UNITED STATES OF AMERICA	)	IN THE UNITED STATES COURT OF
	)	MILITARY COMMISSION REVIEW
Appellant,	)	
	)	BRIEF ON BEHALF OF APPELLANT
	)	
	)	U.S.C.M.C.R. Case No. 14-001
	)	
	)	Arraigned at Guantanamo Bay, Cuba
v.	)	on November 9, 2011
	)	
	)	Before a Military Commission
	)	convened by Vice Admiral (ret.)
	)	Bruce E. MacDonald, USN
	)	
ABD AL RAHIM HUSSAYN	)	Presiding Military Judge
MUHAMMAD AL NASHIRI	)	Colonel Vance H. Spath, USAF
	)	
Appellee.	)	DATE: September 29, 2014

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

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STATEMENT OF STATUTORY JURISDICTION[1]

The Military Judge's Ruling dismissing Specification 2 of Charge IV (Terrorism), Charge VII (Attacking Civilians), Charge VIII (Attacking Civilian Objects), and Charge IX (Hijacking or Hazarding a Vessel or Aircraft) without prejudice qualifies for appeal by Appellant under 10 U.S.C. § 950d(a)(1) because it "terminates proceedings of the military commission with respect to a charge or specification." *See* R.M.C. 908(a)(1). The Military Judge issued his decision on September 16, 2014. App. 465-471.[2] Appellant noticed its appeal from this decision to the Military Judge on September 19, 2014, and filed the appeal directly with the Court the same day. 10 U.S.C. § 950d(e); R.T.M.C. ¶ 25-5f ("Once the decision to file the appeal is made, the appeal must be filed with the USCMCR within five days of the ruling."); U.S.C.M.C.R. Rule of Practice 14(c)(1) ("Filing the notice of appeal will satisfy Regulation ¶ 25-5f."). In deciding the appeal, the Court may act only with respect to matters of law. 10 U.S.C. § 950d(g).

STATEMENT OF THE CASE

On September 15, 2011, the United States swore charges against Abd Al Rahim Hussayn Muhammad Al Nashiri under the Military Commissions Act of 2009 ("M.C.A.") for his alleged role in the bombing of the United States warship USS COLE (DDG 67) on October 12, 2000 and

[1] On September 23, 2014, Al Nashiri moved the Court to dismiss the appeal for lack of jurisdiction. Appellant hereby incorporates by reference its response to the motion to dismiss that Appellant filed contemporaneously with this Brief on September 29, 2014.

[2] All citations to the record and other materials are included in the Appendix filed herewith.

the French vessel MV *Limburg* on October 6, 2002, and the attempted bombing of the United States warship USS THE SULLIVANS (DDG 68) on January 3, 2000. App. 78-101. On September 28, 2011, Convening Authority Bruce MacDonald, VADM (ret.), USN, referred the following nine charges for trial by a capital military commission: (I) using treachery or perfidy, 10 U.S.C. § 950t(17); (II) murder in violation of the law of war, *id*. § 950t(15); (III) attempted murder in violation of the law of war (two specifications), *id*. § 950t(28); (IV) terrorism (two specifications), *id*. § 950t(24); (V) conspiracy to commit terrorism and murder in violation of the law of war, *id*. § 950t(29); (VI) intentionally causing serious bodily injury, *id*. § 950t(13); (VII) attacking civilians, *id*. § 950t(2); (VIII) attacking civilian objects, *id*. § 950t(3); and (IX) hijacking or hazarding a vessel or aircraft, *id*. § 950t(23). App. 78-101. Al Nashiri was arraigned on these charges on November 9, 2011. *See* App. 102. He has not entered a plea on any of the charges. On September 16, 2014, the Military Judge dismissed without prejudice Specification 2 of Charge IV and Charges VII, VIII, and IX—the charges regarding the MV *Limburg* bombing. App. 470-471. The United States appeals from this decision.

STATEMENT OF FACTS

The charges allege that Al Nashiri, a Saudi Arabian citizen, planned a complex series of attacks known as the "boats operation" with Usama Bin Laden and executed the attacks with assistance and participation from other named individuals. App. 82-83. According to the charges, Al Nashiri made extensive preparations to execute the al Qaeda boats operation, some of which he accomplished personally and some of which he directed others to accomplish. App. 83-86. These preparations allegedly included, over many months and across multiple national boundaries, enlisting the assistance of suicide bombers and explosives experts, purchasing vehicles, procuring boats and materials, documenting ownership of the boats and registering them, renting houses, obtaining global positioning system equipment, directing the transfer of money, assembling the attack boats, hiring cranes for their movement, and obtaining false identification documents. *Id.* According to the charges, the boats operation resulted in the attack

upon the USS COLE when two suicide bombers in civilian clothes waved at the crew and pulled alongside USS COLE in their boat full of explosives, tearing a large hole in the side of the ship, killing 17 sailors, and injuring dozens more; and also in the attack on the MV *Limburg*, in which an explosives-laden boat detonated alongside the civilian tanker, damaging it and killing one crewmember who was a Bulgarian citizen. App. 86.

I. THE UNITED STATES CHARGES AL NASHIRI WITH COMMITTING OFFENSES FOR HIS ALLEGED ROLE IN THE MV *LIMBURG* BOMBING AS PART OF A COMMON PLAN AND CONSPIRACY

On September 15, 2011, the United States formally charged Al Nashiri with committing four completed offenses for his alleged role in the MV *Limburg* bombing. Each charge begins—

> In that [the accused], an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around the coast of Al Mukallah, Yemen, on or about 6 October 2002, in the context of and associated with hostilities . . .

The Limburg-related Terrorism Charge (Specification 2 of Charge IV), continues—

> . . . and in a manner calculated to influence and affect the conduct of the United States government by intimidation and coercion and to retaliate against the United States government, intentionally kill and inflict great bodily harm on one or more protected persons and engage in an act that evinced a wanton disregard for human life, to wit: detonating an explosives-laden boat alongside *MV Limburg*, resulting in the death of one civilian person, Atanas Atanasov, serving onboard *MV Limburg*.

The Attacking Civilians Charge (Charge VII) continues—

> . . . intentionally attack civilian persons onboard *MV Limburg*, a civilian oil tanker crewed by civilian personnel, not taking direct or active part in hostilities, and that resulted in the death of one person, Atanas Atanasov, and the said NASHIRI knew that such targets were in a civilian status.

The Attacking Civilian Objects Charge (Charge VIII) continues—

> . . . intentionally attack *MV Limburg*, a civilian oil tanker owned by a civilian entity and crewed by civilian personnel, not a military objective, and the said NASHIRI knew that such target was not a military objective.

The Hijacking or Hazarding a Vessel Charge (Charge IX) continues—

> . . . intentionally endanger the safe navigation of a vessel, *MV Limburg*, not a legitimate military objective, to wit: by causing an explosives-laden civilian boat to detonate and explode alongside *MV Limburg*, causing damage to the

> operational ability and navigation of *MV Limburg*, and resulting in the death of one crewmember, Atanas Atanasov.

App. 81-89. Because the government alerted the Commission and Al Nashiri's counsel that the co-conspirator theory of liability applied to these charges and comprised the agreement to commit terrorism and murder alleged in the Conspiracy Charge (Charge V), *see* App. 108, the Accused is on notice of twenty-six overt acts detailing the common plan—al Qaeda's "boats operation"—in which he is alleged to have participated. Overt acts 2, 3, and 26, all alleged to have been taken in furtherance of the "unlawful purpose of the conspiracy," state as follows:

> 2. In approximately late 1997 to 1998, NASHIRI discussed with bin Laden plans for a boats operation to attack ships in the Arabian Peninsula, a plan which previously had been discussed by [Usama] bin Laden and Walid Muhammad Salih Mubarak bin 'Attash ("Khallad").
>
> 3. NASHIRI, bin Laden and Khallad ultimately planned al Qaeda's boats operation, which came to encompass at least three separate terrorist attacks: an attempted attack on the USS The Sullivans (DDG 68) on 3 January 2000; a completed attack on USS Cole (DDG 67) on 12 October 2000; and a completed attack on a French supertanker, *MV Limburg*, on 6 October 2002.
>
> 26. On or about 6 October 2002, near the port of Al Mukallah, Yemen, as a result of planning by NASHIRI and others, suicide bombers, at the direction of NASHIRI, used an explosives-laden boat to attack the French supertanker *MV Limburg*. The explosion blasted a hole through the hull of the ship, resulting in the death of a crewmember, injury to approximately 12 crewmembers, and spillage of approximately 90,000 barrels of oil into the Gulf of Aden.

App. 83, 86. The charges are merely allegations; Al Nashiri is presumed innocent unless and until proven guilty beyond a reasonable doubt. *See* 10 U.S.C. § 949l(c)(1).

Awaiting trial on these charges, Al Nashiri remains detained at Guantanamo Bay, Cuba with access to federal civilian court to challenge his detention. His counsel concede he "is not a citizen of the United States." Unofficial/Unauthenticated Transcript ("Tr.") at 2741 (App. 1); *see* App. 285, 355. Al Nashiri's to-date unsuccessful collateral attacks in federal court challenging his detention and trial by military commission have not included a challenge to his status as an alien unprivileged enemy belligerent ("AUEB"). *See, e.g.*, *Nashiri v. MacDonald*, 741 F.3d 1002, 1007 (9th Cir. 2013) ("Al-Nashiri, a Saudi national, does not contest his designation as an 'enemy combatant.'") (App. 368). The Commission is aware of Al Nashiri's pursuit of collateral

proceedings, App. 207, at which courts have declined to intervene in the accused's military commission trial on statutory grounds and on principles of equitable abstention. *MacDonald,* 741 F.3d. at 1006.

