MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 104** **Government Response** To Defense Motion to Dismiss Because The Convening Authority Exceeded His Power In Referring This Case To A Military Commission 13 September 2012

1. Timeliness

This response is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

2. Relief Sought

The government respectfully requests the Commission to deny the defense motion to dismiss.

3. Overview

The defense motion to dismiss should be denied for three reasons: (1) whether the offense was committed in the context of and associated with hostilities is a common element of fact that the government must prove at trial; (2) these charges properly were referred because the Convening Authority found reasonable grounds to believe they were committed in the context of and associated with hostilities; and (3) the existence of hostilities is an objective question of fact for the members.

4. Burden of Proof

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

Abd Al Rahim Hussayn Muhammad Al Nashiri ("accused") is a Saudi Arabian citizen and senior member of al Qaeda. He is charged with multiple offenses under the Military Commissions Act of 2009 ("2009 M.C.A.") for violations of the law of war, which were committed in the context of and associated with hostilities between the United States and al Qaeda. These charges relate to the accused's alleged role in planning and executing attacks on USS COLE (DDG 67) on 12 October 2000, and *MV Limburg* on 6 October 2002, and an attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000. The attack on USS COLE (DDG 67) occurred while it was refueling in Aden, Yemen. This attack killed 17 U.S. sailors, injured at least 37 others, and caused significant property damage. The attack on *MV Limburg*, a civilian oil tanker, occurred in or around the coast of Al Mukallah, Yemen. This attack killed one civilian crewmember, caused significant property damage, and resulted in a large oil spill. The government alleges that these attacks were attempts to strike the United States on behalf of al Qaeda. The government also alleges that these attacks were committed in the context of and associated with hostilities between the United States and al Qaeda.

On 23 August 1996, Usama bin Laden issued a public "Declaration of War Against the Americans Occupying the Land of the Two Holy Places," in which he called for the murder of U.S. military personnel serving on the Arabian Peninsula. *See* Usama bin Laden, Declaration of War Against the Americans Occupying the Land of the Two Holy Places (Aug. 23, 1996).

In about March 1997, in an interview with CNN, Usama bin Laden promised to drive Americans away from all Muslim countries. *See* CNN Interview with Osama bin Laden at 2, *available at* http://fl1.findlaw.com/news.findlaw.com/cnn/docs/binladen/binladenintvw-cnn.pdf. Usama bin Laden also warned the United States of the deadly consequences if it did not leave the Arabian Peninsula: "So if the U.S. does not want to kill its sons who are in the army, then it has to get out." *Id.* at 5. Usama bin Laden also indicated he could not guarantee the safety of U.S. civilians because they voted to elect America's political leaders and, therefore, were responsible for the consequences of U.S. foreign policy. *Id.* at 2.

On 23 February 1998, Usama bin Laden and others, issued a fatwah (a purported religious ruling) claiming that it was God's order and an individual duty for every Muslim to "kill the Americans and plunder their money wherever and whenever they find it." *See* World Islamic Front, Statement (Feb. 23, 1998), *available at* http://www.fas.org/irp/world/para/docs/980223-fatwa.htm. The fatwah directed all Muslims to kill Americans and their allies, be they civilian or military. *Id.*

On 25 May 1998, Usama bin Laden publicly announced the formation of the "International Islamic Front for Jihad Against the Jews and the Crusaders." Three days later, on 28 May 1998, in an interview with ABC News in Afghanistan, Usama bin Laden reiterated the February 1998 fatwah's call for killing Americans, stating: "We do not differentiate between those dressed in military uniforms and civilians; they are all targets in this fatwah." ABC News Interview with Usama bin Laden at 2, *available at* http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/prosecution/AQ00081T.pdf. Usama bin Laden further stated that if his demands were not met, al Qaeda would send to the United States coffins containing the corpses of American troops and American civilians. *Id.* at 5.

