UNITED STATES COURT
OF
MILITARY COMMISSION REVIEW

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

Corrected

UNITED STATES	)	
Appellee	)	ISSUES FOR BRIEFING AND ORDER FOR ORAL ARGUMENT
v.	)	
SALIM AHMED HAMDAN	)	CMCR CASE NO. 09-002
Appellant	)	DATE: February 3, 2011

Upon consideration of the record of trial and pleadings of the parties and *amicus curiae*, the court directs briefing and oral argument on the following issues:

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

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

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[1]Judges D. O'Toole, E. Price, and C. Thompson took no part in the decision in this Order, having recused from further participation in this case.

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

Oral argument on the issues will be heard at 11:30 A.M. Eastern Time on March 17, 2011, in Courtroom 201, United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC.

FOR THE COURT:

LEROY F. FOREMAN
Clerk of Court

Copy to:
Convening Authority, OMC
Judges Listed
Appellate Counsel (copy to Accused)

UNITED STATES, Appellee, v. SALIM AHMED HAMDAN, Appellant.	**IN THE COURT OF MILITARY COMMISSION REVIEW** APPELLANT'S MOTION FOR LEAVE TO SUBMIT BRIEF AND ORAL ARGUMENT ON SPECIFIED QUESTIONS CMCR Case No. 09-002 Tried at Guantanamo Bay, Cuba 4 Jun 2007 – 7 Aug 2008 before a Military Commission convened by Hon. Susan J. Crawford Presiding Military Judge CAPT Keith Allred, JAGC, USN

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

COMES NOW Appellant Salim Hamdan and respectfully requests leave to submit additional briefing and oral argument directed to the two questions specified by the Court in its Order dated January 25, 2011 ("the 25 January Order") in *United States v. al Bahlul*.

Discussion

On 25 January 2011, the Court issued an Order in *al Bahlul* requesting additional briefing and oral argument on two specified questions. The first question concerns (a) what impact the "joint criminal enterprise" theory of individual criminal liability has on the Court's determination of whether Conspiracy, Solicitation, and Providing Material Support for Terrorism constitute Law of War offenses triable by military commission, and (b) whether such charges brought in 2007 for conduct that occurred years prior violate the Ex Post Facto Clause of the Constitution. The second question concerns whether the offense of "aiding the enemy" is limited to an Accused who has betrayed an allegiance or duty to a sovereign nation. However, given the

reference in the question to Civil War and Philippine Insurrection military commission cases, the parties' responses may speak to the viability of Material Support for Terrorism as a recognized LOW violation (since the Government relies heavily on those antiquated records to support the validity of its Material Support charge). Both of these questions are pure issues of law, and neither is unique to the *al Bahlul* case. Indeed, each question, if resolved by the Court sitting *en banc* in *al Bahlul*, will have direct, immediate, and profound consequences for Mr. Hamdan's appeal as well. As the Court is well aware, Mr. Hamdan's appeal is also to be decided by the Court sitting *en banc*.

Mr. Hamdan was convicted of Material Support for Terrorism and his appeal is now pending before this Court. Oral argument in the *Hamdan* case occurred on the same day as argument in the *al Bahlul* case, January 26, 2010. The primary legal issues Hamdan raises on appeal with regard to his conviction – whether Material Support for Terrorism is a recognized offense against the Law of War, and whether the conviction is barred by the Ex Post Facto Clause – are squarely implicated by the January 25 Order calling for additional briefing and argument in *al Bahlul*. It is highly likely that the Court's disposition of the specified questions will have a material and potentially dispositive effect on Mr. Hamdan's appeal.

Accordingly, Mr. Hamdan's interests are very much at stake in the Court's consideration of the questions posed in *al Bahlul*. But his interests cannot adequately be protected unless he is given the opportunity to address the Court on these matters. Mr. Hamdan has a right to his own counsel under the 6th Amendment, the Military Commissions Act of 2009, and the rules and regulation promulgated thereunder. That right to the assistance of counsel will be compromised if Mr. Hamdan's own counsel are not heard on these two highly material legal questions specified in *al Bahlul*, particularly as both the *al Bahlul* and *Hamdan* appeals are pending before

the Court sitting *en banc*. Although the legal issues raised by the Material Support for Terrorism convictions certainly overlap in the two appeals, Mr. Hamdan's arguments against the validity of the Material Support prosecution differ in certain respects from those offered by Mr. al Bahlul. Mr. al Bahlul's counsel obviously have no duty to present those arguments, but even were they to do so, they still are not legal representatives on behalf of Mr. Hamdan, who has a right to have those matters affecting his appeal argued in *his* case, by *his* counsel.