II. AL NASHIRI MOVES TO DISMISS CHARGES VII, VIII, AND IX, ARGUING THAT CONGRESS LACKS AUTHORITY TO PROSCRIBE THE ALLEGED CONDUCT

On August 26, 2013, Al Nashiri moved the commission to dismiss Charges VII, VIII, and IX. App. 209-218. Styling his motion as one challenging "jurisdiction," Al Nashiri argued that international law did not provide a basis for Congress to prescribe law criminalizing conduct related to the bombing of a French ship in a Yemeni harbor and making that conduct punishable by a United States court. App. 215-216; App. 236. In other words, according to the defense, Congress lacked the power (the jurisdiction) to proscribe the alleged conduct at issue. The government opposed the motion to dismiss, arguing that the "protective principle" of international law permits the United States to proscribe conduct outside U.S. territory that threatens its national interest. App. 224-225. In doing so, the government explained that, at the time of the alleged conduct, the United States was a State engaged in hostilities with al Qaeda, the Taliban, and associated forces and that it would show at trial Al Nashiri's alleged conduct was part of a broader al Qaeda plot to conduct terrorist attacks against the United States and its coalition partners. *Id*.

In his reply, Al Nashiri maintained that international law did not permit the United States to proscribe his alleged conduct. App. 234-236. He emphasized that the charges involve the death of a Bulgarian crewmember on a French oil tanker in Yemeni waters carrying Iranian oil under a Malaysian contract. He argued that the government failed "to explain how French shipping, Bulgarian nationals, or commerce between Iran and Malaysia critically endanger the security of the United States or the functioning of its government." App. 235. He further argued that the MV *Limburg* bombing "did not constitute hostilities against the U.S." App. 232. He added that even if the alleged conduct threatened the national interest and international law thus

permitted the United States to proscribe the conduct, the Military Judge should still dismiss the charges because "France was neither engaged in hostilities in the Gulf of Aden on October 6, 2002, nor a 'coalition partner' of the United States outside of Afghanistan." *Id*.

At oral argument, the then-presiding Military Judge, Colonel James Pohl, appeared to construe the motion as one requesting dismissal of the charges—not because Congress lacked authority to proscribe the alleged conduct—but because the Commission lacked authority to hear the case under the M.C.A. Judge Pohl asked defense counsel whether "the Limburg would meet the definition of coalition partners" set forth in Section 948a(7) of the M.C.A. and whether this question was "an issue of proof." Tr. at 3070-71 (App. 5-6). Defense counsel responded, "Well, it could be, Your Honor, and if Your Honor's decision is in this case to hold an evidentiary hearing, I think that that may be a very legitimate decision to have, and we could have an evidentiary hearing with respect to the Limburg the next session or the session after that." *Id.* at 3071 (App. 6). Judge Pohl responded, "I as a general proposition don't direct counsel to file any type of motions. You file what you do. If this is an issue of proof, and therefore it's an element, you know, you can choose the way forward as you deem fit." *Id*. He continued, "Because even if there was no motion, it would still have to be presented to the fact-finder as an element, right? . . . But what I'm simply saying, if you wish to make it a motion, which would basically be a jurisdictional motion and you can handle it as an interlocutory matter, that's also an option. But again, that would be a decision of the parties, not a decision of the judge." *Id*. at 3071-72 (App. 6-7).

The government argued that "at this point the commission is to look at the facts in a light favorable to the government, as we haven't yet had an opportunity to put on the case and the full proof, so to look at the charges and determine if the commission has jurisdiction." *Id*. at 3076 (App. 11); *see id*. at 3077 (adding that the government "will put on proof," for example, "of the price of oil rising for all countries significantly because of insurance rates going up, the disruption") (App. 12). Judge Pohl noted that the government charged the accused as an AUEB and that 10 U.S.C. § 948a(7) defines the term "three separate ways" (*id.* at 3083 (App. 18)) as an

individual who "(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully 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 alleged offense under this chapter." 10 U.S.C. § 948a(7).[3] Judge Pohl asked whether the government intended to offer proof at trial to support all three. Tr. at 3083-84 (App. 18-19). The government responded that Al Nashiri would qualify as an AUEB within the meaning of § 948a(7) if the panel members found the government proved beyond a reasonable doubt he was an AUEB under any one of the "three separate ways"—§ 948a(7)(A), § 948a(7)(B), or § 948a(7)(C). *Id*. at 3083-84 (App. 18-19); *see id*. at 3092 (App. 27). The government explained, even if it failed to prove one of the three separate ways, it still may prevail in proving Al Nashiri constituted an AUEB if it proves one of the two remaining ways. *Id*. at 3086 (App. 21); *id*. at 3092 (App. 27). The government added, "[W]e see that as going to the panel members to determine hostilities, to determine that this is an armed conflict against the United States." *Id*. at 3081 (App. 16).

During the defense rebuttal, Judge Pohl characterized the coalition-partner issue as one regarding personal jurisdiction under § 948a(7). *Id*. at 3093 (App. 28). He then suggested that being subject to a court's jurisdiction does not constitute "an offense in and of itself." *Id*. The defense agreed and then argued that § 948a(7)(C) "is insufficient just on its face, that there has to be some additional conduct coupled with mere membership for this court to have jurisdiction." *Id*. at 3094 (App. 29). Because the defense contended that "(7)(C) hasn't been squarely presented before this commission," the defense requested an opportunity to supplement its briefing regarding whether the "international principles of jurisdiction [to prescribe] are inconsistent with (7)(C)." *Id*. at 3094, 3098 (App. 29, 33); *see id*. at 3875 ("The original briefing in this case was focused on the first two prongs of [948a], it was focused on (7)(A) and (B), and then this third basis, al Qaeda, was asserted . . . .") (App. 38). The defense concluded by

[3] Section 948a(7) appears in the definitions section of the M.C.A. and not the operative provision for personal (10 U.S.C. § 948c (2009)) or subject-matter jurisdiction (10 U.S.C. § 948d (2009)).

maintaining its position that France did not constitute a coalition partner under the M.C.A. and that this issue was "a matter of law, (7)(A) jurisdiction." *Id*. at 3097-98 (App. 32-33). Judge Pohl concluded the pretrial session by permitting Al Nashiri to supplement his motion to dismiss.

III. AL NASHIRI SUPPLEMENTS HIS MOTION TO DISMISS CHARGES VII, VIII, AND IX AND MOVES TO DISMISS SPECIFICATION 2 OF CHARGE IV

On March 7, 2014, Al Nashiri supplemented his motion to dismiss Charges VII, VIII, and IX and moved the Commission to dismiss Charge IV (Specification 2). App. 474-484. He claimed the government asserted for the first time at oral argument that he qualified as an AUEB under § 948a(7)(C). No matter, argued Al Nashiri, because his response remained the same: international law does not permit the United States to try "all war crimes committed by Al Qaeda anywhere on the planet," particularly without any U.S. nexus. App. 474, 477-478. The defense argued that the Commission should dismiss the charges also because trying Al Nashiri under § 948a(7)(C) would raise *ex post facto* issues and because "the prosecution has offered no evidence to satisfy its burden that the attack on the MV *Limburg* threated the *security* or *governmental functions* of the United States." App. 476-477 (emphases in original). The defense did not invoke 10 U.S.C. § 948c or otherwise raise a challenge to the Commission's personal jurisdiction over Al Nashiri.

The government urged the Commission to deny the defense motion because "the accused's prosecution before a military commission for the alleged attack on the MV *Limburg* is consistent with" the protective principle of international law. App. 487-488 (citing 10 U.S.C. § 948a(7)). The government added that the M.C.A. "limits the personal jurisdiction of military commissions to try [AUEBs]." App. 488. The government explained that the Commission has both personal jurisdiction over the accused and subject-matter jurisdiction over the charges as permitted by international law because "the United States is at war with al Qaeda and in the context of those hostilities the accused, who is alleged to be a member of al Qaeda, [is alleged to have] committed serious violations of the law of war." App. 491. Compelling precedent for this invocation of the protective principle was the decision of the U.S. Court of Appeals for the

Second Circuit in *United States v. Yousef*, 327 F.3d 56, 85-86 (2d Cir. 2003), which affirmed jurisdiction over a charge ("Count Nineteen") involving a 1994 attack on a Philippine aircraft traveling from Manila to Japan with no American passengers and resulting in the death of a single Japanese passenger but which sought to influence United States policy and which involved the same modus operandi as other charged attacks against United States targets. *Id*.

Judge Pohl heard oral argument on the defense supplement and motion to dismiss Specification 2 of Charge IV on April 24, 2014. Tr. at 3874-3905 (App. 37-68). The defense maintained that Congress lacked "authority to prescribe" and that "international law does not permit the United States the authority to punish" the charged conduct. *Id*. at 3875 (App. 38); *see id*. at 3900-01 ("So if al Qaeda commits a clear war crime, let's say murdering chaplains or medical personnel and they do it in a closet in the Himalayas, no, judge, I don't believe that this commission has jurisdiction. And more importantly, Congress doesn't have the power to criminalize that conduct. And that's what we're really dealing with here.") (App. 63-64). The defense added that no evidence established a U.S. nexus to the attack or that France was a coalition partner. *Id*. at 3879, 3881 (App. 42, 44); *see id*. at 3900 ("[W]hat we're asking Your Honor to make is a determination that this individual with respect to the Limburg offenses, the allegations simply don't involve conduct against the United States or its coalition partners and, therefore, should be dismissed.") (App. 63).

Judge Pohl remarked that although the government's argument touched on personal jurisdiction, the challenge Al Nashiri raised was "more of a subject matter jurisdiction argument." *Id*. at 3876 (App. 39). The defense responded that international law does not "have the neat analog to personal jurisdiction and subject matters [sic] jurisdiction" the M.C.A. has and that "[w]e're really talking about the ability of our Congress to prescribe conduct"—mere membership in al Qaeda at issue in § 949a(7)(C). *Id*. at 3876-78 (App. 39-41). Judge Pohl returned to personal jurisdiction, stating that "the personal jurisdiction aspect of it . . . would appear to maybe go to both the judge and at members." *Id*. at 3902-03 (App. 65-66). But then Judge Pohl ultimately dismissed the idea: "No decision because that's not the issue before me."