On 29 May 1998, Usama bin Laden issued a statement entitled, "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting the Jews and Crusaders," in which Usama bin Laden stated "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God." *See* CNN, Timeline: Osama Bin Laden, Over the Years (May 2, 2011), available at http://articles.cnn.com/2011-05-02/world/bin.laden.timeline_1_bin-laden-group-osama-bin-king-abdul-aziz-university/3?_s=PM:WORLD (quoting International Islamic Front for Fighting the Jews and Crusaders, The Nuclear Bomb of Islam (May 29, 1998)).

On 7 August 1998, al Qaeda engaged in coordinated attacks against U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. These attacks killed 224 people, including Americans, and injured thousands more. *United States v. Ghailani*, 761 F. Supp. 2d 167, 185-86 (S.D.N.Y. 2011) ("These bombings killed over two hundred people, injured and maimed

thousands, and did tremendous damage to the embassies themselves. Two hundred and thirteen individuals perished in Nairobi. Eleven died in Dar es Salaam. Approximately 4,000 people were injured by the bombing in Nairobi, while 85 were injured in Dar es Salaam."). The attacks also caused significant property damage to the two U.S. embassies. *Id.*

On 20 August 1998, in response to these attacks, U.S. armed forces struck terrorist training camps in Afghanistan and a suspected chemical weapons laboratory in Khartoum, Sudan. *See* Permanent Rep. of the United States to the U.N., Letter from the Permanent Rep. of the United States of America to the President of the Security Council of the United Nations, U.N. Doc. S/1998/780 (Aug. 20, 1998) ("In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America has exercised its right of self-defence in responding to a series of armed attacks against United States embassies and United States nationals."); President William J. Clinton, Address to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 Pub. Papers 1460 (Aug. 20, 1998); President William J. Clinton, Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 Pub. Papers 1464 (Aug. 21, 1998). The United States also contemplated and prepared to launch follow-on military operations. *See* Nat'l Comm'n on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 120-21 (2004) [hereinafter 9/11 Commission Report], *available at* http://www.9-11commission.gov/report/911Report.pdf.

On 3 January 2000, al Qaeda attempted to armed attack the USS THE SULLIVANS (DDG 68) near Aden, Yemen. On 12 October 2000, al Qaeda attacked the USS COLE (DDG 67) while it was refueling in Aden, Yemen. This attack killed 17 U.S. sailors, injured at least 37 others, and caused significant property damage.

On 11 September 2001, al Qaeda continued its attacks against the United States. In coordinated attacks, terrorists from that organization hijacked four commercial airliners and used them as guided missiles to attack prominent U.S. targets, including the World Trade Center and the Pentagon. The attacks resulted in the loss of nearly 3,000 lives, the destruction of hundreds

of millions of dollars in property, and severe damage to the U.S. economy. *See* 9/11 Commission Report 4-14 (2004).

On 18 September 2001, Congress passed, and the President of the United States signed, the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001). Among other things, 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" al Qaeda. *Id.* On 7 October 2001, acting pursuant to the AUMF, the President ordered U.S. Armed Forces to begin military operations in Afghanistan, where he determined that the Taliban was harboring members of al Qaeda. *See* Permanent Rep. of the United States to the U.N., Letter from the Permanent Rep. of the United States of America to the President of the Security Council of the United Nations, U.N. Doc. S/2001/946 (Oct. 7, 2001). In addition, on 13 November 2001, the President issued a military order that authorized trial by military commission of noncitizens he had reason to believe were or had been members of al Qaeda; those who had engaged in, aided or abetted, or conspired to commit international acts of terrorism against the United States; and those who had harbored others covered by the military order. *See* President George W. Bush, Mil. Order, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001) ("International terrorists, including members of al Qaeda, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.").

On 6 October 2002, al Qaeda attacked MV *Limburg*, a civilian oil tanker, off the coast of Al Mukallah, Yemen. This attack killed one civilian crewmember, caused significant property damage, and resulted in a large oil spill.

