UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

D012
RULING ON MOTION
TO DISMISS (EX POST FACTO)

And

D050
DEFENSE REQUEST TO ADDRESS
SUPPLEMENTAL AUTHORITY ON D012

14 July 2008

The Defense has moved this Commission to dismiss referred charges for lack of subject matter jurisdiction. Specifically they claim the charges of Conspiracy and Providing Material Support for Terrorism violate the prohibition against Ex Post Facto application of the law, found both in the Constitution, in Common Article 3 of the Geneva Conventions, and in the law of nations. The Government opposes the motion, arguing variously that the Constitution does not protect aliens held outside the United States, and that even if it does, there is ample precedent in the Law of Armed Conflict for the trial of these offenses by military commission as violations of the Law of Armed Conflict.

BURDEN OF PERSUASION

The Defense characterizes its motion as one challenging the Commission's jurisdiction, and argues that the burden should be on the Government to prove jurisdiction, in accordance with R.M.C. 905(c)(2)(B). The Government denies that this is a jurisdictional issue, and argues that the burden remains on the Defense, as moving party, in accordance with RMC 905(c)(2)(A). Because a military commission has narrowly constrained jurisdiction as to offenses, the Commission assigns the burden to the Government to demonstrate that the offenses with which the accused is charged were violations of the law at the time Mr. Hamdan engaged in the actions with which he is charged.

DOES THE CONSTITUTION OF THE UNITED STATES PROTECT MR. HAMDAN?

The Commission has previously determined that an alien unlawful enemy combatant held outside the sovereign borders of the United States, who has no voluntary connection to the United States other than his confinement, cannot claim the protections of the Constitution *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007); *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) cert. den. 516 U.S. 913 (1995); *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 284 (D.C. Cir. 1989). In light of the Supreme Court's recent ruling, the Defense requests reconsideration and agues that the Constitution does

protect detainees held in Guantanamo, and specifically Mr. Hamdan. *Boumediene v. Bush,* 533 U.S. _____ (2008), [hereinafter *Boumediene*].

In addition, the Defense points out that the Ex Post Facto clause of the Constitution is not a substantive protection to be claimed by individual claimants, but a substantive limitation on the power of Congress. "There is a clear distinction between . . . prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states. Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' . . . it goes to the competency of Congress to pass a bill *of that description." Downes v. Bidwell*, 182 U.S. 244, 276-77 (1901). Thus, the Defense argues, whether the ex post facto protections of the Constitution protect aliens in Guantanamo Bay, the Constitution prohibits Congress from enacting *ex post facto* legislation. This Commission concludes that Congress is not authorized to pass *ex post facto* legislation, and thus will review the MCA prohibitions against conspiracy and material support for terrorism to determine whether they are such offenses.

To prevail on this motion, the Government must show that conspiracy and material support for terrorism were traditional violations of the law of armed conflict when he engaged in the conduct with which he is charged.

CONSPIRACY

The parties have argued this issue with commendable skill and passion. The Defense points to the plurality's holding that conspiracy is not a "clear and unequivocal" violation of the common law of war (citing *Hamdan v. Rumsfeld,* 126 S.Ct. 2749, 2780 & n. 34); that there has been no "universal agreement and practice" establishing conspiracy as a violation of the law of war (citing *Ex Parte Quirin*, 317 U.S. 1, 30); the rejection of conspiracy as a war crime by the Nuremberg Tribunal on the ground that "[t]he Anglo-American concept of conspiracy was not a part of European legal systems and arguably not an element of the internationally recognized laws of war" (citing T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 36 (1992); an Amicus Curiae Brief of Specialists in Conspiracy and International Law before the Supreme Court; and the conclusion of a UN Special Rapporteur who concluded that conspiracy is not an offense under the laws of war (citing U.N. Doc. A//HRC/6/17/Add.3 (Nov. 22, 2007).

The Government responds that the Supreme Court's opinion in *Hamdan* should be read in light of the absence (at that time) of Congressional action to define violations of the law of war under its Constitutional authority to "define and punish" offenses against the laws of nations, and cite Justice Kennedy's observation that "Congress, not the Court, is the branch in the better position to undertake the sensitive task" of determining whether conspiracy is a war crime. *Hamdan v. Rumsfeld,* 126 S. Ct. 2749, 2809 (Kennedy, J, concurring). The Government notes that conspiracy convictions of Nazi saboteurs were upheld in *Ex Parte Quirin,* 317 U.S. 1 (1942) and *Colepaugh v. Looney,* 235 F. 2d 429, 431, 433 (10th Cir 1956), cert denied 352 U.S. 1014 (1957). In the Pacific theater, "orders establishing the jurisdiction of military commissions in various theaters of operation provided that conspiracy to violate the laws of war was a cognizable offense" *Hamdan* at 2834 (Thomas, J. dissenting). The World War II military tribunals of several European nations recognized conspiracy to violate the laws of war as an

offense triable before military commissions, and military commissions in the Netherlands and France tried conspiracy to violate the laws of war, as did the International Military Tribunal at Nuremburg with respect to four specific types of conspiracies. *Hamdan* at 2836, n. 14. (Thomas, J. dissenting). The conspirators who assassinated Abraham Lincoln were tried and punished by a military commission for conspiracy, and an 1865 Opinion of the Attorney General declares that "to unite with banditti, jayhawkers, guerillas or any other unauthorized marauders is a high offense against the laws of war; the offence is complete when the band is organized or joined." 11 Op. Atty. Gen. at 312.