Moreover, the composition of the Court has changed very significantly since Mr. Hamdan's case was argued on January 26, 2010. A majority of the Judges currently considering Mr. Hamdan's appeal have not heard oral argument at all. Affording Mr. Hamdan the opportunity to be heard on the specified questions will allow the new members of the Court a chance to pose questions on Material Support for Terrorism that may not be directly addressed in the briefing. Permitting Mr. Hamdan's counsel and the Prosecution an opportunity to submit additional briefing and to present oral argument on the two specified questions will assist the Court in reaching a well reasoned disposition of <u>both</u> cases.

In light of these circumstances, Mr. Hamdan requests leave to submit briefing and to present oral argument responsive to the two questions specified in the January 25 Order.

Respectfully submitted,

HARRY H. SCHNEIDER, JR.
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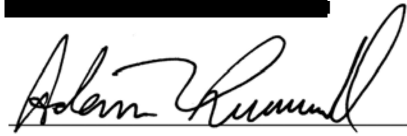

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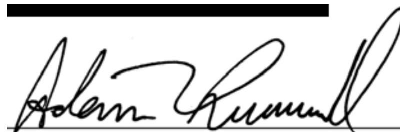
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to Mr. Michel Paradis, counsel for Mr. al Bahlul, and Mr. Francis Gilligan and CAPT Edward White, counsel for the United States, on 2 February 2011.



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Counsel for Appellant Salim Hamdan

UNITED STATES, Appellee, v. SALIM AHMED HAMDAN, Appellant.	)	**IN THE COURT OF MILITARY COMMISSION REVIEW** APPELLANT'S SUPPLEMENTAL BRIEF ON JOINT CRIMINAL ENTERPRISE AND AIDING THE ENEMY CMCR Case No. 09-002 Tried at Guantanamo Bay, Cuba 4 Jun 2007 – 7 Aug 2008 before a Military Commission convened by Hon. Susan J. Crawford Presiding Military Judge CAPT Keith Allred, JAGC, USN

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

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TABLE OF AUTHORITIES

Page

Cases

Boumediene v. Bush, 553 U.S. 723 (2008) 10
Carlisle v. United States, 83 U.S. 147 (1872).......... 21, 23
Hamdan v. Rumsfeld, 548 U.S. 557 (2006). .... passim
Loving v. United States, 517 U.S. 748 (1996) 10
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).......... 10
Prosecutor v. Brdjanin, Judgment, Case No. IT-99-36-A (Appeals Chamber, ICTY, 3 April 2007) 8
Prosecutor v. Krnojelac, Judgment, Case No. IT-97-25-A (Appeals Chamber, ICTY, 17 September 2003) 4
Prosecutor v. Milutnovic, Decision on Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72 (Appeals Chamber, ICTY, 21 May 2003)....... 7
Prosecutor v. Ojdanic 15
Prosecutor v. Tadic.......... 4, 7, 15
Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Charges (Trial Chamber, 29 January 2007).......... 15
Prosecutor v. Vasiljevic, Judgment, Case No. IT-98-32-A (Appeals Chamber, ICTY, 25 February 2004):.......... 5
United States v. Batchelor, 22 C.M.R. 144 (1956) 20
United States v. Hunt, 22 C.M.R. 814 (AFCMR 1956).......... 20
United States v. Khadr, CMCR Case No. 07-001 (24 September 2007).......... 12
United States v. Sloan, 35 M.J. 4 (CMA 1992) 21
United States v. Young, 97 U.S. 39 (1877)"……………22, 23
United States v. Wiltberger, 18 U.S. 76 (1820) 21