In October 2006, Congress enacted the Military Commissions Act of 2006 ("2006 M.C.A."), which provided statutory authority for military commissions, limited their jurisdictional scope, and provided significant procedural rights for an accused. In October 2009,

Congress amended the 2006 M.C.A. to provide greater procedural protections to detainees tried by military commission ("2009 M.C.A.").

On 28 September 2011, capital charges were referred against the accused. The Commission arraigned the accused on 9 November 2011.

6. Law and Argument

An offense enumerated in the 2009 M.C.A. is only triable by military commission "if the offense is committed in the context of and associated with hostilities." 10 U.S.C. § 950p(c) (the "hostilities element"). The government has alleged in every charge that the accused committed his offenses in the context of and associated with hostilities. The 2009 M.C.A. defines "hostilities" as "any conflict subject to the laws of war," which apply during "armed conflict." 10 U.S.C. § 948a(9). A military commission convened under the 2009 M.C.A. has "jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter . . . whether such offense was committed before, on, or after September 11, 2001." 10 U.S.C. § 948d.

The defense argues that the Convening Authority could not have found that the offenses charged took place in the context of and associated with hostilities, and, therefore, the referral was defective. This untenable request should be denied for three reasons. First, whether the offense was committed in the context of and associated with hostilities is a common element of fact that the government must prove at trial. Second, these charges properly were referred because the Convening Authority found reasonable grounds to believe they were committed in the context of and associated with hostilities. Third, the existence of hostilities is an objective question of fact for the members.

I. Whether the Offense Was Committed in the Context of and Associated with Hostilities Is a Common Element of Fact the Government Must Prove at Trial

The requirement that offenses must be "committed in the context of and associated with hostilities" is a common element of fact that the government must prove to the members at trial. It is a fundamental principle of statutory construction that individual clauses in a statute should be read in context, not in isolation. *See Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("In reading a

statute we must not look merely to a particular clause, but consider [it] in connection with it the whole statute.") (citing *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)) (internal quotation marks omitted); *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850) ("[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."). Here, the hostilities requirement is in a provision called, "Common Circumstances," which is contained in subchapter VIII of the 2009 M.C.A., called "Punitive Matters." *See* 10 U.S.C. § 950p(c). This "Punitive Matters" subchapter broadly lists the triable offenses, the elements of those offenses, and the different forms of criminal liability. *See* 10 U.S.C. § 950p (definitions, construction of certain offenses, common circumstances); 10 U.S.C. § 950q (principals); 10 U.S.C. § 950r (accessory after the fact); 10 U.S.C. § 950s (conviction of lesser offenses); 10 U.S.C. § 950t (crimes triable by military commission). By placing the hostilities requirement in the punitive matters section, which lists the offenses and their elements, Congress intended to make the hostilities requirement a common element of fact for all the triable offenses.

If Congress wanted the hostilities element to be approached as a threshold jurisdictional requirement, it could have included it in the statute's "Jurisdiction of military commissions" section. That section, however, does not mention any hostilities requirement:

> A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, sections 904 and 906 of this title (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war, *whether such offense was committed before, on, or after September 11, 2001*, and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized under this chapter. A military commission is a competent tribunal to make a finding sufficient for jurisdiction.

10 U.S.C. § 948d (emphasis added). Instead, the statute explicitly gives this Commission jurisdiction to try offenses committed "before, on, or after September 11, 2001." *Id.*

The *Hamdan* commission (convened under the 2006 M.C.A.) agreed that the hostilities nexus was a question of fact for the members. *See United States v. Hamdan*, AE 190, Ruling on Motion *in Limine* (Transportation Services) and Start of Hostilities (D-033 & D-016) at 2 (May