MATERIAL SUPPORT FOR TERRORISM

Once again, the question here is whether "Material Support for Terrorism," criminalized by 18 U.S.C. §950v(25), is sufficiently well established as a violation of the law of war that exposing Mr. Hamdan to punishment for that offense is not an ex post facto application of the law.

For this offense, the Defense points again to the UN Special Rapporteur, who concluded in 2007 that terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying and conspiracy "go beyond offences under the law of war." *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,* 12, U.N. Doc.A/HRC/6/17/Add.3 (Nov 22, 2007). American military tribunals have never tried this offense, and it is not listed as a war crime in the U.S. War Crimes Act, 18 U.S.C. § 2441, or the U.S. Army's *Law of War Handbook* (2005). A Congressional Research Service report prepared for Members of Congress recently concluded that "defining as a war crime 'material support for terrorism' does not appear to be supported by historical precedent."[1] Nor is the offense mentioned in any of the treaties or statutes that define law of war offenses: the Hague Conventions, the Rome Statute of the International Criminal Court, nor the International Criminal Tribunals for the Former Yugoslavia, Rwanda or Sierra Leone.

In reply, the Government argues that violations of Common Article 3 (such as "violence to life and person" of those "taking no active part in hostilities") are widely considered to be war crimes and have been criminalized by the U.S. War Crimes Act, 18 U.S.C. §2441; Providing Material Support for Terrorism and Providing Material Support for an International Terrorism Organization have been violations of federal law, with provisions made for the prosecution of extraterritorial offenses, since 1993. (18 USC §2339A and 2339B) U.N. Security Council Resolutions 1189 and 1373 condemn terrorism and require member states to criminalize it; and the United States is a party to twelve international treaties that prohibit kidnappings, hijackings, bombings, the killing of innocent civilians and other acts of "terrorism." In essence, the Government argues in part that because terrorism is condemned by International law, and material support for terrorism a violation of U.S. federal law, material support for terrorism has traditionally been a crime under the law of armed conflict, or at least that Hamdan must have known his conduct was not "innocent when done."

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[1] Jennifer K. Elsea, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparisons with Previous DOD Rules and the Uniform Code of Military Justice,* 12 (CRS, updated Sep. 27, 2007), available at http://www.fas.org/sgp/crs/natsec/RL33688.pdf.

The Government offers evidence of U.S. practice during the American Civil War. An 1894 Congressional document asserted that during the war, there were "numerous rebels . . . that . . . furnish[ed] the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents [we]re banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste to the country. All such persons are by the laws of war in every civilized country liable to capital punishment." H.R. Doc. No. 65, 55th Cong. 3d Sess., 234 (1894). Likewise, Colonel Winthrop wrote that during the Civil War numerous persons were "liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by a military commission" based upon their support for unlawful combatants. Winthrop, *Military Law and Precedents*, 784.

In addition, the language of General Orders establishing the jurisdiction for military commission during the Civil War suggests the existence of an offense similar to "providing material support for terrorism" existed during that conflict: "There are numerous rebels . . . that . . . furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several areas of the interior counties for the purpose of assisting the enemy to rob, to maraud, and to lay waste of the country. *All such persons are by the laws of war in every civilized country liable to capital punishment* (emphasis added)). Numerous trials were held under this authority." *Hamdan v. Rumsfeld, supra,* at 817 n. 9 (Thomas, J. dissenting)(quoting from H.R. Doc. No. 65, 55th Cong., 3d Sess. 164 (1894). Thereafter Justice Thomas cites several General Court-Martial Orders in which convictions were upheld for "being a guerrilla." The meaning of this term is made clear by Colonel Winthrop, who explains, under his description of "Irregular Forces in War," the meaning of the term "Guerillas." The term encompasses "irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders. . . . ." *Winthrop,* at 783. After a discussion of these forces, which a modern reader might understand to be a description of "unlawful combatants," Winthrop continues in this vein:

> But a species of armed enemies whose employment in a military capacity was not and could not be justified were the so called "guerillas" of our late civil war. [Note 55 inserts here "Called 'guerilla-marauders' in the act of July 2, 1864, c. 215 and the 105th Article of War. They were also styled, in different localities, "bushwhackers," "jayhawkers," "regulators," etc. Prof. Leiber (Inst § 82, 84) refers to them as "highway robbers or pirates" and "armed prowlers."] These were persons acting independently, and generally in bands, within districts of the enemy's country or on its borders, who engaged in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage, and even in the ransacking of towns, from motives mostly of personal profit or revenge." Winthrop, at 783-784 and note 55.

