

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

ABD AL RAHIM HUSSAYN
MUHAMMED AL NASHIRI

Government Response

To Defense Motion For Appropriate Relief
To Determine If The Trial Of This Case Is
One From Which The Defendant May Be
Meaningfully Acquitted

27 October 2011

1. Timeliness.

This response is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court (RC) 6(b)(1).

2. Relief Sought and Overview.

Defense's request for an order compelling the United States Government to issue a factual statement on whether Abd Al Rahim Hussayn Muhammad Al Nashiri (the accused) will be released from the custody of the government in the event of an acquittal (AE 011) should be denied. This military commission is not the proper forum to consider the relief sought by defense. Military commissions have the jurisdiction defined for them by Congress in the Military Commissions Act of 2009 (M.C.A.). The M.C.A. authorizes military commissions to try noncitizen unprivileged belligerents for certain offenses made punishable by the M.C.A. or the law of war. Just as courts or other court-like bodies may not act beyond their scope of authority, military commissions should seek diligently to remain within the parameters of their jurisdiction. This military commission was convened specifically for trial of the accused on charges that were referred to it by the Convening Authority and, if the accused is convicted, for determination of an appropriate sentence. As elaborated below, such a trial is important and

meaningful, and it is made more meaningful because of the restricted focus the law requires of military commissions on the cases properly before them.

3. Burden of proof.

As the moving party, defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1).

4. Facts.

The accused is charged with multiple offenses under the M.C.A., 10 U.S.C. §§ 948a, *et seq.*, relating to his participation in the attack on USS COLE (DDG 67) on October 12, 2000, and *MV Limburg* on October 6, 2002, and in the attempted attack on USS THE SULLIVANS (DDG 68) on January 3, 2000. The charges pending against the accused were sworn on September 15, 2011. The Convening Authority referred the charges to this military commission on September 28, 2011. The arraignment is scheduled for November 9, 2011. AE 003.

5. Law and Argument.

A. This military commission is not the proper forum to consider the relief sought by the defense.

Congress by statute authorized the convening of this military commission, and in so doing granted it a substantial and meaningful power: to try alien unprivileged enemy belligerents for offenses made punishable by the M.C.A. or the law of war. *See* 10 U.S.C. §§ 948c, 948d. In granting this power, however, Congress did not authorize the commission to resolve every aspect of the life of the accused, to be the sole process determining whether the accused might ever be detained by the United States Government, or even to try the accused for every potentially criminal act that he might be alleged to have committed. The M.C.A. does not authorize the commission to determine the detention status of an accused for all purposes and in all legal contexts following completion of the commission proceedings.

The legality of the accused's law-of-war detention is a matter beyond the scope of commission proceedings. The military commission presiding over the prosecution of the accused does not have jurisdiction to decide the legality of the accused's continued detention, nor does it have jurisdiction to compel the government to make a determination regarding the continued detention of the accused prior to the resolution of the commission proceeding. While Congress has given the commission formidable powers, and while a meaningful outcome of an acquittal would be the preclusion of this accused being again placed in jeopardy for the same offenses by the same sovereign, *see* 10 U.S.C. §949h(a); R.M.C. 907(b)(2)(B), those powers are appropriately narrowed by the M.C.A. to presiding over the charges referred against the accused and, if convicted, to adjudging an appropriate sentence. The status of the accused is a matter that will be addressed by appropriate components of the U.S. government, subject to habeas review by the federal courts, after the commission proceedings have been resolved, and after giving full consideration to all circumstances which are relevant at the time, and which cannot be adequately foreseen at this point.¹

B. Defense did not provide this military commission with a legal basis to order the requested relief.

Defense provided no legal basis for its requested relief. Indeed, defense offered no statute or regulation that allows the relief it seeks, and it cited no case law from previous military commissions or from any court. The fact is that no such legal basis exists.

In support of its motion, defense relies on a speech by Justice Robert H. Jackson to the American Society of International Law shortly before President Truman's request for Justice

¹ Likewise, trial counsel has a defined and limited role in the commission proceedings—a role that does not include the authority to provide the factual statement sought by defense. Trial counsel is authorized to prosecute the case as referred by the Convening Authority on behalf of the United States and to cause a record of trial to be prepared. *See* R.M.C. 502(d)(6).

