al Qaeda.

Membership in a criminal enterprise by itself is distinguishable from JCE. "[O]nly natural persons (as opposed to juridical entities) were liable under the Tribunal's Statute, and that mere membership in a given criminal organi[z]ation [is] not sufficient to establish individual criminal responsibility" or liability under JCE.[74] JCE is "concerned with the participation in the commission of a crime as part of a [JCE], a different matter."[75] To be clear, the doctrine of JCE entails a combination of membership, organizational liability, and participation of the individual. Appellant's membership in Al Qaeda and knowledge of its purposes was established at the military commission. The participation aspect was met through the conduct comprising the specifications before us.

JCE doctrine provides a theory of liability for proving a specific crime, and it is not a stand-alone substantive offense.[76] JCE considers each member of an organized criminal group individually responsible for crimes committed by the group within the common plan or purpose, and it requires an overt act in support of the offense. As such, the doctrine brings a similar analytical nexus to providing material support for terrorism.[77]

In *Tadić*, the Trial Chamber found no direct evidence that the accused had taken an actual part in the killings charged. *Tadić* Appeal Chamber, *supra* n. 75, at ¶¶ 178-183. The Appeals Chamber, however, overturned the Trial Chamber and convicted *Tadić* relying on the concept of common purpose, later referred to as JCE. Under JCE "responsibility for a crime other than the one agreed upon in the common plan arises if, under the circumstances of the case, (i) it was *foreseeable*

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[73] *See Hamdan*, 548 U.S. at 611, n.40 (Stevens, Souter, Ginsburg, and Breyer, JJ., concurring)(noting ICTY has adopted JCE, which "is a species of liability (akin to aiding and abetting)") (citations omitted).

[74] *Prosecutor v. Milutinović,* Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, Case No. IT–99–37–AR72, ¶ 25 (ICTY App. Chamber, May 21, 2003) (*Milutinović* Appeal Chamber). The Appeals Chamber referred the Secretary-General's Report, *supra* n. 70, at ¶¶ 50 and 51.

[75] *Id.* at ¶ 26 (discussing *Prosecutor v. Tadić,* Judgment, Case No. IT–94–1–A, ¶¶ 200- 227 (ICTY Appeal Chamber, July 15, 1999) (*Tadić* Appeal Chamber)).

[76] *See generally*, Allison M. Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Calif. L. Rev. 75, 118 (2005).

[77] The ICTY recognizes three types of JCE, and each has different elements. *Prosecutor v. Tadić, supra* n. 75, at ¶ 195. The first category has two pertinent elements: "(i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result." *Id.* at ¶ 196. The *Tadić* Appeal Chamber notes that although the accused's acts "must form a link in the chain of causation, it was not necessary that his participation be a *sine qua non*, or that the offense would not have occurred but for his participation." *Id.* at ¶ 199 (citation omitted). *See also Prosecutor v. Vujadin Popovic*, Case No. IT-05-88-T (Appeals Judgment, vol. I, June 10, 2010), ¶¶ 1021-32 n. 3357-93.

that a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*." *Id.* at ¶ 228 (emphasis in original). *Tadić* actively took part in the attack on the town, and was involved in beating a resident. *Id.* at ¶ 232. *Tadić* was found criminally liable because he shared the intent of the JCE to use violence to ethnically cleanse the town of Jaskici. *Id.* at ¶¶ 232-33. He was, therefore, held to be responsible for the five deaths since they were perpetrated in the course of the removal and were a foreseeable consequence of the plan. *Id.* at ¶¶ 233-34. *Tadić* was found guilty of a "violation of the laws or customs of war in terms of . . . murder," among other offenses. *Id.* at ¶¶ 235-37.

In JCE, the establishment of a common purpose is critical for criminal liability. In the *Milošević* case, prosecutors argued that the indictments against Milosevic were "all part of a common scheme, strategy, or plan on the part of the accused to create a 'Greater Serbia,' . . . and that this plan was to be achieved by forcibly removing non-Serbs from large geographical areas through the commission of the crimes charged in the indictments."[78] Under this theory of criminal liability, members of the JCE were held responsible for all of the crimes committed by the group in furtherance of the "Greater Serbia" plan.

Although the members of the JCE must have a common purpose, it is not necessary for the participants to be organized "into any sort of military, political, or administrative structure."[79] The common purpose need not be previously "arranged or formulated but 'may materiali[z]e extemporaneously and be inferred from the fact that a plurality of persons act in unison to put into effect a joint criminal enterprise.'" The "common criminal purpose in terms of both the criminal goal intended and its scope" may be specified in general terms, such as ethnic cleansing of certain geographic areas. Under the third category of JCE, "the accused does not need to possess the requisite intent for the extended crime—the crime falling outside the common purpose."

JCE liability does not require "that the accused [be] present at the time and place of perpetration of the crime. . . , it suffices that an accused perform acts 'that in some way are directed to the furthering of the common plan or purpose.'" Although the accused's "participation or contribution . . . to the common purpose need not be substantive, . . . 'it should at least be a significant contribution to the crimes for which the accused is found responsible.'"

An accused's participation in a JCE need not involve an act or failure "to act in a way that assists, encourages, or lends moral support to another in the perpetration of a crime or underlying offence. Rather, the accused need merely act or fail to act 'in some way. . . directed to the furtherance of the common

[78] *Prosecutor v. Slobodan Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder (Appeal Chamber Apr. 18, 2002), ¶ 8. The Trial Chamber concluded that the events in Kosovo were separated from the events in Bosnia by more than three years and the two enterprises lacked sufficient connection to form a common scheme. *Id.* at ¶¶ 9-10. Thus, the Kosovo indictment was severed from the Bosnia and Croatia indictments. *Id.* at ¶¶ 1-2. The Appeal Chamber overruled the Trial Chamber and concluded the Kosovo events were part of the same transaction as the events in Croatia and Bosnia. *Id.* at ¶ 21.

[79] The source for the facts and quoted passages in this and the next paragraph is *Popovic*, *supra* n. 77, at ¶¶ 1023-31 (citations omitted).

plan or purpose.'"[80] An accused who is convicted for participating in the JCE "is guilty of the substantive crime or underlying offence committed, regardless of the role that he played in the enterprise."

On July 17, 1998, the Rome conference adopted the proposed Statute for a permanent International Criminal Court (ICC) with 120 voting in favor, 7 voting against (including the United States), and 21 abstentions.[81] On April 11, 2002, the 60th ratification of the Rome Statute occurred, and the ICC came into existence on July 1, 2002. As of June 24, 2011, there are 115 state parties, and 139 states have signed the Rome Statute of the ICC,[82] creating a standing tribunal with jurisdiction over individuals who commit genocide, crimes against humanity, war crimes, and eventually, crimes of aggression.[83] The Rome Statute gives the ICC an expansive list of available theories of liability for individual criminal responsibility, and it provides as follows:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) *For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission,* including providing the means for its commission; (d) *In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose*. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.

Id. at Art. 25(3) (emphasis added). Thus, the ICC articulates a theory of criminal liability under international law which permits it to hold individuals responsible not only for committing crimes but also for aiding, abetting, and assisting in the commission of crimes as well as the knowing or purposeful contribution to the commission or attempted commission of such crimes by a group acting with a common purpose.

In applying the JCE liability analysis, appellant's underlying conduct constitutes known, unlawful acts historically punishable and established before 1996.

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[80] The source for the facts and quoted passages in this paragraph is *Prosecutor v. Milan Milutinović*, Case No. IT-05-87-T (Appeals Judgment, vol. I, Feb. 26, 2009), ¶¶ 103, 105 (citations omitted).

[81] Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 Rutgers L. J. 1, 15 (2002) (citations omitted).

[82] The United States has signed but not ratified the Rome Statute. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 276 n. 9 (2d Cir. 2007) (noting that the United States has not ratified the Rome Statute because of concerns about potential abuse of prosecutorial authority). The ICRC website, *supra* n. 57, is the source of the information about state parties and signatures.

[83] Rome Statute, *supra* n. 61 at art. 5. *See also* Report of the International Criminal Court to the UN General Assembly, A/65/313, pp. 6-7 (Aug. 19, 2010).

3. Non-United States Domestic Terrorism Laws

There are a variety of definitions of terrorism in both domestic and international sources, but most of them entail politically motivated violence against civilians designed to coerce governments or intimidate civilian populations.[84] It is the duty of this court to ascertain whether appellant's conduct, providing material support for terrorism, constituted an offense against the law of nations. In doing so, we apply the definition of terrorism in 2006 M.C.A. § 950v(b)(24), *supra* n. 41, and we consider the degree to which appellant's underlying conduct violated international standards defining crimes as shown by various national laws prohibiting terrorism. *See Bin Laden*, 92 F. Supp. 2d at 220-21 (*quoted* at pp. 21-22, *supra*).

While some nations have considerable experience with using laws to combat violence against civilians for political ends, after the attacks on September 11, 2001, many additional nations enacted criminal prohibitions against providing assistance to terrorist organizations and involvement in terrorist acts.[85] UN Security Council Resolution 1373,[86] Section 2(e) required all member states to establish as serious criminal offenses in domestic law any planning, preparation, support, and perpetration of terrorist acts, and report by the end of 2001 steps taken to implement this resolution. *Id*. Section 6. By the time the 2006 M.C.A. was enacted, providing material support for terrorism was recognized by various "members of the international community as being [an offense] against the law of nations,"[87] as shown by their adoption of domestic laws prohibiting assistance to terrorist organizations or various levels of involvement in terrorist acts.[88]

Some nations have had prohibitions against offenses involving criminal organizations for many years,[89] and such laws may also be available to punish terrorist crimes

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[84] *See, e.g.,* 22 U.S.C. § 2656f(d); Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. Legis. 249, 254-55 (2004) ("There are at least nineteen definitions or descriptions of terrorism, as well as three terms relating to the support of terrorism, in federal law." (citations omitted)).

[85] *See* Reuven Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, 29 B.C. Int'l Comp. L. Rev. 23, 73-75, 80-89 (2006) (discussing development of anti-terrorism laws in the United Kingdom, India, and New Zealand). *See also* Adam Tomkins, *Criminalizing Support for Terrorism: A Comparative Perspective*, 6 Duke J. Const. Law & Pub. Pol'y 81, 86-97 (2010) (discussing anti-terrorism laws and prohibitions against providing support for terrorist organization in the United Kingdom); Report of Lord Carlile of Berriew Q.C., *The Definition of Terrorism* (Berriew Report) 1, 9-15 (2007).

[86] S/Res/1373 (2001), Sep. 28, 2001. Eleven follow-up Security Council Resolutions addressed suppression of terrorism. Security Council Resolution 1904 (2009), S/Res/1904 (2009), (Dec. 17, 2009) pp. 1, 3 (emphasizing condemnation of al Qaeda, bin Laden and the Taliban as well as associated groups and reaffirming measures to suppress these entities).

[87] *See Bin Laden*, 92 F. Supp.2d at 220-21 (passage quoted at pp. 21-22, *supra*).

[88] *See* Berriew Report, *supra* n. 85, at 9-15 (comparing definitions of terrorism and similar terror-type prohibitions in 60 countries with the United Kingdom's definition).

[89] *See* Edward M. Wise, *RICO Thirty Years Later: A Comparative Perspective: RICO and Its Analogues: Some Comparative Considerations*, 27 Syracuse J. Int'l L. & Com. 303, 314-22 (2000) (discussing crimes involving assistance to or complicity in criminal organizations in France, Italy, and Germany); Alexander D. Tripp, *Margins of the Mob: A Comparison of Reves v. Ernst & Young with Criminal Association Laws in Italy and France*, 20 Fordham Int'l L. J. 263, 298-309 (1996) (discussing legal liability for criminal association, accomplice, and complicity in Italy and France); Matthew H. James, *Keeping the Peace-British, Israeli, and Japanese Legislative Responses to Terrorism*, 15 Dick. J. Int'l L. 405 (1997).

involving violence. Other nations have statutes specifically prohibiting aiding or assisting a terrorist organization or aiding in a terrorist act or similar offenses. The developments in anti-terrorism laws taking place in Canada, India, and Pakistan are briefly illustrated here.[90]

Canada's 2001 Anti-terrorism Act (2001 ATA), ¶ 83.01 defines "Terrorist Activity" in two ways, and "satisfying either part constitutes a 'terrorist activity.'"[91] First, it includes in Section 83.01(1)(a), "an act or omission that is committed in or outside Canada and that, if committed in Canada," is an offense under ten specified United Nations (UN) Conventions and Protocols relating to terrorism that the Canadian Government has signed and ratified.[92] Second, the 2001 ATA, § 83.01(1) includes "(b) an act or omission, in or outside Canada, (i) that is committed (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and" is intended to intimidate "the public or a segment of the public" or to compel "a person, a government or a domestic or an international organization to do or to refrain from doing any act. . . and (ii) that intentionally (A) causes death or serious bodily injury to a person by the use of violence," or that intentionally "(B) endangers a person's life, [or] (C) causes a serious risk to the health or safety of the public or any segment of the public…" "The definition of 'terrorist activity' includes conspiracy, attempt or threat to commit any act or omission that would fall within the definition of 'terrorist activity', or being an accessory after the fact or counseling in relation to any such act or omission."[93]

Under the 2001 ATA, a terrorist group is defined as an entity that has as one of its purposes or activities the facilitating or carrying out of terrorist activities or any entity that associates with such a group.[94] The entity is set forth in a list established by regulation.[95] Being on the list does not itself constitute a criminal offence, although "it can lead to criminal consequences.[96]

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[90] *See e.g.,* United Kingdom Secretary of State for Foreign and Commonwealth Affairs, *Counter-Terrorism Legislation and Practice: A Survey of Selected Countries* (Oct. 2005) (U.K. Report) (discussing counter-terrorism laws in Australia, Canada, France, Germany, Greece, Italy, Norway, Spain, Sweden, and the United States) (on file with the USCMCR Clerk of Court).

[91] The Department of Justice (DoJ), Canada, *The Anti-terrorism Act, Definition of Terrorist Activity*, (Canadian DoJ webpage). Updated to Apr. 1, 2008. http://www.justice.gc.ca/antiter/sheetfiche/terrordefp1-terreurdefp1-eng.asp.

[92] *Id.* (listing in Criminal Code, R.S.C. 1985, c. C-46 (Canadian Criminal Code) § 83.01(1)(a)(i) to (x), "the offences referred to in" ten United Nations counter-terrorism Conventions and Protocols).