13, 2008) ("[T]he existence o[f] a state of armed conflict before 2001 is clearly a question of fact for the members to decide. Evidence bearing upon the issue may be offered by either side, and the Commission will instruct the members appropriately before they retire to deliberate."). The Commission ruled that because the "Government must prove, as an element of each offense," that the accused's offenses "were significantly related to a period of armed conflict," the "members should hear and decide that matter." *Id.*

Because the hostilities requirement is an element of the crime, the only discernible basis for the defense motion to dismiss is that the Convening Authority improperly referred these charges.[1]

II. The Convening Authority Properly Referred the Charges Because He Found Reasonable Grounds To Believe They Were Committed in the Context of and Associated with Hostilities

The Convening Authority properly referred these charges to this Commission. The Convening Authority may only refer charges to a military commission if he finds, or is advised by his Legal Advisor, that there are "reasonable grounds to believe that an offense triable by a military commission has been committed and that the accused committed it, and that the

[1] AE 104 is not properly read as a challenge to the Commission's subject-matter jurisdiction. But even if the defense does file an appropriate motion to dismiss for lack of subject-matter jurisdiction, the Military Judge would have to determine whether the charged offenses are among those Congress authorized for trial, not whether those offenses were committed in the context of and associated with hostilities. As argued above, the hostilities nexus is to be treated at trial as a common element of fact, rather than a threshold jurisdictional requirement. Because every charge here is an enumerated offense under the 2009 M.C.A., a motion to dismiss for lack of subject-matter jurisdiction in this case would fail.

AE 104 also does not challenge this Commission's personal jurisdiction. The 2009 M.C.A. states that "[a]ny alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter." 10 U.S.C. § 948c. An unprivileged enemy belligerent is one who "has engaged in hostilities against the United States or its coalition partners; has purposefully and materially supported hostilities against the United States or its coalition partners; or was a part of al Qaeda at the time of the alleged offense under this chapter." 10 U.S.C. § 948a(7). By referring this case, the government made a *prima facie* showing for personal jurisdiction. *See United States v. Khadr*, 717 F. Supp. 2d 1215, 1235 (U.S.C.M.C.R. 2007) ("We find that this facial compliance by the Government with all the pre-referral criteria . . . combined with an unambiguous allegation in the pleadings that Mr. Khadr is 'a person subject to trial by military commission as an alien unlawful enemy combatant,' entitled the military commission to initially and properly exercise *prima facie* personal jurisdiction over the accused until such time as that jurisdiction was challenged by a motion to dismiss for lack thereof, or proof of jurisdiction was lacking on the merits."). There is no plausible way to read AE 104 as challenging this Commission's personal jurisdiction and, as such, the government does not address that issue in this response.

specification alleges an offense." R.M.C. 601(d)(1). To refer a charge, the Convening Authority must be convinced by the evidence that there are reasonable grounds to believe every element of that charge. And he must make such a determination independently and free from influence. *See* R.M.C. 601 and 104. In this case, the defense does not claim that the Convening Authority failed to follow the proper procedure or to review the evidence. In fact, after reviewing the evidence presented, the Convening Authority declined to refer sworn charges VII and VIII, both of which related to the destruction of property in violation of the law of war. The defense nonetheless argues that the Convening Authority somehow exceeded his authority in referring the remaining charges.

The defense motion does not claim that the charges fail to allege a nexus to hostilities, or that the facts alleged foreclose the existence of such a nexus. Rather, it claims that the Convening Authority could not have found reasonable grounds to believe that each offense was committed in the context of and associated with hostilities because, in the defense's view, hostilities did not exist at the time and place of the alleged offenses. In effect, the defense asks this Commission to reach into the Convening Authority's purview and reevaluate the Convening Authority's determination that reasonable grounds existed to support the hostilities element. By referring these charges, the Convening Authority necessarily determined that there were reasonable grounds to believe that each charge was committed in the context of and associated with hostilities. The defense provides no legal basis for reconsidering this determination.

