# UNITED STATES COURT
# OF
# MILITARY COMMISSION REVIEW

Before
B. Brand, D. Conn, T. Gallagher, J. Hoffman,
J. Perlak, E. Price, and M. Sims[1]

| | | |
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| UNITED STATES | ) | |
| Appellee | ) | SPECIFIED ISSUES AND ORAL ARGUMENT |
| v. | ) | |
| ALI HAMZA AHMAD SULIMAN AL BAHLUL | ) | CMCR CASE NO. 09-001 |
| Appellant | ) | DATE: January 25, 2011 |

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

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

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

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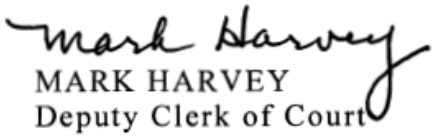
[1]Judges D. O'Toole and C. Thompson took no part in the decisions in this Order, having previously recused themselves from participation in this case.

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

FOR THE COURT:

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Judges Listed
Appellate Counsel (copy to Accused)

**UNITED STATES COURT OF MILITARY COMMISSION REVIEW**

***en banc***

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| UNITED STATES,<br><br>Appellee,<br><br>*v.*<br><br>ALI HAMZA AHMAD SULIMAN AL BAHLUL,<br><br>Appellant. | APPELLANT RESPONSES TO CERTIFIED ISSUES<br><br>CMCR CASE NO. 09-001<br><br>Tried at Guantanamo, Cuba on<br>7 May 2008,<br>15 August 2008,<br>24 September 2008,<br>27 October – 3 November 2008<br><br>Before a Military Commission convened by<br>Hon. Susan Crawford<br><br>Presiding Military Judge<br>Colonel Peter Brownback, USA (Ret.)<br>Colonel Ronald Gregory, USAF<br><br>24 February 2011 |

**TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW**

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## QUESTION 1

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

**Short Answer**

Joint criminal enterprise is a routine way to prove individual liability when groups commit war crimes on a massive scale. In evaluating how the doctrine impacts the charges in this case, it is important to distinguish between what the doctrine is and what it is not. A joint criminal enterprise *is* a theory of co-perpetration that establishes a defendant's liability for a specifically charged and fully proven criminal act. It is not a means by which to establish inchoate liability. And that distinction highlights the deficiencies of the charges in this case in at least three important respects.

First, the development of the doctrine since World War II and its importance in war crimes prosecutions is largely a consequence of the fact that inchoate liability is inapplicable to war crimes. In case after case, military commissions and federal courts have held that the joining in or providing support for a joint criminal enterprise is not a crime in itself.

Second, for joint criminal enterprise to be relevant here, the offenses charged would have to have established Mr. al Bahlul's co-perpetration of a specific and completed war crime. At bottom, it is the same elements test used in finding lesser included offenses. A law of war offense must be equal to or a lesser included offense of the crimes charged. All joint criminal enterprise does is add elements of concerted action to the elements of the underlying offense.

Based on the record in this case, the elements of any completed offenses were neither alleged nor found. The presentation of the evidence, the instructions from the military judge and

the findings of the members all rested on theories of inchoate liability that lacked some or all of the elements of the underlying crimes. Nothing in the record would have put Mr. al Bahlul on notice that he was being charged with specific war crimes on the basis of his joining in a criminal enterprise or otherwise. To the contrary, the government struck language from the Charge Sheet that alleged Mr. al Bahlul joined a "criminal enterprise." And it did this on its own motion.

Third, the same elements test governs whether the Military Commissions Act constituted an *ex post facto* law. If Congress sought to retroactively eliminate elements of war crimes, then the law would be an unambiguous breach of the *Ex Post Facto* clause. Here, no crimes even comparable to the charges against Mr. al Bahlul existed under the law of war a decade ago. By definition, they are inchoate crimes that eliminate elements of the underlying offenses. Regardless of whether Congress could have prospectively defined new war crimes in 2006, these sections of the Military Commissions Act would be unconstitutional as applied to Mr. al Bahlul.

While the scope of Congress' power to create war crimes and the prohibition of *ex post facto* laws pose difficult constitutional questions, they can be readily avoided in this case. Under the law prevailing a decade ago, the government would have to have charged completed crimes and proven that Mr. al Bahlul committed those crimes either personally or via a joint criminal enterprise. The Military Commissions Act contains nothing that suggests its enumerated offenses were intended to apply retroactively regardless of whether they would raise doubts about the *Ex Post Facto* clause. When Congress wanted other parts of the Act to apply retroactively, it gave a clear statement to that effect. It made no clear statement for the offenses triable by military commission and a number of sections of the Act say precisely the opposite. This Court should therefore rely on fundamental rules of constitutional avoidance and presumptions against retroactivity to vacate the judgment below for defects in subject matter jurisdiction.

**1. The legal development of joint criminal enterprise is a consequence of the rejection of inchoate war crimes.**

Joint criminal enterprise is a common, though sometimes controversial, means by which to establish individual liability for war crimes.[1] The strongest indication that it would be applicable in military commission prosecutions is the reference to it in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). In rejecting the viability of an inchoate conspiracy charge, the Justices referenced jurisprudence from the International Criminal Tribunal for the former Yugoslavia (ICTY), which had "adopted a 'joint criminal enterprise' theory of liability" for violations of the laws of war. *Id*. at n. 40.[2]

The ICTY Appeals Chamber first articulated what would come to be known as "joint criminal enterprise" in *Prosecutor v. Tadíc,* Judgment, Case No. IT-94-1-A ¶ 172 (ICTY App. Chamber, Jul. 15, 1999) (*Tadíc* Appeal Judgment). The phrase itself is not found anywhere in the ICTY Statute and the *Tadíc* Appeal Judgment used a variety of interchangeable terminology to describe the doctrine, such as "common criminal plan," *id*. at ¶ 185, " common criminal design," *id*. at ¶ 196, and "common enterprise." *Id*. at ¶ 199.

The doctrine derives from a reading of the law of principals that is neither exotic nor exceptional. *Tadíc* Appeal Judgment at ¶ 229. The ICTY Statute prescribes individual criminal

[1] Disputes over the scope of liability that can result from a joint criminal enterprise have been common in international criminal tribunals. The International Criminal Court and the war crimes tribunal in Cambodia have declined to apply it as a form of vicarious liability. *See Prosecutor v. Ieng Thuruth, et al*., Case No. 002/19-09-2007-ECCC/OCIJ, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (PTC38, May 20, 2010) (rejecting joint criminal enterprise as a basis of vicarious liability for war crimes arising in Cambodia during the 1970s); *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC 01/04-01/06, Decision on Confirmation of Charges (PTC I, Jan. 29, 2007) (rejecting joint criminal enterprise as a basis of vicarious liability and requiring that co-perpetrators have each had an essential role in the common criminal plot).

[2] The same is true for the International Criminal Tribunal for Rwanda (ICTR). *See Prosecutor v. Ntakirutimana*, Judgement, Cases Nos. ICTR-96-10-A & ICTR-96-17-A, ¶¶ 463-65 (ICTR App. Chamber, Dec. 13, 2004) (*Ntakirutimana* Appeal Judgment).

responsibility in identical terms to what is applicable in federal courts (18 U.S.C. § 2), courts-martial (10 U.S.C. § 877) and military commissions (10 U.S.C. § 950q).[3] All the Appeals Chamber in *Tadíc* held was that "participation in a joint criminal enterprise is a form of 'commission' under Article 7(1) of the Statute." *Prosecutor v. Kvočka*, Judgment, IT-98-30/1-A ¶ 79 (ICTY App. Chamber, 28 February 2005) (*Kvočka* Appeal Judgment).

While elaborated in the context of war crimes, a joint criminal enterprise is no different from what has been called a "common enterprise", a "criminal venture" or an "illegal enterprise" under Article 77, UCMJ. *See, e.g.*, *United States v. Jefferson*, 22 M.J. 315 (C.M.A. 1985); *United States v. Maisel*, 24 C.M.R. 194 (C.M.A. 1957). Sometimes used interchangeably with aiding and abetting, a defendant's guilt can be established for crimes he or she did not personally commit if they were the intended result of a common plan to commit them or "if such crimes are likely to result as a natural and probable consequence of the criminal venture or design." MCM, Part IV, ¶ 1(a)(5) (2008).[4]

Like Article 7(1) of the ICTY statute, Article 77 is "not punitive as such." MCM, Part IV, Discussion. Defendants are charged with specific, substantive crimes and their participation in

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[3] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(1) (2009) ("A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.").