[93] Canadian DoJ webpage, http://www.justice.gc.ca/antiter/sheetfiche/terrordefp4-terreurdefp1-eng.asp. Canada's Criminal Code prohibits participating in, facilitating, or providing instructions concerning terrorist activity and harboring others who carry out terrorist activity. Annemieke Holthuis, *Seeking Equilibrium: Canada's Anti-Terrorism Act and the Protection of Human Rights*, Seminar on Prosecution Practices to Implement the International Covenant on Civil and Political Rights and Other Instruments 1, 8 n. 35 (Beijing, China, 2007) (citing Canadian Criminal Code §§ 83.18, 83.19, 83.21, 83.22, and 83.23). The 2001 ATA lapsed on January 15, 2007 because of sunset clauses. *See id.*, at 9-10, 20-21. *See also* Canadian DoJ webpage, The Anti-terrorism Act, Parliamentary Review of the Anti-terrorism Act. http://www.justice.gc.ca/antiter/home-accueil-eng.asp (discussing proposals for replacement of the 2001 ATA).

[94] Debbie Johnston, *Lifting the Veil on Corporate Terrorism: The Use of the Criminal Code Terrorism Framework to Hold Multinational Corporations Accountable for Complicity in Human Rights Violations Abroad*, 66 U.T. Fac. L. Rev. 137, 160-63 (2008) (citations omitted). *See also* Canadian Criminal Code §§ 83.18, 83.19, 83.2, 83.21, and 83.22.

[95] *Id.* at 160 n. 113 (citing Canadian Criminal Code § 83.01).

[96] Holthuis, *supra* n. 93, at 8 n. 36 (citing Canadian Criminal Code § 83.05).

After Indira Gandhi's assassination in 1984, India prohibited various terrorism-related activities.[97] The Terrorist and Disruptive Activities (Prevention) Act, No. 31 of 1985 and No. 43 of 1987 (1987 TADA), were Amended by Act 43 of 1993.[98] The 1987 TADA punished "terrorist acts"[99] and various offenses related to terrorist acts.[100] Moreover, anyone who harbors or conceals a terrorist is criminally liable, as is anyone "who is a member of a terrorist gang or a terrorist organization." 1987 TADA, § 3(4). TADA lapsed in 1995; however, new cases continue to be initiated "based on allegations arising from the period when TADA was in effect." Kalhan, *supra* n.97, at 150 (citations omitted). The Prevention of Terrorism Act, No. 15 of 2002 (2002 POTA), "came into force on October 24, 2001," and "remain[ed] in force for three years." *Id.* at 152 n. 245. The 2002 POTA criminalizes:

> (1) commission of a "terrorist act," (2) conspiring, attempting to commit, advocating, abetting, advising or inciting, or knowingly facilitating the commission of a terrorist act or "any act preparatory to a terrorist act," (3) "voluntarily harbor[ing] or conceal[ing], or attempt[ing] to harbor or conceal any person knowing that such person is a terrorist," (4) "possession of any proceeds of terrorism," and (5) knowingly holding any property that has been "derived or obtained from commission of any terrorist act" or that "has been acquired through the terrorist funds."

Id. at 155 (citing 2002 POTA § 3). The 2002 POTA broadly defines "terrorist act," duplicating many of the core offenses in the 1987 TADA, and adds organizational or association prohibitions. *Id.* at 155-57 (citations omitted). Subsequent legislation continued many of the important prohibitions contained in the 2002 POTA.[101]

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[97] Anil Kalhan, *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 Colum. J. Asian L. 93, 144-45 (2006).

[98] The 1985 TADA did not address "terrorist gangs" and "terrorist organizations." *Id.* at 156-57 n. 262. The 1993 TADA amendment criminalized "membership in a 'terrorist gang or a terrorist organi[z]ation, which is involved in terrorist acts'"; however, it did not define the terms terrorist gang or a terrorist organization. *Id.* (quoting Act No. 43 of 1993, § 4 (amending 1987 TADA § 3)).

[99] 1987 TADA at § 3(1) ("Whoever with intent . . . to strike terror in the people or any section of the people . . . does any act or thing by using [various devices or weapons] . . . or by any other substances . . . to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property . . . or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act.").

[100] 1987 TADA, § 3(3) ("Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act shall be punishable . . . .). *See also* Kalhan, *supra* n. 97, at 144-45. The term, "abet" includes "i. the communication or association with any person or class of persons who is engaged in assisting in any manner terrorists or disruptionists" and "iii. the rendering of any assistance, whether financial or otherwise, [to] the terrorists or disruptionists." 1987 TADA, § 2(a)i and iii.

[101] *See* Kalhan, *supra* n. 97, at 153, 158-59 (citing Unlawful Activities (Prevention) Amendment Act, No. 29 of 2004 (enacted Dec. 21, 2004); Unlawful Activities (Prevention) Amendment Ordinance, No. 2 of 2004 (promulgated Sep. 21, 2004) (2004 UAPA Ordinance), Official Website of the Ministry of Law & Justice, Government of India, New Delhi, (India website) http://lawmin.nic.in/legislative/unlawful.htm. The Unlawful Activities (Prevention) Act, 1967 (1967 UAPA), was tailored to prohibit cession or secession of part of India. After the 2002 POTA was repealed, on September 21, 2004, the President of India, "promulgated an Ordinance to amend the" 1967 UAPA. (India website, 2004 UAPA Ordinance webpage). The 2004 UAPA Ordinance § 15 defines terrorist act in a manner similar to 1987 TADA at § 3(1) (quoted at n. 99, *supra*), includes extraterritorial language, and adds, among other prohibitions, attempts "to

For decades, the Pakistani legal system has punished acts of terrorism. "Under the Suppression of Terrorist Activities (Special Courts) Act, 1975 [(1975 STA)], many times subsequently amended, special courts were" established to try suspects for terrorist offenses.[102] An August 1997 Pakistan Law Commission Report noted that in mid-1997 in four provinces "some 18,625 cases were pending under" the 1975 STA. *Id*. Section 6 of the Anti-Terrorism Act, 1997 (1997 ATA) provides:

> Whoever, to strike terror in the people, or any section of the people, . . . does any act or thing by using . . . [various devices and weapons] in such a manner as to cause, or to be likely to cause, the death of, or injury to, any person or persons, or damage to, or destruction of, property . . . , or threatens with the use of force public servants in order to prevent them from discharging their lawful duties commits a terrorist act.[103]

Various amendments addressed the Pakistani judiciary's procedural concerns about the 1997 ATA, and Pakistani terrorism law and procedures evolved.[104] The Anti-Terrorism (Second Amendment) Ordinance, 1999 (Dec. 2, 1999) (1999 ATA), expanded the offenses cognizable by the anti-terrorism courts to include offenses of abetment, concealment, conspiracy, attempts, and facilitation of offenses.[105] The Anti-Terrorism (Amendment) Ordinance or Act, 2001 (Aug. 15, 2001) (2001 ATA) further enlarged the class of cases under the jurisdiction of the terrorism courts. The 2001 ATA defines "terrorism" to be an offense if:

> a) it involves the doing of anything that causes death; b) it involves grievous violence against a person or grievous bodily injury or harm to a person; c) involves grievous injury to property; d) involves the doing of anything that is likely to cause death or endangers a person's life. . . ; f) incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance. . . . [or] i) creates a serious risk to safety of the public . . . [106]

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compel the . . . the Government of a foreign country or any other person to do or abstain from doing any act." The 2004 UAPA Ordnance § 18 includes a variety of offenses stating, "Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable." Section 19 prohibits attempts to harbor or conceal any person known to be a terrorist. Membership in a "terrorist gang or a terrorist organization, which is involved in terrorist act" is prohibited under § 20. Under § 2(1)(l), the term, "terrorist gang" is defined as "any association, other than terrorist organi[z]ation, whether systematic or otherwise, which is concerned with, or involved in, [a] terrorist act." Al Qaeda is included as a scheduled terrorist organization. *Id*. at § 28.

[102] Amnesty International, *Pakistan Legalizing the Impermissible: The new anti-terrorism law*, ASA 33/34/97, 3 n. 3 (1997) (on file with the USCMCR Clerk of Court).

[103] *Id*. at 5 n. 5; Shabana Fayyaz, *Responding to Terrorism: Pakistan's Anti-Terrorism Laws*, 2 Perspectives on Terrorism, Issue 6, 10, 12 (2008) (citing 1997 ATA, PLD 1997 Central Statutes (unreported) 537); Charles H. Kennedy, *The Creation and Development of Pakistan's Anti-terrorism Regime, 1997-2002*, in Religious Radicalism and Security in South Asia, 387, 390 (Satu P. Limaye, Mohan Malik, and Robert G. Wirsing eds., 2004) (quoting 1997 ATA, § 6) (on file with Clerk of Court).

[104] James J. Saulino, *Strategic Choices: Four Legal Models for Counterterrorism in Pakistan*, 2 Harv. Nat. Sec. J. 247, 256-60 (2011); Kennedy, *supra* n. 103, at 389-408; Fayyaz, *supra* n. 103, at 13-16, http://harvardnsj.com/wp-content/uploads/2011/01/Saulino_Final.pdf.

[105] Kennedy, *supra* n. 103, at 398-99 (citing various sections of the 1999 ATA); Fayyaz, *supra* n. 103, at 15 (citing 2001 ATA).

[106] Kennedy, *supra* n. 103, at 403 (citation omitted); Fayyaz, *supra* n. 103, at 15 (citing 2001 ATA, § 11-A).

The 2001 ATA "stated that any person committing or linked to a terrorist act either in Pakistan or abroad" or who "train[ed] someone in the use of weapons or for terrorism" was subject to punishment.[107] Pakistan also began to apply criminal sanctions against membership in specified organizations involved in terrorism. Kennedy, *supra* n. 103, at 403-04 (citing 2001 ATA § 11-A). Additional amendments changed the investigative procedures and the procedures at the anti-terrorism courts. *Id.* at 408-10 (citations omitted). The Anti-Terrorism (Amendment) Ordinance, 2004 "increased the penalties *for persons assisting terrorists in any manner*."[108]

D. Prosecutions for Wrongfully Providing Aid or Support to the Enemy

The offense of aiding the enemy "is almost as old as warfare itself, and . . . may be found in the earliest of recorded military codes."[109] On September 20, 1776, the Continental Congress enacted the American Articles of War of 1776, including Section XIII, Article 18, which punishes any person who provides relief to "the enemy with money, victuals, or ammunition," or who "knowingly harbor[s] or protect[s] an enemy." 1920 Winthrop, *supra* n. 23, at 967.

The court recognizes as a preliminary matter the occurrence of these events prior to the 1949 Geneva Conventions and 1950 Uniform Code of Military Justice era and looks to these cases as historic precedent for the law of war. Comparison of the contents of 19th century military commission law of war charges and specifications with appellant's charges and specifications is one way of determining whether offenses similar to appellant's were already punishable. Some basic information about the contents of military commission charges and specifications before appellant's offenses is helpful in making this assessment.

1. Contents of Specifications

Under military law in the 1860s and today, "the *charge* designates the crime, or offence in law, as mutiny; the *specification* alleges or specifies the act, with time, place, and circumstance."[110] Military law requires that each specification "must specify the material facts necessary to constitute the offence."[111] However, "[t]he specification need not possess the technical nicety of an indictment at common law. The most bald statement of facts is sufficient, provided the legal offense itself be distinctly and accurately described; this should be done, if possible, in the words of the Article violated."[112] When an accused was charged with both murder, and murder in violation of the laws of war,

[107] Saba Noor, *Evolution of Counter-Terrorism Legislation in Pakistan*, 1 Conflict and Peace Studies 1, 9 (2008) (citing 2001 ATC Sections 11-V and 21-C), http://www.google.com/search?hl=en&biw=992&bih=581&q=noor+tion+of+counter-terrorism+legislation+in+ pakistan&aq=f&aqi=&aql=&oq=.

[108] Noor, *supra* n. 107, at 11 (emphasis added).

[109] *United States v. Olson*, 7 U.S.C.M.A. 460, 466, 22 CMR 250, 256 (1957) (citing Code of Articles of King Gustavus Adolphus of Sweden, Art. 76 and 77 (1621) and Articles of War of James II, Art. 8 (1688)).

[110] *See* S. V. Benet, *A Treatise on Military Law and the Practice of Courts-Martial*, 61 (5th Ed. 1866) (emphasis in original); 2008 MCM, Rule for Courts-Martial 307(c) and Discussion. *See also Digest of Opinions of the Judge Advocate General of the Army* 27, 61-62, 66, 133 (1865).

[111] William Winthrop, *Military Law*, vol. I, 171-72 and n. 3 (Morrison 1886) (1886 Winthrop) (citations omitted).

[112] P. Henry Ray, *Instructions for Courts-Martial and Judge Advocates*, at p. 23 (H.Q. Dept. of the Platte, 1890) (citing 7 Op. Atty. Gen., p. 604) (emphasis omitted), http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1890.pdf.

the dual charges recognized that a murder can violate *both* civil law and the laws of war and that the murder was not exclusively a civil crime.[113] During the Civil War-era each specification of a charge was required to be complete and independent of other specifications and stand on its own as a separate criminal offense.[114] They were required to allege the factual basis for the elements of the offense.[115] Each finding of guilty for each specification must be supported by evidence, and the members of the court must vote on each specification.[116] The members may amend the specification by making findings by exceptions and substitutions. *Id.* For example, if the absence of a breach of duty or allegiance is not in the elements and form specifications, the members are not required to assess this element before making their findings, and they are free to find enemy aliens with no such duty guilty of aiding the enemy. *Compare* n. 28, *infra* (listing elements of providing material support for terrorism) *with* 1920 Winthrop, *supra* n. 23, at 1023 (form charge and specification for "Guerilla warfare, in violation of the Laws of War" for "acting independently of" lawful belligerents, "did, in combination with sundry other persons similarly acting, engage in unlawful warfare against the inhabitants of the United States.").