Id. at 3903 (App. 66). He added that if the defense presents its personal-jurisdiction challenge to the Commission and does not prevail, the defense "can challenge it with the members." *Id*.

The government agreed that the defense challenge regarding § 948a(7)(C) was not a challenge to the Commission's personal jurisdiction over Al Nashiri. *Id*. at 3885 (App. 48). Judge Pohl asked the government when it would provide the evidentiary predicate to establish subject-matter jurisdiction. *Id*. at 3888 (App. 51). The government responded it would present the evidence to the panel members at trial but offered to give the Commission information on the nexus between the charged conduct and the United States, if the Commission needed it to resolve the motion to dismiss. *Id*. at 3889-90 (App. 52-53). Judge Pohl responded,

> It doesn't work that way. I don't tell you what I think I need for the government to prevail or for the defense to prevail. . . . [Y]ou present whatever you want to present. I mean, as far as I am seeing right now, the government's presentation is that this is a legal issue and can be decided on the briefs and the argument.

Id. at 3890 (App. 53). The government maintained its position that it would proceed by presenting evidence establishing subject-matter jurisdiction at trial. *Id*. at 3891 (App. 54). Judge Pohl did not reveal, or otherwise provide notice, to the government whether he objected to proceeding in this manner or whether he deemed proceeding in this manner dispositive of the motions to dismiss.

IV. JUDGE POHL DETAILS A NEW JUDGE TO THE CASE

On July 10, 2014, Judge Pohl, as Chief Trial Judge, detailed Colonel Vance Spath as the military judge in the case. App. 500. Although Judge Pohl stated he would issue orders on all motions the parties had fully briefed and argued (which would include the motions to dismiss at issue here), Judge Spath ruled that he would decide all outstanding motions. App. 503. He said he would base his decisions "on the record as it exists," unless he had questions or needed clarification. App. 502. Judge Spath did not seek clarification or additional argument on the defense motions to dismiss the MV *Limburg* charges.

V. JUDGE SPATH GRANTS THE MOTIONS TO DISMISS THE MV *LIMBURG* CHARGES ON INSUFFICIENCY OF EVIDENCE GROUNDS

On August 11, 2014, Judge Spath granted the motions to dismiss Specification 2 of Charge IV and Charges VII, VIII, and IX. App. 245 ("August Order"). Judge Spath construed the motions as motions to dismiss for "lack of subject matter jurisdiction." App. 241. He then granted the motions to dismiss, relying on an insufficiency-of-the-evidence rationale. Judge Spath reasoned that although "the Prosecution on several instances averred it would provide evidence to the panel during the merits portion of the trial to establish jurisdiction," the government failed to satisfy its burden to persuade the Commission by a preponderance of evidence before trial that it has jurisdiction "as to the charges and specification involving the MV Limburg." App. 242-243, 245. In particular, Judge Spath concluded that the government failed to request an evidentiary hearing or otherwise prove specific "facts to support its assertion of jurisdiction," one of which was that "'hostilities,' as the term is defined in 10 U.S.C. § 948a(9), against the United States existed." App. 243. Although unclear, Judge Spath also suggested he dismissed the charges, at least in part, because he concluded the government failed to establish personal jurisdiction. In either event, Judge Spath's decision to dismiss the charges rested solely on his assessment of the sufficiency of the evidence before him. And because he resolved the motions on this ground alone, he did "not reach any conclusions of law based on both parties' legal arguments." App. 245.

VI. THE GOVERNMENT MOVES JUDGE SPATH TO RECONSIDER

The government moved Judge Spath to reconsider his August Order and, upon reconsideration, to hold an evidentiary hearing on personal jurisdiction. App. 247. The government also asked him, upon reconsideration, to deny the motions to dismiss without prejudice or, in the alternative and while preserving its objections to any premature judgments as to sufficiency of evidence, to reopen the evidence to hold an evidentiary hearing on subject-matter jurisdiction for the MV *Limburg* charges and then rule on the motions. *Id*. The government argued that the Judge clearly erred in dismissing the charges for failure of proof on

subject-matter jurisdiction where his questions also went to an element of the offense and in faulting the government for not seeking an evidentiary hearing when the offenses were properly pleaded and referred and there was no fairly raised challenge to personal jurisdiction. *Id.* The government further argued that the August Order was inconsistent with Judge Pohl's previous orders in AE 104F—ruling that hostilities "is a question of fact and an element of proof" and deferring before trial to the political branches' determination that a state of hostilities existed (App. 207)—and AE 174C—ruling that "matters concerning the MV Limburg's and the Accused's legal status at the time of the alleged attack . . . are questions of fact and must be resolved by the fact-finder" (App. 473). App. 263.

In its response, the defense characterized its motions to dismiss as requests for the Commission to dismiss the charges for lack of subject-matter jurisdiction over the offense. App. 458-459. The defense also made clear it was not challenging the Commission's jurisdiction over Al Nashiri or his status as an AUEB: it insisted the government "wrongly cast[] the argument as one pertaining to personal jurisdiction." App. 461. The defense pledged it would "raise a challenge to this commission's personal jurisdiction over the accused, including his alleged status as an unprivileged enemy belligerent, in due course." *Id.* In arguing a lack of jurisdiction over the offenses, the defense agreed "it is generally true that jurisdictional 'elements' are decided by the jury" but urged Judge Spath to uphold the dismissal because the motions to dismiss "d[id] not deal with such an element and the government has not identified a particular element they believe they can prove." App. 460.

VII. JUDGE SPATH GRANTS THE MOTION TO RECONSIDER BUT DISMISSES THE CHARGES—THIS TIME, WITHOUT PREJUDICE

Judge Spath granted the government's motion to reconsider the August Order. App. 470 ("September Order"). Although the government had identified three bases for granting the motion to reconsider, Judge Spath did not identify the basis on which he granted that motion. He did evince for the first time however that the sole issue before him on AE 168 and AE 241 was the Commission's subject-matter jurisdiction under 10 U.S.C. § 948d—a section of the M.C.A.

that he had not cited in his August Order and that the defense passingly cited once as inapplicable in its AE 168 and AE 241 briefs. App. 466; App. 213. Also evincing that Al Nashiri's status as an AUEB subject to the M.C.A. was not at issue, Judge Spath articulated the issue before him—not as the authority of Congress to proscribe the alleged conduct under international law, as the defense had framed the issue in its motions to dismiss—but rather as "the authority of the Commission to adjudicate 'any offense made punishable by this chapter . . . or the law of war whether such offense was committed before, on, or after September 11, 2001.'" App. 466 (quoting 10 U.S.C. § 948d) (alteration in original). Then Judge Spath articulated his test for subject-matter jurisdiction under the M.C.A.: "[i]n order to establish subject matter jurisdiction as to the [MV *Limburg* charges], the Commission finds the Prosecution must establish by a preponderance of the evidence the last statutory element for each offense, which is whether 'the conduct took place in the context of and was associated with hostilities.'" App. 469. This element is common to all the offenses on the Charge Sheet, not just the offenses related to the MV *Limburg*.

Judge Spath did not elucidate why the government must prove this element before trial. He also did not reconcile his decision with Judge Pohl's prior orders at AE 104F—deferring to the political branches' determination that hostilities existed on the dates of the alleged offenses (App. 207)—and AE 174C—ruling that "matters concerning the MV Limburg's and the Accused's legal status at the time of the alleged attack . . . are questions of fact and must be resolved by the fact-finder" (App. 473). He also did not explain why he denied the request for an evidentiary hearing. Instead concluding that the government failed to prove the hostilities element of the offenses before trial, Judge Spath dismissed the MV *Limburg* charges—and only those charges—for lack of subject-matter jurisdiction. App. 469-470. Whereas he dismissed these charges outright in his August Order, Judge Spath decided to dismiss the charges without prejudice in his final September Order. App. 470.

STANDARDS OF REVIEW

Jurisdiction is a legal question this Court reviews *de novo*. *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1164 (U.S.C.M.C.R. 2011) (citing *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008)); *United States v. Khadr*, 717 F. Supp. 2d 1215, 1220 (U.S.C.M.C.R. 2007) ("Regarding all matters of law, [the Court] review[s] the military judge's findings and conclusions of law *de novo*."); *see United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012) ("Jurisdiction 'is a legal question which we review de novo.'" (quoting *United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006))). The Court reviews for an abuse of discretion a decision to resolve jurisdictional questions without first considering the admissibility and merits of evidence offered on those questions. *Khadr*, 717 F. Supp. 2d at 1234 (concluding that "the military judge abused his discretion in deciding this critical jurisdictional matter without first fully considering both the admissibility and merits of evidence Appellant offered to present on this issue").

ARGUMENT

The Military Judge erred in dismissing before trial properly pleaded and referred charges for lack of subject-matter jurisdiction on insufficiency-of-evidence grounds where there were contested issues of fact intertwined with the ultimate issue of guilt. While enjoying discretion to resolve questions of law and certain interlocutory questions of fact even, in some special contexts, when this entails relitigating issues before the panel, the Military Judge here abused his discretion by demanding a premature presentation of evidence relating to the nature of these complex conspiracy-guided offenses, ignoring ample and unchallenged jurisdictional facts of the Accused's status as an AUEB, and then denying an evidentiary hearing on factual matters that could be properly resolved without trial on the merits. Dismissal could cause grave and unjust damage to this prosecution and to the legitimacy of the forms of proof received in this forum. The Military Commission has jurisdiction to proceed to trial, and the Court should thus reverse

the Military Judge's ruling and remand for further proceedings, including an evidentiary hearing on the Accused's status.

