

BEFORE THE MILITARY COMMISSION

UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

D-007

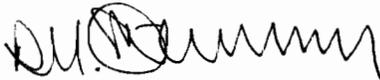
Government Notice
of Intent to File Motion for Reconsideration
of the Commission's Ruling (D-007)
of 24 September 2008

29 September 2008

1. **Timeliness.** This notice is timely under the Military Commissions Trial Judiciary Rules of Court.

2. As the Commission's ruling (D-007) of 24 September 2008 is premised on a construction of the MCA that is contrary to case precedents interpreting similar jurisdictional provisions under the Uniform Code of Military Justice (UCMJ), the United States hereby gives notice of its intent to seek reconsideration of this ruling. A more fully developed Motion for Reconsideration on this issue is forthcoming.

Respectfully submitted,



Douglas M. Stevenson
Lt Col, U.S. Air Force
Prosecutor

John Ellington
LCDR, JAGC, U.S. Naval Reserve
Prosecutor



Arthur L. Gaston III
LCDR, JAGC, U.S. Navy
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Office of Military Commissions

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UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

D-007

**Government Motion
for Reconsideration**

9 October 2008

- 1. Timeliness.** On 24 September 2008, the Military Commission issued its ruling on the Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction (hereinafter “D-007 Ruling”). As the record of trial in this case has not yet been authenticated, pursuant to R.M.C. 905(f) this motion for reconsideration is timely.
- 2. Relief Sought.** The Government respectfully moves the Military Commission to reconsider its D-007 Ruling insofar as it holds that (a) “unlawful enemy combatant status is . . . a substantive component of the offenses and must be proven . . . beyond a reasonable doubt,” and (b) “[p]roof the Accused is an unlawful enemy combatant, by itself, is insufficient to establish that the attempted murders in this case were in violation of the law of war.”
- 3. Summary of the argument.** Given their parallel structure and purpose, the Military Commissions Act (M.C.A.), 10 U.S.C. §§ 948a *et seq.*, and the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. §§ 801 *et seq.*, are *in pari materia*, and therefore the words, “[a]ny person subject to this chapter,” should be read in the same way in both statutes. Case precedents interpreting this language in punitive articles under the U.C.M.J have consistently held it to be jurisdictional in nature and not an element of the offense. Absent authority to the contrary, this language should be read the same way under the M.C.A. So construed, the statute no longer supports the corollary argument from surplusage, that Congress did not intend that the element of “in violation of the law of war” could not be proven solely through evidence that the accused engaged in belligerent acts as an unlawful combatant. To the contrary, if the jurisdictional language does not form a separate element, the surplusage argument leads to the opposite conclusion—that Congress must have included the words, “even lawful combatants,” in the

definition of Murder in Violation of the Law of War, in order to specifically encompass belligerent acts by unlawful combatants within the scope of this enumerated offense.

4. Burden of persuasion. As the moving party, the burden of persuasion is on the Government.

5. Discussion

A. CASE PRECEDENTS UNDER THE U.C.M.J. ESTABLISH THAT THE M.C.A.'S PREFATORY JURISIDICTIONAL LANGUAGE SHOULD NOT BE CONSTRUED AS AN ELEMENT OF THE OFFENSE.

The words, “[a]ny person subject to this chapter,” at the start of 10 U.S.C. § 950v(b)(15) do not form an element of the offense of Murder in Violation of the Law of War under the M.C.A. any more than the same words at the start of 10 U.S.C. § 918 (U.C.M.J. Article 118) form an element of the offense of Murder under the U.C.M.J. Rather, as under the U.C.M.J., this prefatory language merely sets forth the baseline for jurisdiction under the M.C.A., common to all its enumerated offenses. In light of the settled judicial interpretation of this language under the U.C.M.J., Congress should be presumed to have intended that such language be given the same construction under the M.C.A.

In the U.C.M.J., Congress began 45 of the 59 punitive articles¹ with the words, “[a]ny person subject to this chapter,” exactly the same words it used at the start of each offense codified in the M.C.A. *See* 10 U.S.C. § 950v(b)(1)-(28). As defined under U.C.M.J. Article 2, “person subject to this chapter” refers essentially to the active duty military status of the accused, 10 U.S.C. § 802, which is generally unrelated to the elements set out under each offense. *See*,

¹ U.C.M.J. Articles 81, 82, 84, 87, 89, 90, 92-98, 100-102, 105, 106a-111, 112a, 114-120, and 121-132 all begin with the words, “Any person subject to this chapter who.” Article 83 begins, “Any person who.” Articles 85 and 86 begin, “Any member of the armed forces who.” Article 88 begins, “Any commissioned officer who.” Article 91 begins, “Any warrant or enlisted member who.” Article 99 begins, “Any member of the armed forces who.” Article 103 begins, “All persons subject to this chapter shall.” Articles 104 and 106 begin, “Any person who.” Article 112 begins, “Any person subject to this chapter other than.” Article 113 begins, “Any sentinel or lookout.” Article 120a begins, “Any person subject to this section.” Article 133 begins, “Any commissioned officer, cadet or midshipman.” Article 134 departs from this general formula and simply makes punishable all disorders and neglects to the prejudice of good order and discipline or of a nature to bring discredit on the armed forces.

e.g., 10 U.S.C. § 918; Part IV, para. 43, Manual for Courts-Martial (2008 ed.) (not listing active duty military status among the elements of the offense of U.C.M.J. Article 118, Murder).

Interpreting this language under the U.C.M.J., the Court of Appeals for the Armed Forces has specifically held that these introductory words do not form an element of the offense, but rather set forth the baseline for jurisdiction common to all offenses. *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002), *cert. denied*, 537 U.S. 1112 (2003); *see also United States v. McDonagh*, 14 M.J. 415, 422 (C.M.A. 1983) (for U.C.M.J. offenses not of a peculiarly military nature it has never been necessary to submit a dispute over military status to trier of fact); *United States v. Masseria*, 13 M.J. 868, 870 (N.M.C.M.R. 1982) (military status of accused not an element of offenses under U.C.M.J. and need only be proven at trial if contested by defense); *United States v. Buckingham*, 9 M.J. 514, 516 (A.F.C.M.R. 1980) (“any person subject to this chapter” language appearing at start of many of U.C.M.J. offenses does not necessarily require factual question of accused’s military status be submitted to trier of fact); *United States v. Bailey*, 6 M.J. 965, 963 (N.C.M.R. 1979) (en banc) (“In a purely military offense the accused’s status is always a part of, or fundamentally underlies, one of the elements, but it is not, itself, a separate element.”).