2. 19th Century Irregular Warfare and Aiding the Enemy

In 1818, during the first Seminole War, General Andrew Jackson and the U.S. Army entered Florida, which at that time was neutral Spanish territory, in pursuit of Indian warriors. David Glazier, *The Laws of War: Past, Present, and Future: Precedents Lost: The Neglected History of the Military Commission*, 46 Va. J. Int'l L. 5, 27 (2005) (cita-

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[113] *See* 1886 Winthrop, *supra* n. 111, at vol. 2 at 75-76 (1886); 1920 Winthrop, *supra* n. 23, at 842 (1920) (both stating, "The offence, where a civil crime, is commonly designated in the charge by its legal name, as Murder, Manslaughter, Robbery, Larceny, &c.; where a violation of the laws of war, by simple terms of description—as Being a guerilla, Unauthorized Trading or Intercourse with the enemy, Recruiting for the enemy within the U. S. lines, Violating a parole by a prisoner of war, &c., or simply Violation of the Laws of War, the specification indicating the species of the violation. Where the offence is both a crime against society and a violation of the laws of war, the charge, in its form, has not [i]nfrequently represented both elements, as "Murder, in violation of the laws of war," "Conspiracy, in violation," &c."); *see also, id.* (The next paragraph in both versions of Winthrop's Treatise describes the difference between a jurisdictional statement and the description of the offense in military commission charge sheets as follows, "The *specification* should properly set forth, not only the details of the act charged, but the circumstances conferring *jurisdiction*—as that a state of war existed, military government was exercised, or martial law prevailed, at the time and place of the offence: the status of the offender should also appear—as that he was an officer or soldier of the enemy's army or otherwise a public enemy, or a prisoner of war, or an inhabitant of a place or district under military government or martial law or person there serving. It is not however essential to aver facts of which the court will take judicial notice.") (emphasis in original and citations omitted). Unlike modern military practice, during the 19th Century, the charge did not require citation to the statutory authority for the offense. David Glazier, *The Laws of War: Past, Present, and Future: Precedents Lost: The Neglected History of the Military Commission*, 46 Va. J. Int'l L. 5, 28 (2005) (citing Alexander Macomb, *The Practice of Courts Martial* 26 (1841)); 1920 Winthrop, *supra* n. 23, at 146.

[114] 1886 Winthrop, *supra* n. 111, vol. 1 at 199 (emphasis in original and citations omitted); *see also* Benet, *supra* n. 110 at 63 ("The settled usage of military courts permits . . . trial for several distinct offenses at the same time. In such cases, each distinct offence must be made the burden of a separate charge and its specification, although but one sentence is adjudged for all the offenses tried upon one arraignment.") (emphasis in original omitted).

[115] 1920 Winthrop, *supra* n. 23, at 133 (internal quotation marks and citations omitted).

[116] 1886 Winthrop, *supra* n. 111, vol. I at 529-48 (describing the findings process).

tions omitted) Two British citizens, Arbuthnot and Ambrister, were aiding the Indian warriors. *Id.* (citation omitted). Following their capture, a special court,[117] military commission,[118] or court-martial[119] was convened to try the two men. Arbuthnot was found guilty of, "Charge 1st. Exciting and stirring up the Creek Indians to war against the United States. . . [and] Charge 2d. [A]iding, abetting, and comforting the enemy, supplying them with the means of war," and he was sentenced to hang. Glazier, *supra* n. 113, at 28 (citations omitted). Ambrister was convicted of, "Charge 1st. Aiding, abetting, and comforting the enemy, supplying them with the means of war, he being a subject of Great Britain, at peace with the United States, and lately an officer in the British colonial marines. . ." and, "Charge 2d. Leading and commanding [Indians], in carrying on a war against the United States." *Id.* at 28 (citing Minutes of the Proceedings of a Special Court, H.Q. Div. of the South at 154-55, 164; H.Q. Div. of the South, G.O. (Apr. 29, 1818)). Colonel Winthrop criticized General Jackson for approving a harsher sentence than the tribunal adjudged on reconsideration.[120] Birkhimer, however, considered General Jackson's actions to be lawful in every respect.[121] Winthrop did not criticize the decision to charge Arbuthnot and Ambrister with aiding the enemy. 1920 Winthrop, *supra* n. 23, at 464-65.

The court takes no comfort in the historical context in which these events occurred or the ultimate disposition of these cases. We cite to these events for their historical occurrence as an embryonic effort of the United States to deal with the complexity of fighters in irregular warfare. In contrast, under the 2006 M.C.A., AUECs have significant due process and are not subject solely to the discretion of the executive. *See* n. 171 *infra*.

During the War with Mexico, "guerilla warfare became in fact a systematic mode of prosecuting hostilities sanctioned by the Mexican government." 1920 Winthrop, *supra* n. 23, at 783 n. 51 (citing G.O. 372, H.Q. of Army, 1847). Military commission-type "trials, however, were few; this branch of juris-

[117] Glazier, *supra* n. 113 at 27 (citation omitted).

[118] *See* George Davis, *A Treatise on the Military Law of the United States* 308 n.1 (rev. 3d ed. 1915) (describing limitations of court-martial jurisdiction for prosecuting civilians and indicating the court which tried British Major John Andre´for spying during the War of the Revolution was "in fact a military commission."). Major General Davis was the Judge Advocate General of the Army from May 24, 1901, to Feb. 14, 1911, and a Professor at the U.S. Military Academy. His treatise on military law is cited in *Hamdan*, 548 U.S. at 590. Another noted author on military law, William Birkhimer, also took the view that the Ambrister and Arbuthnot "special court" was more accurately "a war court such as would now be known as a military commission." William E. Birkhimer, *Military Government and Martial Law*, 3d ed. 196-97 (Franklin Hudson Pub. Co., Kansas City, Mo., 1914). *See also* Louis Fisher, *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* 11-13 (2005) (referring to the trial of British Major John Andre´as a "Board of Officers.").

[119] 1920 Winthrop, *supra* n. 23, at 103 states, "In 1818, R. C. Ambrister, a civilian, was convicted by a court-martial convened by General, afterwards President, Jackson, (by whom also the finding and sentence were approved,) of aiding the enemy by 'supplying them with the means of war.'" *Id.* (citing *Trial of Arbuthnot and Ambrister* (London 1819)**;** 1 Am. State Papers, Mil. Affairs, pp. 721-34).

[120] 1920 Winthrop, *supra* n. 23, at 464-65 (citations omitted). Winthrop emphasized that Arbuthnot's proceeding was a court-martial, and the first sentence "to be shot" was a nullity. The sentence on reconsideration was the only sentence, which General Jackson could not increase. Thus, Arbuthnot's execution was "wholly arbitrary and illegal. For such an order and its execution a military commander would *now* be indictable for murder." *Id.* (citations omitted; emphasis in original).

[121] Birkhimer*, supra* n. 118, at 196-97 (citations omitted).

diction not then becoming fully developed." *Id.* at 832-33 (internal footnote omitted).

There were 4,271 documented military commission trials during the Civil War and another 1,435 during Reconstruction.[122] A number of commissions tried individuals for being guerillas and for their conduct while a guerilla.[123] The Civil War General Orders establishing military commissions were consistent with this position. On December 4, 1861, H.Q., Dept. of the Missouri issued General Orders No. 13, ¶¶ II, III, IV, and VII which read:

> II. It is represented there are numerous rebels . . . that . . . furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste the country. All such persons are *by the laws of war* in every civilized country liable to capital punishment. . . .
>
> III. Commanding officers . . . will arrest and place in confinement all persons in arms against the lawful authorities of the United States or who give aid, assistance or encouragement to the enemy. . . .
>
> IV. Commissions will be ordered from these headquarters for the trial of persons charged with aiding and assisting the enemy, [and causing] the destruction of bridges, roads, and buildings. . . .
>
> * * *
>
> VII. Persons not commissioned or enlisted in the service of the so-called Confederate States who commit acts of hostility will not be treated as prisoners of war but will be held and punished as criminals. And all persons found guilty of . . . pillaging and marauding under whatever authority will either be shot or otherwise less severely punished as is prescribed by the Rules and Articles of War or authorized by the usages and customs of war in like cases.[124]

In 1862, Major General (Maj. Gen.) Henry Halleck was the General-in-Chief of the Union Army and a leading international law scholar of his time.[125] In General Orders No. 1, HQ, Dept. of the Missouri (Jan. 1, 1862)

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[122] Glazier, *supra* n. 113, at 40 (citing Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 168-73, 176-77 (1991)). *See* 1920 Winthrop, *supra* n. 23, at 832-34, 839-41; *see also Quirin*, 317 U.S. at 31 n. 10.

[123] *See* 1920 Winthrop, *supra* n. 23, at 783 (defining the term "guerillas") and 783-84 n. 55 (listing various synonyms for the term guerilla). *See e.g.*, *id.* at 769 n. 19 (describing the cases of Beall and Kennedy as "the leading cases . . . of violators of the laws of war as 'prowlers,' (Lieber's Instructions ¶ 84,) or guerillas; the crimes of Beall consisting mostly in seizing and destroying steamers and their cargoes on Lake Erie, and attempting to throw passenger trains off the track in the State of New York, in September and December, 1864; and the principal crime of Kennedy being his taking part in the attempt to burn the City of New York by setting fire to Barnum's Museum and ten hotels on the night of Nov. 25th, 1864." (citing G.O. 14, 24, Dept. of the East (1865); Printed Trials, New York, 1865).

[124] H. R. Doc. No. 65, 55th Cong., 3d Sess., *reprinted in The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, Ser. II, vol. I, (Civil War, Ser. II, vol. I), pp. 233-36, G.O. 13 (1861) (emphasis added).

[125] Glazier, *supra* n. 113, at 41 n. 229 (citing Henry W. Halleck, *International Law* (1861)); James G. Garner, *General Order 100 Revisited*, 27 Mil. L. Rev. 1, 5 n. 13 (1965).

(G.O. 1),[126] Halleck noted in Pt. II, Rule 5 that charges preferred before a military commission should be "'violation of the laws of war,' . . . in [such] cases we must be governed by the general code of war." G.O. 1, Pt. II, Rule 9 stated:

> [T]he code of war gives certain exemptions to a soldier regularly in the military service of an enemy . . . insurgents not militarily organized under the laws of the State, predatory partisans and gue[]rilla bands are not entitled to such exemptions; such men are not legitimately in arms and the military name and garb which they have assumed cannot give a military exemption to the crimes which they may commit. They are in a legal sense mere freebooters and banditti….

In an August 6, 1862 letter, Maj. Gen. Halleck asked Lieber to write a pamphlet addressing violent guerilla activity behind the lines. Halleck succinctly described the Union Army's problem:

> The rebel authorities claim the right to send men, in the garb of peaceful citizens, to waylay and attack our troops, to burn bridges and houses, and to destroy property and persons within our lines. They demand that such persons be treated as ordinary belligerents, and that when captured, they have extended to them the same rights as other prisoners of war; they also threaten that if such persons be punished as marauders and spies, they will retaliate by executing our prisoners of war in their possession.

Garner, *supra* n. 125, at 17. In August 1862, Lieber responded to Halleck's request with a pamphlet entitled, "Gue[]rilla Parties Considered with Reference to the Laws and Usages of War." *Id.* at 17. Dr. Lieber defined a "gue[]rilla party" as follows:

> [I]t is universally understood in this country, at the present time, that a gue[]rilla party means an irregular band of armed men, carrying on an irregular war, not being able, according to their character as a gue[]rilla party, to carry on what the law terms a *regular* war. The irregularity of the gue[]rilla party consists in its origin, for it is either self-constituted or constituted by the call of a single individual, . . . and it is irregular as to the permanency of the band, which may be dismissed and called again together at any time.

George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 Am. J. of Int. L. 14, 16 (1907) (quoting Francis Lieber, *Miscellaneous Writings* (1881)) (emphasis in original), http://www.jstor.org/ stable/2186282. *See also* 1920 Winthrop, *supra* n. 23, at 783. Guerillas are known for "intentional destruction for the sake of destruction," and "general and heinous criminality . . . because the organization of the party being but slight and the leader utterly dependent upon the band, little discipline can be enforced." Davis, *supra* at 16. The concern was that "he that today passes you in the garb and mien of a peaceful citizen, may tomorrow, as a guerilla-man, fire your house or murder you from behind the hedge." *Id.* Lieber concluded, guerilla parties do not enjoy the full benefit of the law of war because after committing a violent act they blend back into the noncombatant population, and because they, "cannot encumber

[126] Civil War, Ser. II, vol. I, *supra* n. 124, pp. 247, 249.

themselves with prisoners of war; they have, therefore, frequently, perhaps generally, killed their prisoners . . . thus introducing a system of barbarity which becomes [more intense] in its demoralization as it spreads and is prolonged." *Id.*

Lieber was the lead author of Army General Orders 100 (1863) (G.O. 100), which was subsequently styled the Lieber Code. *See* Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (*Lieber's Instructions*) 2 (1898). It represented one of the first comprehensive lists of the laws of war.[127] On April 24, 1863, President Abraham Lincoln approved G.O. 100, and directed its publication, "for the information of all concerned." *Lieber's Instructions*, *supra* at 2. We address two categories of individuals described in G.O. 100 as law of war violators.

General Orders 100, § V, includes several articles that address the issue of loyalty, allegiance, or treason. *See e.g.*, *Lieber's Instructions*, at 28-30 (G.O. 100, arts. 88-98). A "war traitor" or "traitor" is "a person in a place or district under martial law who, unauthorized by military commander, gives information of any kind to the enemy, or holds intercourse with him." *Id.* (G.O. 100, art. 90).[128] Numerous Civil War and Philippine-era military commission specifications alleged violation of a duty of allegiance to the United States, or violation of an oath of allegiance.[129] Those articles and specifications relating to a breach of loyalty or allegiance are not pertinent here because appellant and al Qaeda have no duty to the United States.[130] Military commission trials for aiding the enemy-type offenses were not limited to such offenses.

General Orders 100, § IV addresses "armed enemies not belonging to the hostile Army," who unlawfully engage in violence and are therefore eligible for military commission trial, and it labels two of these categories, "Armed enemies not belonging to the hostile army" and "Armed Prowlers." G.O. 100, Articles 82 and 84. Those two articles provide:

> 82. Men, or squads of men, who commit hostilities, whether by fighting, or in-

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[127] "The Lieber Code established the basis for later international conventions on the laws of war at Brussels in 1874 and at The Hague in 1899 and 1907." Richard D. Rosen, *Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity*, 42 Vand. J. Transnat'l L. 683, 695 (2009) (citation omitted).

[128] *See also* Garner, *supra* n. 125, at 14-15 (The term "war treason" has fallen into disuse. Under Articles 64-68 of the Geneva Civilian Convention (IV) of 1949, n. 57 *supra*, inhabitants of occupied territory do "not owe any duty of allegiance" to the occupying force. *Id.* at 15-16). *See also id.* at 15 (explaining "war treason" in Lieber's Code could occur only in occupied, conquered, or invaded territory. (citing GO 100, arts. 90, 92, 95, 98)); *Compare The Rules of Land Warfare*, ¶¶ 202-05, 207, 210-11, 372 (1914) (1914 *Manual*) *with* Field Manual 27-10, The Law of Land Warfare ¶¶ 72-74, 79-82, 432-446 (1956) (1956 Manual).