I. THE MILITARY JUDGE ERRED IN CONSTRUING THE DEFENSE MOTIONS AS MOTIONS TO DISMISS FOR LACK OF JURISDICTION UNDER 10 U.S.C. § 948D AND IN REQUIRING THE GOVERNMENT TO PRESENT FORMAL EVIDENCE BEFORE TRIAL ON WHAT SHOULD HAVE BEEN CONSTRUED AT THIS POINT IN THE PROCEEDINGS AS A PURELY LEGAL QUESTION

The question presented by the defense motions to dismiss was whether Congress exceeded its power (jurisdiction) to criminalize Al Nashiri's alleged conduct. *See, e.g.*, App. 215-217 (moving for dismissal by arguing that international law does not provide a basis for Congress to prescribe law criminalizing conduct related to the MV *Limburg* bombing); App. 474, 477-478 (arguing that international law constrains Congress from criminalizing the alleged conduct); Tr. 3900-01 ("And more importantly, Congress doesn't have the power to criminalize that conduct. And that's what we're really dealing with here.") (App. 63-64). The question presented was not whether the Commission has the power (jurisdiction) to adjudicate the case under a provision referred to for the first time by the Commission only in the final September Order appealed here. App. 466; *see* 10 U.S.C. § 948d (authorizing military commissions to "try persons subject to this chapter for any offense made punishable by [the M.C.A., articles 104 and 106 of the Uniform Code of Military Justice ("UCMJ"),] or the law of war . . . .).

The latter question is a properly a separate one asking whether Al Nashiri qualifies as an AUEB subject to trial by military commission and whether the charged offenses are punishable by military commission. Because the former question—the question presented by the defense—is a purely legal question of whether Congress exceeded its constitutional authority in criminalizing the conduct as alleged, the government need not present any evidence to enable judicial decision as an interlocutory matter. Congress either has the power or it does not. The Military Judge erred in the first instance in misconstruing the defense motions, and this Court should reverse the dismissal and remand the case with instructions for the Military Judge to decide the actual question of law the defense presents—now or at the appropriate time. It should

also instruct the Military Judge to issue a briefing order on jurisdiction—if he questions whether the Commission has personal or subject-matter jurisdiction under 10 U.S.C. § 948c or 10 U.S.C. § 948d respectively, and if the factual issues go solely to the status of the Accused as a UEB or can be fully segregated from evidence that will be presented at trial—in order to afford the parties the opportunity to fully brief and argue the issue.

II. EVEN IF THE COURT CONCLUDES THAT THE MILITARY JUDGE PROPERLY CONSTRUED THE MOTIONS TO DISMISS, THE COURT SHOULD STILL REVERSE THE DISMISSAL BECAUSE THE MILITARY JUDGE ERRED IN HOLDING THAT THE COMMISSION LACKED JURISDICTION TO HEAR THE CASE

Even if the Court concludes that the Military Judge properly construed the motions to dismiss, the Court should still reverse the dismissal because he erred in holding that the Commission lacked jurisdiction to hear the case. Although Judge Spath purported to assess "the *Government's* assertion of subject matter jurisdiction over the charged offenses" (App. 469-470 (emphasis added)), jurisdiction under Sections 948c and 948d of the M.C.A. refers to "the power of a *court* to try and determine a case and to render a valid judgment." *Ali*, 71 M.J. at 261 (internal quotation marks omitted) (emphasis added); *accord* R.M.C. 201(a)(1) Discussion ("'Jurisdiction' means the power to hear a case and to render a legally competent decision."); *see* 10 U.S.C. §§ 948c, 948d (setting forth military-commission jurisdiction). "A military commission always has jurisdiction to determine whether it has jurisdiction." R.M.C. 201(b); *see Khadr*, 717 F. Supp. 2d at 1234 (concluding that military judges has "the independent authority" to determine the commission's jurisdiction). There are five jurisdictional requisites:

> (1) [t]he military commission must be convened by an official empowered to convene it; (2) [t]he military commission must be composed in accordance with these rules with respect to number and qualifications of [the military judge and members]; (3) [e]ach charge before the military commission must be referred to it by a competent authority; (4) [t]he accused must be a person subject to military commission jurisdiction; and (5) [t]he offense must be subject to military commission jurisdiction.

R.M.C. 201(b). Judge Spath dismissed on the basis that the government failed to establish with separate formal proof before trial the final requisite—jurisdiction over the offense—under

Section 948d of the M.C.A. App. 469-470 (holding that the government's failure to provide a factual basis before trial "for the Government's assertion of subject matter jurisdiction over the charged offenses . . . [was] fatal as to the charged offenses").

Section 948d of the M.C.A. sets forth the "[j]urisdiction of military commissions." 10 U.S.C. § 948d. It provides in relevant part that a military commission has "jurisdiction to try persons subject to this chapter for any offense made punishable by [the M.C.A., articles 104 and 106 of the UCMJ,] or the law of war . . . ." *Id*. In requiring that the accused qualify as a "person[] subject to [the M.C.A.]," the M.C.A. is like the UCMJ, which grants general courts-martial "jurisdiction to try persons subject to this chapter for an offense made punishable by [the UCMJ]." 10 U.S.C. § 818 (2006). Interpreting a court-martial'sjurisdictional grant in *Solorio v. United States*, the United States Supreme Court made clear that the pretrial inquiry into jurisdiction should focus on the person's status—whether the person is subject to the UCMJ, and here the M.C.A., when the offense was allegedly committed. 483 U.S. 435 (1987). In doing so, the *Solorio* Court overruled *O'Callahan v. Parker*, 395 U.S. 258 (1969), in which the Supreme Court had held that court-martial jurisdiction depended on the "service connection" of the offense charged, spawning confused pretrial hearings over offense-specific factors. *Solorio*, 483 U.S. at 436, 448. Eschewing this test, the *Solorio* Court returned to earlier precedent, nothing that "military jurisdiction has always been based on the 'status' of the accused, rather than on the nature of the offense." *Id*. at 439.

A pretrial focus upon the status of the accused, following the approach of *Solario* and consistent with this Court's decision in *Khadr*, gives proper significance to key jurisdictional *facts* present in this case: the defense has not challenged Al Nashiri's AUEB status, and the properly referred charges specifically allege a nexus to the hostilities with the United States that the government has a clear burden to prove at trial. Section 948c of the M.C.A. identifies which persons are subject to trial by military commission. It subjects "[a]ny [AUEB]" to trial by military commission. 10 U.S.C. § 948c. Al Nashiri has conceded he is an alien within the meaning of the statute. Tr. at 2741 (defense counsel conceding that Al Nashiri "is not a citizen

of the United States") (App. 1). Although he has not conceded he was an unprivileged enemy belligerent ("UEB") at the time of the MV *Limburg* attack, he has also not yet challenged his UEB status, and it is that very same status—which is subject to federal court habeas review—that continues to justify his detention and trial for *all* of the charges. A UEB under the M.C.A. is

> an individual (other than a privileged belligerent) who—(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully 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 alleged offense under this chapter.

10 U.S.C. § 948a(7) (emphasis added).

The Commission has jurisdiction because, as explained below, Al Nashiri is a person subject to the M.C.A. With regard to the offense prong of subject-matter jurisdiction, Al Nashiri was charged with violating, *inter alia*, Sections 950t(24), 950t(2), 950t(3), and 950t(23) of the M.C.A. App. 81-82, 89. Because these alleged offenses are made punishable by the M.C.A., the Military Commission also has subject matter jurisdiction over the offenses. *See Ali*, 71 M.J. at 261 ("Because Ali was charged with and convicted of misconduct punishable by Articles 107, 121, and 134 of the UCMJ, the court-martial had jurisdiction over the offenses.").

A. Because the Three Types of Unprivileged Enemy Belligerents Are Defined in the Disjunctive, the Military Judge Erred in Concluding the Government Must Prove Hostilities With Formal Evidence Before Trial To Meet the Jurisdictional Requirements of 10 U.S.C. § 948d

In exercising personal jurisdiction over the Accused, the Commission must be satisfied that Al Nashiri qualifies as a UEB under any *one* or more of the three ways specified in Section 948a(7) and thus is a person whose status subjects him to trial by military commission. As the government explained during oral argument, the definitions section of the M.C.A. invokes the disjunctive "or," so Al Nashiri need not satisfy all three modes of qualification to acquire status as a UEB subject to trial. Tr. at 3079-80 (App. 14-15); *see Khadr*, 717 F. Supp. 2d at 1235 (interpreting the personal-jurisdiction provision in the 2006 M.C.A. as "set[ting] forth alternative approaches for establishing military commission jurisdiction" because the statute used "or" between subsections). Only Sections 948a(7)(A) and 948a(7)(B) require that the accused has

engaged in or supported "hostilities against the United States or its coalition partners"; Section 948a(7)(C) requires that the accused "was a part of al Qaeda at the time of the alleged offense under this chapter." Meanwhile, that the conduct took place "in the context of and associated with hostilities" is an element common to all the charged offenses. *See* 10 U.S.C. § 950p(c).

But because under the M.C.A., Al Nashiri can have acquired UEB status before the MV *Limburg* attack without a showing that he engaged in or supported hostilities against the United States or its coalition partners in the context of that attack (and thus be subjected to trial by commission as a member of Al Qaeda), the Commission erred in concluding that for it to have jurisdiction under 10 U.S.C. § 948d, the government must prove up the hostilities element against Al Nashiri before trial . *Cf. Khadr*, 717 F. Supp. 2d at 1235-36 (holding that the military judge erred in interpreting the personal-jurisdiction provision of the 2006 M.C.A. "as if written in the conjunctive"). In light of the prior judge's pretrial decision to defer to the political branches' determination that hostilities between Al Qaeda and the United States existed on the dates of the alleged offenses, App. 207, this Court should find error in the Military Judge's apparent interpretation of 10 U.S.C. § 948a(7) in the conjunctive and in his reliance upon that interpretation to dismiss.

