

UNITED STATES OF AMERICA)	PROSECUTION RESPONSE
)	TO DEFENSE MOTION
)	CHALLENGING
v.)	COMMISSION'S
)	JURISDICTION AT
)	GUANTANAMO BAY, CUBA
)	
DAVID MATTHEW HICKS)	15 October 2004
)	

1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Defense motion should be denied.

3. Facts.

a. The President’s Military Order of 13 November 2001, authorizes the Secretary of Defense or his designee to convene military commissions for the trial of certain individuals “for any and all offenses triable by military commission.” *See* The President’s Military Order of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, (hereinafter “The President’s Military Order”). The President’s Military Order also provides that military commissions may “sit at any time and place” as the Secretary may provide. *Id.*

b. The President specifically stated that he issued this Military Order “by the authority vested in [him] as President and as Commander in Chief of the Armed Forces ... [including] sections 821 and 836 of Title 10 United States Code.” President’s Military Order (Preamble); *See also* 10 United States Code §§821 and 836.

c. The Accused was captured in Afghanistan on or about December 2001 during Operation Enduring Freedom. On or about 12 January 2002, U. S. Forces transferred the Accused to Guantanamo Bay, Cuba for continued detention.

d. The President determined that the Accused is subject to his Military Order on 3 July 2003.

e. The Appointing Authority approved the charges in this case on 9 June 2004 and on 25 June 2004 referred the same to this military commission in accordance with commission orders and instructions. In the Appointing Authority’s 25 June 2004 memorandum appointing military commission members in this case, he stated that “[t]he military commission will meet at such times and places as directed by the Appointing Authority or the Presiding Officer.” *See* Appointing Authority Appointment of Military Commission Members No. 40001, dated 25 June 2004. On 5 October 2004, the Appointing Authority stated that “[a]ll sessions of the Commission shall be conducted at Guantanamo Bay.” *See* Memorandum for the Presiding Officer, dated 5 October 2004, Subject: Request for authority Submitted as “Interlocutory Question 1.”

f. With regard to this ongoing operation, on 4 October 2004, The Secretary of Defense Donald H. Rumsfeld marked the “third anniversary of the commencement of Operation Enduring Freedom” stating that we took “the battle to the extremists, and we attacked al Qaeda and The Taliban in Afghanistan,” and that we are “[t]hree years into the global war on terror.” *See* Remarks as Delivered by Secretary of Defense Rumsfeld, New York City, New York, 4 October 2004 (the war against al Qaida “will likely go on for years”) (hereinafter “Secretary Rumsfeld’s 4 October 2004 Remarks”)

4. Discussion.

a. Military commissions can sit outside of Afghanistan.

Winthrop is an 1896 treatise cited by the Defense, and is in no way authoritative with regard to removing prisoners from the theater of operations and holding trial outside the area of operations. This Winthrop passage which the Defense relies upon was written prior to the creation of jurisdiction for military commissions that was granted in Title 10 of the U. S. Code. See 10. United States Code (hereinafter “U.S.C.”) §§ 821 and 836. This statutory authority for military commissions contains no limitation on the situs for military commissions. *See Id.* The Defense motion also suggests that the U.S. Supreme Court held in *In Re Yamashita*, 327 U.S. 1 (1946), and in *Ex Parte Quirin*, 317 U.S. 1 (1942), that military commissions can try cases in some locations but not others. This suggestion is incorrect. While the Supreme Court addressed the jurisdiction of military commissions in those cases, it made no holding regarding any limitation on the permissible locations of military commissions. The Supreme Court also did not announce any limitation on where a military commission may sit when it considered the habeas corpus petitions of persons convicted by military commissions in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), or awaiting trial by military commission in *Rasul*, *supra*. The Court simply has never held a military commission, which has jurisdiction over the offense and over the accused, must hear cases in a war zone or in any other particular place.

1. This is a Global War, and by definition, the “theater of operations” is larger than Afghanistan.

Beyond the fact that nothing prohibits holding commissions outside the “theater” of conflict, as discussed in paragraph 2 below, the Defense incorrectly attempts to limit the “theater” in our war with al Qaida to Afghanistan. United States courts have addressed the “theater of war” issue. For instance, in the case of a German citizen held in New York awaiting a military trial for spying, the court said:

World War [I] through which we have just passed, the field of operations which existed ... brought the port of New York within the field of active operations. The implements of warfare and the plan of carrying it on in the last gigantic struggle placed the United States fully within the field of active operations. The term "theater of war," as used in the *Milligan* Case, apparently was intended to mean the territory of activity of conflict. With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations One of the lessons taught by this war is that the ocean is no longer a barrier for safety or an insurance against America's being involved in [foreign] wars.

Weesels v. McDonald, 265 F. 754 at 763 - 64 (E.D.N.Y. 1920) (addressing the advances of warfare tactics during World War I since the decision in *Ex Parte Milligan*, 71 U. S. 2 (1866) and discussing the de facto expansion of the meaning of “theater of war.”)