Statutes

5 U.S.C. § 8312.......... 18
10 U.S.C. § 904.......... 17
10 U.S.C. § 950v(b) 1, 2
10 U.S.C. §§ 950q – t.......... 15
10 U.S.C. § 948d.......... 8
10 U.S.C. § 950v(b) 1, 2
10 U.S.C. § 950t(26).......... 17
Military Commissions Act of 2006, 120 Stat. 2600, 2630, P.L. 109–366, § 950v(b)(26) (October 17, 2006) 1, 17
Military Commissions Act of 2009, 10 U.S.C. 948a *et seq.*.......... 16
Uniform Code of Military Justice, 10 U.S.C. § 801*et seq.* 17

Rules and Regulations

Manual for Courts-Martial Part IV, ¶ 5(26)(b)(3) 17
Manual for Courts-Martial ¶ 28(c)(1).......... 20

Constitutional Provisions

Ex Post Facto clause 1, 8, 10, 12

Other Authorities

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Allen O'Rourke, *Joint Criminal Enterprise and Branin: Misguided Overcorrection*, 47 HARV. INT'L L.J. 307 (Winter 2006) 13

Catherine H. Gibson, *Testing the Legitimacy of the Joint Criminal Enterprise Doctrine in the ICTY: a Comparison of Individual Liability for Group Conduct in International and Domestic Law*, 18 DUKE J. OF COMP. AND INT'L L. 521 (Spring 2008) 13

Fred Borch III, "Tried for Treason: The Court-Martial of Private First Class Dale Maple," *The Army Lawyer* 4, 5 (November 2010) 19

Hearings before the Senate Committee on the Philippines, "Charges of Cruelty, Etc., to the Natives of the Philippines," Senate Sess. 57:1, Doc. No. 331, Part 2 (1902)), at 1014, 1016; , G.O. No. 129 (Manila., P. I., November 26, 1900) 23

M. Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUMBIA L. REV. 1751, 1790-91, 1800 (October 2005) 13

Report of the UN Special Rapporteur, U.N. Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007), ... 8

Treatises

Winthrop, *Military Law and Precedents* (2nd ed. 1920) 24

Military Commission Orders and Rulings

G.O. No. 6 (January 9, 1901) 28
G.O. No. 9 (1862) 25
G.O. No. 17 (March 14, 1900) 27
G.O. No. 18 (January 25, 1901) 27
G.O. No. 23 (February 1, 1901) 28
G.O. No. 31 (June 11, 1900) 26
G.O. No. 51 (1866) 25
G.O. No. 55 (July 15, 1900), ... 29
G.O. No. 55 (March 21, 1901) 29
G.O. No. 93 (1864) 25
G.O. No. 108 (May 31, 1901) 25, 27
G.O. No. 112 (June 5, 1901) 27
G.O. No. 121 (June 13, 1901) 28
G.O. No. 130 (November 26, 1900) 27
G.O. No. 137 (June 22, 1901) 27, 28
G.O. No. 139 (December 10, 1900) 27
G.O. No. 140 (June 25, 1901) 28
G.O. No. 141 (June 25, 1901) 28
G.O. No. 153 (June 29, 1901) 23
G.O. No. 174 (July 19, 1901) 27, 28
G.O. No. 204 (August 2, 1901) 27, 28
G.O. No. 222 (August 17, 1901) 28
G.O. No. 285 (September 20, 1901), ... 28, 29

G.O. No. 357 (November 18, 1901) 27
G.O. No. 377 (December 6, 1901)... 29
G.O. No. 383 (December 9, 1901)... 28
G.O. No. 384 (December 9, 1901)... 29
Special Orders, No. 39 25
United States v. Salim Hamdan, Military Commissoin, Ruling on Motion to Dismiss Conspiracy (1 June 2008)... 17

By Order dated 3 February 2011, the Court directed Appellant Salim Hamdan to submit supplemental briefing on the following issues:

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

Factual Background

On 1 May 2007, two charges against Mr. Hamdan were referred to a military commission convened pursuant to the Military Commissions Act of 2006 ("MCA").[1] AE 001, App. B.[2] Those charges were (1) Conspiracy in violation of 10 U.S.C. § 950v(b)(28) and (2) Providing Material Support for Terrorism ("MST") in violation of 10 U.S.C. § 950v(b)(25). The proscribed conduct constituting those offenses was identified in the MCA, and the elements of the crimes were further defined in the Manual for Military Commissions ("MMC") promulgated in January 2007. The Conspiracy charge contained two specifications. Specification 1 of the Conspiracy

[1] Public Law 109-366, 120 Stat. 2600.