B. The Military Judge Erred in Requiring Proof Before Trial of the Hostilities Element of the Offenses To Establish Subject-Matter Jurisdiction Because Al Nashiri Has Not Challenged His Status as an Alien Unprivileged Enemy Belligerent

The Military Judge also erred in requiring proof before trial of the hostilities element (*i.e.*, that the conduct "took place in the context of and was associated with hostilities") to establish subject-matter jurisdiction because Al Nashiri has not challenged his status as an AUEB. "Post-*Solorio*, the status of the individual is the focus for determining both jurisdiction over the offense and jurisdiction over the person." *Ali*, 71 M.J. at 264. "The only difference [between the two determinations] is that jurisdiction over the person depends on the person's status as a 'person subject to the Code' both at the time of the offense and at the time of trial," *id.* at 265, whereas jurisdiction over the offense depends on Congress's grant of, and ultimate

authority to proscribe, the enumerated offenses in the Military Commissions Act. In *Khadr*, this Court held that "jurisdiction attaches upon the formal swearing of charges against the accused, after an individual subject to the [UCMJ] avers under formal oath that the charges are 'true in fact.'" 717 F. Supp. 2d at 1234-35. Until the accused challenges personal jurisdiction in a motion to dismiss or "proof of jurisdiction is lacking on the merits," the commission may "exercise *prima facie* personal jurisdiction over the accused" if (1) "an individual subject to the [UCMJ] avers under formal oath that the charges are 'true in fact'"; (2) the charges are referred for trial by commission in compliance with the pre-referral criteria in the Rules for Military Commissions ("R.M.C."); and (3) the pleadings unambiguously allege that the accused is "a person subject to trial by military commission as an alien unlawful enemy combatant." *Id.*; *see* Francis Gilligan & Fredric Lederer, *Court-Martial Procedure* § 2-52.10 (3d ed. 2006) ("In general, in personam jurisdiction over an accused will be assumed in the absence of a motion to dismiss.").

Each of these steps occurred here. An individual subject to the UCMJ averred under formal oath that the charges against Al Nashiri were true to the best of his knowledge. App. 78. The charges were referred for trial by commission in compliance with the pre-referral criteria in the R.M.C. *See* App. 275, 277, 285. One of these criteria is that upon referral of each charge to it, "a military commission would have jurisdiction over the accused and the offense." R.M.C. 406(b)(3). Each offense alleges Al Nashiri is an AUEB subject to trial by military commission. App. 80-89; *see* App. 473 (holding that the MV *Limburg* charges "properly state an offense in compliance with the legal requirements"). Also, Al Nashiri has not challenged his status as an AUEB. App. 461; Tr. at 2741 (App. 1).

Because he has not challenged his status and because each of the steps necessary for personal jurisdiction to attach has been satisfied here, the Commission may exercise *prima facie* personal jurisdiction over Al Nashiri. *Khadr*, 717 F. Supp. 2d at 1235. And because the inquiry for subject-matter jurisdiction, in significant part, focuses on the Accused's status at the time of the alleged offenses, the Commission may exercise subject-matter jurisdiction for the same

reason. *See United States v. Oliver*, 57 M.J. 170, 171-73 (C.A.A.F. 2002) (noting that the court-martial proceeded to trial without a hearing on subject-matter jurisdiction where the parties did not dispute the accused's status).

Simply put, it is unchallenged that Al Nashiri "enlisted" in an armed force engaged in hostilities against the United States prior to the attempt on USS THE SULLIVANS and that he fits within none of the eight categories of lawful prisoners of war.[4] His status as an AUEB some thirty-one months after that abortive attempt, when the MV *Limburg* was attacked, thus can be relied upon as a jurisdictional fact permitting the Commission to proceed to trial on these Congressionally-codified offenses, unless and until that status is challenged. *See Harmon*, 63 M.J. at 101 (explaining that "military jurisdiction over the person continues as long as military status exists"). The defense has not—and indeed cannot—credibly claim that Al Nashiri was "discharged" or otherwise lost his AUEB status, and so the chief requisite of subject matter jurisdiction have at this point been met.

To the extent the Commission nonetheless wishes to reassure itself of the Accused's status, it may do so as an interlocutory matter, as that is the clear meaning of this Court's holding in *Khadr* and is consonant with the government's burden to establish status after capture and promptly upon challenge so as to preclude unauthorized deprivations of liberty. And to the extent the Commission wishes to test the government's evidence it believes bears upon the offense prong of subject-matter jurisdiction, it may do so—but only after the government presents its evidence at trial, given the closely intertwined nature of that evidence with elements the panel must find beyond a reasonable doubt *vel non*. As demonstrated in Part III below, the Commission must wait until trial to test the sufficiency of the government's evidence because the factual question relating to subject-matter jurisdiction that the Military Judge raises *sua sponte* is not capable of determination without trial on the general issue of guilt.

[4] Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (placing "[m]embers of the armed forces of a Party to the conflict" and seven related categories within the definition of "prisoners of war").

In rushing to assess jurisdiction before trial, Judge Spath overlooked Judge Pohl's previous order resolving in Appellant's favor the appropriate time for answering the factual aspects of the particular jurisdictional question raised. In January 2013, Judge Pohl found that "[w]hether hostilities existed between Al Qaeda and the United States on the dates of the accused's alleged acts" is (1) "a jurisdictional question subject to purely legal determination under a 'wide deference' standard" and (2) "a question of fact and an element of proof, which must be carried by the government" and "considered by the trier of fact" at trial. App. 204, 207. Judge Pohl treated the "jurisdictional question" as a political question on which proof of facts was unnecessary because he deferred to the Political Branches' "determination that hostilities existed between al Qaeda and the United States prior to September 11, 2001 and on the dates of the alleged offenses, evidenced by the passage of the 2009 MCA, the referral of charges in this case, and the litigation of this case since arraignment." App. 207. Judge Pohl resolved the jurisdictional question associated with whether hostilities existed. That question having been resolved, the government was entitled to rely on the earlier order, especially in the absence of any statement from the Commission that it might reverse course and require the government to submit evidence of hostilities to prove jurisdiction over the offense. As Judge Pohl held, the Commission has jurisdiction to hear this case.

Judge Spath also overlooked Judge Pohl's ruling in the same order that hostilities "is a factor among many to be considered by the trier of fact"—a consideration that would occur at trial by the members. App. 204. In a separate order by Judge Pohl denying the defense motion to dismiss the MV *Limburg* charges for failure to state an offense, Judge Pohl ruled that "[t]he additional matters concerning the MV Limburg's and *the Accused's legal status at the time of the alleged attack*, which were raised in the pleadings and discussed at oral argument, are questions of fact and must be resolved by the fact-finder"—again a determination on which the government could reasonably rely to prepare for presentation of evidence before members and judge at trial, including further facts the judge may believe he needs to confirm jurisdiction. App. 473 (emphasis added). In so ruling, Judge Pohl specifically cited to a portion of oral

argument on AE 174 that dealt with the parties' positions on the defense motion to dismiss the MV *Limburg* charges for lack of jurisdiction (AE 168). *Id*. (citing Tr. 2686-92). Although the government asked Judge Spath to reconcile Judge Pohl's orders with his August Order dismissing the charges, Judge Spath declined to reference or clarify them.

Other facts and findings in the record further support the conclusion that the Commission has jurisdiction. As discussed above, it must not only have personal and subject-matter jurisdiction, but it must also "be convened by an official empowered to convene it," and each charge "must be referred to it by a competent authority." R.M.C. 201(b). These jurisdictional requisites have also been met. In October 2012, Judge Pohl concluded that "[t]he Military Commission is properly convened, and the Charges in this case are properly referred pursuant to R.M.C.s 407, 503, 504, and 601." App. 200. He also concluded that "the Convening Authority was properly appointed by the Secretary of Defense under the relevant statutory and regulatory provisions of 10 U.S.C. §948h" and that the "Convening Authority properly exercise[d] authority to convene this military commission." App. 201-202. Appellant notes that Judge Pohl deferred until trial addressing the requirement that the Commission "must be composed in accordance with [the R.M.C.] with respect to number and qualifications of [the military judge and members]." App. 200. While this jurisdictional requisite remains deferred until it is ripe for determination, the remaining jurisdictional requisites are all provisionally satisfied here. The Commission erred in dismissing the charges for lack of jurisdiction to proceed toward trial, and this Court should accordingly reverse.

C. The Judge Erred in Focusing on the Nature of the Offense, Rather than the Accused's Unchallenged Status, To Determine Jurisdiction To Proceed to Trial

In concluding that the government must establish before trial that the conduct occurred in the context of hostilities in order to establish subject-matter jurisdiction (App. 469), the Military Judge erred in focusing on the nature of the offense—rather than the status of the accused—to determine jurisdiction. The Supreme Court discouraged this analytical approach in *Solorio,* and Congress passed the operative jurisdictional provisions for military commissions modeled on the

UCMJ well after *Solario*. The *Solorio* Court overruled *O'Callahan*, thereby rejecting pretrial jurisdictional inquiries into the "service connection" of the offense charged. *Solorio*, 483 U.S. at 435. Returning instead to its earlier precedent focusing on the status of the accused, the *Solorio* Court reasoned that "the proper exercise of court-martial jurisdiction over an offense [is conditioned] on one factor: the military status of the accused." *Id*. at 439 (citations omitted). It further reasoned that basing military jurisdiction on the nature of the offense not only lacked historical support, but also created confusion and litigation over jurisdiction because of "'the infinite permutations of possibly relevant factors'" to weigh in determining whether an offense is service-connected. *Id*. at 448 (quoting *O'Callahan*, 395 U.S. at 284 (Harlan, J., dissenting)). Indeed, "the service-connection approach, even as elucidated in [*Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355 (1971)], [] proved confusing and difficult for military courts to apply." *Id*.

By reverting to the seductive but discredited *O'Callahan* approach, the Military Judge erred in focusing his pretrial jurisdictional analysis on the nature of the offense. He concluded that to establish subject-matter jurisdiction, the government must formally prove prior to its presentation before the members that the alleged "'conduct took place in the context of and was associated with hostilities.'" App. 469. As an element of the offense, hostilities is a highly fact-specific inquiry that requires examining the nature of the alleged offense , and that is for the panel members as the triers of fact to find. In the trial of Omar Ahmed Khadr, the Military Commission instructed the members that

> [i]n determining whether hostilities existed between the United States and al Qaeda and when such hostilities may have begun, you may consider, but not limited to, such things as: the length, duration, and intensity of the hostilities between the parties; whether there was protracted armed violence between government 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; and the number of persons killed or wounded on each side; the statements of the leaders of either side indicating their perceptions regarding the existence of an armed conflict, including the presence or absence of a declaration to that effect.