Therefore, to say that Guantanamo Bay, Cuba, lacks jurisdiction because it is far away from the “theater of war,” is just plain wrong. The Accused was captured in the context of this global war where he and his co-conspirators hatched plans to attack and or conduct attacks and military operations against the United States and its allies in Europe, Africa, Asia, the Middle East, and in the United States itself, planning and attacks that continue to this day.

2. There is no prohibition in moving detainees from Afghanistan to Guantanamo, Bay for detention and trial.

A well-founded and followed principle of international law regarding a State’s authority to take action is found in *The Case of S.S. Lotus (France v. Turkey)*, [1927] P.C.I.J. Ser. A, No. 10 at 19. The *Lotus case* stands for the international law proposition that a State’s actions are authorized absent a specific prohibition. *See Id.* In fact, soldiers have a duty to safeguard enemy prisoners. This can be accomplished by moving them from the area of active combat operations. *See e.g. Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949, (hereinafter “Geneva Convention (III)”) Article 19 et seq. See also e.g. Geneva Convention (IV) Relative to the Protection of Civilian Persons in the Time of War, August 12, 1949, (hereinafter “Geneva Convention (IV)”) Article 45.*

Even today, with over 16,000 soldiers on the ground, Operation Enduring Freedom’s active combat operations continue against al Qaida in Afghanistan. *See e.g.* Secretary Rumsfeld’s 4 October 2004 Remarks. One purpose of evacuating captured persons from areas of ongoing hostilities is for their safety. *See e.g. Geneva Convention (III), supra.* To follow the Defense’s suggestion and move the Accused to an active combat zone to hold this military commission would be in contravention to the logic of this safety principal and would risk the safety of, not only the Accused, but also participants in this proceeding.

The United States is engaged in a global war against al Qaida and its associates. *See President’s Military Order §1 (Findings with regard to issuing the order.) Cf.* Secretary Rumsfeld’s 4 October 2004 Remarks. By its very nature, the “theater” of this war is not confined to Afghanistan. Applying the rationale in the *Weesels* case, The US Naval Base at Guantanamo Bay, Cuba, is within the theater of war, and is accordingly a lawful and appropriate location to hold military commissions.

b. Guantanamo Bay, Cuba, is a lawful and proper location to hold military commissions.

1. U.S. statutory authority for military commissions does not limit the location where military commissions can be held.

The Defense’s citation to Professor Winthrop is inapposite. Again, this passage upon which the Defense relies was written prior to the creation of jurisdiction for military commissions that was granted in Title 10 of the U. S. Code. See 10. United States Code

(hereinafter “U.S.C.”) §§ 821 and 836. This statutory authority for military commissions contains no limitation on the situs for military commissions. *See Id.*

2. The Naval Base at Guantanamo Bay, Cuba is a place under U.S control.

In *Rasul*, the U.S. Supreme Court, after reviewing the pertinent documents, found the following in recognizing U. S. control of Guantanamo Bay:

The United States occupies the [Naval Base at Guantanamo Bay], which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the Agreement, ‘the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the leased areas,’ while ‘the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.’ In 1934, the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect ‘so long as the United States of America shall not abandon the naval station of Guantanamo.’

Rasul v. Bush, __ U. S. __ (2004); 124 S. Ct. 2686 at 2690-91 (2004) (original brackets and ellipses omitted) (citing Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418; A supplemental lease agreement, executed in July 1903, obligating the United States to pay annual rent and maintain permanent fences around the base.; Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U. S.-Cuba, Arts. I-II, T. S. No. 426; and Treaty Defining Relations with Cuba, May 29, 1934, U. S.-Cuba, Art. III, 48 Stat 1683, T. S. No. 866.)

3. Mr. Altenburg’s authority to convene military commissions at Guantanamo Bay flows from the President and the Secretary of Defense.

Congress has stated that “The Office of the Secretary of Defense is composed of . . . [s]uch other offices and officials as may be established by law or the Secretary of Defense may establish or designate in the Office.” *10 United States Code (“U. S. C.”) §131(b)(8) See also 10 U. S. C. § 113 (d).* The President’s Military Order states that “As a military function and in light of the findings in section 1 [of this order]...the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.¹ *President’s Military Order § 4 (b).* As a result, on 12 March 2002, the Secretary of Defense issued Military Commission Order (“MCO”) Number 1 stating that “In accordance with the President’s Military Order, the Secretary of

¹ Subsection (a) states that persons subject to the President’s Military Order shall, when tried, be tried by military commission for any and all offenses triable by military commission . . . and be punished in accordance with the penalties provided under applicable law. *President’s Military Order §4(a).*

Defense or a designee (“*Appointing Authority*”) may issue orders from time to time appointing one or more military commissions to try individuals subject to the President’s Military Order and appointing any other personnel necessary to facilitate such trials.” MCO No. 1. § 2 (emphasis added). The Secretary of Defense then appointed Mr. John D. Altenburg, Jr., as the Appointing Authority for these military commissions in December 2003. The Secretary of Defense further solidified the position and office of the Appointing Authority within his Department by issuing Department of Defense Directive 5105.70, dated 10 February 2004. Thus, Mr. Altenburg’s authority to convene these military commissions and direct that they take place at Guantanamo Bay, Cuba, is lawful and properly flows from the President, through the Secretary of Defense.

c. Conclusion.