In *Oliver*, a case involving a charge of fraud against the United States under U.C.M.J. Article 132, C.A.A.F. held that “Congress set forth the ‘any person’ language as a basic jurisdictional prerequisite, *not as an element of a particular offense or offenses* that are not peculiarly military.” *Oliver*, 57 M.J. at 172 (emphasis added). *See also id.* at 173 (Sullivan, J., concurring) (finding no legal authority under the Manual for Court-Martial or case law for the premise that the accused’s status as a person subject to the U.C.M.J. is an element of the offense of which he was convicted) (citations omitted). Further, the Court in *Oliver* held that “[j]urisdiction is an interlocutory issue, to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence.” *Id.* at 172. Under this precedent, an accused’s military status has no bearing on the elements of nonmilitary offenses under the U.C.M.J., and need not be proven to members at all, let alone beyond a reasonable a doubt.

Even with respect to purely military offenses under the U.C.M.J., which bear a closer substantive connection to the accused's military status,² the status itself is still not, strictly speaking, an element of the offense. As the Navy Court of Military Review explained, "the statement that ' . . . the accused's status as a member of the military becomes, in effect, an element of the offense when absence or desertion is charged,' is not completely accurate and, therefore, misleading." *Bailey*, 6 M.J. at 968 (quoting *United States v. Spicer*, 3 M.J. 689, 690 (N.C.M.R. 1977)). Even in such cases, a factual dispute over the status of the accused need only be submitted to the trier of fact when it is raised by the defense *and* proof of the requisite status is necessary to establish one of the elements of the offense, such as the duty to be present with one's unit, to obey orders, etc. *Id.* at 969.

Given the subject matter of the M.C.A., the fact that Congress located it immediately following the U.C.M.J. in the United States Code, and the identical language Congress used at the start of the substantive offenses in both the M.C.A. and U.C.M.J., the prefatory words, "[a]ny person subject to this chapter," of M.C.A. section 950v(b)(15) should be given the same construction as those same words in the U.C.M.J. Further, the Commission should presume Congress was aware of the settled judicial construction of those words in the U.C.M.J., and intended for them to be construed in the same way in the M.C.A. *See United States v. Wells*, 519 U.S. 482, 495 (1997) (Congress presumed to expect statutes to be read in conformity with Supreme Court precedents); *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992) (Congress presumed to know Supreme Court's interpretations of statutes it is amending); *District of Columbia v. Murphy*, 314 U.S. 441, 454 (1941) (Congress should be taken to have been cognizant of pertinent judicial decisions); 73 Am. Jur. 2d Statutes § 79.

Nor does allegation in the specifications that the accused is "a person subject to trial by military commission as an alien unlawful enemy combatant" convert this jurisdictional allegation into an element that must be proven to the trier of fact beyond a reasonable doubt. Rather, these words continue to be merely an allegation of jurisdiction—which is an interlocutory issue the military judge decides by a preponderance of the evidence, if challenged by the accused. Such a

² Since active duty military status gives rise, for example, to the duty to obey orders, to be present for duty, to be respectful of superiors, etc.

conclusion is consistent with military justice practice, in which the jurisdictional allegation that the accused is “on active duty” is routinely included in specifications—regardless of whether they are military or nonmilitary offenses—without converting that allegation into an element that must be proven beyond a reasonable doubt. For example, in *Oliver*, a fraud case, two of the three specifications alleged that the appellant was on active duty at the time of the offenses. *Oliver*, 57 M.J. at 170. Nevertheless, C.A.A.F. rejected the appellant’s contention that his status as a person subject to court-martial jurisdiction—i.e., that he was on active duty—was an element of the offense. *See id.* at 172.

The same holds true even of military offenses, in which the accused’s status bears a closer connection to an element of the offense. In both *United States v. Hoxsie*, 14 M.J. 713 (N.M.C.M.R. 1982), and *Masseria*, for example, the Navy-Marine Corps Court of Military Review refused to require the Government to prove, beyond a reasonable doubt, to the trier of fact, that the accused was on active duty, despite the fact such an allegation had been included in the specifications. *Hoxsie*, 14 M.J. at 716; *Masseria*, 13 M.J. at 869. As the Court in *Hoxsie* explained, “the condition precedent to the application of the beyond a reasonable doubt standard to the underlying factor of military status in a ‘purely military offense’ is raising the personal jurisdiction issue on the merits.” *Hoxsie*, 14 M.J. at 717. In other words, where the accused raises lack of status as a defense to a charged military offense, the Government must prove that status—in order to prove the underlying duty to be present, to obey, to be respectful—beyond a reasonable doubt. The mere allegation of status in the specification, however, does not obligate the Government to prove that status to the trier of fact.

In *Masseria*, the Government’s evidence consisted solely of the accused’s Naval Reserve enlistment contract and a service record document establishing the dates of his unauthorized absence. Following argument on findings, the military judge asked the trial counsel if the Government intended “to offer evidence to indicate that the accused was on active duty.” *Masseria*, 13 M.J. at 869. Subsequently, the military judge allowed the Government to reopen its case to present evidence the accused had been on active duty, as alleged. On appeal, the accused argued the military judge had erred by allowing the Government to reopen its case. The Navy-Marine Corps Court ruled that, because the evidence presented during the case-in-chief

was adequate to establish guilt, there was no reason to have allowed the Government to reopen its case. *Id.* at 870. In other words, the allegation that the accused was “on active duty” was not an element, and did not need to be proven, if not contested by the Defense.

Similarly, in the case *sub judice*, the prefatory jurisdictional language that identifies the accused as subject to the M.C.A.—i.e., “a person subject to trial by military commission as an alien unlawful enemy combatant”—is not and does not create an element of the offense. As with similar language used to similar ends in military practice under the U.C.M.J., these words constitute an allegation of jurisdiction, which is an interlocutory question for the military judge to determine. Alleging such language in the specification neither converts that allegation into an element of the offense, nor requires the Government to prove that status beyond a reasonable doubt to the trier of fact.

The Government recognizes in the case at hand that it may be necessary to prove to the trier of fact, beyond a reasonable doubt, that the accused is an unlawful enemy combatant (UEC) in order to prove that his belligerent conduct was in violation of the law of war. But in that event, such proof would be required not because AEUC status is itself an element. Just as *Oliver* held active duty status not to be an element of the U.C.M.J. offense of Murder, AEUC status is not an element of the M.C.A. offense of Murder in Violation of the Law of War. Rather, the reason it might be necessary to prove the accused’s status as an unlawful enemy combatant beyond a reasonable doubt to the trier of fact would be because that status, as a factual matter, underlies an element of the offense—similar to the way active duty status underlies an element of military offenses under the U.C.M.J.—namely, that the accused’s actions were in violation of the law of war.³

³ Even then, the Government would need to prove the accused’s status as an unlawful enemy combatant on the merits only if the Commission accepts the government’s position that that status is factually relevant to the “in violation of the law of war” element of the offense. If the Commission does not accept that position, then the accused’s unlawful combatant status is exactly analogous to active duty status in nonmilitary offenses under the U.C.M.J.— i.e., it is not an element of the offense, is an interlocutory question for the judge alone to decide, and need not be proven to members at all, let alone beyond a reasonable doubt.