[2] The citations herein to "App." refer to the Appendices submitted by Mr. Hamdan with his merits brief in this appeal, filed 15 October 2009.

charge included an allegation that Hamdan had "join[ed] an enterprise of persons" that shared a "common criminal purpose" to commit a variety of criminal acts. AE 001, App. B at A8.

The MST charge against Hamdan contained eight specifications relating to alleged conduct and/or services provided by Hamdan for Osama bin Laden and al Qaeda. The alleged conduct consisted of (1) driving, (2) serving as a bodyguard, (3) weapons transport, and (4) unspecified training. App. B at A9-A10. This conduct was alleged to have occurred at unspecified times between February 1996 and the date of Hamdan's capture in Afghanistan, November 24, 2001. *Id.*

Prior to trial, the Defense filed a Motion to Dismiss Specification 1 of Charge 1 (Conspiracy), which, among other things, argued that the specification should be dismissed because "Congress did not criminalize 'join[ing] an enterprise of persons who shared a common criminal purpose,' and the Secretary [of Defense]'s attempt to unilaterally add this alternative definition of the crime of conspiracy to 10 U.S.C. § 950v(b)(28) is void *ab initio*." AE 124 at 2. On 1 June 2008, the Military Judge granted the Defense motion in part, ruling that in enacting the MCA, Congress did not intend to import a joint criminal enterprise theory of liability into the offense of Conspiracy. The Military Judge struck the allegations from Specification 1 relating to joint criminal enterprise, and ruled that "the Government may not proceed to trial on its 'enterprise' theory of liability." AE 211 at 3-4.

Hamdan pled "not guilty" to both charges. At the close of his trial, he was acquitted of Conspiracy, but found "guilty" of Providing Material Support for Terrorism. Mil. Comm. Order No. 2-09, App. E.

In this appeal, Hamdan asks the Court to vacate his MST conviction on the following grounds: (1) MST is not a cognizable offense against the law of war and, therefore, falls outside

the strictly limited jurisdiction of the military commission; (2) even if MST became a cognizable law of war offense after the enactment of the MCA in October 2006, it was not such an offense at the time of the alleged conduct (February 1996 – November 2001), and therefore Hamdan's conviction is the result of an illegal *ex post facto* prosecution; and (3) the prosecution of Hamdan by a military commission affording fewer substantive rights and procedural protections than would be afforded to a similarly-situated American citizen, violated Equal Protection principles enforceable under both U.S. and international law.

Discussion

I. The Joint Criminal Enterprise Theory of Liability Has No Bearing on Whether Material Support for Terrorism is a Law of War Violation, or on Whether Hamdan's Conviction was the Result of an *Ex Post Facto* Prosecution

The 3 February 2011 Order specifying the questions for additional briefing and argument correctly characterized joint criminal enterprise ("JCE") as "a theory of individual criminal liability." As a theory of liability, JCE is not a substantive offense. Rather, it is a doctrine of imputed or vicarious liability pursuant to which, if all the requisite conditions are met, an individual may be held responsible for other charged offenses (*i.e.*, specified crimes other than JCE, which is not a crime) committed by others as part of a common plan in which the accused participated.

A. Conditions for Imposing Liability on Grounds of Joint Criminal Enterprise

The seminal case describing JCE as a mode of liability is *Prosecutor v. Tadic*, a 1999 decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY").[3] In that case, the Appeals Chamber ruled that the accused, Dusko Tadic,

[3] *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-A (Appeals Chamber, ICTY, 15 July 1999).

could be held criminally responsible for the deaths of five Bosnian villagers, despite the fact that none of the witnesses who identified Tadic as one of the armed men who attacked the village could specifically link him to those killings. The Appeals Chamber interpreted the Statute establishing the ICTY, at Article 7(1), to "cover[ ] first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission of one of the crimes envisaged [elsewhere in] the Statute might also occur through *participation in the realisation of a common design or purpose*." *Tadic* at ¶ 188 (emphasis added).