[129] Allegiance language in a specification is surplus aggravating information, when a violent, guerilla-type offense is alleged. *See e.g.*, G.O. 93, pp. 8-9 (1864) (T. Sanders), G.O. 93, pp. 10-12 (1864) (J. Overstreet). Some charge sheets contain a separate charge and specifications alleging violation of an oath of allegiance. *See e.g.*, G.O. 93, pp. 3-5 (1864) (F. Norvel); G.O. 112(II), pp. 353-57 (1901) (A. Jiloca), n. 144 *infra*. *See also* Brief for Appellant on Granted Issue at 21-25. *See also infra* pp. 57-64, 70-71.

[130] *See* Granted Issues, *supra* n. 7, responsive briefs, and elements of providing material support for terrorism, which does not have such an element. *See* Elements, *supra* p. 28. It is unnecessary for this Court to determine whether aiding the enemy under Article 104, UCMJ, applies in this case because appellant is not charged with violating Article 104, UCMJ. We look to the law of war for the historical underpinnings of providing material support for terrorism. *See also* n. 128 *supra*.

> roads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not [lawful combatants], and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.
>
> 84. Armed prowlers by whatever names they may be called, or persons of the enemy's territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of war.

The conduct described in G.O. 100, Articles 82 and 84, was exemplified by guerilla raiders "in Kansas and Missouri who simply slaughtered unarmed soldiers and civilians, including an infamous massacre in Lawrence, Kansas in 1863."[131] "The guerilla fighting in Missouri produced a form of terrorism that exceeded anything else in the war. Jayhawking Kansans and bushwhacking Missourians took no prisoners, killed in cold blood, plundered and pillaged and burned . . . without stint." *Id.* (citation omitted).

The Lieber Code and Attorney General Speed's 1865 Opinion (1865 AG Opinion) state that such offenses committed in connection with membership in a guerilla band, or similar informal organization, violate the law of war. *See Opinion of the Constitutional Power of the Military to Try and Execute the Assassins of the President*, 11 Op. Atty. Gen. 297 (1865). Although the motivation for rape, robbery, murder, and theft may be personal gain, other crimes such as burning bridges, and destroying telegraph and railroad lines were clearly designed to aid or provide material support to the enemy and to impede the Union's ability to prosecute the war. Such offenses, if done by an unauthorized guerilla force, are traditional law-of-war violations.

The 1865 AG Opinion concerns the legality of the military commission trial of several individuals who conspired to assassinate President Lincoln. It supports a tradition of prosecution by military commission of offenses similar to aiding or assisting in the President's murder or providing material support for terrorism stating:

> A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offences as the laws of war permit; they must proceed according to the customary usages of such tribunals in time of war, and inflict such punishments as are sanc-

[131] Sean Murphy, *Enemy Combatants After Hamdan v. Rumsfeld: Evolving Geneva Convention Paradigms in the "War on Terrorism": Applying the Core Rules to the Release of Persons Deemed "Unprivileged Combatants,"* 75 Geo. Wash. L. Rev. 1105, 1111-12 (2007) (comparing the transnational group al Qaeda with "Lieber's gue[]rilla brigands").

> tioned by the practice of civilized nations in time of war.

Id. at 298. The 1865 AG Opinion continued:

> Congress shall have power "to define and punish . . . offences against the law of nations." Many of the offences against the law of nations for which a man may, by the laws of war, lose his life, his liberty, or his property, are not crimes. . . . [*T*]*o unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war.* Some of the offences against the laws of war are crimes, and some not. . . . Murder is a crime . . . [and] in committing the murder an offence may also have been committed against the laws of war; for that offence he must answer to the laws of war, and the tribunals legalized by that law.
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> * * *
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> If the prisoner be a regular unoffending soldier of the opposing party to the war, he should be treated with all the courtesy and kindness consistent with his safe custody; if he has offended against the laws of war, he should have such trial and be punished as the laws of war require. . . . A bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, . . . as offenders against the laws of war.

Id. at 312-14 (original emphasis deleted; emphasis added).

Violations of the rules regarding assistance to enemies are traditionally punished under the law of war, including "Infractions of [the rule forbidding trade or interchange with the enemy], by selling to, buying from or contracting with enemies, furnishing them with supplies, corresponding, mail carrying, passing the lines without authority, &c." 1920 Winthrop, *supra* n. 23, at 777. *Rendering or attempting to render "material aid or information to the enemy…are among the most frequent of the offences triable and punishable by military commission.*" *Id.* (emphasis added).

Colonel Winthrop organized Civil War military commission offenses into three classifications. 1920 Winthrop, *supra* n. 23, at 839. Here, we are exclusively interested in use of military commissions for violations "of the laws and usages of war cognizable by military tribunals only."[132] Domestic crimes and law-of-war offenses were both tried before the same commissions, acting as both martial law or military government tribunals and law-of-war commissions. The following law-of-war offenses were tried by Civil War military commissions:

> breaches of the law of non-intercourse with the enemy, such as running or attempting to run a blockade; unauthorized

[132] In *Hamdan*, seven Justices agreed that the focus of inquiry should be on law-of-war offenses tried by military commissions, and not on the other two types of military commissions. *Compare Hamdan*, 548 U.S. 599-600 n. 21, 608 (Stevens, Souter, Ginsburg, and Breyer, JJ., concurring) *with id.* at 689-91 (Thomas, Scalia, and Alito, JJ., dissenting).

> contracting, trading or dealing with, enemies, or furnishing them with money, arms, provisions, medicines, &c.; conveying to or from them dispatches, letters, or other communications, passing the lines for any purpose without a permit,[133] or coming back after being sent through the lines and ordered not to return; aiding the enemy by harboring his spies, emissaries, &c., assisting his people or friends to cross the lines into his country, acting as guide to his troops, aiding the escape of his soldiers held as prisoners of war, secretly recruiting for his army, negotiating and circulating his currency or securities-as confederate notes or bonds in the late war, hostile or disloyal acts, or publications or declarations calculated to excite opposition to the federal government or sympathy with the enemy, &c.; engaging in illegal warfare as a guerilla, or by the deliberate burning, or other destruction of boats, trains, bridges, buildings, &c., acting as a spy, taking life or obtaining any advantage by means of treachery; violation of a parole or of an oath of allegiance or amnesty, breach of bond given for loyal [behavior], good conduct, &c.; resistance to the constituted military authority, ...

1886 Winthrop, *supra* n. 111, vol. 2, at 71-72 (footnotes omitted). In 1912, Charles Howland, on behalf of the Office of The Judge Advocate General, described numerous offenses against the law of war, and most involved aiding the enemy in one manner or another. Charles R. Howland, *A Digest of Opinions of the Judge Advocates General of the Army* 1070-71 (1912) (Howland); *see also* Davis at 310 n.2, *supra* n. 118. Howland's description of law of war military commission offenses is similar to the list in Winthrop's 1886 Treatise.

Numerous Civil-War era military commission cases resulted in law of war convictions for aiding the enemy, and the following are illustrative examples:[134] giving aid, assis-

[133] 1886 Winthrop, *supra* n. 111, vol. 2, at 13 ("**Secretly Entering the Lines**. Similar to the violation of the laws of war committed by the spy is that of officers, soldiers, or agents of the enemy, coming secretly within our lines or into country occupied and held by our forces, for any unauthorized purpose, as, for example, for the purpose of recruiting for their army, obtaining horses or supplies for the same, holding unlawful communication, &c., a class of offenses of which instances were not infrequent in the border States during the late war.")(emphasis in original; footnotes omitted).

[134] H. R. Doc. No. 65, 55th Cong., 3d Sess., *reprinted in The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, Ser. II, vol. I (Civil War, Ser. II, vol. 1), pp. 265, 284-92, 389-453; 457-75 is the source for the following records cited in this paragraph: G.O. 15, p. 473 (1862) (J. Bently); G.O. 9, p. 465 (1862) (S. Bontwell); G.O. 15, p. 473 (1862) (S. Boswell); S.O. 28, pp. 443-45 (1862) (J. Bowles); G.O. 42, p. 448 (1862) (I. Breckinridge); S.O. 28, pp. 427-31 (1862) (W. Combs); S.O. 97, pp. 383-86, 405 (1861) (R. Crowder); G.O. 20, pp. 405-06 (1862) (G. Cunningham); S.O. 97, pp. 378-80, 405 (1861) (W. Forshey); S.O. 97, pp. 389-402 (1861) (T. Foster); G.O. 9, p. 466 (1862) (I. Giddings); G.O. 15, p. 474 (1862) (R. Hawkins); S.O. 81, pp. 284-92 (1861) (W. Hearst); G.O. 15, pp. 472-73 (1862) (T. Henly); S.O. 28, pp. 437-39 (1862) (J. Howard); S.O. 97, pp. 494-502 (1861) (J. Hussey); G.O. 9, p. 466 (1862) (I. Jones); G.O. 20, pp. 403, 405-06 (1862) (J. Jones) (1862); G.O. 20, pp. 405-06 (H. Jones) (1862); G.O. 9, pp. 464-65 (1862) (W. Kirk); S.O. 160, pp. 451-52 (1862) (J. Lane); G.O. 9, pp. 470-71 (1862) (W. Lisk); S.O. 28, pp. 431-37 (1862) (W. Mathews); G.O. 12, p. 471 (1862) (J. McClurg); G.O. 9, pp. 465-66 (1862) (J. Montgomery); G.O. 15, p. 474 (1862) (W. Norris); S.O. 28, pp. 406-21 (1862) (J. Owen); S.O. 97, pp. 381-83, 405 (1861) (J. Patton); G.O. 15, pp. 473-74 (1862) (J. Penn); S.O. 160, pp. 457-64 (1862) (W. Petty); S.O. 97, pp. 386-89, 405 (1861) (G. Pulliam); S.O. 160, pp. 449-50 (1862) (J. Quisenberry); G.O. 15, p. 473 (1862) (S. Rice); G.O. 9, p. 468 (1862) (J. Sallie); S.O. 28, pp. 445-48 (1862) (W. Shearin); G.O. 20, pp. 404-06 (1862) (T. Smith); G.O. 20, pp. 404-06 (1862) (S. Stott); G.O. 12, p. 471 (1862) (J. Stout); G.O. 9,

tance, presence, advice, counsel, or comfort to a party of armed men or joining a party of armed men, who damaged or destroyed railroad or telegraph property;[135] providing combatants with clothing, horses, ammunition, firearms, tools, or other supplies, or a team to haul supplies, *see e.g.*, I. Breckinridge, I. Giddings, W. Lisk, J. Sallie, and E. Wingfield, n. 134 *supra*, or attempting to do so, *see e.g.*, J. Trimble, n. 134 *supra*; harboring and maintaining persons in rebellion against the United States;[136] offering a horse, saddle, firearm, or money to another to take up arms against the United States, *see e.g.*, W. Lisk, n. 134 *supra*; or buying for or delivering cattle to the Southern army, *see e.g.*, n. 134 *supra*, S. Bontwell, I. Jones, and J. Montgomery.[137]

Guerilla activity and aiding guerillas violate the law of war and resulted in military commission convictions for offenses such as: unlawfully plundering an oxen, wagon, horse, or other property, *see e.g.*, W. Kirk and S. Bontwell, n. 134 *supra*; forcing a loyal citizen to take an oath of allegiance to the Confederacy, *see e.g.*, W. Kirk, n. 134 *supra*; taking a loyal U.S. citizen prisoner, *see e.g.*, S. Bontwell, n. 134 *supra*; committing various acts of outlawry,[138] and murdering or advising, aiding, and assisting in the murder of a loyal U.S. citizen.[139]

Aid to the enemy, in violation of the law of war, included providing advice, information, one's own person, or other services to assist the enemy. *See e.g.*, n. 134 *supra* (listing

p. 470 (1862) (J. Sublett); S.O. 97, pp. 374-78, 405 (1861) (J. Tompkins); G.O. 9, pp. 468-69 (1862) (J. Trimble); G.O. 15, p. 475 (1862) (J. Williams); G.O. 15, p. 475 (1862) (E. Wingfield); S.O. 28, pp. 439-43 (1862) (F. White). All cited Civil War and Philippine War orders in n. 134 through n. 144 are on file with Clerk of Court.

[135] *See e.g.*, Civil War, Ser. II, vol. 1, n. 134 *supra*, J. Bowles, I. Breckinridge, W. Combs, R. Crowder, G. Cunningham, W. Forshey, T. Foster, R. Hawkins, J. Howard; W. Hearst, H. Jones, J. Jones, J. Lane, W. Mathews, W. Norris, J. Owen, J. Patton, W. Petty, G. Pulliam, J. Quisenberry, W. Shearin, T. Smith, S. Stott, J. Tompkins, E. Wingfield, and F. White.

[136] *See e.g.*, Civil War, Ser. II, vol. 1, n. 134 *supra*, I. Breckinridge. Aiding guerillas by feeding or harboring them resulted in military commission convictions for law of war violations. *See e.g.*, G.O. 148, pp. 1-2 (1863) (M. Jackson); G.O. 148, p. 2 (1863) (S. Jackson); and G.O. 86, pp. 1-2 (1864) (M. Davis).

[137] Providing transportation, such as a horse in the Civil War to guerillas, is similar to driving a vehicle and transporting al Qaeda personnel in its conflict against the United States. *See* H.R. Doc. 111-26 (Statement of Steven A. Engel) 109, 121-23, *supra* at n. 39. Engel was assigned to the Department of Justice's Office of Legal Counsel from June 2006 to January 2009, where he worked with Congress to develop the 2006 M.C.A. *Id.* at 37-38. He acknowledged the historical support from the Civil War era for the existence of the offense of providing material support for terrorism, *id.* at 122 (stating, "During the Civil War, for instance, the United States prosecuted by military commissions 'numerous rebels . . . that furnish[ed] the enemy with arms, provisions, clothing, horses and means of transportation' for the purpose of engaging in sabotage operations behind Union lines. [*United States v. Hamdan*, Ruling on Motion to Dismiss (Ex Post Facto)] at 4 (quoting H.R. Doc. No. 65, 55th Cong 3d Sess. 234 (1894)). . . . In view of these historical precedents, the United States is well justified in prosecuting al Qaeda members who do the same in support of the enemy in Afghanistan or elsewhere.").

[138] *See e.g.*, Civil War, Ser. II, vol. 1, n. 134 *supra*, J. Montgomery; G.O. 41, pp. 6-7, 21 (1864) (M. Fornshal) and G.O. 86, pp. 4-5 (1864) (J. Williams).