B. BECAUSE AUEC STATUS IS NOT AN ELEMENT OF ATTEMPTED MURDER, THE WORDS “IN VIOLATION OF THE LAW OF WAR” NEED NOT REQUIRE PROOF BEYOND THAT THE ACCUSED ENGAGED IN HOSTILITIES AS AN UNLAWFUL ENEMY COMBTANT TO AVOID RENDERING THOSE WORDS MEANINGLESS AND SUPERFLUOUS.

In its D-007 Ruling, the Military Commission reasoned as follows:

Major Premise: That the accused’s conduct was in violation of the law of war and that the accused was an alien unlawful enemy combatant are two separate elements.

Minor Premise: “Congress must have intended each [element] to have independent meaning.” D-007 Ruling at 2.

Conclusion: Therefore, the “in violation of the law of war” element must require proof beyond simply that the accused was an alien unlawful enemy combatant, because “[t]o accept otherwise would render that part of the statute requiring the murder be in violation of the law of war meaningless.” *Id.* at 2-3.

As noted above, however, the major premise is incorrect. The accused’s status as an alien unlawful enemy combatant is not a separate element. Because the major premise is incorrect, the logic of the syllogism fails. In other words, the canons of statutory construction do not *require* that the words “in violation of the law of war” in section 950v(b)(15) of the M.C.A. be read to require proof beyond that the accused was an unlawful enemy combatant. Rather, to prove the accused’s conduct was “in violation of the law of war,” it is sufficient to prove that the accused was an unlawful enemy combatant at the time of his allegedly criminal acts and that those acts were belligerent acts.

C. SINCE AUEC STATUS IS NOT AN ELEMENT, THE CANONS OF STATUTORY CONSTRUCTION ACTUALLY SUPPORT THE CONCLUSION THAT THE “IN VIOLATION OF THE LAW OF WAR” ELEMENT IS MET BY PROOF THE ACCUSED WAS AN UNLAWFUL ENEMY COMBATANT AT THE TIME OF HIS ALLEGEDLY CRIMINAL, HOSTILE ACT.

In addition to the syllogistic reasoning addressed above, the Military Commission’s ruling also appears to adopt the Defense position that for an act to be “in violation of the law of war,” the act must be a war crime independent of the status of the actor. *See* D-007 Ruling at 3. That construction, however, violates the very canon of statutory construction cited in the Commission’s ruling: “a court must construe the language of a statute so as to avoid rendering any words superfluous.” *Id.* (citing *United States v. Gomez-Gomez*, 493 F.3d 562, 570 (5th Cir. 2007)).

First, as an enumerated offense, section 950v(b)(15) is itself superfluous if the *only* conduct that violates that provision is conduct that also *necessarily* violates one of the other substantive war crimes codified in the M.C.A. The Defense construction of the words “in violation of the law of war,” however, produces that result. Congress took pains to codify 28 substantive crimes in the M.C.A, the vast majority of which concern acts that always violate of the law of war—e.g., murder of protected persons, denial of quarter, taking hostages, perfidy. Congress should be presumed, therefore, by inserting the words “in violation of the law of war” in section 950v(b)(15), to have intended to criminalize conduct beyond simply that which they were already criminalizing in its own right elsewhere in the M.C.A.

Second, and more significantly, the Defense construction of the statute renders the words “including lawful combatants” in section 950v(b)(15) meaningless. Section 950v(b)(15) makes it a crime to “intentionally kill[] one or more persons, *including lawful combatants*, in violation of the law of war.” 10 U.S.C. § 950v(b)(15) (emphasis added). If the Defense correctly construes the words “in violation of the law of war,” then the words “including lawful combatants” are meaningless, because if the method, manner or circumstances of a killing would constitute a war crime if done by a privileged belligerent, then the identity of the victim is wholly

irrelevant. If, on the other hand, a violation of the law of war can be established by proving that the accused was an unlawful combatant and that the killing was a hostile act, then the words “including lawful combatants” serve to communicate Congress’ intent that such a killing is criminal, even if the victim would otherwise be a lawful military target for lawful combatants.⁴

D. CONCLUSION

For the foregoing reasons, the Military Commission should reconsider its D-007 Ruling of 24 September 2008, and conclude that the words “in violation of the law of war” in section 950v(b)(15) of the M.C.A. encompass hostile acts by unlawful enemy combatants. Reading the statute in that way (a) comports with the precedents cited in the Government’s earlier briefs; (b) avoids rendering the words, “including lawful combatants,” meaningless; and (c) gives meaning and effect to the words “in violation of the law of war” without rendering the entire statute superfluous. This reading of the statute gives meaning to the words “in violation of the law of war,” by limiting the acts covered by the statute to only that subset of murders committed by an unlawful combatant that are belligerent acts, as opposed to those that are not belligerent acts, such as a killing over a personal dispute or grievance.

6. **Oral argument.** The United States respectfully requests oral argument.

⁴ As evidenced in its Bill of Particulars, the government intends to prove violation of the law of war in essentially this manner—by proving that the accused intentionally engaged in a hostile act against lawful combatants while he himself neither was a lawful combatant, nor took steps to distinguish himself as a combatant at the time of his attack.

As further support for this theory of violation of the law of war, separate and apart from the arguments advance *supra* based on statutory construction of the MCA, the government requests that the Commission consider the “Hostage Cases” during the Nuremberg trials, in which German occupational commanders were charged with various offenses against the civilian population under their control. See *Trials of War Criminals Before the Nuerberg Military Tribunals*, Vol. XI, available at http://www.loc.gov/rr/frd/Military_Law/military-legal-resources-home.html. These officers were charged *inter alia* with summarily punishing and executing guerrilla resistance forces, many of whom wore civilian clothes and did not carry their arms openly. See *id.* at 1244. The tribunal refused to convict the German commanders of taking actions against such guerilla (“*francs-tireur*”) combatants because they “are not lawful combatants” and therefore not entitled to protection against prosecution or punishment under the law of war. See *id.* at 1245. As the tribunal stated, “guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain *war criminals* in the eyes of the enemy and may be treated as such.” *Id.* (emphasis added). The government’s theory of what constitutes a war crime in this case, and what Congress specifically intended and drafted the MCA to apply to in this regard, draws directly from this international legal precedent.