Moreover, after reviewing the records of war crimes trials following World War II and other legal sources, the Appeals Chamber "concluded that participation in a joint criminal enterprise as a form of liability, or the theory of common purpose as the Chamber referred to it, …existed in customary international law at the time of the facts [in the *Tadic* case], that is in 1992." *Prosecutor v. Krnojelac*, Judgment, Case No. IT-97-25-A (Appeals Chamber, ICTY, 17 September 2003) at ¶ 29. The ICTY's review of the relevant case law led it to identify three types of cases in which JCE or "common purpose" could give rise to criminal liability. These three scenarios are summarized in *Prosecutor v. Vasiljevic*, Judgment, Case No. IT-98-32-A (Appeals Chamber, ICTY, 25 February 2004):

> 97. The first category is a "basic" form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention. An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.
>
> 98. The second category is a "systemic" form of joint criminal enterprise. It is a variant of the basic form, characterized by the existence of an organized system of ill-treatment. An example is

> extermination or concentration camps, in which prisoners are killed or mistreated pursuant to the joint criminal enterprise.
>
> 99. The third category is an "extended" form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect "ethnic cleaning") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.

Prosecutor v. Vasiljevic, Judgment, Case No. IT-98-32-A (Appeals Chamber, ICTY, 25 February 2004) at ¶¶ 97-99.

For all three categories, the *actus reus* of this form of liability is the same, consisting of:

> (i) *A plurality of persons*. . . .
>
> (ii) *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute*. . . .
>
> (iii) *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute.

Id. at ¶ 31 (emphasis in original). The *mens rea*, however, differs according to the category of the common design, but in all cases requires intent, either specific intent to commit the crime that occurred (category 1; *e.g.*, a plan to kill), or intent to further the system of ill-treatment in which the crime inevitably occurred (category 2; *e.g.*, a death camp), or intent to further the criminal activity and foreseeability that the charged crime might be perpetrated by a group member in carrying out that common plan (category 3; *e.g.*, a plan to engage in violent ethnic cleansing). As summarized by the ICTY Appeals Chamber:

> The Appeals Chamber considered that the *mens rea* differs according to the category of the common design under consideration:
>
> -- The first category of cases requires the intent to perpetrate a specific crime (this intent being shared by all the co-perpetrators).
>
> -- For the second category which, as noted above, is a variant of the first, the accused must have personal knowledge of the system of ill-treatment (whether proven by express testimony or inferred from the accused's position of authority), as well as intent to further this concerted system of ill-treatment.
>
> -- The third category requires the *intent* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or, in any event, to the commission of a crime by the group. In addition, responsibility for the crime other than the one agreed upon in the common plan arises only if, in the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.

Id. at ¶ 32 (emphasis in original).

It is important to recognize that "[c]riminal liability pursuant to a joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter." *Prosecutor v. Milutnovic*, Decision on Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72 (Appeals Chamber, ICTY, 21 May 2003) at ¶ 26 (quoted in part and relied on by the plurality in *Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n.40 (2006)).[4]

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[4] Similarly, this Court has interpreted the MCA to not criminalize mere membership in any given group: "Limiting criminal responsibility to an individual (including a member of al Qaeda or the Taliban, or associated forces) who actually 'engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents' [prerequisites for personal jurisdiction] appears to be the clear intent of Congress, and requires much more than mere membership in an organization for criminal responsibility to attach." *United States v. Khadr*, CMCR Case No. 07-001 (24 September 2007) at 14.

In the years following the initial articulation of the JCE theory in *Tadic*, the ICTY has emphasized that JCE cannot be permitted to undermine the "basic assumption" stated in *Tadic* that "the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated." *Tadic* at ¶ 186. Thus, in its 2007 Judgment in *Brdjanin*, the ICTY Appeals Chamber stated:

> 428. The Appeals Chamber emphasizes that JCE is not an open-ended concept that permits convictions based on guilt by association. On the contrary, a conviction based on the doctrine of JCE can occur only where the Chamber finds all the necessary elements satisfied beyond a reasonable doubt . . . .
>
> 429. To begin with, as explained above, the accused must possess the requisite intent. Moreover, a Chamber can only find that the accused has the requisite intent if this is the only reasonable inference on the evidence.
>
> 430. The other requirements are no less stringent. . . . In establishing [the] elements, the Chamber must, among other things: identify the plurality of persons belonging to the JCE (even if it is not necessary to identify by name each of the persons involved); specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims); make a finding that this criminal purpose is not merely the same, but also common to all of the persons acting together within a joint criminal enterprise; and characterize the contribution of the accused in this common plan. On this last point, the Appeals Chamber observes that, although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible.