[139] *See e.g.*, Civil War, Ser. II, vol. 1, n. 134 *supra*, J. McClurg and J. Stout. In 1862, the trials of at least ten individuals resulted in treason convictions by taking up arms against the United States and usually other law of war offenses; however, the treason charges were disapproved because treason is not an offense triable by military commission. In the cases of T. Benedict, J. Rumans, R. Batterdon, and J. Tuggle, the only charge was treason. G.O. 20, pp. 402-05 (1862), n. 134 *supra* (citing G.O. 1, (1862), Pt. II, Rule 6 [Civil War, Ser. II, vol. 1, p. 248], which provides, "Treason as a distinct offense is defined by the Constitution and must be tried by courts duly constituted by law; but certain acts of a treasonable character such as conveying information to the enemy, acting as spies, &c., are military offenses triable by military tribunals . . . .").

cases). Commissions convicted defendants of transgressing the laws of war by wrongfully taking or inciting, inducing, or procuring others "to take up arms and to commit acts of hostility" against the forces or property of the United States as an insurgent, outlaw, guerilla, bushwacker or otherwise,[140] for acts of hostility against U.S. forces;[141] and for informing the enemy "where Union men lived and encouraging the enemy" to harm them to drive them from their homes or to coerce "them into the service of the Southern Army," *see e.g.*, I. Jones, n. 134 *supra*.

Civil War military commissions, trying violations of the law of war, were not limited to cases involving accused that resided inside the lines or within occupied states.[142] For example, in May 1865, T. Hogg and six others were convicted of a single specification and charge of "Violation of the laws and usages of civilized war."[143] The seven men were "commissioned, enrolled, enlisted or engaged" by the Confederate Government, before they went aboard the "U.S. merchant steamer Salvador," which was in the port of Panama, New Granada. *See* n. 143, at 674. They were "in the guise of peaceful passengers," and lacked "any visible mark or insignia indicating their true character as enemies." *Id.* They were secretly armed and intended to capture the Salvador, secure the passengers and crew, and use her for "a cruiser to prey on the commerce of the citizens of the United States." *Id.* After a legal review by the Army Judge Advocate General, their convictions for violations of the laws of war were "approved and confirmed." *Id.* at 679-81, 650-53, 905.

As Attorney General Speed explains at p. 58, *ante*, the offense against the law of war was complete when these individuals joined the guerilla band. Of course, some action is usually required to manifest that they have joined the guerilla band, such as "taking up arms," providing advice on how to destroy trains or telegraphs, or providing their presence on a raid. *See* p. 58, *supra*. A person can also violate the law of war by providing assis-

[140] *See e.g.*, Civil War, Ser. II, vol. 1, n. 134 *supra*, J. Bently, M. Boswell, T. Henly, J. Penn, S. Rice, J. Sublett, and J. Williams. They all received the same sentence. *Id.* at pp. 472-74. *See also Hamdan*, 548 U.S. at 694-95 and n. 9 (Thomas and Scalia, JJ., dissenting) (citing G.O. 51, p. 1 (1866) (J. Wells); G.O. 108, p.1 (1865) (H. Magruder); G.O. 41, pp. 1-2, 21 (1864) (J. Wilson); G.O. 153, p. 1 (1864) (Kight); G.O 93, pp. 3-4, (1864) (F. Norvel); G.O 93, p. 9 (1864) (J. Powell); G.O 93, pp. 10-11 (1864) (J. Overstreet); *Hamdan*, 548 U.S. at 601, 609-10 n. 37 (Steven, Souter, Ginsburg, and Breyer, JJ., concurring) (discussing conspiracy commission cases). *See also e.g.*, Civil War, Ser. II, vol. 1, n. 134 *supra*, J. Bowles, J. Montgomery, J. Owen, W. Shearin, F. White, and E. Wingfield; G.O. 41, pp. 13-14, 21 (1864) (W. Roberts); G.O. 41, pp. 14-15, 21 (H. Sipes) (1864); and G.O. 86, pp. 2-4 (1864) (J. Turner).

[141] *See e.g.*, G.O. 93, pp. 1-3, 11 (1864) (J. Highley); G.O. 93, pp. 3-6, 11 (1864) (F. Norvel); G.O. 148, pp. 8-9 (1863) (J. Jones); G.O. 148, pp. 7-8 (1863) (T. Meade).

[142] *See e.g.*, Military commission charges of W. Mathews, Civil War, Ser. II, vol. 1, n. 134 *supra*, of the Confederate Army, who "secretly and unlawfully entered the lines occupied" by the U.S. military where he advised persons to take up arms and become insurgents. He met with armed bands and advised the destruction of railroad property, "contrary to the laws and customs of war." *See also* G.O. 41, pp. 6-7, 21 (1864) (M. Fornshal); G.O. 41, pp. 15-17, 21 (G. Ham) (1864) (recruiting behind lines for Confederate Army, inciting insurrection, and spying); and G.O. 41, pp. 17-22 (R. Louden) (1864) (conspiracy to destroy steamboats, spying, and other offenses).

[143] H. R. Doc. No. 314, 55th Cong., 3d Sess., *reprinted in The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, Ser. II, vol. 8 (1899), is the source for the following records cited in this paragraph: G.O. 52, pp. 674-81, 750-53, 905 (1865) (T. Hogg and six others,); G.O. 24, pp. 414-16, 428-29, 850, 852, 857, 859, 880, 891, 937, 941 (1865) (R. Kennedy). *See* n. 123 *supra*. *See also e.g.*, Civil War Ser. II, vol. 1, n. 134 *supra*, W. Mathews.

tance to a guerilla band, and Civil War military commissions punished numerous offenders for providing a wide array of such assistance. These examples of Civil War-era military commission convictions for providing support or aid to insurgents and guerillas illustrate the long-standing prohibitions against conduct similar to appellant's aid to al Qaeda.

3. The Philippine-American War, 1899-1902

General Orders No. 100 (1863), the Lieber Code, continued in force as the practical and effective "rule of conduct to which every officer understands that he must conform" during the Philippine-American War.[144] It provided for punishment of those who engaged in unauthorized hostilities. 57th Cong., 1st Sess., Sen. Doc. No. 205, Part 1 (1902 Sen. Doc.) p. 29 (1902) (quoting Article 82 of the Lieber Code at p. 57, *supra*).

During the Philippine war, numerous residents of the Philippines were convicted of various violations of the laws and usages of war, such as: constituting themselves as a "band of armed prowlers," and damaging railroad track, a public highway, and telegraph wires, *see e.g.*, D. Noul and 13 others; soliciting or collecting and providing money, food, clothing, information, and other items to the insurgents, *see e.g.*, Julian Confesor; F. Morales; inciting, procuring, aiding, abetting, ordering, and commanding two native policemen to murder a U.S. Army soldier, which they did, *see e.g.*, Julian Confesor; collecting and transmitting money, clothing, bolos, cigarettes, 20 persons (more or less to become members of the bands of outlaws), and other articles to a native outlaw engaged in guerilla warfare against the United States, *see e.g.*, F. Trinidad; and becoming an active member in an organization that assists and supports the insurgent forces, and by contributing and collecting money, food, clothing, and tobacco or other supplies to the organization for the insurgent forces, *see e.g.*, Juan Confesor and A. Jiloca.

Conduct and not residency is the focus of whether a law of war offense involving guerilla activity has been committed.[145] In a memorandum affirming the commission conviction of D. Noul and 13 others, the reviewing authority noted that the permanent residence of the insurrectionists is irrelevant stating, "Under the laws of war, armed prowlers whether they permanently reside within or, residing elsewhere, steal within the lines of an occupying army, and there [damage public property] are not entitled to the privileges of prisoners of war." 1902 Sen. Doc., *supra* n. 144, at 80. Moreover, ". . . all those who order or cause the same to be done *or connive at or secretly aid and assist therein* will take warning that regard for the helpless and noncombative population . . . whose lives are put in jeopardy by the destruction of [public property] . . . will make unavoidable" the imposition

[144] 57th Cong., 1st Sess., Sen. Doc. No. 205, Part 1 pp. 1-3 (1902) (1902 Sen. Doc.). All cited General Orders (G.O.) in this section refer to military commission trials in the Philippines from 1900 to 1901, and are reprinted in 1902 Sen. Doc. at the pages indicated. Each cited G.O. is the source for the information in the paragraph where the footnote is located, unless stated otherwise: G.O. 174, pp. 213-16 (1901) (Juan Confesor); G.O. 112(I), pp. 351-53 (1901) (Julian Confesor); G.O. 112(II), pp. 353-57, (1901) (A. Jiloca); G.O. 52, pp. 126-27 (1901) (F. Morales); G.O. 147, pp. 79-80 (1900) (D. Noul and 13 others); G.O. 204, pp. 229-30 (1901) (F. Trinidad).

[145] Some specifications stated that the territory was occupied by U.S. troops in insurrection against the lawful authority of the United States, without being part or portion of any organized hostile army, *see e.g.*, D. Noul and 13 others; Felix Trinidad.

of the most severe penalties upon those who are found guilty. *Id.* (emphasis added).

4. World War II Era

The extent of Nazi and Japanese outrages against civilian populations, as exemplified at Auschwitz, Nanking, and the Philippines, compelled the Allies to create a legal structure to prosecute not only those who personally committed atrocities but also those who supported such large-scale war crimes.

Seven months after the Japanese attack on Pearl Harbor and the subsequent entry of the United States into the war, President Franklin Roosevelt proclaimed that enemy belligerents who "enter or attempt to enter the United States," and who commit, attempt, or prepare to commit, "hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals." *Quirin*, 317 U.S. at 22-23 (quoting Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942)). On the same day, President Roosevelt, acting as President and Commander in Chief, appointed a military commission and directed it to try four German saboteurs for "offenses against the law of war and the Articles of War." *Quirin*, 317 U.S. at 22.

"On July 3, 1942, the Judge Advocate General's Department of the Army prepared" and provided to the Commission four charges and supporting specifications against the captured saboteurs: violation of the law of war;[146] "relieving or attempting to relieve, or corresponding with or giving intelligence to the enemy" in violation of Article 81 of the Articles of War; spying in violation of Article 82; and conspiracy to commit the first three offenses. *Id.* at 23.

The Court denied the saboteurs' request for habeas relief solely on the grounds that Specification 1 of Charge I "alleged an offense which the President is authorized to order tried by military commission." *Id.* at 48. In *Quirin*, the Court discounted the arguments of the defendants that they had not actually committed any damage to the United States and did not invade an area under active military operations stating:

> Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations. The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered -- or, having so entered, they remained upon -- our territory in time of war without uniform or other appropriate means of identification. For that reason, even when com-

[146] Specification 1 "charged that they, 'being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States.'" *Quirin*, 317 U.S. at Syllabus.

> mitted by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other.[147]

Even before the end of the war in Europe was in sight, Stalin, Churchill, and Roosevelt released the Moscow Declaration on November 1, 1943, which addressed the need to hold Nazi war criminals responsible for their crimes.[148] In a series of meetings, the United Nations, as President Roosevelt styled the alliance in that document, worked out specific details on how the Nazis would be tried. On August 8, 1945, after long negotiation, they produced a document known as the London Charter.[149]

Article 9 of the London Charter empowered the tribunal to "declare groups and organizations [to be] criminal organizations" and then, under Article 10, to take individuals to trial for membership *alone* in one of those organizations. 1 *Trial of the Major War Criminals Before the International Military Tribunal* 255 (1947). The tribunal addressed the scope of membership liability or organizational guilt, and described the criminal organization's essence as being "bound together and organized for a common purpose." *Id.* at 256. The criminal group must be "formed or used in connection with the commission of crimes denounced by the Charter." Individuals are not subject to criminal liability for membership of the organization if they have "no knowledge of the criminal purposes or acts of the organization," or were compelled to become members, "unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter." *Id.* With these restrictions in mind, "[m]embership alone is not enough to come within the scope of these declarations."

The tribunal, in effect, limited liability to two groups within the criminal enterprises: (1) those "who became or remained members of the organizations with knowledge that it was being used for the commission of acts declared criminal" (i.e., war crimes), and (2) those "who were personally implicated as members of the organizations in the commission of such crimes." Quincy Wright, *The Law of the Nuremberg Trial*, 41 Am. J. Int'l L. 38, 70 (1947) (citing Judgment at 256, 262, 266). Additionally, the tribunal "considered criminal responsibility an individual matter," and gave "the benefit of the doubt to the accused." *Id.* Finally, "no person could be convicted unless as an individual he had conspired in criminal activities or purposes." *Id.* Even with these judicial limitations, it is clear that the concept of organizational guilt employed at Nuremberg is similar to providing

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[147] *Quirin*, 317 U.S. at 38 (citing *Morgan v. Devine*, 237 U.S. 632 (1915); *Albrecht v. United States*, 273 U.S. 1, 11-12 (1927)).

[148] Quincy Wright, *The Law of the Nuremberg Trial*, 41 Am. J. Int'l L. 38, 39 (1947). *See also Joint Four-Nation Declaration from the Moscow Conference of October 1943*, http://avalon.law.yale.edu/wwii/-moscow.asp.

[149] *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 177 (2d Cir. 2009) (stating that the United States, United Kingdom, Soviet Union, and France "established the International Military Tribunal ('IMT') through entry into the London Agreement of August 8, 1945. M. Cheriff Bassiouni et al., *An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation*, 72 J. Crim. L. and Criminology 1597, 1640 and n. 220 (1981)) (internal quotation marks omitted). Annexed to the London Agreement was the London Charter, which served as the IMT's constitution. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, with annexed Charter of the IMT art. 2, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, *available at* 4 *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10* at X-XIV (1951).

material support for terrorism under the M.C.A. *See* M.M.C., Part IV, ¶ 6(25)b, *supra* p. 29 (listing elements for providing material support for terrorism).