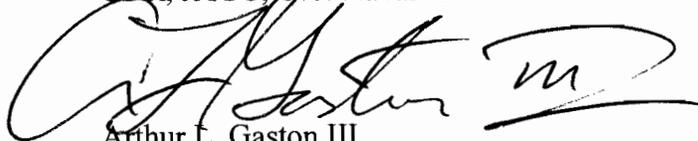
7. **Witnesses and Evidence.** All relevant materials are already in the record.
8. **Certificate of Conference.** The defense opposes this request.
9. **Additional information.** None
10. **Attachments.** None

Respectfully Submitted,



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John T. Ellington
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Edmonds, Matthew, SSG, DoD OGC

From: Frakt, David, MAJ, DoD OGC
Sent: Tuesday, October 21, 2008 5:15 PM
To: Polley, James, Mr, DoD OGC
Cc: Doxakis, Katharine, LCDR, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Morris, Lawrence, COL, DoD OGC; Pagel, Bruce, COL, DoD OGC; Poulson, Craig, LCDR, DoD OGC; Lever, Terri, SMSgt, DoD OGC; Cox, Dale, MSgt, DoD OGC; Calopietro, John, LNC, DoD OGC; Edmonds, Matthew, SSG, DoD OGC; Galvan, Delia, SSGT, DoD OGC; Gaston, Arthur, LCDR, DoD OGC; Mason, Alveta, Ms, DoD OGC; Williams, Patricia, SSG, DoD OGC; Sowder, William, LTC, DoD OGC; Montalvo, Eric, Maj, DoD OGC; Stevenson, Douglas, LTC, DoD OGC; Harrison, Marion, MSgt, DoD OGC; Masciola, Peter, COL, DoD OGC; Ellington, John, CDR, DoD OGC; Apostol, Liam, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC; 'Madeline MORRIS'; Frakt, David, MAJ, DoD OGC
Subject: RE: Defense Special Request for Relief/Preliminary Answer to D-007 Government Reply to Defense Response to Government Motion for Reconsideration: U.S. v. Jawad
Signed By: david.frakt@edwards.af.mil

The government filed a Reply to the Defense Response to the Government Motion for Reconsideration on 21 October 08. The government's original motion for reconsideration was filed on 9 October 08. The defense response was timely filed on 16 October 08. Under Military Commission Trial Judiciary Rules of Court, Rule 3, paragraph 6, Replies are due within 3 calendars days of a response. The government's reply was filed 5 days after the response. Furthermore, no request for an extension was made, pursuant to MCTJRC, Rule 3, para 5.(4) "Requests to extend the time a filing was received shall be in the form of a special request for relief. In the alternative, a request for an extension may be filed."

Therefore, the reply is untimely and cannot be considered.

Furthermore, paragraph 6,(1) indicates that "Counsel must take care that matters that should have been raised in the original motion are not being presented for the first time as a reply." Very little of the reply is actually a reply to the defense response. Most of the reply is new matter that should have and could have been raised long ago. In particular, the government request to reopen the hearing on D-007 and offer the testimony of a government witness on the law of war is untimely. The proposed witness did not appear on the Government's "final" witness list, which was due to the defense by order of the commission on 2 September 08. The proposed witness did not appear on the Government's updated "final" witness list on 15 September after the government was given a reprieve by the commission when their first list failed to comply with the commission's order.

At the 13 August 08 hearing at which Professor Morris testified on Motion D-007, Trial Counsel cross-examined Professor Morris by asking her if he was aware that W. Hays Parks had a different opinion on certain matters of the law of war. Clearly, the government was aware of the existence of W. Hays Parks and what his opinions were at that time. The government, knowing that Professor Morris would testify, and knowing the general nature of her opinion, based on her previously submitted affidavit, chose not to offer any testimony from W. Hays Parks or any other experts which contradicted her views or otherwise supported the government's position.

Therefore, the defense requests in this special request for relief that the commission rule:

1. that the government reply is untimely and will not be considered, and
2. should the military commission approve the government's request for oral argument on the reconsideration motion (which the defense opposes) the government will not be authorized to reopen the hearing on D-007 and submit additional evidence in the form of testimony, written or oral, from W. Hays Parks or any other purported expert on the law of war.

The defense requests the military commission to respond by COB on 22 October to this special request for relief. If the military commission denies either request 1. or 2. above, the defense requests leave of the court to submit a formal answer to the government reply by Friday 24 October 2008.

Respectfully submitted,

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From: Gaston, Arthur, LCDR, DoD OGC
Sent: Tuesday, October 21, 2008 4:28 PM
To: Polley, James, Mr, DoD OGC
Cc: Doxakis, Katharine, LCDR, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Morris, Lawrence, COL, DoD OGC; Pagel, Bruce, COL, DoD OGC; Poulson, Craig, LCDR, DoD OGC; Lever, Terri, SMSgt, DoD OGC; Cox, Dale, MSgt, DoD OGC; Calopietro, John, LNC, DoD OGC; Edmonds, Matthew, SSG, DoD OGC; Galvan, Delia, SSGT, DoD OGC; Mason, Alveta, Ms, DoD OGC; Williams, Patricia, SSG, DoD OGC; Sowder, William, LTC, DoD OGC; Montalvo, Eric, Maj, DoD OGC; Stevenson, Douglas, LTC, DoD OGC; Harrison, Marion, MSgt, DoD OGC; Masciola, Peter, COL, DoD OGC; Ellington, John, CDR, DoD OGC; Frakt, David, MAJ, DoD OGC; Apostol, Liam, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC
Subject: D-007 Government Reply to Defense Response to Government Motion for Reconsideration: U.S. v. Jawad

Mr. Polley,

Attached please find the subject Reply for filing in U.S. v. Jawad.

V/r,

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From: Frakt, David, MAJ, DoD OGC

10/22/2008

Sent: Thursday, October 16, 2008 9:58 AM

To: Polley, James, Mr, DoD OGC; Wilkins, Donna, Ms, DoD OGC; Apostol, Liam, Mr, DoD OGC

Cc: Doxakis, Katharine, LCDR, DoD OGC; Berrigan, Michael, Mr, DoD OGC; Morris, Lawrence, COL, DoD OGC; Pagel, Bruce, COL, DoD OGC; Poulson, Craig, LCDR, DoD OGC; Lever, Terri, SMSgt, DoD OGC; Cox, Dale, MSgt, DoD OGC; Calopietro, John, LNC, DoD OGC; Edmonds, Matthew, SSG, DoD OGC; Galvan, Delia, SSGT, DoD OGC; Mason, Alveta, Ms, DoD OGC; Williams, Patricia, SSG, DoD OGC; Sowder, William, LTC, DoD OGC; Montalvo, Eric, Maj, DoD OGC; Stevenson, Douglas, LTC, DoD OGC; Harrison, Marion, MSgt, DoD OGC; Masciola, Peter, COL, DoD OGC; Gaston, Arthur, LCDR, DoD OGC; Ellington, John, CDR, DoD OGC

Subject: D-007 Defense Response to Government Motion for Reconsideration: U.S. v. Jawad

Attached please find the Defense Response to the Government's Motion for Reconsideration on the Commission's Ruling on D-007 in Word and signed PDF formats.