[4] *See also United States v. Speer*, 40 M.J. 230, 234 (C.M.A. 1994) ("In order to convict a person under an aiding-and-abetting theory, the Government must introduce evidence that the defendant somehow associated himself with the criminal venture, participated in it as something he wished to bring about, and sought by his action to make it succeed."); *United States v. Garrett*, 720 F.2d 705 (D.C. Cir. 1983) ("[O]ne who puts in motion or assists in the illegal enterprise . . . is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.") (quoting H.R. Rep. No. 304, 80th Cong., 1st Sess. A5 (1947)); *Brđanin* Appeal Judgment at ¶ 430 ("[To establish liability under a joint criminal enterprise a] trier of fact must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose; that the accused made a contribution to this common criminal purpose; and that the commonly intended crime (or, for convictions under the third category of JCE, the foreseeable crime) did in fact take place.").

and liability for those crimes is established by showing that they joined the criminal enterprise responsible for them.

To be sure, a joint criminal enterprise is analogous to conspiracy in terms of shared criminal intent and the vicarious liability that can result. And courts have sometimes referred to it as a "conspiracy theory" of liability. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 260 (2d Cir 2009); *United States v. Garrett*, 720 F.2d 705, 714 (D.C. Cir. 1983); *Jefferson*, 22 M.J. at 324.[5] But since at least World War II, courts have consistently emphasized that joint criminal enterprise does not give rise to inchoate liability under the law of war. Inchoate crimes are the rare exception and where they have been recognized, as with genocide and aggression, they are explicitly provided for.

**i. While defendants were held jointly liable for common plans to commit war crimes after World War II, inchoate war crimes were rejected.**

The most prominent example of joint criminal enterprise being applied and inchoate liability being rejected was at the Nuremberg Trials. *See* London Charter of the International Military Tribunal at Nuremberg, art. 6(a), 59 Stat. 1544, 82 U.N.T.S. 279 (Aug. 8, 1945) (London Charter). Prosecutors charged the Nazi leadership with conspiracy to commit war crimes and crimes against humanity. But the International Military Tribunal at Nuremberg (IMT) dismissed these charges because, with the exception of aggression, the law of war only sanctions "the responsibility of persons participating in a common plan" for otherwise perpetrated war

[5] As the Justices noted in *Hamdan*, the charging documents in past military commissions would sometimes use the word "conspire" along with "combine," "confederate" and other similar words when indicating the co-perpetration of an otherwise charged crime. *Hamdan*, 548 U.S. at n. 35; *see also* H.R. Doc. No. 314, 55th Cong., 3d Sess., 696 (1899) ("For maliciously, unlawfully, and traitorously, and in aid of the existing armed rebellion against the United States of America, on or before the 6th day of March, A D. 1865, and on divers other days between that day and the 15th day of April, A. D. 1865, combining, confederating, and conspiring together . . . to kill and murder, within the Military Department of Washington, and within the fortified and intrenched (sic) lines thereof, Abraham Lincoln . . . .").

crimes and crimes against humanity, not for merely entering into a plan to commit them. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, 469 (1947).

While "common design" was both recognized and frequently utilized in subsequent trials, prosecutors were rebuffed whenever they sought to bring charges of conspiracy to commit war crimes and crimes against humanity. This included an *en banc* panel of the U.S. Nuremberg judges, who ruled that under the laws of war, "this tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense." 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1100 (note) (G.P.O 1949). The UN War Crimes Commission drew the same conclusion. Noting that the United States made regular use of common design as a means of establishing liability for completed offenses, it had "not recognized as a separate offense conspiracy to commit war crimes or crimes against humanity." 15 L. REP. TRIALS OF WAR CRIMINALS 90 (1950).

In the wake of these decisions, Congress did nothing to change or even show its disagreement with the law. The Geneva Conventions were ratified and included no inchoate liability of the kind at issue here. *See Hamdan*, 548 U.S. at 604. The Genocide Convention is the only law of war treaty ratified by Congress that includes inchoate conspiracy, incitement and complicity as a basis for individual criminal liability. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (Dec. 9, 1948).

#### ii. International tribunals have been emphatic that joint criminal enterprise does not give rise to inchoate liability.

The rejection of inchoate liability for war crimes is also reflected in the unanimous body of law the United States was instrumental in developing during modern conflicts. *See Prosecutor*

*v. Milutinovíc,* Decision on Dragoljub Ojdaníc's Motion Challenging Jurisdiction-Joint Criminal Enterprise, Case No. IT-99-37-AR72 (ICTY App. Chamber, May 21, 2003).[6] The ICTY has reiterated time and again that joint criminal enterprise is a means of proving significant culpability for the commission of serious crimes; "it is not a crime in itself." *See*, *e.g.*, *Kvočka* Appeal Judgment at ¶ 91; *Prosecutor v. Brđanin*, Judgment, IT-99-36-A ¶ 431 (ICTY App. Chamber, 3 April 2007) (*Brđanin* Appeal Judgment) ("[When guilt is established on the basis of a joint criminal enterprise], the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission.").

This consensus remained undisturbed up through the creation of the Supreme Iraqi Criminal Tribunal, nearly a year to the day before the passage of the Military Commissions Act. Law of the Supreme Iraqi Criminal Tribunal, Al-Waq'I Al-Iraqiya – No. 4006 (18 October 2005) (Encl. A-108). Designed for the prosecution of war criminals in Iraq, the Tribunal has jurisdiction over violations of the laws and customs of war, genocide, crimes against humanity and three assimilated offenses under Iraqi law dealing with corruption. *Id*. at arts. 11-14. While a joint criminal enterprise type of liability appears available for all crimes, inchoate liability only attaches for genocide. *Id*. at art. 15.

[6] "In sum, the Appeals Chamber does not view the concept of joint criminal enterprise as a separate offence in itself, but only as a mode of committing one of the offenses prescribed . . . ." *Milutinovíc* Decision on Joint Criminal Enterprise at ¶ 44; *see also id*. at ¶ 23 ("[W]hile mere agreement is sufficient in the case of conspiracy, the liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise."); *id*. at ¶ 21 ("[T]he joint criminal enterprise is to be regarded, not as a form of accomplice liability, but as a form of 'commission' and that liability stems not, as claimed by the Defense, from mere membership of an organization, but from participating in the commission of a crime as part of a criminal enterprise.").

This is noteworthy because these aspects of the Iraqi statute reflect the legal judgment of the United States. The Tribunal's subject matter jurisdiction was carried over from a predecessor tribunal created by the Coalition Provisional Authority in December 2003. Statute of the Iraqi Special Tribunal, arts. 10-15 (Dec. 10, 2003) (Encl. A-109). A primary *casus belli* for Operation Iraqi Freedom had been Iraqi support for terrorist groups, including al Qaeda.[7] Yet such support is not identified as a war crime that can be brought against any of Iraq's former leaders. In other words, even two years after Mr. al Bahlul was first arrested, the United States conducted itself on the basis that genocide was the only crime for which inchoate liability could be established under the laws of armed conflict.

### iii. Federal courts have rejected the use of joint criminal enterprise to establish inchoate liability for war crimes.

The same conclusion has been reached by federal courts in diverse legal circumstances. As this Court noted in its specified issues, the Justices in *Hamdan* highlighted the availability of joint criminal enterprise under the laws of war. They did so to reaffirm the "special emphasis on the *completion* of an offense" that the Supreme Court had earlier made in *Ex parte Quirin*, 317 U.S. 1 (1942). *Hamdan*, 548 U.S. at 606 (emphasis in original) (citing *Quirin*, 317 U.S. at 37-38 (explaining that the saboteurs were incorrect that they had not "actually committed or attempted to commit" an offense, because for the charge of crossing enemy lines out of uniform, "the offense was complete" once they had entered U.S. territory)).

Following *Hamdan*, the Second Circuit assumed the availability of joint criminal enterprise to prove a defendant's liability for a completed law of war offense. *Presbyterian*

[7] *See* Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, Pub. L. 107-243 (2002); Remarks by the President in Address to the Nation, (Mar. 17, 2003) (Encl. A-110); Sec. of State Colin Powel, Address to the United Nations (Feb. 5, 2003) (Encl. A-111).

*Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d. Cir 2009) *cert. denied* 131 S.Ct. 79 (2010). But it summarily dismissed a conspiracy claim because as to "conspiracy as an inchoate offense, the Supreme Court held in *Hamdan v. Rumsfeld*, . . . that 'the only conspiracy crimes that have been recognized by international war crimes tribunals . . . are conspiracy to commit genocide and common plan to wage aggressive war.'" *Id*. at 260; *see also Belfast v. United States*, 611 F.3d 783 (11th Cir. 2010) (relying on *Hamdan* for the proposition that "a conspiracy to violate the customary international law of war was not an offense punishable under that body of law in a military commission.").

In reaching this conclusion, the Second Circuit relied in part on the D.C. Circuit's decision in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) *cert. denied* 470 U.S. 1003 (1985). In *Tel-Oren*, plaintiffs brought an Alien Tort Statute action against, *inter alia*, three organizations alleged to have supported the Palestinian Liberation Organization, members of which had perpetrated a terrorist attack in Israel. The district court dismissed because these "three defendants have not been connected to the claimed torts sufficiently to permit the action to proceed against them. . . . Simply put, plaintiffs have not satisfied the requirement of [the Alien Tort Statute] that a tort be stated in violation of the law of nations or a treaty of the United States . . . ." *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F.Supp. 542, 549 (D.D.C. 1981).

The D.C. Circuit affirmed in a *per curiam* opinion. The three judges wrote separately on their preferred readings of the Alien Tort Statute, but each took as established that "terrorism" broadly defined was not a violation of the law of nations. *Tel-Oren*, 726 F.2d at 795-96 (Edwards, J., concurring); *id*. at 806-10 (Bork., J., concurring); *id*. at 823-825 (Robb, J., concurring). Judge Bork, in particular, placed special emphasis on the fact that while "aspects of terrorism have

been the subject of several international conventions, such as those concerning hijacking, . . . no consensus has developed on how properly to define 'terrorism' generally." *Id*. at 807.[8]

**2. Charges I-III would only be violations of the laws of war if they entailed the defendant's actual perpetration of a completed war crime.**

The proof of an offense on the basis of a joint criminal enterprise does not create a new offense or lower the standard of proof for the underlying crime. All joint criminal enterprise does is add elements that reflect a common plan to the elements of the perpetrated crime. For an offense under the Military Commissions Act to be construed as the true equivalent of a joint criminal enterprise to commit an underlying offense, the underlying offense would have to be the equivalent of a lesser included offense of the charges actually brought. The elements of the underlying offenses would have to be "a subset of the elements of the charged offense." *Schmuck v. United States*, 489 U.S. 705, 717 (1989); *see also United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009).

The crimes charged here do not come close to this standard. All three of the charges allege inchoate crimes, only two of which even contained a reference to an underlying offense in

[8] The D.C. Circuit's conclusion was recently reaffirmed in a case where the defendant was convicted for, *inter alia*, bombing passenger aircraft as part of an al Qaeda plot. *Yousef v. United States*, 327 F.3d 56, 103-108 (2d Cir. 2003). Addressing the reach of federal jurisdiction over not just foreign support for terrorist groups but the perpetration of terrorist acts abroad, the Court found that the law of nations did not support jurisdiction. "We regrettably are no closer now than eighteen years ago to an international consensus on the definition of terrorism or even its proscription." *Id.* at 103-108. Nevertheless, the Court found that the federal district courts had jurisdiction over the offense because Congress had enacted legislation to proscribe the acts charged prior to their being carried out. *Id*. at 109-110; *see also* Trial of Spies by Military Tribunals, 31 Op. Atty. Gen. 356 (1918) (opining that courts-martial had no jurisdiction over a Russian spy captured entering U.S. territory because mere planning to cross military lines is not a violation of the law of war but the offense of espionage, which can only be prosecuted in an Article III court).

the Charge Sheet. By definition, none of the charged offenses encompass the elements of an underlying war crime because proof of an underlying war crime was not required.

Conspiracy under the Act, like the crime of conspiracy under municipal law, punishes criminal agreements as a "distinct evil." *See United States v. Jimenez Recio*, 537 U.S. 270, 274-75 (2003). Identical to the charge in *Hamdan*, conspiracy does not require that "the overt acts alleged to have been committed in furtherance of the agreement [are themselves] war crime[s], or even necessarily occurred during time of, or in a theater of, war." *Hamdan*, 548 U.S. at 612. All that is required is the bare allegation of some underlying crime at the center of the agreement, regardless of whether its elements can be proven. And as courts have regularly stressed, that is only the starting point of a joint criminal enterprise. *Talisman Energy*, 582 F.3d at 260.

Inchoate solicitation is even further from a completed offense than an inchoate conspiracy. Where conspiracy and joint criminal enterprise require the forming of a criminal venture, a solicitation is merely an invitation to join one. *See United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010); *United States v. Higgins*, 40 M.J. 67 (C.M.A. 1994).

The 2339B Material Support charge is the furthest of all three from any completed offense. It does not even require the defendant to have "intended to further a foreign terrorist organization's illegal activities." *Humanitarian Law Project v. Holder*, 130 S.Ct. 2705, 2717 (2010). The only crime under the Military Commissions Act that is even superficially similar is Terrorism. But the crime of Terrorism shares no elements with the 2339B Material Support offense.[9] Even if one analogized a terrorist organization to a joint criminal enterprise, there is no such crime as "aiding and abetting a joint criminal enterprise." *Kvočka* Appeal Judgment at ¶ 91.

[9] The elements of Terrorism under MMC, Part IV (24):

> (1) The accused intentionally killed or inflicted great bodily harm on one or more protected persons or engaged in an act that evinced a wanton disregard for human life;

Joint criminal enterprise is a theory of principal liability. Even assuming the provisions of the Act could be construed as requiring the equivalent of joint criminal enterprise liability for underlying crimes, nothing in the record would have put Mr. al Bahlul on notice that he was being held personally liable as a principal for underlying war crimes. *Cf. United States v. Riley*, 40 M.J. 410, 415-416 (C.A.A.F. 1999). The prosecution never pursued a conviction on that basis, the members were not instructed on such a theory and, in fact, the government disclaimed reliance on such a theory before the trial.

If the government believed it had credible evidence to show that Mr. al Bahlul committed actual war crimes, on the basis of a joint criminal enterprise or otherwise, it would have charged him with the same specificity it has used in cases brought before and after his. *See United States v. Morton*, 69 M.J. 12 (C.A.A.F. 2010) ("It is the Government's responsibility to determine what offense to bring against an accused. Aware of the evidence in its possession, the Government is presumably cognizant of which offenses are supported by the evidence and which are not.").

When the government has actually sought to prove liability for completed war crimes, it alleges each criminal act by name and code section.[10] It describes its necessary elements with

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(2) The accused did so in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct; and
(3) The killing, harm or wanton disregard for human life took place in the context of and was associated with hostilities.

The elements of Material Support under MMC, Part IV (25)(B):

(1) The accused provided material support or resources to an international terrorist organization engaged in hostilities against the United States;
(2) The accused intended to provide such material support or resources to such an international terrorist organization;
(3) The accused knew that such organization has engaged or engages in terrorism; and
(4) The conduct took place in the context of and was associated with hostilities.

[10] *See, e.g.*, *United States v. Nashiri*, Charges & Specifications (referred Dec. 19, 2008) (alleging Conspiracy, Murder in Violation of the Laws of War, Perfidy, Destruction of Property in

particularity. The specifications name each and every one of the victims as well as the specific objects the defendants allegedly targeted for attack. In *Muhammed, et al.*, for example, the charges list over one hundred overt acts that each of the defendants did as part of "an enterprise of persons with the intent to further the unlawful purpose of the enterprise." This level of specificity speaks volumes on what the government itself believes is required to charge and ultimately prove a defendant liable for actual war crimes.

There are no comparable allegations in the charges against Mr. al Bahlul. None of the elements of any underlying acts are specified. And under the theory put forward by the government, instructed by the military judge and inevitably found by the members, they did not need to be.

In explaining the elements of the Conspiracy charge, the military judge instructed the members that "proof that [any one of the underlying law of war offenses] actually occurred is not required." (R. at 835). He then went on to emphasize that "the overt act required for this offense does not have to be a criminal act." (R. at 836). When instructing on the Solicitation charge, the military judge again stated that "You are further advised that proof that the offenses listed in the Specification of Charge II actually occurred is not required." (R. at 847); *see also id.* at 846-47) ("it is not necessary that the person solicited agree to the [requested crime] or act upon it"); *id.* at 847 ("it is not necessary the person advised agrees to the advice or act upon it.").