Jackson to lead the prosecutorial work at Nuremberg.² With hostilities over and the post-war Nuremberg trials preparing to commence, Justice Jackson stressed that “courts must not be swayed by policy” and that “Judges must be above policy pressures.” *The Rule of Law Among Nations*, 31 ABAJ 290 (1945). Justice Jackson continued:

We must not use [] judicial proceedings to carry out or rationalize previously settled political or military policy. Farcical judicial trials conducted by us will destroy confidence in the judicial process as quickly as those conducted by any other people. Of course, if good faith trials are sought, that is another matter.

The Rule of Law Among Nations, 31 ABAJ 290 (1945). Rather than law emanating from a legislature or anchored to a specific case or controversy, this is eloquent commentary by a respected legal practitioner, war crimes prosecutor, and judge. Faithfully applied to this case, it actually affirms the wisdom of keeping the accused’s military commission separate from other processes arising out of national policy or military operations. Here, in its daily decisions and proceedings, there is ample and meaningful work for the commission to do in examining the evidence, considering motions, weighing the charges, entering a verdict, and, if necessary, arriving at a just sentence, and to do this work in a manner that instills confidence for reasonable persons in the process. There is no predetermined result. These proceedings are governed by an act of Congress and rules promulgated by the Executive Branch, and are subject to review by the U.S. Court of Appeals for the D.C. Circuit and the United States Supreme Court. The system of checks and balances permeates and strengthens these proceedings, and the infirmities identified

² Defense cites three cases to support its request. These cases are relevant neither to military commissions nor to the issue raised in the motion for appropriate relief. In *B.M.W. v. Gore*, 517 U.S. 559 (1996), the Supreme Court found punitive damages in a civil case to be grossly excessive. In *Lankford v. Idaho*, 500 U.S. 110 (1991), the Supreme Court held that the defendant’s due process rights under the Constitution were violated when the defendant was not provided adequate notice that the trial judge might adjudge a death sentence. And in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Supreme Court held that the defendant received ineffective assistance of counsel in counsel’s having failed to advise the defendant that a guilty plea made him subject to automatic deportation. The legal basis upon which the defense asks this military commission to take such an extraordinary action is indiscernible from these decisions.

by the Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557, 625, 635 (2006), have been specifically addressed by the Congress and the Executive Branch.

Defense's claim that the proceedings will not be conducted in good faith is unfounded and without evidentiary basis. Defense merely provides conclusory statements that "[the Members] must be told that if they acquit the defendant he still will be detained for the rest of his life." Defense Motion, p. 5. This is precisely the conflation of politics and justice that Justice Jackson condemned. There is no such risk of conflation in this military commission, as the government must prove serious charges beyond a reasonable doubt during a trial before an impartial military judge, and a panel selected after a process of *voir dire*, subject to review by no fewer than three independent judicial bodies.

C. Defense confuses the government's authority to detain persons who were part of Al Qaeda, Taliban, or associated forces until the cessation of hostilities with its authority to prosecute those alleged to have committed war crimes.

Absent from defense's motion is any recognition that the authority to detain an individual is different from the authority to prosecute. Pursuant to the Authorization for Use of Military Force (AUMF), the United States government may detain persons who were part of or substantially supporting al Qaeda, the Taliban or associated forces. Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001); *see also*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); *Uthman v. Obama*, 637 F.3d 400, 402 (D.C. Cir. 2011). Where the government shows by a preponderance of the evidence—in other words, that it is “more likely than not”—that the detainee was part of, or substantially supported, al Qaeda, the Taliban, or associated forces when captured, the person may be detained under the AUMF for the duration of hostilities. The D.C. Circuit “focus[es] upon the actions of the individual in relation to the organization” to make that determination. *Uthman*, 637 F.3d at 402.

While the AUMF does not expressly speak to the prosecution of individuals, Congress directly authorized the prosecution of certain offenses committed by unprivileged belligerents. *See* 10 U.S.C. §§ 948c, 948d. Detention and trial are distinct “important incidents of war.” *Hamdi*, 542 U.S. 507, 518 (2004).³ The *Hamdi* plurality made clear that the purpose of detention is not to punish, but “to prevent captured individuals from returning to the field of battle and taking up arms once again.” *Id.* As noted above, in addition to having different sources of authority, the AUMF and M.C.A. have different purposes and standards of proof: the AUMF authorizes detention of an individual, to remove him from the fight for the duration of hostilities, based on a preponderance of the evidence, while the M.C.A. authorizes prosecution and punishment of an individual, for enumerated crimes, if proved beyond a reasonable doubt. Thus, the outcome of a prosecution under the M.C.A. is not necessarily determinative of a decision whether that individual qualifies for detention under the AUMF.

