MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 104F** **ORDER** **DEFENSE MOTION TO DISMISS BECAUSE THE CONVENING AUTHORITY EXCEEDED HIS POWER IN REFERRING THIS CASE TO A MILITARY COMMISSION** 15 January 2013

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009)(hereafter "2009 MCA"). He was arraigned on 9 November 2011.

2. On 30 August 2012, the Defense filed a motion (AE 104) requesting dismissal of the charges against the accused with prejudice based on a legal theory that referral of charges for trial by military commission is *ultra vires* and beyond the scope of the 2009 MCA because the alleged violations of the law of war occurred prior to the commencement of hostilities between the United States and certain unlawful combatants, including Al Qaeda. The Prosecution filed a response opposing the Defense motion on 13 September 2012, and the Defense submitted a Supplemental Filing on 17 October 2012, incorporating by reference two briefs of *amicus curiae* in the case of *al-Nashiri v. MacDonald*, currently pending decision by the U.S. Court of Appeals for the Ninth Circuit.

3. The §§948c and 948d of the 2009 MCA vest jurisdiction in military commissions to try "any alien unprivileged enemy belligerent" for "any offense made punishable by…the law of war, whether such offense was committed before, on, or after September 11, 2001."

a. Existence of Hostilities as a Question of Fact. Whether hostilities existed on the date of the acts alleged to have been committed by the accused is as much a function of the nature of hostilities as any particular legally significant act by either the legislative or executive branches of government. Whether hostilities existed on the dates of the charged offenses necessarily is a fact-bound determination; moreover, whether a state of hostilities existed is as much a function of the will of the organization to which the accused is alleged to belong to as the U.S. government. In determining whether hostilities exist or do not exist, the enemy gets a vote.[1] Whether Al Qaeda, the organization of unprivileged enemy belligerents to which the accused is alleged to be a member, considered itself to be at war with the United States on the date of the alleged law of war violations is a factor among many to be considered by the trier of fact and is as relevant as any judgments made or withheld by the President or the Congress.

b. Existence of Hostilities as a Question of Law.

(1) Congress, with the President's concurrence, has impliedly made a political judgment regarding the existence of hostilities through its recognition of military commissions as a forum for adjudication of violations of the laws of war occurring "before, on, or after

[1] "In connection with the plan of a campaign we shall hereafter examine more closely into the meaning of disarming a nation, but here we must at once draw a distinction between three things, which as three general objects comprise everything else within them. They are the military power, the country, and the *will of the enemy*. The military power must be destroyed, that is, reduced to such a state as not to be able to prosecute the war. This is the sense in which we wish to be understood hereafter, whenever we use the expression "destruction of the enemy's military power." The country must be conquered, for out of the country a new military force may be formed. *But if even both these things are done, still the war, that is, the hostile feeling and action of hostile agencies, cannot be considered as at an end as long as the will of the enemy is not subdued also…*" Carl von Clausewitz, On War Book I Chapter 2 (1832)(emphasis added). In other words, whether the enemy has the will to make war is determinative of whether hostilities begin to exist, continue to exist, or have been terminated.

September 11, 2001…" 2009 MCA, §948d. Implicit in a plain-meaning reading of this statutory language is Congress' recognition of the fact that violations of the law of war might have occurred during a state of hostilities existing prior to the attacks of September 11, 2001, and the United States Government had simply been slow to recognize the existence of a state of hostilities then existing between the United States and Al Qaeda and its affiliates and franchises. To wit, in World War II, hostilities began the moment the first bomb was dropped on Pearl Harbor, not the next day when Congress declared war.[2]

(2) In support of its position, the Defense cites *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir 2010). In fact, *Al-Bihani* supports the government's interpretation in this case. A unanimous panel of the U.S. Court of Appeals for the District of Columbia Circuit noted:

> The determination of when hostilities have ceased is a political decision, and we defer to the Executive's opinion on the matter, at least in the absence of an authoritative congressional declaration purporting to terminate the war. Al-Bihani urges the court to ignore *Ludecke's* controlling precedent because the President in that case had pronounced that a war was ongoing, whereas in this case the President has made no such pronouncement. We reject Al-Bihani's entreaty. A clear statement requirement is at odds with the wide deference the judiciary is obliged to give to the democratic branches with regard to questions concerning national security. In the absence of a determination by the political branches that hostilities in Afghanistan have ceased, Al-Bihani's continued detention is justified. *Al-Bihani v. Obama*, 590 F.3d 866, 874-5 (D.C. Cir. 2010), quoting *Ludecke v. Watskins*, 335 U.S. 160, 168-70 & n.13 (1948)("Termination [of a state of war] is a political act.").