The Defense’s motion suggests that the Naval Base at Guantanamo Bay is not a place under military control and that Mr. Altenburg lacks the authority to convene these military commissions there. The Defense’s position is incorrect. The Defense also hints that the proper location to hold this military commission is in Afghanistan, in or near the theater of operations; this position is also wrong. Were this Commission required to be held in Afghanistan, the proper remedy would be a change of venue, not dismissal as requested here. However, not only do the Geneva Conventions recommend the evacuation of detainees from Afghanistan for safety reasons, but there is no prohibition to holding the Commission in Guantanamo Bay, Cuba, under American or International law. Furthermore, a change of venue from Guantanamo Bay, to Afghanistan, where active operations are ongoing, would only serve to pose unwarranted risk to the Accused and all commission participants. In any event, the “War on Terror” is a global war without geographic boundaries such that a change of venue would not move the proceedings any closer to the “theater of war.” Guantanamo Bay, Cuba is well within the global theater of this terror war and a proper place to hold this Commission. The Defense motion should be denied.

5. Oral Argument. The Prosecution requests the opportunity to respond to Defense arguments, if oral argument is granted.

6. Legal Authority.

a. The President’s Military Order of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.

b. Military Commission Order Number 1, dated 21 March 2002

c. 10 U.S.C §131(b)(8)

d. 10 U.S.C. § 113 (d)

e. 10 U.S.C. § 821

f. 10 U.S.C. § 836

g. Department of Defense Directive 5105.70, dated 10 February 2004

h. *Rasul v. Bush*, ___ U. S. ___ (2004); 124 S. Ct. 2686 at 2690-91 (2004)

- i. *In Re Quirin*, 317 U.S. 1 (1942)
- j. *In Re Yamashita*, 327 U.S. 1 (1946)
- k. *Johnson v. Eisentrager*, 339 U.S. 763 (1950)
- l. *The Case of S.S. Lotus (France v. Turkey)*, [1927] P.C.I.J. Ser. A, No.10 , available at <http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/>
- m. *Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949, Article 19 et seq.*
- n. *Geneva Convention (IV) Relative to the Protection of Civilian Persons in the Time of War, August 12, 1949, Article 45*
- o. *Weesels v. McDonald*, 265 F. 754 at 763 - 64 (E.D.N.Y. 1920)

7. Witnesses/Evidence.

No witnesses are anticipated as this time.

- a. Remarks as Delivered by Secretary of Defense Rumsfeld, October 4, 2004 available at <www.defenselink.mil/speeches/2004/sp20041004-secdef0801.html>
- b. Appointing Authority Appointment of Military Commission Members No. 40001, dated 25 June 2004. (Trial Review Exhibit No.1.)
- c. Memorandum for the Presiding Officer, dated 5 October 2004, Subject: Request for authority Submitted as “Interlocutory Question 1.”

8. Additional Information. None.

/original signed/
XXXX
Major, U. S. Army
Prosecutor



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APPOINTING AUTHORITY FOR
MILITARY COMMISSIONS

October 5, 2004

MEMORANDUM FOR Colonel Peter E. Brownback III, Presiding Officer for
United States v. Hamdan, United States v. Hicks, United States v. al Qosi, United States v. Bahlul

SUBJECT: Request for Authority Submitted as "Interlocutory Question 1"

On August 31, 2004 you forwarded "Interlocutory Question 1" to me for decision, requesting authority to hold closed sessions of the Commission, from which the accused has been properly excluded, at a location within the Continental United States.

This issue is not properly raised as an Interlocutory Question. I view the requirement of MCI Number 8, paragraph 4(A) that "the full commission shall adjudicate all issues of fact and law" as a prerequisite to your exercise of discretionary authority to certify an interlocutory question to me. Until such time as the full commission has ruled on a question of fact or law, certification as an interlocutory question for an advisory opinion is not authorized. Accordingly, your request is denied in the form of an interlocutory question.

I will consider your question as a request for me to exercise the authority vested in the Appointing Authority by MCO Number 1, Section 6(B)(4), to authorize holding closed sessions of the Commission at a place other than Guantanamo Bay, Cuba. The request is denied. All sessions of the Commission shall be conducted at Guantanamo Bay.

A handwritten signature in black ink, appearing to read "John D. Altenburg Jr.", written over a circular stamp.

John D. Altenburg Jr.
Appointing Authority
for Military Commissions