Respectfully submitted,

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Government Reply
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for Reconsideration

21 October 2008

1. **Timeliness.** This reply is timely filed under Rules 1.6 and 3.6.c(2) of the Military Commissions Trial Judiciary Rules of Court.

2. **Discussion**

The Commission should not interpret alien unlawful enemy combatant (AUEC) status to be an element of the offenses under the Military Commissions Act (M.C.A.), when military case precedents have consistently reached the opposite conclusion in interpreting identical jurisdictional language for offenses under the Uniform Code of Military Justice (U.C.M.J.). There is thus no statutory basis to read “in violation of the law of war” in any way other than the Secretary of Defense’s congressionally authorized interpretation under the Manual for Military Commissions (M.M.C.). The defense has not shown this reading to be inconsistent with the international law of war, and the government is prepared to offer its own expert testimony in this regard and respectfully requests the opportunity to do so.

a. **Neither U.C.M.J. Case Precedents Nor the *Khadr* Decision Support Finding That AUEC Status Is an Element of the Offense.**

In addressing parallel “person subject to” jurisdictional language under the U.C.M.J., military appellate courts have divided the landscape between military and non-military offenses. For military offenses, on the one hand, active duty military status underlies the duty element of the offense; hence, proof of active duty status goes *both* to jurisdiction *and*, if raised as an issue, to the duty element of the offense. For non-military offenses, on the other hand, the accused’s

status has no bearing on the elements of the offense; hence, proof of the accused's status goes solely to jurisdiction and is never submitted to the trier of fact for resolution. Under neither of these regimes, however, does the accused's status itself comprise an element of the offense.

(1) Every Case Cited By the Defense Supports the Government Position that AEUC Status Is Not an Element of the Offense.

The defense has pointed to no authority to challenge the government's proposition that, by analogy to U.C.M.J. case precedents, AUEC status should be similarly construed not to be an element of the offenses under the M.C.A. In this regard, not only is the defense's reliance on *United States v. Ornelas*, 6 C.M.R. 96 (C.M.A. 1952), misplaced, but that case's subsequent explanation and interpretation by the very cases cited in the government's motion has specifically resolved the issue in line with the government's position.

Ornelas involved a charge of desertion—a military offense—to which the accused asserted as a defense that he had never been properly inducted onto active duty. The facts surrounding his induction thus bore on whether the accused was indeed on active duty at the time of the offense, which in turn bore directly on the duty element of desertion—namely, whether the accused had a legal duty to be present with his unit. The issue of the accused's active duty status therefore went not only to the issue of whether the court-martial had jurisdiction over him, but also to *his innocence or guilt of the charged offense*. Hence, the court in *Ornelas* properly found that the facts surrounding the accused's induction into the service should have been submitted to the trier of fact for determination, explaining,

We conclude that where an accused raises a *defense or objection which should properly be considered by the court in its determination of guilt or innocence*, and which resolves itself into a question of fact, that issue must be presented to and decided by the court pursuant to appropriate instructions. But where the issue is *purely interlocutory* or raises solely a question of law, it is within the sole cognizance of the law officer.

Id. at 101 (emphasis added).

Again, *Ornelas* involved a purely military offense under the U.C.M.J. By contrast, in cases involving non-military offenses, in which the accused's status has no bearing on the

elements of the offense, military appellate courts have found no reason to submit the issue of the accused's status to the trier of fact. Indeed, these courts have taken pains over the last 50 years since *Ornelas* was decided to specifically explain and define what that case stands for, lest it be misread in precisely the manner the defense now posits. In the very cases cited in the government's motion, these subsequent decisions have consistently reasoned that unless it bears directly on an element of a *military* offense, the issue of the accused's status is an interlocutory jurisdictional matter for the judge alone to decide.

In *United States v. McDonagh*, for example, the court explained that unlike military offenses such as desertion or unauthorized absence, for offenses not of a peculiarly military nature, "it has never been necessary to submit a disputed issue of military status to the trier of fact or for the Government to establish military status beyond a reasonable doubt." 14 M.J. 415, 422 (C.M.A. 1983). The court in *United States v. Bailey* expounded at length on precisely this point:

Our reading of [*Ornelas*] convinces us that the Court of Military Appeals did not intend for the law officer, or military judge under current law, to submit questions of jurisdiction to the members for decision. We believe that the military judge must resolve such matters alone, as an interlocutory matter, *but* when a question of fact involved in the jurisdictional issue also goes to the ultimate question of the accused's guilt or innocence of the offense charged, then the factual question, upon being raised after a plea of not guilty is entered, must be resolved by the court members.

6 M.J. 965, 968 (N.C.M.R. 1979). The defense brief quotes only the latter half on this passage for the proposition that is diametrically opposed to what the full passage, and the court's holding in the case, stands for: that the jurisdictional issue of the accused's status becomes an issue for the trier of fact only when it *both* (1) is raised by the defense *and* (2) bears on the element of a *military offense* related to the accused's status. Every additional case cited by the defense is in accord with this holding. See *United States v. Jessie*, 5 M.J. 573, 575 (A.C.M.R. 1978) ("Where the offense is nonmilitary in nature (e.g., larceny), the disputed factual issue on the question of jurisdiction over the person is resolved by the military judge as an interlocutory matter."); accord *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983) (accused's status in case of unauthorized absence, a military offense, must be proven beyond reasonable doubt); *United States v.*

McGinnis, 15 M.J. 345 (C.M.A. 1983) (same); *United States v. Spicer*, 3 M.J. 689 (N.C.M.R. 1977) (same).

The defense has offered no reasoned basis why these U.C.M.J. case precedents should not be applied, by analogy, to the parallel jurisdictional language and framework of the M.C.A.¹ Unless AUEC status somehow bears on the element of “in violation of the law of war,” there is no reason for the Commission to treat Murder in Violation of the Law of War under the M.C.A. any differently than military courts-martial treat Murder—a non-military offense under the U.C.M.J.²—for which the status of the accused is unrelated to the elements of the offense and thus is solely an interlocutory matter for the judge alone to decide. As the military case precedents make absolutely clear, in a case charging murder under the U.C.M.J., the status of the accused (which gives rise to jurisdiction) is not, and does not underlie, an element of the offense; nor does including jurisdictional prefatory language in the charge itself serve to convert that status into an element.