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Violation of the Laws of War, Intentionally Causing Serious Bodily Injury, Terrorism, Material Support); *United States v. Muhammed, et al.*, Charges & Specifications (referred May 9, 2008) (alleging Conspiracy, Attacking Civilians, Attacking Civilian Objects, Intentionally Causing Serious Bodily Injury, Murder in Violation of the Laws of War, Destruction of Property in Violation of the Laws of War, Hijacking, Terrorism, Material Support); *United States v. Khadr*, Charges & Specifications (referred Apr. 24, 2007) (alleging Murder in Violation of the Laws of War, Attempted Murder in Violation of the Laws of War, Conspiracy, Material Support, Spying).

The prosecution neither charged nor pursued a conviction for any underlying war crimes or joint criminal enterprise as a theory of liability. *See Rewis v. United States*, 401 U.S. 808, 814 (1971) (a theory on which the government did not rely and the jury was not instructed "cannot be employed to uphold these convictions."); *United States v. McCracken*, 67 M.J. 4671, 468 (C.A.A.F. 2009) (cannot affirm on a theory "which was not the factual basis upon which members were instructed."). A holistic look at the trial record, from charging to instructions, reveals that principal responsibility or any other vicarious theory of liability for underlying law of war offenses was never the government's goal.

With joint criminal enterprise, in particular, this is not just an inference from the record. The government "expressly disclaimed" joint criminal enterprise as its theory at the outset of its case. *Riley*, 40 M.J. at 416. Before the members were even chosen, prosecutors moved to strike all language from the charge sheet that alleged Mr. al Bahlul "joined a criminal enterprise." (R. at 108-12). After the military judge inadvertently mentioned the word "enterprise" in his instructions, (R. at 834-35), he went back and admonished the members to "please strike the words 'or enterprise', that's not before you." (R. at 868). So even if joint criminal enterprise could have played a role at trial, it did not.

### 3. The retroactive application of the Conspiracy, Solicitation and Material Support offenses would violate the Ex Post Facto clause.

The constitution rejects as *ex post facto* any law that "retrospectively eliminate[s] an element of the offense." *Carmel v. Texas*, 529 U.S. 513, 532 (2000). Equally laws that increase the available punishment after the fact or which make an offense more serious than when committed are as categorical a breach of the *Ex Post Facto* clause as a law creating a new offense whole cloth. In every such case, "the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier

conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Id.* at 533.

The mere fact that Congress may have viewed itself as codifying prior law does not vary the Court's analysis. "[T]o declare what the law is, or has been, is a judicial power, to declare what the law shall be is legislative . . . ." *Town of Koshkonong v. Burton*, 104 U.S. 668 (1881). Regardless of what the legislature thinks the pre-enactment state of the law was, courts have to make their own determination of what law applied at the relevant time. *Id*. In the area of war crimes, that requires courts to find "plain and unambiguous" precedent showing that all of the elements of a pre-existing offense are identical to or contained in the offense charged. *Hamdan*, 548 U.S. at 602; *see also In re Yamashita*, 327 U.S. 1, 17 (1947); *Quirin*, 317 U.S. at 36.

Prior to the Military Commissions Act of 2006, Congress never identified any of the offenses charged here as violations of the laws of war that would be triable by military commission. The War Crimes Act, 18 U.S.C. § 2441, contained nothing like these offenses and military commission jurisdiction under the UCMJ only extended to common law war crimes and two statutory offenses –Aiding the Enemy and Spying. 10 U.S.C. §§ 821, 904, 906. Article 81's proscription of Conspiracy applied only to persons "subject to this chapter," only covered conspiracies "to commit an offense under this chapter," and made no mention of being cognizable by a military commission.[11] 10 U.S.C. § 881. Only with the Military Commissions

[11] Inchoate solicitation and Material Support offenses under the UCMJ were and remain covered only by the general article. *See* 10 U.S.C. § 934. As noted in Appellant's reply brief, the United States has never prosecuted inchoate solicitation to commit war crimes. Reply Brief at 12. The only analogous crime is limited to the discrete context of commanders giving illegal orders. And to prove such charges, the prosecution had to establish that the commander "must have passed

Act of 2006 did Congress perceive this as a gap in the law. And only in 2006, did Congress amend Article 81 to make conspiring "to commit an offense under the law of war" triable by military commission. MCA (2006) § 4(b).

All the offenses brought here do is reduce the number of elements the government must prove from what would be necessary to prove an underlying crime. Had the government truly charged Mr. al Bahlul on the basis of his joining a criminal enterprise, it would have to have proven all the elements of the underlying offenses in addition to his agreement with, solicitation of or support for a criminal venture. But as the record here makes clear, proof that an underlying crime occurred, let alone proof of all of its elements, was "not required." The government has given this Court no "plain and unambiguous" precedent to show that the law of war recognized liability on that basis at any time relevant to the charges here.

Appellant continues to maintain that Congress' authority to proscribe war crimes, even prospectively, is limited by the plain terms of the Define and Punish Clause. But even assuming that Congress has the power to proscribe new war crimes and that it sought to exercise that power here, inchoate conspiracy, solicitation and material support did not become offenses against the laws of war until at least 2006. This was five years after Mr. al Bahlul was in custody. And in enacting them into law, Congress removed elements that would have been required to prove any other war crime.

While a ruling on *ex post facto* grounds avoids the need to decide whether punitive sections of the Military Commissions Act must be struck down, it does require that they be held

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the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known to be criminal." *United States v. Wilhelm von Leeb, et al.*, 12 L. REP. TRIALS OF WAR CRIMINALS 121 (1950). As is also provided in the Appellant's Brief, no court, military or federal, had extraterritorial jurisdiction over the Material Support offense charged here until December 2004. Appellant Brief at 26-29.

unconstitutional as applied to Mr. al Bahlul. The judgment below must be vacated and his case remanded so that the military commission can "apply, if possible, the law in place when his crime occurred." *Weaver v. Graham*, 450 U.S. 24, n.22 (1981) ("[W]e note that only the *ex post facto* portion of the new law is void as to petitioner, and therefore any severable provisions which are not *ex post facto* may still be applied to him.").

**4. This Court should avoid reaching the constitutional issues because under the law Congress passed, charges may only be brought if they constituted "plain and unambiguous" violations of the laws of war at the time they were committed.**

The Supreme Court applies a strong presumption against retroactivity for all laws. "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film*, 511 U.S. 244, 265 (1994). The Supreme Court has consequently required a "clear statement" of intent for any law to apply retroactively.

This requirement is all the greater when legislation has the tendency to raise constitutional problems. "In traditionally sensitive areas, ... the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). It ensures that courts avoid constitutional holdings when Congress did not intend to force a constitutional question.[12] Consequently, the Supreme Court has required statutory language that demonstrates

[12] A relevant illustration can be found in the GTMO habeas litigation. In *Hamdan*, the Court construed statutory limits on habeas corpus applications as only applying prospectively. Under the presumption against retroactivity, Congress had failed to make an "unmistakably clear statement to the contrary." *Boumediene v. Bush*, 553 U.S. 723, 738 (2008) (citing *Hamdan*, 548 U.S. at 575). This prompted Congressional amendments to make explicit that it "shall apply to

Congress considered the temporal scope of a provision and affirmatively chose to apply it retroactively. The kinds of statutory language found to pass this test all involve either clauses explicitly stating "retroactivity" or otherwise using mandatory words of inclusion, such as "shall" and "all." *See Lindh v. Murphy*, 521 U.S. 320, 325-26, 328-29 n.4 (1997).

There is no mandatory language for the retroactive application of the charges here. While the military commissions are given jurisdiction over pre-enactment offenses, the jurisdictional section of the Act presupposes that the charges will allege "offenses" that existed at the time they were "committed." 10 U.S.C. § 948d(a) (2006). The section actually enumerating the crimes contains no statement of retroactivity, mandatory or otherwise. 10 U.S.C. § 950v(b) (2006) ("Offenses. – The following offenses shall be triable by military commission under this chapter at any time without limitation. . . .").

This is in marked contrast with the contemporaneous amendments Congress made to the War Crimes Act. MCA § 6(b). Congress added specified offenses to the War Crimes Act and made explicit that they should be retroactively applied. In a subsection entitled "Retroactive Applicability," Congress made clear that the "amendments made by this subsection, . . ., shall take effect as of November 26, 1997, as if enacted immediately after the amendments made by section 583 of Public Law 105–118 (as amended by section 4002(e)(7) of Public Law 107–273)." *Id*. at § 6(a)(2).