This Commission should decline the defense's novel request to reevaluate the Convening Authority's referral of charges. The government is aware of no case where a military judge dismissed a properly referred charge at court-martial simply because the military judge disagreed with the Convening Authority's determination that reasonable grounds existed to support that charge. Similarly, the government could not find a single case where a federal judge dismissed an indictment because the defense argued the government would not be able to prove a disputed factual element at trial. Just like certain federal crimes that require an interstate nexus as an element, a military commission under the 2009 M.C.A. may only try substantive offenses with a

nexus to hostilities. However, there is no authority in either system for the defense to move for dismissal based solely on its claim that the government will not be able to prove the hostilities or interstate commerce nexus at trial. Rather, so long as the charge or indictment alleges that nexus, the defense cannot challenge the adequacy of proof for that allegation before the prosecution has presented its evidence at trial. *See United States v. Costello*, 350 U.S. 359, 409 (1956) ("[A]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for a trial on the charge on the merits."); *accord United States v. Moore*, 563 F.3d 583, 586 (7th Cir. 2009); *United States v. Todd*, 446 F.3d 1062, 1068 (10th Cir. 2006); *United States v. Hickey*, 367 F.3d 888, 894 (9th Cir. 2004); *United States v. Salman*, 378 F.3d 1266, 1268 (11th Cir. 2004).

Once the grand jury or convening authority sends a case to trial, the remedy for the defense claim that the government lacks evidence on an element is to obtain a directed verdict or an acquittal at trial. Instead, the defense seeks to have the Commission intrude into the Convening Authority's deliberative process and reconsider his otherwise valid determination. The charges in this case clearly allege that the offenses were committed in the context of and associated with hostilities, and the Convening Authority has found that the government's evidence establishes reasonable grounds to believe the same. Because there is no basis in law for this Commission to reevaluate the Convening Authority's reasonable-grounds determination, the defense motion to dismiss should be denied.

III. The Existence of Hostilities Is an Objective Question of Fact for the Members

Although the defense motion has no basis in law and should be denied outright, it also fails on the merits. The defense argues that "the recognition of hostilities . . . is a political act that must be decided by the political branches" and that the Convening Authority therefore has no authority to "countermand the decisions of the political branches . . . ." AE 104 at 6, 8. The defense then claims that because the offenses allegedly were committed when there was no political recognition of hostilities in Yemen, the Convening Authority did not have the power to

refer these charges. *See* AE 104. There are at least three major problems with the defnese's argument.

First, the defense's focus on the recognition of hostilities specifically in Yemen is misplaced. *See* AE 104 at 8 ("[T]he earliest date on which the political branches officially recognized hostilities in any sense *in Yemen* was September 19, 2003.") (emphasis added). The government does not argue, and does not intend to prove, that hostilities, within the meaning of the 2009 M.C.A., existed between the United States and Yemen during the relevant timeframe. The defense seems to argue that separate conflicts existed and continue to exist between the United States and al Qaeda in different geographical locations. To the contrary, al Qaeda is a transnational terrorist organization that has committed, and plans to commit, violent acts against American people and interests throughout the world. As the military judges in *Hamdan* and *Al Bahlul* instructed the members:

> 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.

United States v. Hamdan, 801 F. Supp. 2d 1247, 1279 n.54 (U.S.C.M.C.R. 2011) (quoting *Hamdan* Tr. 3752-53) (emphases added). This instruction is consistent with U.S. historical practice. During World War II, for instance, hostilities existed between Germany and the United States. Nonetheless, battles that occurred at a great distance from either nation—such as in North Africa—still were unarguably in the context of and associated with those hostilities, as were offenses committed outside a theater of active military operations. *See Ex parte Quirin*, 317 U.S. 1, 38 (1942) (finding that individuals properly may be subject to trial by military commission even if "they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations"). The government will prove at trial that hostilities existed between the United States and al Qaeda, and that the charged offenses were all committed in the "context of and associated with" those hostilities. That is all that the 2009 M.C.A. requires.