If, on the other hand, the Commission agrees with the government that an accused’s unlawful combatancy may indeed bear on the element of “in violation of the law of war,” then the offense would be treated more like the peculiarly military offenses under the U.C.M.J. are treated—i.e., facts bearing on the accused’s unlawful combatant status (which in turn bears on the “in violation of law of war” element) may indeed need to be submitted to the members for

¹ While 10 U.S.C. § 948b(c) indicates that military court-martial precedents are not binding on military commissions, it also specifically states that “[t]he procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under [the U.C.M.J.]” The procedures further developed under the M.M.C. by the Secretary of Defense are also specifically derived from the principles of law used in trial by general courts-martial. *See* 10 U.S.C. § 949a(a); *see also* Forward to M.M.C. These common origins and procedural structures between the two types of proceedings are precisely why case law under the U.C.M.J. has precedential value, by analogy, to issues like the present one regarding military commissions.

² Contrary to the defense’s apparent misconception, which misinforms much of their argument in this area, the government’s position is not that the offenses under the M.C.A. are themselves “non-military” in some abstract sense. Rather, it is that, by analogy to the different ways jurisdictional status is treated in “peculiarly military” and “non-military” offenses under the U.C.M.J., the only way the jurisdictional AUEC issue would be properly submitted to members is if the Commission construes the offense at issue under the M.C.A. in the same way that peculiarly military offenses under the U.C.M.J. are construed—in other words, that AUEC status, in addition to being jurisdictional, also bears on an element of the offense.

determination.³ Even under this view, however, as under the U.C.M.J., the status of the accused is not itself an element of the offense, and alleging that status in the specification does not make it so.

(2) The *Khadr* Decision Supports the Government Position.

Contrary to the defense’s assertions, the Court of Military Commissions Review’s decision in *United States v. Khadr*, CMCR 07-001, is fully consistent with the view that AUEC status is a jurisdictional issue, not an element of the offense. Indeed, as argued in previous government submissions, *Khadr* stands for exactly the proposition being asserted now: that, if not already determined by a previous tribunal, the jurisdictional determination of AUEC status is an interlocutory matter for the judge alone to decide. *See id.* at 20 (citing R.M.C. 201(b)(3) (“A military commission always has jurisdiction to determine whether it has jurisdiction.”)). Nor is that fact changed by the judge’s inherent ability to reassess a *prima facie* or preliminary jurisdictional determination upon a motion from the defense or *sua sponte* if proof of jurisdiction is found lacking upon presentation of evidence on the merits.

In fact, in explaining this province of military judges, the *Khadr* court posited exactly the same analogy from the U.C.M.J. that is cited in this motion:

The text, structure, and history of the M.C.A. demonstrate clearly that a military judge presiding over a military commission may determine both the factual issue of an accused’s “unlawful enemy combatant status” and the corresponding legal issue of the military commission’s *in personam* jurisdiction. *A contrary interpretation would ignore the bifurcated structure of M.C.A. § 948(1)(A) and the long-standing history of military judges in general courts-martial finding jurisdictional facts by a preponderance of the evidence, and resolving pretrial motions to dismiss for lack of jurisdiction.*

Id. at 24 (emphasis added). No aspect of the *Khadr* decision stands for the proposition that AUEC status under the M.C.A. is either an element of the offenses or a finding that the

³ Even so, as with military offenses under the U.C.M.J., facts regarding an accused’s unlawful combatancy might not need to go to members in every case, depending on the circumstances. If, for example, the element of violation of law of war were clearly established through other means—such as through evidence that an accused intentionally used unlawful weaponry—then it might not be necessary to submit specific facts regarding the accused’s unlawful combatant status to prove the element of “in violation of the law of war.”

members, vice the military judge, must make.⁴ Hence, if anything, the *Khadr* holding binds the commission to rule in favor of the government, not the defense, on this point.

b. Since AUEC Status Is Not an Element, There is No Basis to Depart From the M.M.C.’s Interpretation of What Constitutes a “Violation of the Law of War” Under the M.C.A.

Since AUEC status is not an element of the offenses under the M.C.A., the corollary argument from surplusage does not provide a statutory basis for departing from the M.M.C.’s congressionally authorized interpretation of that statute. The M.M.C.’s interpretation clearly and unequivocally states that establishing a “violation of the law of war” under the M.C.A. requires no additional proof beyond that the accused engaged in “acts as a combatant without having met the requirements for lawful combatancy.” M.M.C., Part IV-6(13)(d). Nor is there any independent basis under international law, as the defense argues, to depart from that interpretation. Out of an abundance of caution, however, and due to the seminal importance of this issue to multiple pending and anticipated cases for which this case may appear to set a precedent, the United States respectfully requests that the Commission hear further expert testimony on this issue prior to ruling on this motion.

⁴ In this same regard, the Commission’s ruling on the defense motion to dismiss for lack of personal jurisdiction (D-002) also disposes of the defense’s argument that a members finding is required under international law to resolve the jurisdictional issue. See Ruling (D-002) of 9 September 2008 at 2 (holding that where an accused’s AUEC status has not been previously determined, “the military judge has ‘the power and authority under subsection (i) of § 948a(1)(A) of the M.C.A. to hear evidence concerning, and to ultimately decide, [the accused’s] ‘unlawful enemy combatant’ status’”) (citing *Khadr*, CMCR 07-001 at 25).

It is equally clear that the M.C.A., not international law, provides the controlling law on this jurisdictional issue. See Government Response to D-002 at 4-7; see also *TMR Energy Limited v. State Property Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) (“Never does customary international law prevail over a contrary federal statute.”) (citations omitted); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) (“[C]lear congressional action trumps customary international law and previously enacted treaties.”); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (explaining that customary international law is relevant to U.S. courts “where there is no treaty, and no controlling executive or legislative act or judicial decision”).

(1) Since the Argument From Surplusage Is Not Valid, There Is No Statutory Basis to Depart From the M.M.C.

As argued previously, since AUEC status is not an element, the corollary argument from surplusage fails. Contrary to the defense's assertions, without that argument there is no statutory basis to depart from the "elements and modes of proof" that the Secretary of Defense has developed under the M.M.C. pursuant to the specific authorization of Congress. *See* 10 U.S.C. § 949a(a) ("Pretrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense, in consultation with the Attorney General.").