The only suggestion of Congress' view with respect to military commission offenses is a section of the Act entitled "Statement of Substantive Offenses." 10 U.S.C. § 950p (2006). It contains a subsection entitled "Purpose," which states in relevant part that "This chapter does not

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all cases, without exception, pending on or after the date of the enactment of this Act." MCA § 7(e) (2006). In *Boumediene*, the Court found that this was sufficient to force the constitutional question and the Court to strike the law down.

establish new crimes that did not exist before its enactment, but rather codifies those crimes from trial by military commission." *Id*. at § 950p(a). A second subsection entitled "Effect" states that the crimes enumerated "are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter." *Id*. at § 950p(b).

This is a far cry from the clarity Congress used in making the War Crimes Act provisions retroactive. It is this Court's duty to say "what the law is" and nothing indicates Congress' intention to adjudicate its own statute. Rather, Congress recognized that it was enacting legislation that could cover allegations spanning two decades, during which the laws of war developed in a variety of respects. All this section reveals is an understandable desire not to force constitutional questions relating to the *Ex Post Facto* clause.

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). Ordinary presumptions against retroactivity and in favor of constitutional avoidance require that charges brought under the Act be "plain and unambiguous" violations of the laws of war at the time they were allegedly committed.

*Hamdan* laid out in considerable detail why the kind of inchoate liability charged here failed this standard. The current administration has repeatedly expressed its opinion that the Material Support offenses fail this standard.[13] And the persistence of these doubts years after the

[13] *See* Prepared Testimony of Jeh Johnson, DoD General Counsel, before the Senate Armed Services Committee on Jul. 7, 2009, at 4 ("After careful study, the Administration has concluded that appellate courts may find that 'material support for terrorism' – an offense that is also found in Title 18 – is not a traditional violation of the law of war. As you know, the President has made clear that military commissions are for law of war offenses. We thus believe it would be best for material support to be removed from the list of offenses triable by military commission, which would fit better with the statute's existing declarative statement."); Prepared Testimony of David Kris, Assistant Attorney General *cited in* Appellant Brief at 22, n.6 ("[O]ur experts believe that

fact is probably the best evidence that they failed this standard at any time relevant to the charges here. While that requires the judgment in this case to be vacated for simple lack of subject matter jurisdiction, it avoids a construction of the statute that would create significant doubts about its constitutionality.

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there is a significant likelihood that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense").

## QUESTION 2

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

**Short Answer**

Appellant has conducted a thorough review of military commission records from the Civil War and the Philippine Insurrection, including all of the existing records cited in *Hamdan*, in WINTHROP and by the government in its merits briefing here. In every case, as well as cases arising in the twentieth century, the defendants owed a duty of loyalty to the United States. None involved a foreigner who had not undertaken some allegiance to the government by, at a minimum, temporary residence in an area under its authority.

This consistency derives from the fact that the prohibition on aiding the enemy is a component of the law of non-intercourse. As Winthrop describes it, the law of non-intercourse is a term of art that derives from the fact that "[a]ll the inhabitants of the belligerent nations or districts become, upon the declaration or initiation of a foreign war, or of a civil war, (such as was the late war of the rebellion,) the enemies both of the adverse government and of each other, and all intercourse between them is terminated and interdicted." COL William WINTHROP, MILITARY LAW AND PRECEDENTS 776-77 (2d Ed. 1920).[14]

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[14] One of the government's primary argument in its merits briefing to this Court was that "in describing violations of the 'laws and usages of war cognizable by military tribunals,' Colonel Winthrop includes: 'running a blockade, unauthorized contracting, trading or dealing with enemies, furnishing them with money, arms, provisions, medicines, etc. . . .'" Brief for Appellee at 26. The actual passage reads:

> Of the second class, of offenses in violation of the laws and usages of war, those principally, in the experience of our wars, made the subject of charges and trials [by military tribunals] have been – *breaches of the law of non-intercourse with the enemy, such as* running or attempting to run a blockade, unauthorized contracting, trading or dealing with, enemies, or furnishing them with money, arms, provisions, medicines, etc. . . .

WINTHROP at 839-40 (emphasis added).

What makes aiding the enemy criminal is not the support given, but the breach of fidelity it entails. As Winthrop described them, aiding the enemy offenses "are treasonable in their nature." WINTHROP at 629. The treatises he cites call offenses that we would now construe as material support as "closely allied to treason." JOHN O'BRIEN, A TREATISE ON AMERICAN MILITARY LAWS, AND THE PRACTICE OF COURTS-MARTIAL 146 (Philadelphia 1846) (Encl. A-7); *see also* E. SAMUEL, A HISTORICAL ACCOUNT OF THE BRITISH ARMY, AND OF THE LAW MILITARY… 583 (London 1816) (Encl. A-9) (referring to the aiding the enemy offenses as "so many acts of treason"). And like treason, criminal penalties for giving aid to the enemy "can of course apply only to those owing allegiance, either permanently or temporarily, (as in the case of foreign occupied conquered provinces) to the United States." O'BRIEN at 148.

A non-resident alien owes no duty of fidelity to the United States. *See La Plante v. United States*, 6 Ct. Cl. 311 (1870) (rule of non-intercourse does not apply to non-resident aliens). When a non-resident alien supports hostilities against the United States, he may be properly targeted as an enemy "by reason of his hostile acts." *Young v. United States*, 97 U.S. 39, 66 (1877). But as the Supreme Court has held, "He was no offender, in a criminal sense. He had committed no crime against the laws of the United States or the laws of nations . . . ." *Id.*; *see also* O'BRIEN at 148 (unlike spying, aiding the enemy offenses "could never be supposed to apply to an alien enemy.").

**1. Aiding the enemy during the Civil War**

Most of the military commissions to deal with aiding the enemy during the Civil War were convened in border-states like Missouri that were also under martial-law. Offenses against martial-law are "utterly different" from war crimes. *Hamdan*, 548 U.S. at 596. As a consequence,

"[t]he Civil War precedents must . . . be considered with caution," because these military commissions often heard cases arising under both martial-law and the laws of war. *Id*.

Even with that caveat, the status of the defendants charged with aiding the enemy before these commissions was uniform. While Appellant makes no claim of exhaustiveness for every trial conducted during the Civil War, in the cases cited in *Hamdan*, by Winthrop, and the government's merits briefing here, the defendants were either U.S. citizens or resident aliens, who breached their duty of allegiance to the United States by supporting a domestic insurgency. *See* Encl. A-1 (summarizing thirty-four military commission records relating to supporting the enemy from the Civil War). None involved non-resident aliens for their conduct abroad.

While it is always difficult to prove a negative, this absence of precedent is consistent with two other contexts in which the legal liability of non-resident aliens who provided material aid to rebel forces was litigated. The **first** was military commission prosecutions for blockade running. The law of the time recognized the right of non-resident aliens to engage in unmolested trade with either side of a conflict. The only exception applied to "goods contraband of war, or conveyed with intent to violate a blockade." *The Bermuda*, 70 U.S. 514, 551 (1865).

Ships caught supplying the rebellion with contraband were liable to capture and condemnation in a prize court. *The Prize Cases*, 67 U.S. 635, 675-80 (1862). But the foreign crew could only be "temporarily detained . . . to serve as witnesses" in a condemnation hearing. They could be neither prosecuted nor "made prisoners of war, but must be released as soon as the Prize Court has pronounced its verdict. The only penalty which may be pronounced is confiscation of the vessel and the cargo." 2 LASSA OPPENHEIM, INTERNATIONAL LAW: WAR AND NEUTRALITY 476-77 (2d ed. 1912) (Encl. A-8); *see also The Santissima Trinidad*, 20 U.S. 283, 340 (1822) (Story, J.).

This general immunity from prosecution did not, of course, extend to citizens or resident aliens who were caught running a blockade while "owing allegiance to its government." *See* Dig. J. A. Gen. at 79 (Encl. A-11). These individuals not only could be prosecuted, they were. In the military commission of J.B. Sabels, the charges alleged that he was "a citizen owing allegiance to the United States" and that he was the master of the "schooner 'Sting-ray.'" The Sting-ray delivered substantial quantities of munitions "to enemies in arms against the United States" and Sables was found guilty of having "intended [them] for the aid and comfort of the enemy." War Dep't, G.C.M.O., No. 254 (1864) (Encl. A-62).

When prosecutions for blockade running were brought before military commissions, the dispositive question was often the citizenship or residency status of the defendants. Citizens and resident aliens were subject to criminal penalties. Non-resident aliens were released.