Second, the defense purports to argue that the recognition of hostilities is a "political question," but in fact argues that the existence of hostilities in Yemen must be decided by the Military Judge on an incomplete record consisting only of selected contemporaneous statements made by political figures. *See* AE 104 at 5-6 (stating that the existence of hostilities "is a political act that must be decided by the political branches"). The defense cites no support for its position, which fundamentally misunderstands the 2009 M.C.A. and ignores binding U.S.C.M.C.R. precedent. Under the statute and the caselaw, the duration and scope of the hostilities between the United States and al Qaeda is an objective factual element that the members must resolve at trial after receiving an instruction on the proper legal standard. *See United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1189 (U.S.C.M.C.R. 2011) (stating that "the determination whether the hostilities in issue satisfy [the hostilities nexus] is objective in nature and generally relate to the intensity and duration of those hostilities."); *Hamdan*, 801 F. Supp. 2d at 1278-79 (affirming the conviction because the military judge "properly instructed" the members on hostilities, and that the members "found beyond a reasonable doubt that this requirement was met").[2] Along the same lines, international criminal tribunals applying the law

[2] The full text of the military judge's instruction reads:

> With respect to each of the ten specifications [of material support] 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 U.S. and AQ 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 U.S. decided to employ the combat capabilities of its armed forces to meet the AQ 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

of war also repeatedly have held that the existence of hostilities is an objective question of fact.[3] Although not binding on this Commission, these international cases lend support to the U.S.C.M.C.R.'s holdings in *Hamdan* and *Al Bahlul* that the existence of hostilities is not a political question in the context of a military-commission trial, but a question of fact for the members to determine. In this case, the members will decide at trial, upon consideration of the totality of the circumstances, whether these offenses were committed in the context of and associated with hostilities between the United States and al Qaeda.

Third, none of the four cases cited in the defense motion actually supports the defense position that the existence of hostilities is a "political question" in the context of a military commission. The defense relies most heavily on *Baker v. Carr*, where the Supreme Court held that a challenge to a state-apportionment statute under the Fourteenth Amendment's Equal Protection Clause was justiciable. 369 U.S. 186 (1962). In considering (and rejecting) the respondent's claim that the challenge infringed on a nonjusticiable political question, the Court "analyze[d] representative cases [and] infer[red] from them the analytical threads that make up the political question doctrine." *Id.* at 211. One such area of cases concerned the duration of hostilities. The Court explained that it generally would refuse "to review the political departments' determination of when or whether a war has ended." *Id.* at 213. This judicial deference to the political branches, however, "is primarily a function of the separation 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.

Hamdan, 801 F. Supp. 2d at 1278 n.54 (quoting *Hamdan* Tr. 3752-53).

[3] For example, in *Prosecutor v. Tadic*, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") rejected the defense argument that "there was no armed conflict at all in the region where the crimes were allegedly committed." Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 65 (2 Oct. 1995). Instead of relying on contemporaneous political determinations, the ICTY found that an armed conflict exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Id.* at ¶ 70; *see also Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement ¶¶ 619-26 (2 Sept. 1998) (not requiring a contemporaneous political determination before assessing that an "armed conflict" exists for the purposes of triggering war crimes liability); *Juan Carlos Abella v. Argentina*, Case 11.137, Report No. 55/97, Inter-Am. Commission on Human Rights, OEA/Ser.L/V/II.98, Doc. 6 rev. (18 Nov. 1997) (determining that an engagement of Argentina's armed forces with organized, armed militants that lasted thirty hours and resulted in casualties and property destruction was an armed conflict under international law without requiring a formal contemporaneous political determination).

powers." *Id.* at 210. In this case, there is no separation-of-powers concern. Congress and the President, through the 2009 M.C.A., created a system of military commissions to try violations of the law of war and expressly made the nexus to hostilities an element of each offense. In so doing, far from removing the determination of the existence of hostilities from the purview of the Commission, Congress and the President actually empowered the members to decide whether the government has proven the hostilities element beyond a reasonable doubt in each case. As in any criminal trial, the members will be asked to weigh the evidence against the legal standards on which they are instructed, and to make a determination as to guilt or innocence. Therefore, *Baker* actually cuts against the defense argument that the political branches must decide the existence of hostilities, and instead supports the government's position that the existence of hostilities is an objective, fact-based inquiry, best left to members.