In light of the deference that such a congressionally mandated interpretation merits, it is unsurprising that even the defense's expert relied heavily on the statutory argument from surplusage in reaching conclusions similar to the Commission's D-007 ruling. *See* Defense Motion (D-007), Attachment A, at 2-3. Since that argument itself stems from a faulty premise, in light of the pertinent U.C.M.J. precedents previously discussed, there is simply no statutory basis to depart from the M.M.C. on this issue.

In addition, the M.M.C.'s interpretation is fully in line with the legislative history of the M.C.A., which supports the view that Congress in no way intended to extend combatant immunity to unlawful combatants charged before military commission with attacking U.S. forces. To the contrary, the M.C.A. was passed specifically to afford the government the ability to prosecute AUEC actors for participating directly in hostilities, not effectively to shield AUEC actors from such prosecution. *See* 152 Cong. Rec. S10,243 (daily ed. Sept. 27, 2006) (statement of Sen. Frist) ("The bill formally establishes terrorist tribunals to prosecute terrorists engaged in hostilities against the United States for war crimes."); *id.* at S10,251 (statement of Sen. Graham) (describing the bill's purpose "to prosecute the person who sells the guns to al-Qaida as much as the people who use the weapons"); *id.* at S10,274 (statement of Sen. Bond) (describing the bill as aimed at individuals who "are, by definition, aliens engaged in or supporting terrorist hostilities against the U.S., and doing so in violation of the laws of the war"). But the upshot of the

defense's argument, and the D-007 ruling as it currently stands, reaches exactly the opposite interpretation—that Congress, in passing the M.C.A., for all intents and purposes granted combatant immunity in military commissions, which has heretofore been the sole province of lawful combatants, to alien unlawful combatants charged with murder in violation of the law of war.

Indeed, the current D-007 ruling arguably makes it even harder to establish a law-of-war violation against an unlawful combatant than against a lawful combatant, which is even further outside the bounds of what the M.C.A. was passed to accomplish. Ordinarily, for example, it would be a violation of the law of war, for lawful combatants to blend into the civilian population, by wearing civilian clothes and not carrying their arms openly, for the purpose of engaging in hostile activity. See Department of the Army Field Manual 27-10: The Law of Land Warfare ¶ 504(g) (1956) (listing as “war crime” the “[u]se of civilian clothing by troops to conceal their military character during battle”). Yet, it is *not* a violation of the same law of war when unlawful combatants do the very same thing—i.e., blend into the civilian population, by wearing civilian clothes and not carrying their arms openly, for the purpose of engaging in hostile activity? That result is not only patently absurd under the law of war itself, but it lies well beyond the scope of any reasonable interpretation of either the M.C.A.'s statutory language or Congress' intent in passing it.

(2) International Law Offers No Independent Basis to Depart From the M.M.C.

Finally, defense arguments to the contrary notwithstanding, international law does not offer any independent basis to depart from the M.M.C.'s congressionally sanctioned interpretation of what establishes violation of the law of war. First, the Commission should only resort to international law when the statute itself and/or its executive interpretation do not speak to the matter at issue. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (explaining that customary international law is relevant to U.S. courts “where there is no treaty, and no controlling executive or legislative act or judicial decision”). As argued previously, both the M.C.A.'s specific use of the language “including lawful combatants,” as well the M.M.C.'s specific interpretation of what “violation of the law of war” means, prevents the Commission

from overruling those through resort to international law. That said, even a resort to international law or commentary does not support the defense's theory of what comprises a war crime.

The defense's extensive treatment of the Hostage Case (*United States v. List, et al.*) from the Nuremberg tribunals boils down to the argument that the tribunal's finding that the guerilla fighters were war criminals was mere dicta as opposed to an integral aspect of the tribunal's holding. That argument is neither correct nor helpful in resolving the issue here, which is whether that tribunal's decision provides case precedent for the M.M.C.'s interpretation of what constitutes a war crime. Clearly it does so, under even the most rudimentary analysis.

The tribunal was examining, *inter alia*, charges against German occupational commanders for summarily punishing partisan guerilla fighters who had been captured attacking lawful combatants (German soldiers). Had these partisan guerilla fighters themselves been lawful combatants, they would have been entitled to prisoner of war (POW) status under the law of war, and their summary punishment by the German commanders would have been unlawful. Just as clearly, had the guerilla fighters been ordinary civilians, they would have been entitled to protected civilian status under the law of war, and their summary punishment by the German commanders would have been unlawful. The tribunal found, however, that the guerrilla fighters were neither POW's nor protected civilians, but were themselves "war criminals" because they had conducted warfare without being privileged to do so—in other words, they were war criminals because they mounted attacks against lawful German combatants as *unlawful combatants*. See *Trials of War Criminals Before the Nuremberg Military Tribunals*, Vol. IX, at 1243-1245. And for that reason, and that reason alone, the Nuremberg tribunal found that these fighters' summary punishment by the Germans was allowable under the law of war, and therefore refused to punish the German defendants for any charged offenses relating to those individuals. See *id.* at 1245.

It is difficult to imagine more persuasive authority, precisely on point, than a war crimes tribunal's decision to acquit defendants of certain war crimes charges based on the determination that the victims at issue were themselves war criminals because they had engaged in hostilities as

unlawful combatants (and thus were not entitled to protection from punishment under the law of war). And how did the Nuremberg tribunal determine that the partisan guerrillas were war criminals? Based on the determination that, almost exactly as demonstrated on the facts in this case, these fighters did not distinguish themselves from the civilian population when mounting their attacks on lawful combatants and thus were guilty of engaging in hostilities without meeting the definition of lawful combatants. *See id.* at 1244 (noting that the partisans generally wore civilian clothes, did not wear insignia that could be seen at a distance, and did not carry their arms openly except when it was advantageous to do so). And what action did the tribunal find tacitly allowable under the law of war for such civilians who directly participated in hostilities? “[P]unishment as a war criminal under the laws of war” by the occupying military force commanders (as opposed to prosecution under domestic law). *See id.* at 1246.

Given this case precedent, the fact that the defense has located other secondary commentary to support its expert’s conclusions is not persuasive. *Cf. The Paquete Habana*, 175 U.S. 677, 700 (1900) (“Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”) The ultimate question is not whether the defense can find secondary sources to support its position, but whether the Commission should adopt their view of international law over the considered and congressionally authorized view of the Secretary of Defense. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (noting a strong argument for giving “serious weight” to the Executive Branch’s view of a case’s impact on foreign policy). Again, the government’s position is that the Commission may not, consistent with the legal deference given to legislative and executive enactments, simply override those enactments without some statutory basis to do so. As demonstrated in the arguments set forth in this motion, the Commission does not have a statutory basis to do so here.