Execution of the Moscow Declaration and London Agreement was entrusted to the Allied Control Council (ACC). On December 10, 1945, acting as the Military Government of Occupied Germany, the ACC adopted Control Council Law No. 10.[150] The International Military Tribunal (IMT) "declared criminal the Leadership Corps of the Nazi Party, the Gestapo and S.D.[151] (intelligence agency), which had been treated together by the Prosecution, and the S.S."[152]

The United States conducted 12 trials with multiple defendants in Germany under the authority of Control Council No. 10, which are known as the Nuremberg Military Tribunals (NMT). These were considered international tribunals administering international law.[153] At the NMT, 177 defendants were tried to verdict, and 142 were convicted. Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council No. 10* (Taylor Report) 91 (Aug. 10, 1949). Although the concept of organizational guilt was not used for the hundreds of thousands of people who were potentially liable under the London Charter and the decisions of the IMT, a significant number of businessmen, doctors, and jurists were tried by military tribunals in the American Occupied zone for their membership in these four criminal organizations. Taylor Report, *supra* at 93 (87 defendants were tried for membership offenses, 74 were convicted of a membership charge among other charges, and 10 were convicted solely of a membership charge). *See also* Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 Colum. L. Rev. 1094 (2009) (discussing charging decisions for membership offenses).

The case of Mathias Graf is an example of a case with a conviction solely of a membership offense. 4 *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10* at 584-85 (1947). Graf was a defendant tried as part of the *Einsatzgruppen* cases. He was a noncommissioned officer who never commanded a unit. *Id.* at 584. Graf's unit, *Einsatzkommando* (*Kommando*) 6, participated in executions and "liquidating operations," which constituted crimes against humanity and war crimes. *Id.* at 585. However, he was found not guilty by the NMT of those offenses, because the tribunal found [that there] lacked proof that he was present during or participated directly in the executions, and he was not in a position to protest against them. *Id.* The tribunal declined to presume that he had taken part in planning operations. *Id.* The

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[150] Telford Taylor, *The Nuremberg War Crimes Trials: An Appraisal*, 23 Proceedings of the Academy of Political Science, 19, 22 (1949).

[151] The "*Die Geheime Staatspolizei* (Gestapo) and *Der Sicherheitsdienst des Reichsführer SS* (SD)" were police and intelligence agencies for the Nazis. *See International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 Am. J. Int'l L. 172, 256-57, 261-62, 266-67 (1946) (*Judgment and Sentences*).

[152] Francis Biddle, *The Nürnberg Trial*, 91 Proceedings of the Am. Philosophical Society 294, 300 (1947). *See also Hamdan*, 548 U.S. at 696 (Thomas & Scalia, JJ., dissenting) (citations omitted).

[153] 6 *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10* at 1188 (1952) (holding in its judgment that the Tribunal conducted by the United States "is an international tribunal established by the International Control Council, the high legislative branch of the four Allied Powers now controlling Germany . . . The Tribunal administers international law.").

tribunal did find, however, that he was aware of at least some of the illegal acts committed. *Id*. The tribunal found him guilty of membership in the SD (*Der Sicherheitsdienst*), found the mitigating circumstance that "his membership in the SD was not without compulsion and constraint," and sentenced him to time served. *Id*. at 587.

By way of example, Doctor Helmut Poppendick was Chief Physician of the Main Race and Settlement Office, Chief of the Personnel Office in Grawitz, an active duty army surgeon, a lieutenant colonel in the SS, and a colonel in the Waffen SS. 2 *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10* at 186, 248-49 (1951). He was acquitted of war crimes and crimes against humanity. *Id*. at 252-53. However, the NMT noted that Poppendick "remained in the SS voluntarily throughout the war, with actual knowledge of the fact that organization was being used for the commission of acts now declared criminal . . . He must, therefore, be found guilty." *Id*. at 253. Poppendick was convicted solely of membership in a criminal organization and sentenced to imprisonment for 10 years. *Id*. at 299. The Supreme Court denied writs of habeas corpus and prohibition. *Brandt v. United States*, 333 U.S. 836 (1948). *See also Hamdan*, 548 U.S. at 696 (Thomas and Scalia, JJ., dissenting) (citations omitted).

"Konrad Meyer-Hetling was the chief of the planning office within the Staff Main Office." 5 *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10* at 156 (1950). He was a professor and scientist of agriculture who worked part time developing the "General Plan East" that was a "proposed plan for the reconstruction of the East." *Id*. The NMT found that there was no evidence to support the assertions that Meyer-Hetling's plan was the cause of the child kidnappings, abortions, reproductive interference and general Germanization of the East, and that his plan did not contain anything incriminating. *Id*. at 156. The NMT found him guilty of count three, membership in a criminal organization, namely, that he was a member of the SS, *id*. at 157, and sentenced him to time served. *Id*. at 165.

In addition to prosecuting membership in a criminal organization as a separate and distinct crime, the NMT also found defendants guilty of war crimes and crimes against humanity for their support of criminal organizations. In the Flick Case, defendants Flick and Steinbrinck were charged in count four with committing "war crimes and crimes against humanity . . . in that they were accessories to, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with: murders, brutalities, cruelties, tortures, atrocities and other inhumane acts . . . ." 6 *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10* at 23 (1952). The indictment alleged that the defendants, as members of the group "Friends of Himmler," "worked closely with the SS, met frequently and regularly with its leaders, and furnished aid, advice, and support to the SS, financial and otherwise." *Id*. The Tribunal found that the "gist of count four is that . . . Flick and Steinbrinck with knowledge of the criminal activities of the SS contributed funds and influence to its support." *Id*. at 1216. Flick's monetary contributions began long before the criminal activities of the SS were widely known, and it was not proven that the money he contributed was directly used for

criminal activities. *Id.* at 1220. The NMT concluded that Flick and Steinbrinck "played but a small part in the criminal program of the SS." *Id.* at 1222. Still, the Tribunal found that the criminal character of the SS "must have been known," and that how the money was spent was "immaterial." *Id.* at 1221. The Tribunal found Flick and Steinbrinck guilty of count four, committing war crimes and crimes against humanity by supporting the criminal organization responsible for such acts. *Id.* at 1221-22.

The NMT held that where clear crimes against humanity and war crimes were committed, an "organization which . . . is responsible for such crimes can be nothing else than criminal. One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes." *Id.* at 1217. The NMT dismissed the argument that the defendants "could not be liable because there had been no statute nor judgment declaring the SS a criminal organization and incriminating those who were members or in other manner contributed to its support." *Id.* at 1217. The NMT further found that Steinbrinck did not seek admission into the SS; his membership was honorary; he only had two official tasks, neither of which were criminal in nature; he had "no duties, no pay, and only casual connection with SS leaders;" and that his activities did "not connect him with the criminal program of the SS." *Id.* at 1221-22. Nevertheless, the NMT found Steinbrinck guilty of membership in an organization declared criminal. Flick was sentenced to seven years confinement and Steinbrinck was sentenced to five years. *Id.* at 1223.

Similarly, in *Einsatzgruppen*, the NMT tried members of *Einsatz* units for a large number of murders, and noted that:

> the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems, paragraph 2 of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt. Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility . . . . Any member who assisted in enabling these [*Einsatz* units whose express mission, well known to all the members, was to carry out a large scale program of murder] to function, knowing what was afoot, is guilty of the crimes committed by the unit…. The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not brandish a cutlass. The man who stands at the door of a bank and scans the environs may appear to be the most peaceable of citizens, but if his purpose is to warn his robber confederates inside the bank of the approach of the police, his guilt is clear enough. And if we assume, for the purposes of argument, that the defendants such as Schubert and Graf have succeeded in establishing that

their role was an auxiliary one, they are still in no better position than the cook or the robbers' watchman.[154]

5. Army 1914 and 1956 Manuals

In 1914, the United States War Department "replaced General Orders No. 100 with an army field manual entitled '*The* [*Rules*] *of Land Warfare*' which, updated, is still in force."[155] The purpose of the 1914 Manual was to provide authoritative guidance to military personnel on customary and treaty law applicable to the conduct of warfare on land. 1914 Manual at 3, 11-13. The 1914 Manual ¶¶ 369, 372, and 373 permit prosecution as war criminals of individuals who engage in hostilities without qualifying as lawful combatants or privileged belligerents, stating:

> 369. **Hostilities committed by individuals not of armed forces**.—Persons who take up arms and commit hostilities without having complied with the conditions prescribed for securing the privileges of belligerents, are, when captured by the enemy, liable to punishment for such hostile acts as war criminals.
>
> 371. **Highway robbers and pirates of war**.—Men, or squads of men, who commit hostilities, whether by fighting, or by inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not [lawful combatants or privileged belligerents], and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers and pirates.
>
> 373. **Armed prowlers**.—Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

In 1942, the Supreme Court cited the 1914 and 1940 Rules of Land Warfare as the War Department's guidance to the Army on war crimes. *See Quirin*, 317 U.S. at 33-34. In 1956, the U.S. Army updated the 1940 version of the Rules of Land warfare with Field Manual 27-10, *The Law of Land Warfare* (1956 Manual). The 1956 Manual at ¶¶ 502-504 listed grave breaches of the Geneva Conventions and a representative list of other war crimes. At ¶ 499 it defines "the term 'war crime'" to be "the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime." Like the 1914 Manual, the 1956 Manual permits pros-

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[154] *Prosecutor v. Tadić*, Judgment, Case No. IT–94–1–A, ¶ 200 (ICTY Appeal Chamber, July 15, 1999) (*Tadić* Appeal Chamber)) (quoting The *United States of America v. Otto Ohlenforf et al.*, 4 *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10* at 372-73 (1951)).

[155] Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 Naval L. Rev. 176, 200 (2000) (citing Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* 10 (1992); Field Manual FM 27-10, *The Law of Land Warfare*, (1956)).

ecution of unlawful combatants or unprivileged belligerents as war criminals, stating:

> **80. Individuals Not of Armed Forces Who Engage in Hostilities**
> Persons, such as gue[]rillas and partisans, who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents (see GPW, art. 4; par. 61 herein), are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.
>
> **81. Individuals Not of Armed Forces Who Commit Hostile Acts**
> Persons who, without having complied with the conditions prescribed by the laws of war for recognition as belligerents (see GPW, art. 4; par. 61 herein), commit hostile acts about or behind the lines of the enemy are not to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment. Such acts include, but are not limited to, sabotage, destruction of communications facilities, intentional misleading of troops by guides, liberation of prisoners of war, and other acts not falling within Articles 104 and 106 of the Uniform Code of Military Justice and Article 29 of the Hague Regulations.

The 1956 Manual provides for punishment of those who assist in illegal hostilities stating in ¶ 82 that persons culpable under ¶¶ 80 and 81 "who have attempted, committed, or conspired to commit hostile or belligerent acts are subject to the extreme penalty of death because of the danger inherent in their conduct. Lesser penalties may, however, be imposed."

E. Ex Post Facto

The Constitution's Ex Post Facto Clause was understood by the Founders to be among the most significant rule of law guarantees in the Constitution. In *The Federalist*, Alexander Hamilton stated:

> The creation of crimes after the commission of the fact, or in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.[156]

Any law which removes defenses, imposes liability or otherwise makes more severe the punishment for past conduct is prohibited as an *ex post facto* application of the laws. *Collins v. Youngblood*, 497 U.S. 37, 42 (1990). Over 200 years ago, Justice Chase described four categories of *ex post facto* laws, stating:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules

[156] Robert G. Natelson, *Statutory Retroactivity: The Founder's View*, 39 Idaho L. Rev. 489, 520 (2003) (quoting Alexander Hamilton, The Federalist No. 84, *The Federalist Papers* 511-12 (Clinton Rossiter Ed., 1961)); Frederick Quinn, *The Federalist Papers Reader* 174 (Seven Locks Press 1993).

> of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.* All these, and similar laws, are manifestly unjust and oppressive.[157]

International law recognizes the legal maxim "*nullum crimen sine lege*" as a general principle of justice. 22 *Trial of the Major War Criminals Before the International Military Tribunal* 462 (1948). The perpetrator "must know that he is doing wrong and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished." *Id*. at 462. Like the Constitution's Ex Post Facto Clause, the maxim's goal is to prevent punishment of an individual for acts which he or she "reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognize the criminal nature of the acts alleged in the indictment."[158] Similarly, the Special Court for Sierra Leone ruled:

> "[i]n interpreting the principle *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance."[159] In other words, it must be "foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable."[160]

Changes to judicial tribunals, venue, and jurisdiction do not violate the Ex Post Facto Clause of the Constitution. Creation of a new court to assume the jurisdiction of an old court does not implicate *ex post facto* prohibitions so long as the "substantial protections" of "the existing law" are not changed to the prejudice of the accused. *See Duncan v. Missouri*, 152 U.S. 377, 382-83 (1894). Transfer of jurisdiction from one court or tribunal to another does not violate *ex post facto* prohibitions. As the Supreme Court explained:

> Application of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case. Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties. Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all.

Hughes Aircraft Co. v. United States, 520 U.S. 939, 951 (1997) (internal citations and quotation marks omitted; emphasis in original). The Supreme Court has upheld post-offense procedural changes against *ex post facto* challenges "even if application of the new rule operated to a defendant's disadvantage in a

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[157] *Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990) (quoting *Calder v. Bull*, 3 U.S. 386, 390-91 (1798) (emphasis in original)). An *ex post facto* law is one which imposes criminal punishment for conduct lawful when committed. *Stogner v. California*, 539 U.S. 607, 609-22 (2003).

[158] *See Prosecutor v. Delalic*, IT-96-21-A, Judgment, Appeals Chamber, ¶ 179 (Feb. 20, 2001) (citation omitted).

[159] *Prosecutor v. Hadzihasanović, Alagić and Kubura*, IT-01-47-PT, Trial Chamber, Decision on Joint Challenge to Jurisdiction, ¶ 62 (Nov. 12, 2002).

[160] *Prosecutor v. Sam Hinga Norman*, SCSL-2004-14-AR72(E), Special Court for Sierra Leone (Appeals Chamber), ¶ 25 (May 31, 2004) (citation omitted).

particular case." *Landgraf v. USI Film Products*, 511 U.S. 244, 275 n. 28 (1994) (citations omitted).

F. Conclusion

When the Supreme Court in *Quirin* analyzed whether the military commission had jurisdiction to adjudicate the cases of the Nazi saboteurs, the Court examined the charged offenses, noting the Congress incorporated by reference through the 15th Article of War, "as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war." 317 U.S. at 30 (internal citation omitted). "Congress had the choice of crystallizing . . . every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts.[161] It chose the latter course." *Id*.

In the instant case, Congress exercised authority derived from the Constitution to define and punish offenses against the law of nations by codifying an existing law of war violation into a clear and comprehensively defined offense of providing material support to terrorism.[162] The President, through the Secretary of Defense, further defined the procedures for military commissions in the M.M.C. in a manner that is similar to the Manual for Courts-Martial (MCM). Congress's stated purpose for the 2006 M.C.A. was to "codify offenses that have traditionally been triable by military commissions." In this case, we find, in defining and punishing providing material support for terrorism in the 2006 M.C.A., that is precisely what Congress has done. Congress did not create a new offense; providing material support for terrorism was an existing law of war offense since at least 1996.