Only in light of the further clarification provided in this footnote does the difference between the two types of Civil War "guerillas" appear. Traditional guerillas were irregular forces who supported the Confederate armed forces, and for whom the protections of prisoner of war status was sometimes claimed. Winthrop at 783. The "guerillas" of the civil war era, i.e. those described in the numerous General Court Martial Orders Justice Thomas refers to in *Hamdan*, at 817 n. 9, were more akin to (and were actually referred to as) "spies," "bridge-burners,"

"pirates," "highway robbers" and "guerilla-marauders." They were subject to trial by military commission, along with those who "join, belong to, act, or co-operate" with them. *Ibid.* They acted entirely without the law "plundered the property of peaceable citizens," and usually for motives of personal profit or revenge. In modern parlance, they might be referred to as terrorists, or those who provided material support for terrorism. At least in American Civil War practice, they were subject to trial by military commission for their activities.

The Government concedes that although the offense of "providing material support for terrorism" does not appear in any international treaty or list of enumerated offenses, the *conduct* now criminalized by the MCA provision has long been recognized as a violation of the law of war. 18 USC §950v(b)(24) defines the offense of Terrorism such that any person "who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life...." shall be punished. Intentionally killing or inflicting great bodily harm upon a protected person is clearly a violation of the law of war. Taking all of this history into account, the Government argues that Congress merely *defined* as "Material Support for Terrorism" conduct that was already proscribed and subject to trial by military commission.

The evidence for both Conspiracy and Material Support for Terrorism is mixed. Absent Congressional action under the define and punish clause to identify offenses as violations of the Law of War, the Supreme Court has looked for "clear and unequivocal" evidence that an offense violates the common law of war, *Hamdan,* at 2780 and n, 34, or that there is "universal agreement and practice" for the proposition. *Ex Parte Quirin,* 317 U.S. 1, 30 (1942). But where Congress has acted under its Constitutional authority to define and punish offenses against the law of nations, a greater level of deference to that determination is appropriate. Quoting from an opinion by the U.S. District Court for the Southern District of New York, the Government argues:

> [E]ven assuming that the acts described in 18 U.S.C. §§ 2332 & 2332a are not *widely* regarded as violations of international law, it does not necessarily follow that these provisions exceed Congress's authority under [Article I, Section 8] Clause 10. Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to "define" such offenses. Hence, provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power to *define* offenses against the law of nations. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820)(Story, J.)("Offenses . . . against the law of nations cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. . . . [T]herefore . . . , there is a peculiar fitness in giving the power to define as well as to punish.") Note, Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Ominbus Diplomatic Security and Antiterrorism Act of 1986,* 72 Cornell L. Rev. 599, 611 (1987) (Congress may define and punish offenses in the international law, notwithstanding a lack of consensus as to the nature of the crime in the United States or in the world community.)

United States v. Bin Laden, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000), *criticized on other grounds by United States v. Gatlin*, 216 F. 3d 207, 212 n.6 (2d Cir 2000); see also Anthony J. Colangelo, *Constitutional Limits on Extra territorial Jurisdiction; Terrorism and the Intersection of National and International Law,* 48 Harv. Int'l L. J. 121, 142 (2007)) ("we might assume , , , that Congress, representing the United States' sovereign lawmaking body within the international system, has at least some leeway to aid in the development of the category of international offenses by pushing the envelope beyond where it already is").

CONCLUSION AND DECISION

In enacting the MCA, Congress asserted that "The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission. . . . Because the provisions of the subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter." MCA § 950p(a),(b). Thus, Congress was clearly aware of the Constitutional limitation of its power, and indicated its sense that it had complied with that limitation. In light of Congress's enumerated power to define and punish offenses against the law of nations, and its express declaration that in doing so, it has not enacted a "new crimes that did not exist before its enactment", the Commission is inclined to defer to Congress's determination that this is not a new offense. There is adequate historical basis for this determination with respect to each of these offenses.

The Government has shown, by a preponderance of the evidence, that Congress had an adequate basis upon which to conclude that conspiracy and material support for terrorism have traditionally been considered violations of the law of war.

The Motion to Dismiss for Lack of Subject Matter Jurisdiction Over Ex Post Facto Charges is DENIED as to both offenses.

Keith J. Allred
Captain, JAGC, USN
Military Judge