Nevertheless, to the extent the Commission may find such opinions helpful to its analysis, the government is prepared to offer expert testimony in support of the Secretary of Defense’s congressionally authorized interpretation of what proof establishes “violation of the law of war” under the M.C.A. Given the importance of this ruling to this and future cases, the United States respectfully requests that the Commission reserve ruling until it may hear

testimony from the expert identified below, as well as further oral argument, now that the issue has been fully briefed and the government has a clearer understanding of the reasoning on which the Commission's D-007 ruling is based.

3. Witnesses and Evidence. The United States respectfully requests that the Commission refrain from ruling on this motion until it can hear testimony from the following expert witness:

- a. W. Hays Parks**
Senior Associate Deputy General Counsel
International Affairs
Office of General Counsel
Department of Defense

As evidenced by his extensive curriculum vitae (Attachment A), Mr. Parks is a recognized expert in the law of war and has been involved with many of the seminal events in developing this body of law's application to U.S. forces and policies. In fact, Mr. Parks is currently spearheading the preparation of the Department of Defense Law of War Manual.

Mr. Parks will testify that the law of war has long recognized that civilians who engage in hostilities without meeting the requirements for lawful combatancy may be targeted while taking a direct part in hostilities or, if captured, prosecuted for violation of the law of war for their direct participation in hostilities. Specifically, Mr. Parks will testify that engagement in hostilities by these unlawful combatants, in and of itself, is a violation of the law of war.

4. Oral argument

The United States respectfully requests that the Commission allow the government to offer testimony from the above witness, as well as present oral argument on this motion. *See* R.M.C. 905(h). Mr. Parks is available during the timeframe currently scheduled for the AUEC hearing, 8-19 December 2008. The United States requests that hearing on this motion be conducted together with the AUEC hearing during that same timeframe, particularly since Mr. Parks' testimony may also be necessary on similar law-of-war issues at the AUEC hearing itself.

5. Additional Information

Finally, the Prosecution is obliged to make one last point—and does so with all due respect and candor to this Commission. Under the military judge’s current construction of the M.C.A., the evidence the government intends to offer at trial will not establish the requirement of the “in violation of the law of war” element as the military judge construes it. The military judge is aware that this issue is of central importance to this case, specifically, and to the military commission process, in general. As the matter currently stands, unless the military judge changes course and agrees with the position advanced by the government (which the prosecution firmly believes is the correct position), the military judge will stand as the final arbiter of this issue, making it unreviewable by any appellate court.

On such a central and hotly contested issue, the appellate courts should not be left on the sidelines, without a voice on this issue in this case. There are only two ways that the appellate courts will have an opportunity to address this issue in this case: (1) if the military judge adopts the government’s position and the accused, if convicted, raises the issue on appeal; or (2) if the military judge now issues an order satisfying R.M.C. 908(a), from which the prosecution would take an interlocutory appeal. Accordingly, to the extent that such an issue merits clarity and resolution from the appellate courts—something both parties deserve an opportunity to pursue (at the appropriate time)—the only avenue would be for the military judge to deviate from the current course and elect either of the two options above. The prosecution respectfully requests that the military judge do so.

6. Attachment

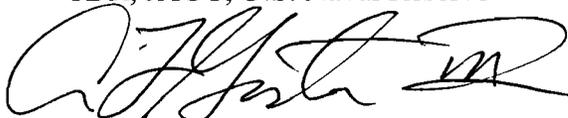
- A. Curriculum vitae of Mr. Parks

Respectfully Submitted,



Douglas M. Stevenson
Lt Col, U.S. Air Force

John T. Ellington
CDR, JAGC, U.S. Naval Reserve



Arthur L. Gaston III
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UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

**D-007
RULING ON GOVERNMENT MOTION
FOR RECONSIDERATION**

1. On September 24, 2008, the Military Commission denied D-007 – a Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction. On September 28, 2008, the Government submitted a document to the Military Commission Trial Judiciary styled “Notice of Intent to File Motion for Reconsideration of Commission’s Ruling.”¹ On October 9, 2008, the Government filed the actual motion requesting reconsideration of that part of the Military Commission’s D-007 holding that “unlawful enemy combatant status is ... a substantive component of the offense and must be proven...beyond reasonable doubt at trial,” and “proof the Accused is an unlawful enemy combatant by itself is insufficient to establish that the attempted murders in this case were in violation of the law of war.” The Defense filed a response in opposition to the Government motion for reconsideration on October 16, 2008.

2. The Government’s additional legal precedent and argument submitted in support of its request for reconsideration is unpersuasive and does not rise to the extraordinary circumstances, manifest injustice or clear error required to warrant modifying or changing the Military Commission’s original ruling.²

¹ A notice of intent to file a motion is not the same as actually filing the motion. *See generally Bowling v. Parker*, 344 F.3d 487 (6th Cir. 2003). *See also Williams v. Fresenius Medical Care of North America*, 2004 U.S. Dist. Lexis 29757 (N.D.W.V.) (notice of intent to file a document within the time set by state law did not satisfy the state law’s requirement to file the document itself within that time limit).

² A motion for reconsideration is appropriate where “the moving party can point to controlling decisions or data that the court overlooked - matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.” *Shrader v. CSX Trans. Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). A motion

3. Congress did not intend to make every murder committed by an alien unlawful enemy combatant or every murder of a lawful combatant by an unlawful combatant a law of war violation. As the Military Commission held in its September 24, 2008 ruling, there is a dual requirement for the Government to prove beyond reasonable doubt (1) that the [attempted] killings in this case were committed by an alien unlawful enemy combatant AND (2) that the method, manner or circumstances used violated the law of war. The propriety of the charges in this case must be based on the nature of the act and not merely on the status of the Accused at the time of the alleged offenses. In other words, proof that the Accused is an alien unlawful enemy combatant alone will be insufficient at trial to find the alleged acts of attempted murder in this case were in “in violation of the law of war.” The Military Commission’s position is consistent with case precedent, international law and Congressional intent.

4. Accordingly, the Government’s request for oral argument and motion for reconsideration are therefore DENIED.

So ordered this 29th day of October 2008:

/s/
Stephen R. Henley
Colonel, US Army
Military Judge

for reconsideration may also be granted to ‘correct a clear error or prevent manifest injustice.’” *In Re Terrorist Attacks on September 11, 2001*, 2006 U.S. Dist Lexis 11741 (S.D.N.Y. Mar. 20, 2006) (quoting *Doe v. New York City Dep’t of Soc. Svcs*, 709 F.2d 782, 789 (2d Cir. 1983)).