For purposes of compliance with the Define and Punish Clause of the Constitution, the standard of review for whether an offense as codified by Congress violates the law of war is not clearly established by applicable precedents. However, we find that the evidence supporting the 2006 M.C.A. offense of providing material support for terrorism as a pre-existing law of war offense far exceeds even the "substantial showing" standard advanced in *Hamdan* that "the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war."[163]

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[161] "For two centuries" the Supreme Court has "affirmed that the domestic law of the United States recognizes the law of nations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729-30 (2004) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances"); *The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Nereide*, 13 U.S. at 423 (Marshall, C. J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land"); *see also Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)).

[162] "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," *Hamdan*, 548 U.S. at 637 (Kennedy, Souter, Ginsburg, and Breyer, JJ., concurring). In the area of national security and foreign affairs, when determining what is required to serve the Government's interest in preventing terrorism, "the considered judgment of Congress and the Executive . . . is entitled to significant weight." *Holder v. Humanitarian Law Project,* 561 U.S. ___, 130 S. Ct. 2705, 2728-29, 177 L. Ed. 2d 355 (2010).

[163] *Hamdan*, 548 U.S. at 602-603 (stating, "Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war," and applying the "substantial showing" standard when "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty,

When appellant's charged offenses began in 1996, the underlying wrongful conduct of providing material support for terrorism, as now defined under the 2006 M.C.A., was a cognizable offense under the law of war. Crimes equivalent to providing material support for terrorism had been recognized in various United Nations Security Council Resolutions, regional conventions, and the domestic criminal codes, among other authorities. Military commission trials in the 19th and 20th centuries involved violations of the law of war similar to wrongfully providing material support to terrorism. Many of these offenses violated the laws and customs of war because they engaged in an unlawful belligerency, used an illegal means of warfare, or targeted protected persons. Additionally, the conduct of providing assistance to others with knowledge that those they assist, have, or intend to violate the laws and customs of war has long been tried as a law of war offense.

In light of our holding that providing material support for terrorism is a codification of a pre-existing law-of-war violation, we conclude that the Ex Post Facto Clause of the Constitution was not violated by appellant's conviction for providing material support to terrorism under the M.C.A. of 2006.

VIII. EQUAL PROTECTION

The military commission judge ruled that the 2006 M.C.A. properly established jurisdiction over appellant and his offenses, notwithstanding its jurisdictional limitation to aliens. On appeal, appellant disputes the military commission judge's ruling by asserting that he possesses a "fundamental right" to equality in criminal proceedings arising from a constitutional entitlement to identical trial forum and procedural treatment to that enjoyed by U.S. citizens. Appellant preserved this issue by litigating it at trial. He argues that any deviation from such equal treatment violates the Fifth and Fourteenth Amendments and the Supreme Court holding in *Boumediene v. Bush,* 553 U.S. 723 (2008), and is only permissible for reasons sufficient to survive a strict scrutiny analysis. We disagree and decline to adopt the level of scrutiny urged by appellant.

Appellant's military commission satisfied the equal protection guarantees of the U.S. Constitution and is consistent with the ruling in *Boumediene*.[164] We agree with the military commission judge that the M.C.A.'s restriction to prosecution of AUECs does not constitute a prohibited invidious discrimination against aliens, and appellant does not have a fundamental constitutional right to criminal procedures identical to those of U.S. citizens.[165]

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the precedent must be plain and unambiguous.") (Stevens, Souter, Ginsburg, and Breyer, JJ., concurring). In our case, Congress has "positively identified" providing material support for terrorism as a war crime. *Id.* at 601-602.

[164] The Court's decision in *Boumediene* was focused on the constitutionality of Section 7 of the 2006 M.C.A., which purported to suspend the writ of habeas corpus for detainees at Guantanamo Bay. The Court distinguished *Eisentrager*, noting that Boumediene had not received a "trial by military commission for violations of the laws of war. The difference [from *Eisentrager*, 339 U.S. at 766] is not trivial." *Boumediene*, 128 S. Ct. at 2260.

[165] The military commission judge at p. 6 found:
(1) that the accused has been found to be an alien unlawful enemy combatant by a full, fair, open and adversarial hearing, the determination having been made by a military [commission] judge; (2) that the site of his apprehension and detention "is a factor that weighs against a finding that he has rights under the [Constitution]" *Boumediene* [,128 S. Ct. 2229, 2260 (2008)]; (3) that there are substantial practical arguments against applying the Equal Protection Clause in Guantanamo Bay; (4) that

A. Jurisdiction of Article I Courts

Congress established the M.C.A. in an exercise of its constitutional authority under Article 1, sec. 8, cl. 10 to "define and punish . . . offenses against the law of nations." In this regard, the legislature provided the executive an additional forum for the prosecution of such offenses. That such executive discretion is based, in part, on a distinction between U.S. citizens and non-citizens is entirely consistent with the Supreme Court's observation that the Constitution's framers had not "supposed that a nation's obligations to its foes could ever be put on a parity with those to its defenders."[166]

The Supreme Court has recognized that U.S. military commissions and U.S. occupation courts are necessary to address "many urgent governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth." *Madsen v. Kinsella*, 343 U.S. 341, 346-47 (1952) (internal footnotes omitted) (citing *In re Yamashita*, 327 U.S. 1, 18-23 (1946)). In direct contrast, the 2006 M.C.A. is an explicit statutory prescription with a further prescribed jurisdictional ambit of AUECs committing offenses in the context of and associated with armed conflict. *See* n. 48, 49, and 54.

Court-martial jurisdiction, like military commission jurisdiction, is based on Article I of the Constitution. In recent years, Congress has expanded court-martial jurisdiction over more offenses and categories of persons. *See Loving v. United States*, 517 U.S. 748, 752-54, 760-68 (1996) (discussing history of the expansion of court-martial jurisdiction and stating "[o]ver the next two centuries, Congress expanded court-martial jurisdiction"); *see also* 10 U.S.C. § 802 (2011) (listing categories of persons subject to court-martial jurisdiction). For example, courts-martial can now try offenses without regard to the offense's service connection.[167] Courts-martial can and do

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the alternative remedy Congress has provided is less protective than the accused would receive were Equal Protection to apply, but not significantly so; (5) that there is no necessity for the Equal Protection Clause to apply to prevent injustice in the trial of detainees in Guantanamo, and (6) that application of the Equal Protection component of the Due Process Clause in Guantanamo Bay would be anomalous and impractical. All of the six factors analyzed weigh against application of the Equal Protection component of the Due Process Clause in Guantanamo Bay. Finally, the Commission notes that in *United States v. Verdugo-Urquidez,* 494 U.S. 259, 269 (1990), the Supreme Court wrote: "[T]his Court's decisions expressly according differing protection to aliens than to citizens also undermine respondent's claim that treating aliens differently under the 14th Amendment violates the Equal Protection component of the 5th Amendment."

[166] *Eisentrager*, 339 U.S. at 775. In *Eisentrager,* the Supreme Court emphatically stated the Fifth Amendment did not invest:

> enemy aliens in unlawful hostile action against us with immunity from military trial, [putting] them in a more protected position than our own soldiers. American citizens conscripted into the military service are thereby stripped of their Fifth Amendment rights and as members of the military establishment are subject to its discipline, including military trials for offenses against aliens or Americans. Can there be any doubt that our foes would also have been excepted, but for the assumption "any person" would never be read to include those in arms against us? It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies. And, of course, it cannot be claimed that such shelter is due them as a matter of comity for any reciprocal rights conferred by enemy governments on American soldiers.

Eisentrager, 339 U.S. at 783 (internal citations omitted).

[167] *Solorio v. United States*, 483 U.S. 435, 450-51 (1987). *Compare Solorio*, 483 U.S. at 442-49, 456-62 (discussing

prosecute federal crimes such as "counterfeiting (18 U.S.C. § 471) and various frauds against the Government not covered by Article 132," UCMJ. 2008 MCM, Part IV, ¶ 60c(4)(b). Courts-martial routinely assimilate state criminal codes for offenses occurring on military installations.[168] *See* 10 U.S.C. § 934. Moreover, courts-martial are not necessarily restricted or limited by other constitutional requirements applicable to Article III Courts.[169]

Appellant's theory that trial of a broad array of criminal and law of war offenses is not constitutionally permitted for jurisdictional reasons in Article I courts is without merit. Like courts-martial, there is no compelling reason not to permit properly constituted military commissions to try such offenses.

history of the scope of court-martial jurisdiction) *with O'Callahan v. Parker*, 395 U.S. 258, 268-74 (1969) (same).

[168] Through the Federal Assimilative Crimes Act, 18 U.S.C. § 13, Congress adopted "state criminal laws for areas of exclusive or concurrent federal jurisdiction," and made them applicable for military personnel who commit offenses against those laws, provided they are not otherwise preempted. *See* 2008 MCM, Part IV, ¶ 60c(4)(c)(ii). *See e.g., United States v. Robbins*, 52 M.J. 159 (C.A.A.F. 1999); *United States v. Wright*, 5 M.J. 106 (C.M.A. 1978); *United States v. Rowe*, 13 U.S.C.M.A. 302, 32 C.M.R. 302 (1962).

[169] *Compare Weiss v. United States*, 510 U.S. 163, 166-68, 181 (1994) (holding appointment of military judges need not satisfy requirements of Appointments Clause and did not violate the Constitution's Due Process Clause, and describing system of courts-martial established pursuant to Art. I, § 8, cl. 14) *with Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59-60, 66, 87 (1982) (holding provisions of the Bankruptcy Reform Act of 1978 unconstitutional because it conferred broad jurisdiction on bankruptcy judges, who lacked lifetime tenure and protection against salary reductions).

B. Due Process

We recognize that the life, liberty, and property of persons tried before an American court or tribunal established under our Constitution are protected by due process.[170] Analyzing the comparative rights and protections afforded by the M.C.A. in comparison to the UCMJ and criminal defendants in domestic federal District Courts, we are satisfied that the equal protection element of the due process clause has been met in this case.[171]

[170] *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *accord Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-53 (1950).

[171] We note, per the M.C.A., appellant enjoys the following benefits similar to the rights received at courts-martial, in U.S. District Courts, and before international tribunals sponsored by the United Nations. Analyzing the comparative rights and protections afforded by the M.C.A. in comparison to the UCMJ and criminal defendants in U.S. Federal District Courts, there is no question that the essential due process requirement is satisfied. The President and Congress in the M.C.A. provided the following procedural benefits to AUECs:

(1) to be represented by counsel;
(2) to a public trial;
(3) to a panel of officer members, selected after a process of voir dire and challenge;
(4) to have compulsory process for the production of witnesses in his defense;
(5) to limitations on the admissibility of evidence under rules similar to the Military Rules of Evidence;
(6) to raise affirmative defenses such as are common in criminal trials;
(7) to be found guilty only if two thirds of the members present at the time of the balloting find him guilty beyond a reasonable doubt;
(8) to have the assistance of counsel in submitting a petition for clemency to the convening authority and filing an appeal;
(9) to have the findings and sentence reviewed by a convening authority and his or her legal advisor, who in the convening authority's sole discretion can grant clemency (including setting aside the findings of guilty, changing them to findings of guilty to a lesser offense, and reducing or setting aside the sentence) for any reason or for no reason at all; and an automatic appeal to the United States Court of Military Commission Review.

C. *Boumediene* and Equal Protection under the Fifth Amendment

Appellant cites *Boumediene* in arguing that all of the constitutional due process and equal protections must apply to appellant's military commission. We find appellant's reliance on *Boumediene* is not persuasive. *Boumediene* decided the narrow issue of whether federal courts may entertain habeas petitions from non-citizens detained outside the United States. We decline to adopt appellant's broad application of the *Boumediene* decision.

Our reading of *Boumediene* suggests that, far from an intentionally broad extension of constitutional due process rights to AUECs, the Court intended to address the more fundamental issue of "the Constitution's separation-of-powers structure." *Boumediene*, 128 S. Ct. at 2246; *see also Rasul v. Bush*, 542 U.S. 466, 485-86 (2004) (Kennedy, J., concurring).[172]

The *Boumediene* Court held that the Suspension Clause of "Art. I, § 9, cl. 2 of the Constitution[173] has full effect at Guantanamo Bay" and "[p]etitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention." *Boumediene,* 128 S. Ct. at 2262. Discussing the Insular Cases,[174] the Supreme Court identified factors[175] relevant to determining whether a Constitutional provision should apply to non-citizens outside of the United States and concluded extension of constitutional protections depends upon "the 'particular circumstances, the practical necessi-

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(10) Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court by writ of certiorari. *See* Jennifer Elsea, Cong. Research Serv. (CRS) Report for Congress Order Code R40932, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Courts*, 8-24 (Jan. 26, 2010), http://www.fas.org/sgp/crs/natsec/R40932.pdf; Jennifer Elsea, CRS Report for Congress Order Code RL31262, *Selected Procedural Safeguards in Federal, Military, and International Courts* 11-34 (Sept. 18, 2006), http://www.fas.org/sgp/crs/natsec/RL31262.pdf.

[172] Justice Kennedy writing for the majority in *Boumediene* noted, "[b]ecause the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." 553 U.S. at 2246 (citations omitted). It does not follow *a fortiori*, that non-citizens have guarantees under the Fifth Amendment in a trial by military commission.

[173] Art. I, § 9, cl. 2 of the Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

[174] The Supreme Court addressed whether the Constitution applied in territories that are not a State, such as the Philippines, Territory of Hawaii, and Puerto Rico, "[i]n a series of decisions later known as the Insular Cases." *Boumediene*, 128 S. Ct. at 2254-55 (citing *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904)). *See also Torres v. Puerto Rico*, 442 U.S. 465, 475-476 (1979) (Brennan, J., concurring in judgment) ("Whatever the validity of the [Insular Cases] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment--or any other provision of the Bill of Rights--to the Commonwealth of Puerto Rico in the 1970's.").