App. 76. This instruction demonstrates the inquiry's complexity. Judge Pohl recognized this complexity when he ruled that the inquiry—even as a "purely legal determination" for jurisdictional purposes—is a political question calling for deference to the Political Branches. App. 207. The confusion created by focusing pretrial attention on the offense at the expense of an accused's often unchallenged status is precisely what the *Solorio* Court sought to avoid by abandoning the service-connection test. *Solorio*, 483 U.S. at 448. And yet the Military Judge reprised that confusion, defeating Congress's design of a simple and workable jurisdictional analysis in Section 948d. The chief jurisdictional test is whether the accused had UEB status when committed properly pleaded and referred offenses under the M.C.A. Because Al Nashiri has not challenged his status as an AUEB and because his offenses are made punishable in the M.C.A., the Commission has jurisdiction to hear this case.

III. THE MILITARY JUDGE ERRED IN DISMISSING CHARGES FOR LACK OF SUBJECT-MATTER JURISDICTION BY TESTING THE SUFFICIENCY OF THE GOVERNMENT'S EVIDENCE BEFORE TRIAL

Although Al Nashiri did not challenge the Commission's power to adjudicate the case under Section 948d or otherwise challenge his status as an AUEB subject to trial by military commission, the Military Judge dismissed the MV *Limburg* charges because it concluded that the government failed "to provide a factual basis for the Government's assertion of subject matter jurisdiction over the charged offenses" under Section 948d. App. 469-470 (citing 10 U.S.C. § 948d for the first time in dismissing the charges). The Military Judge erred in dismissing the charges for lack of subject-matter jurisdiction on sufficiency-of-the-evidence grounds before trial because the jurisdictional issue is intermeshed with questions going to the merits. The charges referred to the Commission suffice for the Commission to proceed to trial, and, at trial, the government will marshal its evidence and be put to its burden of proof on the elements of the offense to establish guilt—proof of which is part and parcel of the jurisdictional issue. Once the government presents its proof at trial, then the Commission may decide whether the government established by a preponderance of the evidence that the Commission has subject-matter

jurisdiction. *See, e.g.*, App. 72-74 (deferring decision on Al Bahlul's status for jurisdictional purposes until after the government presented its evidence at trial).

R.M.C. 905(b) permits a party to raise in a pretrial motion to dismiss "[a]ny defense, objection, or request which is capable of determination without the general issue of guilt." R.M.C. 907(a) adds that "[a] motion to dismiss is a request to terminate further proceedings to one or more charges and specifications on grounds capable of resolution without trial of the general issue of guilt." *See* 10 U.S.C. § 949d(a)(1)(A). The Supreme Court has held that grounds are "'capable of determination' if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of [those grounds]." *United States v. Covington*, 395 U.S. 57, 60 (1969). Thus pretrial dismissal is appropriate only if trial of the facts surrounding the commission of the alleged offense would not assist the commission in determining the validity of the grounds for dismissal. Put another way, pretrial dismissal is inappropriate if trial of the facts surrounding the commission of the alleged offense would assist the commission in determining the validity of the grounds for dismissal.

In dismissing the charges, the Commission concluded that to establish subject-matter jurisdiction, the government must establish "the last statutory element for each offense, which is whether 'the conduct took place in the context of and was associated with hostilities.'" App. 469. This means that trial of the facts surrounding the commission of the alleged offense would necessarily assist the Commission in determining the validity of the jurisdictional issue raised by the Commission. *See United States v. Ornelas*, 6 C.M.R. 96, 98 (C.M.A. 1952) (concluding that the jurisdictional issue "involved a question of fact, which should have been submitted to the court [members]"); *United States v. Bailey*, 6 M.J. 965, 968 (N.C.M.R. 1979) ("But when a question of fact involved in the jurisdictional issue also goes to the ultimate question of the accused's guilt or innocence of the offense charged, then the factual question, upon being raised after a plea of not guilty is entered, must be resolved by the court members."). Al Nashiri seems to concede as much. App. 460 (conceding that jurisdictional elements generally "are decided by the jury" but maintaining, apparently contrary to the Commission, that

the question before the Commission did "not deal with" a jurisdictional element). Even though this is precisely the type of issue the rules do not permit courts to resolve before trial, the Commission did it anyway.

And it did so by prematurely testing the sufficiency of the government's evidence before trial. As the U.S. Court of Appeals for the District of Columbia Circuit concluded in *United States v. Yakou*, it is "an 'unusual circumstance' for the [trial] court to resolve the sufficiency of the evidence before trial because the government is usually entitled to present its evidence at trial and have its sufficiency tested by a motion for acquittal" under applicable criminal-procedure rules. 428 F.3d 241, 247 (D.C. Cir. 2005). Bypassing this conclusion, the Commission relied on a blinkered study of *Yakou*, citing the case in favor of the proposition that the federal circuit courts disagree "as to whether a district court could dismiss an indictment on sufficiency-of-the-evidence grounds." App. 467-468. The Commission seized on this disagreement as proof positive that the government's assertion of error is "suspect." App. 468.

The proposition itself is true—but only with a critical caveat the Commission elided. The inter-circuit disagreement exists only as to whether a court may dismiss charges before trial on sufficiency-of-the-evidence grounds *where the facts are undisputed or the government made a full evidentiary proffer*. *Yakou*, 428 F.3d at 247 (comparing, *e.g.*, *United States v. Phillips*, 367 F.3d 846, 855 & n.25 (9th Cir. 2004) (upholding dismissal where the material facts were undisputed and the government did not object to the court testing the sufficiency of the evidence), and *United States v. DeLaurentis*, 230 F.3d 659, 660-61 (3d Cir. 2000) (recognizing that a court may assess the sufficiency of the evidence before trial where the government made a full proffer of evidence or there is a stipulated record), with *United States v. Salman*, 378 F.3d 1266, 1267-69 (11th Cir. 2004) (holding that courts may not assess the sufficiency of the evidence before trial even when the facts are undisputed)).

That caveat is critical here because the facts are disputed and the government has not made a full proffer of evidence, as the Commission acknowledged. App. 470 (noting that the government "inform[ed] the Commission it would provide the factual basis in its presentation of

evidence to the panel on the merits"); *see United States v. Alfonso*, 143 F.3d 772, 777 (2d Cir. 1998) (concluding that the government's representation at oral argument—that "it could prove defendants conspired to steal money and 'a quantity of cocaine that was more than a personal amount'"—"cannot fairly be described as a full proffer for purposes of a pretrial ruling on the sufficiency of the evidence"). Where facts are undisputed or the government has made a full evidentiary proffer, trial of the substantive criminal charges would not assist the court in deciding the legal issues raised in a pretrial motion to dismiss the charges. Under those circumstances, dismissing charges before trial for insufficient evidence is proper.

But where (as here) the facts are disputed and the government has not made a full evidentiary proffer, federal circuit courts and military courts that have decided the issue agree "a pretrial motion to dismiss an indictment [or in the military context a referred charge sheet] is not a permissible vehicle for addressing the sufficiency of the government's evidence" because the trial would assist the court in deciding the legal issues raised in the pretrial motion to dismiss the charges. *DeLaurentis*, 230 F.3d at 660; *see United States v. High*, 39 M.J. 82, 85 (C.M.A. 1994) (noting that, had the prosecution objected, the court could have concluded "the military judge erred even in considering [whether High had a lawful duty to report to his appointed place of duty] by means of a pretrial motion to dismiss" because "resolution of the lawfulness question was intimately related to the merits of [High's] case"); *United States v. McShane*, 28 M.J. 1036, 1038-39 (A.F.C.M.R. 1989) (holding that the military judge erred in dismissing the charge because, in doing so, the military judge "made a ruling which was not capable of resolution without trial on the general issue of guilt"); *United States v. Spencer*, 29 M.J. 740, 741 n.1 (A.F.C.M.R. 1989) (concluding that a valid ground for a motion to dismiss is one that is capable of resolution without a trial on the general issue of guilt); *United States v. Brantley*, 461 F. App'x 849, 851-52 (11th Cir. 2012) (per curiam) (reversing district-court decision to dismiss the indictment before trial for lack of subject-matter jurisdiction because the district court lacked authority to do so based on the sufficiency of the evidence); *United States v. Guerrier*, 669 F.3d 1, 4 (1st Cir. 2011) ("[C]ourts routinely rebuff efforts to use a motion to dismiss as a way to test

the sufficiency of the evidence behind an indictment's allegations."); *Salman*, 378 F.3d at 1268 (concluding that "the government is entitled to present its evidence at trial and have its sufficiency tested by a motion for [judgment of] acquittal"); *United States v. Prentiss*, 206 F.3d 960, 974 (10th Cir. 2000) ("Because the Indian status of the defendant and victim are indispensable to establishing federal jurisdiction in this statutory scheme, they must be alleged in the indictment and proven *at trial*." (emphasis added)); *Alfonso*, 143 F.3d at 777 (holding that "ordinarily a challenge to the sufficiency of the evidence satisfying the jurisdictional element of the Hobbs Act is not appropriately decided on a motion to dismiss"); *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996) (reversing a district court's decision to dismiss the indictment "[b]y basing its decision on evidence that should only have been presented at trial"); *United States v. Hall*, 20 F.3d 1084, 1086-87 (10th Cir. 1994) ("Generally, the strength or weakness of the government's case, or the sufficiency of the government's evidence to support a charge, may not be challenged by a pretrial motion."); *United States v. Nukida*, 8 F.3d 665, 669-70 (9th Cir. 1993) (holding in Federal Anti-Tampering Act case that "[i]nasmuch as [the defendant's] arguments before the district court challenged the government's ability to prove that her actions affected commerce, her motion to dismiss amounted to a premature challenge to the sufficiency of the government's evidence tending to prove a material element of the offense"); *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1048 (11th Cir. 1987) (holding that sufficiency of evidence satisfying jurisdictional element of federal narcotics trafficking statute was not properly addressed on pretrial motion to dismiss); *United States v. Mann*, 517 F.2d 259, 266-67 (5th Cir. 1975) ("A defendant may not properly challenge an indictment, sufficient on its face, on the ground that the allegations are not supported by adequate evidence, for an indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is enough to call for trial of the charge on the merits." (citing *Costello v. United States*, 350 U.S. 359, 363 (1956))); *United States v. Marra*, 481 F.2d 1196, 1199-1200 (6th Cir.), *cert. denied*, 414 U.S. 1004 (1973) ("A motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence. . . . The Court should not consider evidence not appearing on the fact of the

indictment." (internal quotation marks omitted)); *see also United States v. Knox*, 396 U.S. 77, 83 n.7 (1969) (concluding that courts generally should not resolve evidentiary questions incapable "of determination without the trial of the general issue" in a pretrial motion to dismiss); *United States v. Levin*, 973 F.2d 463, 470 (6th Cir. 1992) (affirming a district-court decision to grant the defendant's pretrial motion to dismiss the indictment as a matter of law on the basis of "*undisputed extrinsic evidence*" (emphasis in original)).