Perhaps the most legally significant blockade running case was the military commission of the crew of *The Banshee*. *See* Encl. A-2 (summarizing the documentary evidence relating to the military commission of the crew of *The Banshee*). The ship and its captain, Jonathan Steele, were infamous for running the Union blockade with armaments and other contraband. When finally caught, Steele and his 38-man crew were taken into custody and transferred to Fort Lafayette.

The Secretary of War directed its commanding general "to detail and organize courts-martial and military commissions for the trial of all persons against whom there shall be any evidence of violating the laws of war, in order that they may have a speedy trial and punishment." Sec. of War Stanton to MB Dix (Jan. 12, 1864) (Encl. A-23). Its only adverse findings, however, were against Steele, who the commission believed to be an American, and a

sailor who "was born in Baltimore and makes no claim to be a British or foreign subject." Sec. of Navy Welles to Sec. of State Seward (Feb. 12, 1864) (Encl. A-118).

In reaching this conclusion, the commission held that "citizens of the United States who have been engaged in such illegal practices" were undoubtedly guilty of having "committed a higher offense, by giving aid and comfort to the enemy." MG Dix to Sec. of War Stanton (Feb. 26, 1864). But because the mere provision of support to the enemy by a non-resident alien was not a crime under the laws of war, the rest of the crew was begrudgingly released.[15]

The **second** context in which the legal consequences of non-resident aliens' support of the enemy arose was in forfeiture proceedings. All those living in insurrectionist territory were deemed under the law of war to be "public enemies" whose property was subject to seizure, regardless of their personal feelings about the Union. *Lamar v. Browne*, 92 U.S. 187, 194-95 (1875). As a result, the Army confiscated enormous amounts of property on the authority of both the common law of war and several Congressional statutes. *See* Confiscation Act of 1861, 12 Stat. 319 (1861); Confiscation Act of 1862, 12 Stat. 589 (1862).

In 1863, Congress recognized the potential severity of the large scale expropriation the Army was undertaking. So it created an exception that allowed individuals to mount an action in the Court of Claims to recover their property upon a showing that they had not "given aid or comfort to the present rebellion." An Act to provide for the Collection of abandoned Property and for the Prevention of Frauds in insurrectionary Districts within the United States, 12 Stat.

[15] Two weeks later, Steele was also released after proving he was British. Sec. of Navy Welles to Sec. of State Seward (Feb. 24, 1864). Ultimately, the commissions at Fort Lafayette concluded that *all* blockade runners, foreign nationals and U.S. citizens alike, had to be released if they were not witnesses in a prize proceeding. Anticipating the Supreme Court's decision in *Ex Parte Milligan* by some two years, the commission held that blockade running was a municipal crime triable by military commission only under conditions of martial law. MAJ Turner to COL Hardie (Jun. 4, 1864) (Encl. A-26).

820 (1863); Captured and Abandoned Property Act, 12 Stat. 765, § 12 (1863). This exception was designed to cover a small group of Southern property owners who had remained loyal to the Union. Following President Johnson's blanket pardon in 1868, however, the potential claimants came to include nearly everyone who had property confiscated during the war. Proclamation No. 15, 15 Stat. 711 (Dec. 25, 1868).[16]

After the pardon, recovery could be had so long as the owner could demonstrate that a) they actually had not provided material aid to the rebellion, or b) they were constructively innocent of such disloyalty by virtue of the pardon. All citizens could therefore obtain recovery. *Carlisle v. United States*, 83 U.S. 147, 153 (1872). Less clear were the rights of aliens to do so. This is because the President's pardon power extends only to relieving individuals of the consequences of criminal liability, not to the restoration of property rights in the absence of a predicate offense. *See* Pardoning Power of the President, 10 U.S. Op. Att'y Gen. 452, 453 (1863). The terms of the 1863 Act meant that foreign litigants were forced into the ironic position of arguing that their support for the rebellion was a criminal offense because that was the only way they could obtain the benefit of the pardon.

The Court of Claims described the effect of the pardon as dividing the universe of claimants "into three classes: citizens, resident aliens, and foreigners." *Green v. United States*, 8 Ct. Cl. 412, 420 (1872). The Supreme Court found that "aliens domiciled in the country . . . [were] bound to obey all the laws of the country, not immediately related to citizenship, during

[16] This was because the President's pardon power extends "to grant Reprieves and Pardons for Offenses against the United States." U.S. Const., art. II, § 2, cl. 1. Like modern criminal forfeitures, the Supreme Court treated most confiscation during the Civil War as punitive in nature because the law "regarded the consent of the owner to the employment of his property in aid of the rebellion as an offense, and inflicted forfeiture as a penalty." *Armstrong's Foundry*, 73 U.S. 766, 769 (1867); *cf. Austin v. United States*, 509 U.S. 602 (1993). For the purposes of the 1863 Act, "a pardon relieves the owner of captured property from the necessity of proving he did not give aid and comfort to the rebellion, because the pardon is equivalent to actual proof of his unbroken loyalty." *Young*, 97 U.S at 66.

their sojourn in it." *Carlisle*, 83 U.S at 154. So with respect to citizens and resident aliens, the provision of "material aid . . . to the rebellion" was a criminal act that was "obliterated by the general proclamation of amnesty." *Green*, 8 Ct. Cl. at 419-20.

The same was not true for non-resident aliens. The most famous such case was *Young v. United States*, which dealt with Alexander Collie. A resident of Manchester, England, Collie's support for the rebellion was lavish and ideological. *Young v. United States*, 12 Ct. Cl. 648, 672 (1876). He donated $30,000 "to aid the needy and suffering in the insurgent States." *Id*. at 655. He made a gift of three Whitworth cannons, which as he boasted in a letter to the Governor of North Carolina was "a new kind of gun" that was "reported to be particularly destructive." *Id*. Not only did "his name [become] synonymous with 'blockade-runner,'" he extended a substantial line of credit to the Confederate Government, which ultimately forced his holding company into bankruptcy after the war. *Id*. at 676.

The Union Army sold off some of his cotton and his bankruptcy estate sued for the proceeds under the 1863 Act. There was no question that Collie had given material aid to the rebellion. Indeed, "in his foreign home, he seems to have done as much as any one private person could do to aid and assist the insurgents in their struggle for supremacy." *Young*, 97 U.S. at 63. Had he been "a citizen of the United States, he would have been guilty of treason," and "aside from all questions of pardon and amnesty," such acts were more than sufficient to disqualify him "from the privileges of the statute under which he claims." *Id*. at 64-65.

But while a similarly situated citizen or resident alien could recover by virtue of the pardon, the Supreme Court held that Collie could not. This was because a non-resident alien who provides support to the enemy commits no crime, under the laws of war or otherwise. "He was no offender, in a criminal sense. He had committed no crime against the laws of the United

States or the laws of nations, and consequently he was not, and could not be, included in the pardon granted by the President in his proclamation." *Young*, 97 U.S. at 66.

It was as legal for a foreigner such as Collie to support insurgents under the laws of war, as it was for the United States to confiscate his hostile property. "While he may not have committed a crime for which he can be personally punished, his offending property may be treated by the adverse belligerent as enemy property." *Young*, 97 U.S. at 63. In the Court's view, had Collie been "a soldier slain in battle," no one would suggest that the government was punishing him for an offense. "He was killed because engaged in war, and exposed to its dangers." *Id*. at 67. And in so holding, the Court emphasized that what made aiding the enemy a criminal act, as opposed to a merely hostile one, was the "breach of allegiance." *Id*. at 62

**2. Aiding the enemy during the Philippine Insurrection**

In the lead-up to the Spanish-American War, the law remained the same. When private citizens were found to be supporting insurgents in Cuba against Spain, the Attorney General took the position that "The mere sale or shipment of arms and munitions of war by persons in the United States to persons in Cuba is not a violation of international law, however strong a suspicion there may be that they are to be used in an insurrection against the Spanish Government." International Law – Cuban Insurrection, 21 U.S. Op. Atty. Gen. 267, 270 (1895). The U.S. government itself provided significant support to insurgents in the Philippines and propaganda efforts by the Filipino exiles for use against Spain. JOHN R. M. TAYLOR, THE PHILIPPINE INSURRECTION AGAINST THE UNITED STATES, 1: 97-99 (1906).

With the Treaty of Paris, Spain ceded sovereignty over the Philippines to the United States and provided that those who remained without declaring the preservation of their allegiance to Spain would be deemed to "have adopted the nationality of the territory in which

they may reside." Treaty of Paris, U.S.-Spain, art. 9, 30 Stat. 1755 (10 December 1898). When many insurgents then turned on the United States, they were punished for breaching the duty of allegiance they incurred by virtue of being under U.S. sovereignty.