The three other cases cited by the defense are no more supportive of the defense position than *Baker*. In *The Protector*, 79 U.S. (12 Wall.) 700 (1872), the Supreme Court granted a motion to dismiss because the appellant exceeded the five-year limitations period for the filing of his appeal. Because the limitations period was tolled during the Civil War, the Court had to decide when the war started and how long it lasted. In a three-page opinion, the Court decided that the war began in Alabama on 19 April 1861, when the President proclaimed an intended blockade, and the war ended on 2 April 1866, when the President proclaimed "the war had closed." *Id.* at 702. The Court itself acknowledged, however, that it only chose those dates "[i]n absence of more certain criteria, of equally general application . . . ." *Id.* at 702. Here too, the members can look to the totality of circumstances to decide whether a given offense was committed in the context of and associated with hostilities. The last two cases cited by the defense, *Ludecke v. Watkins*, 335 U.S. 160 (1948), and *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), arose in the habeas context and concerned the determination of the end of declared war or hostilities. They do not concern how a member's panel, in a military commission, should determine whether a given offense was committed in the context of and associated with some pending or historical hostilities, even absent the controlling political determinations referenced in

those cases. In *Ludecke*, the Attorney General ordered the petitioner removed from the United States as an alien enemy, and the petitioner filed a petition for a writ of habeas corpus. The Supreme Court affirmed the denial of the writ because Congress gave the President summary and unreviewable power to order the removal of enemy aliens during a declared war, and because the declared war between the United States and Germany had not yet terminated. Similarly, in *Al-Bihani*, the D.C. Circuit affirmed the denial of the petitioner's habeas petition and deferred to the executive's determination that the war against the Taliban and al Qaeda was ongoing. An actual declaration of war or hostilities, however, is not at issue in this Commission. At issue here is whether the members may decide whether certain offenses were committed in the context of and associated with hostilities, prior to a formal authorization of military force. Nothing in either *Ludecke* or *Al-Bihani* supports the defense argument that this role of the members, as created by the 2009 M.C.A., should be displaced by the cherry-picked statements offered by the defense. *See* AE 104 at 6.

The defense provides no legal support for its argument that the existence of hostilities is a political question in the context of a military commission. The 2009 M.C.A. and binding U.S.C.M.C.R. precedent establish that the existence of hostilities is an objective question of fact for the members to decide. The defense motion to dismiss, therefore, should be denied.

7. Conclusion

For the foregoing reasons, the Commission should deny the defense motion to dismiss.

8. Oral Argument

The defense has requested oral argument, and the government joins this request.

9. Witnesses

The government has no witnesses at this time.

10. Additional Information

The government has no additional information.

11. Attachments

A. Certificate of Service, dated 13 September 2012.

Respectfully submitted,

//s//

Anthony W. Mattivi
CDR Andrea Lockhart, JAGC, USN
Justin T. Sher
Joanna Baltes
Maj Chris Ruge, USMC
LT Cherie Jolly, JAGC, USN
Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

CERTIFICATE OF SERVICE

I certify that on the 13th day of September 2012, I filed **AE 104, Government Response To Defense Motion To Dismiss Because The Convening Authority Exceeded His Power In Referring This Case To A Military Commission**, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//
Anthony W. Mattivi
Trial Counsel
Office of the Chief Prosecutor
of Military Commissions