Under the "wide deference" standard, the two political branches' collective determination, evidenced by passage of the statute[3] and its signing into law,[4] that hostilities with al-Qaeda in

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[2] Joint Resolution Declaring That a State of War Exists Between The Imperial Government of Japan and the Government And the People of the United States and Making Provisions To Prosecute the Same, S.J. Res. 116, 77th Cong., December 8, 1941 ("Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, that the state of war between the United States and the Imperial Government of Japan which has been thus thrust upon the United States is hereby formally declared…")

[3] National Defense Authorization Act for Fiscal Year 2010, Pub.L.No. 111-84 (2009).

[4] Remarks on Signing the National Defense Authorization Act for Fiscal Year 2010, Daily Comp.Pres.Doc. (October 28, 2009).

Yemen commenced prior to the date of the first act charged against the accused in this case is entitled not to be second-guessed by the judiciary. As the political branches have authority to determine when hostilities have ceased, *Al-Bihani* at 875, so must they have corollary authority to determine when hostilities began. The political branches may make this assessment even when such a determination is not stated as a date certain, but rather is approximated by the use of the temporal language in the 2009 MCA's jurisdiction provision – "…any offense made punishable by…the law of war, whether such offense was committed before, on, or after September 11, 2001…" 2009 MCA §948d.

(3) Finally, if the President disagreed with the Convening Authority's decision to refer this case for trial by military commission, he had ample authority to countermand the Convening Authority's decision by requiring the Secretary of Defense to order the charges dismissed. *See* 2009 MCA §948b(b). *See also* 2009 MCA §948h. The 2009 MCA prescribes a rule of construction wherein military commission practice is informed by and closely tracks that of the Uniform Code of Military Justice (UCMJ). Under the UCMJ, a superior authority may always assume authority over a case from an inferior commander and cause charges to be referred for trial or dismissed, or to be accorded other alternate dispositions. *See* 2009 MCA, §948b(c)("Construction of Provisions – The procedures for military commissions…are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the [UCMJ])…The judicial construction and application of chapter 47 of this title [is] instructive [but not specifically binding]"). *See also* Manual for Courts-Martial (2012 ed.), Rule for Courts-Martial 306(a) and 401(c). If the President had disagreed with the implicit determination evidenced by the charges against the accused, he could have taken action. That he did not evidences his concurrence with Congress' determination expressed through the 2009 MCA that

certain violations of the law of war occurring prior to September 11, 2001, could be the subject of military commissions proceedings.

c. Mixed questions of law and fact, which are partially jurisdictional in nature, are not uncommon in military practice. *See, e.g.,* 10 U.S.C. §883 (Art 83, UCMJ). To establish the elements of fraudulent enlistment, the government must prove "the accused was enlisted or appointed in an armed force." This requires proving an element both jurisdictional, giving a court-martial personal jurisdiction over the accused, and factual (i.e. an enlistment or appointment cannot be fraudulent if it is not an actual enlistment or appointment).

d. The Commission is mindful this issue is currently pending before the U.S. Court of Appeals for the Ninth Circuit.

4. Findings.

a. Question of Fact. Whether hostilities existed between Al Qaeda and the United States on the dates of the accused's alleged acts is a question of fact and an element of proof, which must be carried by the government.

b. Issue of Law.

(1) Whether hostilities existed between Al Qaeda and the United States on the dates of the accused's alleged acts is a jurisdictional question subject to purely legal determination under a "wide deference" standard;

(2) The political branches have made a 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; and

(3) The political branches' collective determination is entitled to judicial deference by this commission.

Accordingly, AE 104 is DENIED without prejudice, with leave to file for reconsideration at an appropriate time.

So ORDERED this 15th day of January, 2013.

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JAMES L. POHL
COL, JA, U.S. Army
Military Judge