Should the accused be acquitted following a trial by military commission, the government could, as a legal matter, continue to detain the accused during hostilities pursuant to the AUMF if it establishes by a preponderance of the evidence that the accused was part of or substantially supported al Qaeda, the Taliban, or associated forces.⁴ Any such detention would itself be subject to review by petition for writ of *habeas corpus* in an Article III court.

³ Where the commission makes a threshold jurisdictional determination that the accused was part of al Qaeda, there will be an issue of what deference a habeas court, adjudicating the lawfulness of the law-of-war detention under the AUMF, later addressing that same issue, would owe to the commission’s determination. *Cf.* 10 U.S.C. § 950h.

⁴ There are historical examples in which individuals tried by United States military commissions have been held under law-of-armed-conflict detention following outcomes comparable to acquittal of the charges. *See* Robert Chesney, *Historical Examples of Remand to Military Detention*, Lawfare (Oct. 25, 2011, at 10:23 AM), <http://www.lawfareblog.com/2011/10/historical-examples-of-remand-to-military-detention-after-commission-prosecution/> (quoting initial and pertinent research done on the matter raised in Defense’s brief by Haridimos V. Thravalos, who located three orders issued by commanding generals during the Spanish-American War and the Philippine Insurrection disapproving convictions entered by military commissions they had convened yet also directing that the individuals in question remain held as prisoners of war). There are also other post-trial examples from the same armed conflicts in which authorities outside the commissions themselves directed release of the detainees. *Id.*

Boumediene v. Bush, 553 U.S. 723, 771 (2008). The accused has filed such a petition in federal court and can challenge his detention under the AUMF in that forum. Whether the government would exercise that option would be a policy decision, based on a wide variety of circumstances that cannot possibly be known at this time, and are not within the province of a military commission to address.⁵

6. Oral Argument.

Defense requested oral argument at the time of arraignment. If the commission grants defense's request for oral argument, the government requests the opportunity to respond through oral argument.

7. Conclusion.

This military commission should do what the law has given it authority to do: determine independently, fairly, and thoroughly whether the accused has committed the offenses charged and, if found guilty, to adjudge an appropriate sentence. It is a fundamental principle of our system of jurisprudence that courts and judges examine the specific cases or controversies before them to prevent abstract and speculative reasoning or decisions. Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 42 (1961) (“It follows that courts may make no pronouncements in the large and in the abstract . . .”). This military commission does not have before it every aspect of the accused's life or every consideration of the network he is alleged to have joined with to commit the serious offenses described in the charge sheet; nor is it formed to consider every basis on which the accused might be answerable under law in such a manner that his liberties might be authoritatively

⁵ When comparing the current commission proceedings to the trials at Nuremberg and the cases before the International Criminal Tribunal for the former Yugoslavia (ICTY), it is important to recognize that the Nuremberg and ICTY trials commenced only after the wars ended and hostilities ceased. Here, by contrast, the war against al Qaeda—an organization of which the accused is part—continues. The government cannot know if the hostilities in which al Qaeda and the United States remain engaged will cease before the conclusion of the trial of the accused.

circumscribed or his person detained. Rather, the meaningful and crucial role of this military commission is to ensure a full, fair, and principled examination of the charges before it. Other authoritative bodies with jurisdiction over this or any other accused should be left to consider their own remit under law.

For the reasons set forth herein, the government respectfully responds that the military commission should deny defense's request and should decline seeking to compel the United States Government to issue a factual statement on whether the accused will be released from custody in the event of an acquittal.

8. Witnesses and Evidence.

The government does not intend to rely on any witnesses or evidence related to this response.

9. Additional Information.

The government has no additional information.

10. Attachments.

The government has no attachments to this response.


Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 27th day of October 2011, I filed the Government Response to Defense Motion For Appropriate Relief To Determine If The Trial Of This Case Is One From Which The Defendant May Be Meaningfully Acquitted with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

A handwritten signature in black ink, appearing to read "Anthony W. Mattivi", written over a horizontal line.

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