[175] *Boumediene*, 128 S. Ct. at 2259 (stating, "[T]he outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in *Eisentrager*. In addition to the practical concerns discussed above, the *Eisentrager* Court found relevant that each petitioner: '(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.'") (citing *Eisentrager*, 339 U.S. at 777).

ties, and the possible alternatives which Congress had before it' and in particular, whether judicial enforcement of the provisions would be 'impracticable and anomalous.'"[176]

The *Boumediene* Court recognized that there was no historical precedent that non-citizens located overseas have rights under the U.S. Constitution, stating, "It is true that before today the Court has never held that non-citizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution." *Boumediene*, 128 S. Ct. at 2262. The Court distinguished *Boumediene* from other habeas cases involving enemy aliens held abroad and those tried by military commissions for war crimes by emphasizing that the proceedings in those cases all had an adversarial structure, which included counsel to defend the accused.[177]

Citing the Insular Cases, the Court explained that the central issue it previously confronted was not whether constitutional protections were universally applicable, but rather "which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements." *Id.* at 2254-55 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922)). Contrary to appellant's assertion, the Court expressly stated that the doctrine arising from its precedents did not practically extend constitutional protections "always and everywhere." *Id.* at 2255. Instead, the Court noted that it did so "sparingly and where it would be most needed." *Id.* at 2255 (citation omitted). We, therefore, view *Boumediene* and related cases as recognizing a limited right to judicial review of extraterritorial detention of non-citizens.

Most recently, our superior court noted that any argument equating a general right to habeas corpus "with all the accoutrements of . . . domestic criminal defendants is highly suspect." *Al-Bihani v. Obama*, 590 F.3d 866, 876 (D.C. Cir. 2010). The *Al-Bihani* Court elaborated as follows:

> [I]n the shadow of *Boumediene*, courts are neither bound by the procedural limits created for other detention contexts nor obligated to use them as baselines from which any departures must be justified. Detention of aliens outside the sovereign territory of the United States during wartime is a different and peculiar circumstance, and the appropriate procedures cannot be conceived of as mere extensions of an existing doctrine.

Id. at 877. In fact, the *Al-Bihani* opinion appeared to reject an extension of equal protection to non-citizen military detainees, when the court concluded that procedural protections of American citizens or legal residents "are likely greater than the procedures to which non-citizens seized abroad during war are entitled." *Id.* at 877 n. 3.

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[176] *Id.* at 2255 (quoting *Reid v. Covert*, 354 U.S. 1, 74-75 (1957) (Harlan, J., concurring) and citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-278 (1990) (Kennedy, J., concurring). In *Reid v. Covert*, 354 U.S. 1, 5 (1957), the Supreme Court held that military trials of two spouses of military personnel were unconstitutional. The *Boumediene* Court noted that the U.S. citizenship of the defendants "was a key factor and was central to the plurality's conclusion that the Fifth and Sixth Amendments apply to American citizens tried outside the United States." *Boumediene*, 128 S. Ct. at 2256.

[177] *Boumediene*, at 2271 (citing *Yamashita*, 327 U.S. at 5; *Quirin*, 317 U.S. at 23-24; Exec. Order No. 9185, 7 Fed. Reg. 5103 (1942) (appointing counsel to represent the Nazi saboteurs)).

We agree with the military commission judge's determination in appellant's case that the Supreme Court's opinion in *Boumediene* does not reflect a broad, wholesale expansion of constitutional due process rights to military detainees and, by extension, to AUECs. We also agree with the military commission judge's further determination that, under the circumstances of the case, extending constitutional equal protection guarantees to AUECs tried before military commissions would be "impracticable and anomalous."

Appellant cites to no precedent comprehensively extending equal protection or other constitutional due process rights to non-citizens tried by military commissions, either inside or outside the United States. Likewise, we find none. We are guided by the Supreme Court's admonition that "any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). To read the *Boumediene* opinion to extend Fifth Amendment equal protection rights to AUECs tried before military commissions would be an exceptionally broad and incautious expansion of constitutional rights. We find, therefore, that AUECs are not under all circumstances fundamentally entitled to constitutional equal protection.

D. The 2006 M.C.A. and the Equal Protection Component of the Due Process Clause of the Fifth and Fourteenth Amendments

Assuming *arguendo* that AUECs tried before military commissions may, under some circumstances, possess a constitutional due process right of equal protection, we will now consider appellant's assertion that his equal protection rights were violated.

The case before this court today involves a federal statute implicating the Fifth, not Fourteenth, Amendment. While the *analysis* and *approach* of equal protection claims under the Fifth and Fourteenth Amendments are the same, the Supreme Court has recognized that there are special circumstances where federal interests compete with equal protection.[178] In those cases where the Court found competing national interests, it found "special deference to the political branches of the Federal Government [are] appropriate." *Id.* (citing, *e.g., Hampton v. Mow Sun Wong*, 426 U.S. 88, 100, 101-102 n. 21 (1976)). The Supreme Court held that:

> The concept of equal justice under the law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. Although both Amendments require the *same type of analysis . . . the two protections are not always coextensive*. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justi-

[178] *Adarand Constructors v. Pena*, 515 U.S. 200, 217 (1995) ("[C]ases in which we found special deference to the political branches of the Federal Government to be appropriate . . . [do not] detract from this general rule [of analyzing equal protection claims with the same approach]"), citing *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection *analysis* in the Fifth Amendment area is the same as that under the Fourteenth Amendment") (emphasis added), and *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n. 2 (1975) ("this Court's *approach* to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."). "We do not understand a few contrary suggestions appearing in cases in which we found special deference to the political branches of the Federal Government to be appropriate." *Id.* at 217-18 (citation omitted).

> fy selective federal legislation that would be unacceptable for an individual State.[179]

In *Holder v. Humanitarian Law Project*, 561 U.S. ___, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010), the Supreme Court considered challenges of 18 U.S.C. § 2339B, which makes it a federal crime to provide "material support or resources to a foreign terrorist organization." Humanitarian Law Project (HLP) argued the statute violated the Fifth Amendment's Due Process Clause because of vagueness, and contravened HLP's First Amendment rights to freedom of speech and association. *Id.* at 130 S. Ct. at 2716-17. The Supreme Court emphasized the importance of not substituting the Court's evaluation of evidence for that of the legislative branch, recognizing that the legislative and executive branch's expertise and authority "do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals. But when it comes to collecting evidence and drawing factual inferences in this area, the lack of competence on the part of the courts is marked," and appropriate "respect for the Government's conclusions" is warranted. *Id.* at 2727 ("One reason for that respect is that national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess") (internal quotation marks and citations omitted).[180] The Court emphasized, the "sensitive interests in national security and foreign affairs at stake," *id.* at 2728. The *Holder* Court, *id.* at 2731, concluded:

> The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to "provide for the common defence." As Madison explained, "[s]ecurity against foreign danger is . . . an avowed and essential object of the American Union." The Federalist No. 41, p. 269 (J. Cooke ed. 1961). We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments.

Bounded by the Constitution of the United States, Congress has the power to define and punish offenses against the laws of nations and to promulgate laws related to national defense, war power, establishment of courts and tribunals, and the treatment of aliens. U.S. Const., art. I, § 8. Individual states subject to the Fourteenth Amendment do not share these powers or responsibilities. This is a significant and dispositive distinction.

As our focus in the instant case is on equal protection under the Fifth Amendment, we decline to opine as to what other, if any, specific constitutional due process rights beyond habeas corpus might, under other circumstances, properly be afforded to AUECs.

E. Legal Test

Appellant argues that discriminatory language of the M.C.A. statute is subject to strict scrutiny because it infringes on his "funda-

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[179] *Hampton*, 426 U.S. at 100 (emphasis added and internal citations omitted).

[180] *See also Holder,* 130 S. Ct. at 2727-28 (noting special deference due political branches of the government when "weighty interests of national security and foreign affairs" are the basis of a statute designed "to prevent imminent harms").

mental rights" to due process. Appellant contends that the alienage distinction was designed to "prevent the disfavored and disenfranchised group from using the political process to protect itself" and that "[l]egislation such as the M.C.A. aimed solely at the politically powerless attracts strict scrutiny." Appellant cites to cases including *Clark v. Jeter*, 486 U.S. 456, 461 (1988), *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982), *Douglas v. California*, 372 U.S. 353, 358 (1963), and *Griffin v. Illinois*, 351 U.S. 12, 15-17 (1956), to make his point that such a fundamental right as equality in criminal proceedings is subject to strict scrutiny. Appellant's Brief 26-30.

Appellant's cited authority is not persuasive and is readily distinguishable. None of the cases he cites involve competing national interests, all of the cases were tried in Article III courts, all of the cases involved the application of the Fourteenth Amendment, and only one case, *Plyler,* involves an alien party.[181] Nothing in those precedents suggests that the Supreme Court intended courts to apply heightened scrutiny in cases involving disparate treatment by the federal government of nonresident alien enemy combatants captured abroad.

On the contrary, precedent clearly mandates that deference be given to congressional classifications based on alienage where foreign policy interests are strongly implicated. In *United States v. Lopez-Florez*, 63 F.3d 1468 (9th Cir. 1995), appellants challenged their conviction under the Hostage Taking Act, 18 U.S.C. § 1203, claiming that it violated the Equal Protection Clause of the Fifth Amendment by "impermissibly classifying offenders and victims on the basis of alienage." *Id.* at 1470. The court held that Congress's plenary control over immigration legislation and the accompanying low level of judicial review "dictate a similarly low level of review here, where foreign policy interests are strongly implicated." *Id.* at 1474. In fact, the 11th Circuit expressly held that "*congressional* classifications based on alienage are subject to rational basis review."[182]

In additional to congressional authority, the President traditionally has had broad authority in matters relating to enemy aliens. In 1950, the Supreme Court stated:

> Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security. This is

[181] In *Clark*, the Court applied "intermediate scrutiny" and decided the state's statute of limitations on filing paternity lawsuits violated the Equal Protection Clause of the Fourteenth Amendment, as the classification burdening illegitimate children, was not "substantially related to an important government objective." 486 U.S. at 461-65. In *Plyler*, the Court invalidated a state statute denying alien children a free public education, as the state had not shown that "the denial furthers a substantial state interest." 457 U.S. at 230. In *Douglas*, the Court stated "where the merits of the one and only appeal an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor," and held an indigent appellant has a right to appointed counsel on their appeal of right. 372 U.S. at 357. And in *Griffin*, the Court held that the state violated the Fourteenth Amendment's Due Process and Equal Protection Clauses by declining to pay for transcripts for indigent appellants. 352 U.S. at 18-20. In the instant case, appellant has a right to a transcript of his trial and to representation by appointed counsel at the trial and appellate levels without regard to his ability to pay. None of the cases appellant cited involved competing national interests.

[182] *United States v. Ferreira*, 275 F.3d 1020, 1025-26 (11th Cir. 2001) (noting that every circuit court of appeals that confronted the equal protection argument in a Hostage Taking Act case applied rational basis review and clarifying the distinction between strict scrutiny that applies to state classifications of aliens and rational basis review applicable to federal classifications of aliens).

> in keeping with the practices of the most enlightened of nations and has resulted in treatment of alien enemies more considerate than that which has prevailed among any of our enemies and some of our allies. [The Alien and Sedition Act of 1789] was enacted or suffered to continue by men who helped found the Republic and formulate the Bill of Rights, and although it obviously denies enemy aliens the constitutional immunities of citizens, it seems not then to have been supposed that a nation's obligations to its foes could ever be put on a parity with those to its defenders.

Eisentrager, 339 U.S. at 774-75. We find, therefore, that the strong foreign policy implications associated with the war on terror, coupled with the recognition of the President's power over enemy aliens in times of war and Congress's power to enact legislation pertaining to aliens and its war powers, dictate the M.C.A.'s alienage distinction be reviewed under the deferential rational basis standard. *See* pages 15-22, *supra*. (discussing authority of Congress and the Executive in the areas of war powers and foreign affairs).

F. Application of Rational Basis Review

Rational basis analysis requires a two-step inquiry: (1) whether there is a legitimate government purpose identifiable, regardless of actual motives; and (2) whether a rational basis exists to believe that the legislation would further that purpose. *United States v. Ferreira*, 275 F.3d 1020, 1026 (11th Cir. 2001) (citing *Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th Cir. 2000)).

Appellant argues that the M.C.A.'s legislative history suggests that Congress intended to create a discriminatory regime of lesser criminal procedures meant to punish aliens. The M.C.A.'s legislative history recognizes that persons tried under the M.C.A. may be captured on the battlefield under conditions where widely-used police investigative procedures cannot be applied. Appellant's assertions that Congress engaged in pernicious discrimination against aliens is not persuasive and wholly irrelevant so long as there is a "conceivably rational basis, [regardless of] whether that basis was actually considered by the legislative body." *Ferreira*, 275 F.3d at 1026 (noting that "the *actual* motives of the enacting governmental body are entirely irrelevant").

The first prong of the inquiry, whether a legitimate government interest exists, is easily satisfied as Congress enacted the M.C.A. to create a forum and a process by which to bring to justice foreign unlawful combatants whose purpose is to terrorize American citizens. There can be no more legitimate purpose of a government than to protect its citizens from its enemies. The second prong of the test, whether there is a rational basis to believe that the legislation will further the legitimate purpose, is met as Congress and the President have rightly determined that the treatment of foreign detainees captured on the battlefield in a foreign land has foreign policy implications, for which they are responsible. The legislation distinguishes between alien unlawful enemy combatants and the rest of the world and has a rational connection to its purpose.

Reviewing the military commission judge's ruling *de novo*, we agree that the Fifth Amendment's equal protection component is not applicable to AUECs, who are

tried at Guantanamo, Cuba, under the M.C.A. Nevertheless, after performing a functional analysis under *Boumediene*, we conclude that Congress established reasonable procedures in the M.C.A. for protecting the rights of AUECs and preserving national security. The M.C.A. provides due process, which is similar to the procedural protections received by defendants in U.S. District Courts, by accused U.S. military personnel at courts-martial, and by accused persons tried before international tribunals under the sponsorship of the United Nations.

Appellant was represented throughout his trial by counsel and received a full and fair trial. He was found not guilty of the majority of the charges. He was sentenced to serve only a few months of confinement after his trial, and has been returned to Yemen. We decline to find that appellant, as an unlawful enemy alien combatant, is entitled to more due process under the Fifth Amendment than he received.

We find, therefore, that Congress had a rational basis for the disparate treatment of aliens in the M.C.A. and that such disparate treatment does not violate the equal protection component of the Fifth Amendment.

X. CONCLUSION

Appellant's assigned errors and legal arguments are without merit. Pursuant to the 2006 M.C.A., these proceedings, the findings, and appellant's sentence are the product of lawful, Congressionally-created processes, "affording all the judicial guarantees of all civilized peoples." *See supra* n. 8.

The findings and approved sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the Appellant occurred. 2009 M.C.A. §§ 950a(a) and 950f(d). Accordingly, the findings and sentence are affirmed.

For the Court:
Mark Harvey
Deputy Clerk of Court

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