This allegiance could arise in a number of ways, be it by virtue of citizenship, residence, occupation, an oath or any other act that brought one within the protection of the United States. *See* MG WILLIAM BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW §§ 26-32 (London 1904) (Encl. A-4). As MG Birkhimer noted at the time, all residents of the Philippines incurred a permanent duty of allegiance to the United States after the treaty with Spain. *Id*. at § 32; *see also* Hearings before the Senate Committee on the Philippines, "Charges of Cruelty, Etc., to he Natives of the Philippines," Senate Sess. 57-1, Doc. No. 205, 1070 (1902). ("Persons who rise in arms against an occupying or conquering army and conspire against the authority established by the same within the occupied territory, are regarded by the laws of war as war-rebels, and if captured, may suffer death. . . ."). So whenever military commissions punished individuals for aiding the insurgents, the charges always specified the nature of the defendant's allegiance as an element of the offense.

The collected military commission records remaining from the Philippines Insurrection are available in Record Group No. 94, vols. 402I-402O, which is held at the National Archives. By Appellant's count, these cover 367 military commission cases brought against 819 defendants. After a thorough review, forty-five of the cases include charges the equivalent of aiding or relieving the enemy. In all of these, the charges and specifications allege how the defendant owed a duty of allegiance to the United States. *See* Encl. A-2 (summarizing aiding the enemy cases from the Philippines Insurrection).

The typical cases alleged that the defendant was a "native," meaning a Filipino resident. Some of these cases even involved Filipino officials. For example, the charges against "Nicolas Valenton, native," alleged that Valenton, a police lieutenant, was guilty of "treachery in office in violation of the laws of war" for failing to take action against guerillas whom he knew had been committing sabotage "in violation of his oath of allegiance." Hdqrs. Div. of the Philippines, G.O. 121 (1901) (Encl. A-69). Others involved deserters from the U.S. military, such as the case of "John W. Nicodemus, late private," who deserted and joined the insurgent forces. Hdqrs. Div. of the Philippines, G.O. 35 (1902) (Encl. A-104).

Language indicating the nature of the allegiance was also included when third country nationals were tried for such crimes. In one case, a Belgian resident of the Philippines was charged with providing money, safe-havens and, in the language of the Articles of War, "victuals" to insurgents in violation of the law of war. The specification begins by averring the nature of his allegiance. "Brix Haelterman, a Belgian citizen, enjoying as such certain privileges of a neutral and the protection of the authorities of the government of the United States, did . . . ." Hdqrs. Div. of the Philippines, G.O. 153 (1901) (Encl. A-72). In another case where a Spaniard was charged with having held "correspondence with the enemy by writing and transmitting secretly through the lines," the charges are explicit that the conduct occurred in "places under the military government of the United States." Hdqrs. Div. of the Philippines, G.O. 55 (1901) (Encl. A-64).

The government's pursuit of criminal charges against those who aided the Filipino insurgents did not extend to the so-called "Hong Kong Junta," a group of exiles that the United States had supported during the insurgency against Spain. TAYLOR, at 2: 486-96. Following the U.S. occupation of the Philippines, the Junta turned its efforts against the United States. This

included a "system of propaganda" that was "chiefly devoted to outrages committed by the Americans and their evident efforts to provoke the Filipinos to war." *Id*. at 497-98. The Junta also ran the blockade with arms and other contraband for the insurgents. *Id*. at 495-96. There are no records, however, of Junta members being prosecuted or of the United States seeking their extradition for supporting the insurgency from abroad, even though there were extradition treaties in effect.

**3. Aiding the enemy is closely akin to treason and entails the breach of allegiance owed to sovereign authority.**

During the Korean War, U.S. prisoners of war who had provided propaganda for the communists were prosecuted for aiding the enemy because the "impassable 'line' between belligerents is not geographic. . . Whatever the place, whether within or without an area controlled by the United States, there can be no unauthorized intercourse between a citizen of the United States and an enemy." *United States v. Dickenson*, 20 C.M.R. 154, 167 (C.M.A. 1955); *see also United States v. Batchelor*, 22 C.M.R. 144, 158 (C.M.A. 1956) (describing aiding the enemy as "closely akin to treason"); *United States v. Olsen*, 22 C.M.R. 250, 256 (C.M.A. 1957) ("Accused's position is not essentially different from that of American citizens interned within enemy territory. . . . The obligation of allegiance which attaches to citizenship continues to rest upon the shoulders of one so situated.") (citing *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950); *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948)).

In the context of the present war in Afghanistan, the crime of aiding the enemy remains reserved for those owing allegiance to the United States. For everyone else, it makes one liable to being treated as an enemy. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 558-59 (2004) (Scalia, J., dissenting) ("a plurality of this Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained until the cessation of hostilities and

then released. . . . That is probably an accurate description of wartime practice with respect to enemy aliens. The tradition with respect to American citizens, however, has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process.").

In their lengthy discussion of why the law of war rejects inchoate crimes, the Justices in *Hamdan* made a point of emphasizing that "the crime of aiding the enemy may, in circumstances where the accused owes allegiance to the party whose enemy he is alleged to have aided, be triable by military commission under Article 104 of the UCMJ." *Hamdan*, 548 U.S. at n. 32. The counterpart to Article 104 in the Military Commissions Act makes explicit the necessary "breach of an allegiance or duty to the United States." 10 U.S.C. § 950t(26). And even if one analogized the federal 2339B Material Support statute to aiding the enemy, the law has only reached non-resident aliens since December 2004. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, Title VI, §§ 6602-6603 (2004).

Allegiances matter. One who has an allegiance has a duty of "fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives." *Carlisle*, 83 U.S at 154. The government has the right to expect that individuals under its protection will not support hostile acts against it or its allies. And under the laws applicable to war and peace, crimes ranging from treason to aiding the enemy protect against that distinct evil.

To be sure allegiances can arise in different ways and against the wishes of the individual who owes it. As in the Philippines and the Civil War, those who resist occupation may violate an imposed allegiance to the occupying power. One might also owe an indirect duty to the United States by virtue of an allegiance to a coalition partner, such as the International Security Assistance Force in Afghanistan. Citing the case of the Australian David Hicks, the Justices in

*Hamdan* suggested that in those kinds of circumstances, some GTMO detainees might be liable for aiding the enemy. In fact, "the Government has charged detainees under this provision when it has seen fit to do so." *Hamdan*, 548 U.S. at n. 32.

But the law of war imposes no duty of non-intercourse on individuals with no duty of allegiance. As the Supreme Court held a century and half ago, "A non-resident alien need not expose himself or his property to the dangers of a foreign war. . . . But so soon as he steps outside of actual neutrality, and adds materially to the warlike strength of one belligerent, he makes himself correspondingly the enemy of the other." *Young*, 97 U.S. at 63. By doing so, he exposes himself to the hazards of war; to being targeted or detained for its duration. But at any time relevant to the charges in this case, such an individual would have committed "no crime against the laws of the United States or the laws of nations. . . ." *Id*. at 66.

## CONCLUSION

If the government feels it must bring these particular charges against Mr. al Bahlul, the federal courts are open. If it believes he can be proven guilty of war crimes, it can bring charges in a military commission. "[T]he circumstances of [al Bahlul]'s trial present no exigency requiring special speed or precluding careful consideration of evidence. For roughly [nine] years, [al Bahlul] has been detained at a permanent United States military base in Guantanamo Bay, Cuba. And regardless of the outcome of the criminal proceedings at issue, the Government claims authority to continue to detain him based on his status as an enemy combatant." *Hamdan*, 548 U.S. at 646 (Kennedy, J., concurring).

*Hamdan* pointed the way for the use of joint criminal enterprise as a way of reaching all those who have committed actual violations of the laws of war and aiding the enemy for those who owe have betrayed a duty of allegiance to the United States. Having weighed the credibility of the evidence in its possession, the government affirmatively declined to proceed on either basis in this case. Vacating the judgment below leaves it free to reconsider that decision.

Respectfully submitted,

/s Michel Paradis

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A-15 Sec. of State Seward to Hon. William Stuart (Aug. 5, 1861), reprinted in Official records of the Union and Confederate Armies in the War of the Rebellion ("O.R."), Ser. 2, vol. 2, at 38-39.

A-16 Edward Archibald to Lord Lyons (Sept. 20, 1861), O.R., Ser. 2, vol. 2, at 546.

A-17 Report reflecting order of Sec. of State Seward to release foreign blockade runners, O.R., Ser. 2, vol. 2, at 307.