In *Alfonso*, the U.S. Court of Appeals for the Second Circuit held that the trial court erred in dismissing a charge (conspiracy to commit a robbery in violation of the Hobbs Act) "on the basis that the government had failed to satisfy the jurisdictional requirement of the Hobbs Act, a theory not advanced by defendants in their motion to dismiss, and neither briefed nor argued by any of the parties." 143 F.3d at 774 (internal quotation marks omitted). The court reasoned,

> [i]n the case of a Hobbs Act prosecution, the requirement of an effect on interstate commerce is itself an element of the offense charged, and the determination of whether the jurisdictional element has been satisfied is part and parcel of the inquiry into the "general issue" of whether the statute has been violated. For this reason, ordinarily a challenge to the sufficiency of the evidence satisfying the jurisdictional element of the Hobbs Act is not appropriately decided on a motion to dismiss. "When a question of federal subject matter jurisdiction is intermeshed with questions going to the merits, the issue should be determined at trial. . . . This is clearly the case when the jurisdictional requirement is also a substantive element of the offense charged."

Id. at 777 (quoting *Ayarza-Garcia*, 819 F.2d at 1048) (citing *Nukida*, 8 F.3d at 669); *see United States v. Gillette*, 738 F.3d 63, 73-74 (3d Cir. 2013). It is also the case when the jurisdictional requirement is not a substantive element of the charged offense but is nonetheless intermeshed with questions going to the merits.

This is so because, as the D.C. Circuit reasoned in *Yakou*, "[t]he government is entitled to marshal and present its evidence at trial, and have its sufficiency of the evidence tested by a motion for acquittal [under applicable criminal-procedure rules]." *DeLaurentis*, 230 F.3d at 661; *accord Yakou*, 428 F.3d at 247. "There being no equivalent in criminal procedure to the motion for summary judgment that may be made in a civil case," the government need not reveal its proof before trial. *United States v. Nabors*, 45 F.3d 238, 240 (8th Cir. 1995); *Salman*, 378 F.3d

at 1268 (concluding that motion for judgment of acquittal is the proper procedural vehicle "for contesting the sufficiency of the evidence in criminal cases because there is no explicit authority to grant a pretrial judgment as a matter of law on the merits"). The unavailability of a summary-judgment rule in determination of general issues of guilt or innocence serves judicial economy by putting the government to its proof once and thus avoiding trial on the merits twice. *See* App. 70-74 (concluding that Al Bahlul's status was an element of the offense and deferring decision on his status for jurisdictional purposes until after the government presented its evidence at trial). It also "helps ensure that the respective provinces of the judge and jury are respected." *Nukida*, 8 F.3d at 670. Whereas trial courts generally may make preliminary findings of fact necessary to decide questions of law presented in pretrial motions, they may not do so if the court's conclusions "invade the province of the ultimate finder of fact." *Levin*, 973 F.2d at 467.

The military judge departed from this well-established rule. Dismissing the MV *Limburg* charges before trial for insufficient evidence invades the province of the members as the ultimate finders of fact because the jurisdictional question is intermeshed with questions going to the merits. To be clear, Congress, in the Military Commissions Act of 2009, granted subject matter jurisdiction to the military commission for all offenses under the Act or the law of war, whether such offense was committed before, on, or after September 11, 2001. *See* 10 U.S.C. § 948d. At trial, the United States is required to prove beyond a reasonable doubt that the attack on the MV *Limburg* was committed in the context of, and associated with, hostilities between al Qaeda and the United States or its coalition partners. *See* 10 U.S.C. § 948a(3); 10 U.S.C. § 948a(7). The United States intends to so establish this nexus, with competent evidence at trial.

However, to persuade a judge whose reservations regarding jurisdiction over the offense can only be guessed at, the government would be compelled to present the same proof necessary to persuade the panel that Al Nashiri, a member of al Qaeda, participated in a common plan and conspiracy leading to the attempted attack upon USS THE SULLIVANS, the successful attack on USS COLE, and the successful attack on MV *Limburg*. Unlike a servicemember's court-

martial in which segregable factual issues could authorize a pretrial interlocutory evidentiary hearing on various matters of jurisdiction, this case involves a complex conspiracy in which many particles of evidence about the attack on the USS COLE—gathered in hard-to-reach, overseas locations—will be illuminated by direct in-court co-conspirator testimony from the later phase of the boats operation, when Al Nashiri's armed force attacked the MV *Limburg*.

Although the Military Judge rushed to dismissal on purported factual grounds before even the scheduled pretrial evidentiary hearings on admissibility, *see* App. 506 (including the judge's characterization of the phase of litigation including AEs 168 & 241 as one of "Law Motions" and calling for later evidentiary hearings), the government intends also to illuminate the conspiracy with voluntary statements of Al Nashiri himself. *See*, *e.g.*, App. 301 (AE 168H/241D, Attachment E at 27 (stating that post-9/11 activities in the United Arab Emirates and Yemen on the boats operation continued to be to do Usama Bin Laden's work against American interests) & 29 (stating that the goal of Limburg attack was to send a message to the United States not to travel through Yemen and the Arabian Peninsula)). The whole, once fully described by competent and admissible evidence, is much more than the sum of the separate parts, as Al Nashiri's individual responsibility for the bombings is alleged to result from being a planner and leader rather than a physical attacker, and that responsibility must be proven by amassing direct and circumstantial evidence of his intent. *See United States v. Moore*, 563 F.3d 583, 585 (7th Cir. 2009) ("[W]e look at the indictment as a whole . . . .").

The government properly charged the MV *Limburg*-related offenses, all of which are triable by military commission, and it should not have to litigate the admissibility of evidence under a narrow exception to M.C.R.E. 404(b);[5] rather, all of the evidence and testimony regarding this tightly woven boats operation and its hostile purposes and resultant impacts upon

[5] M.C.R.E. 404(b) reads: "*Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ."

the United States should be introduced as going to charged conduct. Because trial of the facts surrounding the alleged commission of the offense would assist the Commission in determining jurisdiction, lack of subject-matter jurisdiction is not capable of determination in a pretrial motion to dismiss. *See Covington*, 395 U.S. at 60 (holding that grounds are "'capable of determination' if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of [those grounds]").

This conclusion is consistent with the rule that jurisdiction is an interlocutory issue decided by the judge. In dismissing the charges without prejudice, the Military Judge quoted *Oliver* for the proposition that "'[j]urisdiction is an interlocutory issue to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence.'" App. 466 (quoting *Oliver*, 57 M.J. at 172). Again, the proposition itself is true; but it does not rescue the dismissal because "interlocutory" does not mean "pretrial." It means "interim or temporary, not constituting a final resolution of the whole controversy." Black's Law Dictionary 819 (7th ed. 1999). Thus "[a] question is interlocutory unless the ruling on it would finally decide whether the accused is guilty." R.M.C. 801(e)(3) Discussion. Interlocutory questions even "include all issues which arise *during trial* other than the findings (that is, guilty or not guilty), sentence, and administrative matters such as declaring recesses and adjournments." *Id*. (emphasis added). Because jurisdiction is an interlocutory issue, it is one that the judge may decide at any time up to final resolution of the general issue of guilt or innocence—even during trial. The Military Judge in *Al Bahlul* accordingly resolved the jurisdictional question in that case after hearing the government's evidence at trial but before the findings. App. 72-74. The Commission erred in failing to do the same with jurisdiction over the offense here.

Nor can the judge rescue the dismissal by hinting that "the facts argued by the Prosecution may be easily susceptible of proof," App. 245, as a separate and premature trial on intermeshed evidence undertaken to a preponderance standard of proof is still a trial. And the Military Judge's uneven use of the necessarily broad authority given to trial courts under

M.C.R.E. 104(a) to determine preliminary questions without being bound by the rules of evidence only affirms the law's wisdom in permitting judges to consider pretrial motions to dismiss only "on grounds capable of resolution without trial of the general issue of guilt." R.M.C. 907(a); 10 U.S.C. § 949d(a)(1)(A); *compare, e.g.*, Tr. at 5021 (stating, in the context of litigating AEs 287, 288, 289, 2909, 291, and 292, "I can do away with a good deal of the rules of evidence when I'm dealing with pretrial issues") (App. 69), *with* App. 241-245 & App. 465-471 (ignoring pre-challenge jurisdictional facts involving status like those relied upon by the U.S.C.M.C.R. in *Khadr*, 717 F. Supp. 2d at 1235).