A-18 Hdqrs. Dep't. of the Missouri, General Orders, No. 13 (Dec. 4, 1861), O.R., Ser. 2, vol. 1, at 233-36.

A-19 Sec. of Navy Welles to Robert Murray, Esq. (May 26, 1862), O.R., Ser. 2, vol. 2, at 289.

A-20 Rear Adm. Lee to Sec. of Navy Welles (Nov. 24, 1863), O.R.N., Ser. 1, vol. 9, at 318.

A-21 Major James Bailey to Asst. Adjutant-General E. D. Townsend (Nov. 24, 1863), O.R., Ser. 1, vol. 29 (pt. 2), at 483-84.

A-22 Richard H. Dana, Jr. to Sec. of Navy Welles (Dec. 26, 1863), O.R.N., Ser. 1, vol. 9, at 279.

A-23 Sec. of War Stanton to Maj.-Gen. Dix (Jan. 12, 1864), O.R., Ser. 2, vol. 6, at 835.

A-24 Provost-Marshal Cassels to Maj.-Gen. Butler (April 25, 1864), O.R., Ser. 2, vol. 7, at 90.

A-25 Sec. of Navy Welles to Rear-Adm. Lee (May 9, 1864), O.R.N., Ser. 1, vol. 10, at 61.

A-26 Maj. L.C. Turner to Col. James A. Hardie (June 4, 1864), O.R., Ser. 2, vol. 7, at 194-95.

A-27 Sec. of Navy Welles to Sec. of War Stanton (July 18, 1864), O.R., Ser. 2, vol. 7, at 472.

A-28 Sec. of Navy Welles to Sec. of War Stanton (Mar. 18, 1865), O.R., Ser. 2, vol. 8, at 406-09.

## IV. Military Commission Orders from the Civil War

A-29 Hdqrs. Dep't. of the Missouri, General Orders, No. 42 (Feb. 17, 1862)

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A-31 Hdqrs. Dep't. of Kentucky, General Court Martial Orders, No. 108 (Oct. 14, 1865)

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A-46 War Dep't, General Court Martial Orders, No. 294 (Sept. 8, 1864)

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A-48 Hdqrs. Dep't of the Missouri, General Orders, No. 7 (Jan. 4, 1862)

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A-50 Hdqrs. Dep't of the Missouri, General Orders, No. 86 (Jun. 7, 1864)

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A-58 Hdqrs. Dep't of the Mississippi, General Orders No. 19 (Apr. 24, 1862)

A-59 Hdqrs. Dep't of the Missouri, General Orders, No. 34 (May 4, 1863)

A-60 Hdqrs. Middle Dep't, 8th Army Corps, General Orders No. 41 (Mar. 6, 1865)

A-61 Hdqrs. Dep't of Florida, General Orders, No. 11 (Feb. 7, 1866)

A-62 War Dep't., General Court Martial Orders, No. 254 (Aug. 24, 1864)

**V. Military Commission Orders from the Philippine Insurrection**

A-63 Hdqrs. Division of the Philippines, General Orders, No. 52 (1901)

A-64 Hdqrs. Division of the Philippines, General Orders, No. 55 (1901)

A-65 Hdqrs. Division of the Philippines, General Orders, No. 6 (1901)

A-66 Hdqrs. Division of the Philippines, General Orders, No. 7 (1901)

A-67 Hdqrs. Division of the Philippines, General Orders, No. 23 (1901)

A-68 Hdqrs. Division of the Philippines, General Orders, No. 24 (1901)

A-69 Hdqrs. Division of the Philippines, General Orders, No. 121 (1901)

A-70 Hdqrs. Division of the Philippines, General Orders, No. 137 (1901)

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A-72 Hdqrs. Division of the Philippines, General Orders, No. 153 (1901)

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A-91 Hdqrs. Division of the Philippines, General Orders, No. 5 (1902)

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A-93 Hdqrs. Division of the Philippines, General Orders, No. 69 (1902)

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A-98 Hdqrs. Division of the Philippines, General Orders, No. 30 (1900)

A-99 Hdqrs. Division of the Philippines, General Orders, No. 69 (1900)

A-100 Hdqrs. Division of the Philippines, General Orders, No. 357 (1901)

A-101 Hdqrs. Division of the Philippines, General Orders, No. 362 (1901)

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A-105 Hdqrs. Division of the Philippines, General Orders, No. 103 (1902)

A-106 Hdqrs. Division of the Philippines, General Orders, No. 108 (1902)

## VI. Miscellaneous

A-107 Law of the Supreme Iraqi Criminal Tribunal, Al-Waq'I Al-Iraqiya – No. 4006 (Oct. 18, 2005).

A-108 Statute of the Iraqi Special Tribunal (Dec. 10, 2003).

A-109 Remarks by the President in Address to the Nation (Mar. 17, 2003).

A-110 Secretary of State Colin Powel, Address to the United Nations (Feb. 5, 2003).

A-111 Trial of the Major War criminals Before the International Military Tribunal Nuremberg, 14 November 1945-1 October 1946 (1947).

A-112 Trials of War Criminals before the Nuernberg Military tribunals under Control Council Law No. 10 (G.P.O 1949).

A-113 Report of Lieutenant Colonel Clio Edwin Straight, Deputy Judge Advocate for War Crimes, European Command, to Colonel James L. Harbaugh, Jr., Judge Advocate, European Command, June 1944-July 1948.

A-114 Gideon Welles, Diary of Gideon Welles, Secretary of the Navy Under Lincoln and Johnson (John T. Morse, Jr. ed., 1911).

A-115 Ed. R. S. Canby, ms. opinion (Dec. 10, 1863), Turner-Baker Papers, Case No. 2485, National Archives and Records Administration ("NARA").

A-116 Sec. of State Seward to Sec. of War Stanton (Jan. 11, 1864), Turner-Baker Papers (microfilm), Case No. 2490, NARA.

A-117 First Report of the Military Commissions to Examine Prisoners in Fort Lafayette, Part 3 (Feb. 11, 1864), ms report, NARA.

A-118 Sec. of Navy Welles to Sec. of State Seward (Feb. 12, 1864), mss., NARA.

A-119 Lord Lyons to Sec. of State Seward (Feb. 19, 1864), mss., NARA.

A-120 Lord Lyons to Sec. of State Seward (Feb. 20, 1864), mss., NARA.

A-121 Sec. of Navy Welles to Sec. of State Seward (Feb. 24, 1864), mss., NARA.

A-122 Gen. Dix to Sec. of War Stanton (Feb. 26, 1864), mss., NARA.

A-123 Sec. of Navy Welles to Rear Adm. Lee (July 19, 1864), in Prisoners Captured on Blockade Runner, 1861-1865, ms. ledger, Dept. of Navy, Record Group 45, NARA.

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was sent via e-mail to CAPT Edward White on the 24th day of February 2011.

Dated: 24 February 2011

/s MAJ Todd Pierce, USA

MAJ Todd E. Pierce, USA
Appellate Defense Counsel
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Washington, DC 20005
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**UNITED STATES COURT OF MILITARY COMMISSION REVIEW**
***before* F. Williams, D. Conn, and C. Thompson**

| | |
|---|---|
| UNITED STATES<br><br>Appellee<br><br>*v.*<br><br>ALI HAMZA AHMAD SULIMAN AL BAHLUL<br><br>Appellant. | MOTION<br><br>CMCR CASE NO. 09-001<br><br>Tried at Guantanamo, Cuba on<br>7 May 2008,<br>15 August 2008,<br>24 September 2008,<br>27 October – 3 November 2008<br><br>Before a Military Commission convened by<br>Hon. Susan Crawford<br><br>Presiding Military Judge<br>Colonel Peter Brownback, USA (Ret.)<br>Colonel Ronald Gregory, USAF<br><br>DATE: 24 February 2011 |

**TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW**

COMES NOW Appellant and respectfully requests that this Court accept the appendix of documents that accompany Appellant's response to this Court's specified issues. Most of the attachments are scans of document originals, meaning that the file sizes are very large. We have organized them onto a DVD, five copies of which have been delivered to the Court and two copies of which have been delivered to counsel for the government. Their inclusion will enable this Court to fully consider the issues it has specified. Counsel for the government has been consulted and consents to proceeding in this manner.

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Respectfully submitted,

/s Michel Paradis

Michel Paradis
CAPT Mary McCormick, USN
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was sent via e-mail to CAPT Edward White on the 24th day of February 2011.

Dated: 24 February 2011

/s MAJ Todd Pierce, USA

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