In any event, whatever else *Oliver* means, it cannot mean that the government must present evidence before trial to establish subject-matter jurisdiction. Larry Oliver was a Marine Corps reservist charged with, and convicted of, fraud against the United States. He did not challenge the court's jurisdiction at trial, but rather only on appeal before the Navy-Marine Court of Criminal Appeals. The government opposed, moving the Court of Criminal Appeals to attach Oliver's medical records to show he was continued on active duty in a medical-hold status beyond the expiration of his active-duty orders. *Oliver*, 57 M.J. at 172-73. The Court of Criminal Appeals granted the government's motion and concluded these records established that the court-martial possessed subject-matter jurisdiction over the offense. *Id*. Although the U.S. Court of Appeals for the Armed Forces stated generally that "[j]urisdiction is an interlocutory issue, to be decided by the military judge," it affirmed the finding that the records—which the government entered *after trial* and on appeal—established subject-matter jurisdiction. *Id*.; *see United States v. Morita*, 73 M.J. 548, 556-57 (A.F. Ct. Crim. App. 2014) (noting that the government was permitted to establish jurisdiction at trial). Because the appellate courts permitted the government to prove subject-matter jurisdiction well after trial, *Oliver* disproves the conclusion that the government must prove subject-matter jurisdiction before trial. The jurisdictional prerequisite at issue in *Oliver* was not an element of the offense. *Oliver*, 57 M.J. at 172. *Oliver* does not support dismissal.

Rather than dismissing the charges, the Commission should proceed to trial on the charges as alleged. While it is a deeply-grounded rule that the government's evidence as to one or more elements of a charge or specification should not be prematurely tested under the rubric of a legal challenge to subject-matter jurisdiction, trial courts may rely on allegations in the Charge Sheet, which the Commission should accept as true for purposes of determining jurisdiction to try the offense. *United States v. Vitillo*, 490 F.3d 314, 320 (3d Cir. 2007). Not only do the charges and specifications at issue here properly state offenses triable by military commission, *see* App. 473 ("Specification 2 of Charge IV and Charges VII-IX properly state an offense in compliance with the legal requirements."), but they also comprise a plain, concise, and definite statement putting Al Nashiri on notice of conduct that falls within the jurisdiction of the United States to proscribe, try, and punish.

Because Al Nashiri is not alleged to have been present at the scenes of the attacks, the government has properly alerted the Accused and the Commission it is relying on all appropriate theories of vicarious liability. These include principal theories of liability, 10 U.S.C. § 950q (2009), as well as the well-recognized liability of a co-conspirator within what is here alleged as a tightly conceived common scheme of successive and ultimately deadly operations of similar tactical methodology, geographic focus, and organizational purpose. *See* Dep't of the army, Pamphlet 27-9, *Military Judge's Benchbook* 7-1-4 (Sept. 10, 2014); R.C.M. 307(c)(3) Discussion ¶ (H)(i) ("All principals are charged as if each was the perpetrator."). Fairly informing the Accused of the charges against which he must defend, the Charge Sheet suffices to call for a trial of the charges. *See Gillette*, 738 F.3d at 74 ("It is well-established that an indictment is enough to call for a trial of the charge on the merits so long as it is facially sufficient." (internal quotation marks omitted)).

IV. THE MILITARY JUDGE ABUSED HIS DISCRETION IN DISMISSING THE CHARGES FOR INSUFFICIENT EVIDENCE WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING

Even if the Court concludes that the Military Judge properly construed the motions to dismiss and did not err in prematurely testing the sufficiency of the government's evidence, the Court should still reverse because the Military Judge abused his discretion in dismissing the charges for insufficient evidence without the benefit of an evidentiary hearing offered by the government as soon as it could identify the confusion in the Commission's approach to jurisdiction. Throughout oral argument and in its briefing, the government persisted in putting the Commission on notice that, to the extent the Commission was requiring proof, it would present its proof at trial. App. 224, 226; Tr. 3076-77 (App. 11-12), 3081 (App. 16), 3885 (App. 20), 3888-90 (App. 23-25). The government added, if the Commission was requiring proof, it would offer that proof to the Commission. Tr. at 3890 (App. 25). Despite knowing that this was the government's approach, despite having before him the purely legal issue of Congress's power to proscribe the alleged offenses, and despite perhaps already knowing that he would deem a failure to present formal proof relating to the offense prior to trial as "fatal" (App. 470), Judge Pohl did not hint, and in fact refused to reveal, that he was requiring formal pretrial proof because he, "as a general proposition," does not "direct counsel to file any type of motions." Tr. at 3071 (App. 6); *accord id*. at 3890 ("I don't tell you what I think I need for the government to prevail or for the defense to prevail.") (App. 25).

While judges must "avoid undue interference with the parties' presentations or the appearance of partiality," R.M.C. 801(a)(3) Discussion, this is a case in which the Commission at no time before its September dismissal of the charges correctly identified the governing statutory provision, and even then failed to reconcile that ruling with an apparent contradictory prior order of the previous judge. It is also a case that, when one reads the transcripts carefully, involved no small amount of steering by the Military Judge of defense counsel toward a theory that, to the very end, defense counsel never really shared. A general proposition of noninterference should not be used as an inflexible trump, particularly one that (erroneously)

yields dismissal of serious law-of-war offenses in a death-penalty case where the United States has accused the defendant of misconduct resulting in the deaths of 18 people. The interests of justice strongly favor the Military Judge considering evidence probative of subject matter jurisdiction.. *See Khadr*, 717 F. Supp. 2d at 1233-34 (holding that the military judge "abused his discretion in deciding this critical jurisdictional matter [personal jurisdiction] without first fully considering both the admissibility of evidence Appellant offered to present on this issue"). They also strongly favor permitting the members to consider these charges. The harm to the United States and its people were these charges to be dismissed could include depriving the factfinder of highly probative and relevant in-court testimony from a co-conspirator who joined Al Nashiri after the USS COLE attack, eliminating the one post-9/11 attack from future assessments of whether al Qaeda was engaged in hostilities, and enabling the reduction of a common plan that was carried out across many miles and months into a single, one-off attack. The legitimacy of the military commission forum may also be greatly harmed, as this no-doubt well-intended but erroneous judicial ruling serves to suppress a body of live testimony subject to cross-examination that convincingly corroborates hearsay statements and statements of the accused. Those statements—though probative, reliable, lawfully obtained, and voluntary—will appropriately be subject to the skeptical judgment of history if too singularly relied upon to prove guilt.

The Accused will suffer no prejudice in remanding the case for further proceedings because if the Commission ultimately concludes that the government failed to carry its burden, then the Commission will dismiss for lack of jurisdiction anyway at the end of its presentation on the merits. Given the Military Judge's refusal to reveal whether he was requiring pretrial proof and the purely legal nature of the question presented by the motions to dismiss, the government's approach was reasonable. Nothing suggests that the government was engaged in a deliberate strategy to proceed in a piecemeal fashion or otherwise waste judicial resources. Under these circumstances, the Military Judge abused his discretion in then refusing to consider the government's evidence.

To enable the Commission to consider the government's evidence, the Court should remand the case with instructions for the Military Judge to hold an evidentiary hearing and afford the government the opportunity to present evidence establishing the AUEB status of the Accused, thus providing appropriate assistance to the Military Judge at this pretrial stage on questions he has signaled he is entertaining *sua sponte* regarding subject-matter jurisdiction. While there are ample and unchallenged jurisdictional facts on which the Commission may and should rely to proceed to trial on these properly stated charges, there is no bar to the Judge hearing factual matters which do not improperly require two trials of the governments evidence and even to his ruling on questions of law, such as whether Congress can criminalize the completed bombing of a French vessel in Yemeni waters where the attack is part of a closely connected series and common plan aimed at harming the United States (it clearly can, as demonstrated in *Yousef*, 327 F.3d at 85-86, and as argued by the government; if the Military Judge rules otherwise as a matter of law, then at least this is a decision that is amenable to appellate review).

But if the Military Judge concludes that the factual issues cannot be fully segregated, then he should use the approach adopted by the Military Judge in *Bahlul* by deferring decision on jurisdiction until after the government presents its evidence at trial. *See* App. 70-74. Using this approach gives force both to the M.C.A.'s grant of authority to judges to "hear[] and rule[] upon any matter which may be ruled upon by the military judge . . . , whether or not the matter is appropriate for later consideration or decision by the members," 10 U.S.C. § 949d(a)(1)(B), and the M.C.A.'s restriction of that grant to "hearing and determining motions raising defenses or objections which are capable of determination without trial of the general issues raised by a plea of not guilty." 10 U.S.C. § 949d(a)(1)(A). The legislative history of the identical provisions in the UCMJ makes clear that Congress's intent was "to conform military criminal procedure with the rules of criminal procedure applicable in the U.S. district courts and otherwise to give statutory sanction to pretrial and other hearings without the presence of the members concerning those matters *which are amenable to disposition* on either a tentative or final basis by the

military judge." S. Rep. No. 1601, 90th Cong., 2d Sess. 9-10 (1968) (emphasis added) (App 510-522).

That history explains "[a] typical matter which could be disposed of at a pretrial session is the preliminary decision on the admissibility of a contested confession" and that "[i]f the military judge determines to admit the confession, the issue of voluntariness will normally, under civilian and military Federal practice, be relitigated before the full court." But it is an abuse of discretion for a Military Judge to rule on the belief that the "whether or not the matter is appropriate for later consideration" language of 10 U.S.C. § 949d(a)(1)(B) authorizes his impairment of the Government's right to marshal its evidence at trial. *See id.* (outlining that such discretion can be abused). Whereas the relitigation of voluntariness and aspects of an accused's status is well-supported in civilian and military federal practice, dismissing a charge for lack of subject matter jurisdiction on sufficiency-of-evidence grounds over the prosecution's consistent objection is disallowed. *See Alfonso*, 143 F.3d at 777. The Court should therefore reverse.

CONCLUSION

For these reasons, the Court should reverse the dismissal and remand for further proceedings, including an evidentiary hearing on the Accused's status as an AUEB.

Respectfully submitted,

//s//

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's order of September 25, 2014 granting permission to file an oversized brief.

//s//
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail to Counsel for Mr. Al Nashiri on September 29, 2014. In addition I certify that the Appendix was hand delivered to the Clerk of Court and Counsel for Mr. Al Nashiri on September 29, 2014.

//s//
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