Prosecutor v. Brdjanin, Judgment, Case No. IT-99-36-A (Appeals Chamber, ICTY, 3 April 2007) at ¶¶ 428-30 (footnotes omitted).

B. Joint Criminal Enterprise Is Irrelevant to the Issues Before the Court on the Hamdan Appeal

The first specified question asks the Defense to (1) assume that the charge at issue in this appeal (MST) alleges underlying conduct that violates the law of armed conflict, and (2) assume further that JCE is an accepted theory of liability under the law of armed conflict. 3 February Order at 1. It then asks what impact, if any, such assumptions have on whether MST constitutes an offense triable by military commission and whether, in this case, the MST charge violated the *Ex Post Facto* Clause of the Constitution.

1. JCE is irrelevant in determining whether MST is an offense triable by military commission

The military commission that tried Hamdan only had jurisdiction to try law of war or other closely related offenses historically triable by military commissions. 10 U.S.C. § 948d.[5] MST is neither. Indeed, Hamdan's appeal presents the very question that the Court posits as an assumption in item (1) above. That is, Hamdan disputes that MST is, or ever has been, a cognizable offense under the law of armed conflict or an offense triable by military commission. As shown in the briefing previously submitted by the Defense, and in oral argument on January 26, 2010, prior to the passage of the MCA in October 2006 there was no basis in either U.S. or international law or practice for prosecuting MST as a war crime. Likewise, there is no historical record of any law-of-war military commission ever trying an offense that could fairly be

[5] An example of a "closely related offense historically triable by military commissions" would be spying. While technically no longer considered a war crime, it has long been within the jurisdiction of military commissions, if, and only if, the perpetrator was captured in the act. By stripping away that important temporal qualification, the offense of "spying" in the MCA goes beyond what can properly be tried in a military commission. *See Report of the UN Special Rapporteur*, U.N. Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007), submitted with Hamdan Merits brief as App. I, at A65 ("[T]he offences listed in Section 950v(24)-(28) of the [MCA] (terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying, and conspiracy) go beyond offences under the laws of war.").

characterized as MST. *See* Hamdan Merits Brief (15 October 2009) at 14-18, and Reply Brief (21 December 2009) at 1-10.

The leading Supreme Court precedents on military commissions instruct that, under the Constitution and our tradition of civilian rule, American courts must carefully scrutinize the charges prosecuted in a military tribunal and jealously guard against any undue expansion of military jurisdiction. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 29 (1942) ("We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial."); *In re Yamashita*, 327 U.S. 1, 13 (1946) ("Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war."); *Loving v. United States*, 517 U.S. 748, 760 (1996) ("the Framers harbored a deep distrust of executive military power and military tribunals"); *Hamdan*, 548 U.S. at 567, 602, n.34 ("trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure"; under the common law of war "an act does not become a crime without its foundations having been firmly established in precedent," a precedent that "must be plain and unambiguous.").

In this case, there is no "plain and unambiguous" precedent for prosecuting MST as a war crime. A recital by Congress to the contrary – on an issue squarely within the province of the judiciary[6] – does not change this fact. Instead, as noted by the *Hamdan* plurality, "[n]one of the overt acts that Hamdan is alleged to have committed violates the law of war." 548 U.S. at 600. Under these circumstances, the MST charge based on that conduct does not constitute a war

[6] *See Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (cautioning against an unwarranted deference to the political branches in identifying the content of the law, which "would permit a striking anomaly in our tripartite system of government, leading to a regime in which the Congress and the President, not this Court, say 'what the law is.'") (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

crime and the military commission therefore lacked subject matter jurisdiction. Because MST is not an underlying war crime, there can be no extended liability for remote actors (participants in a common plan) pursuant to a JCE theory. In other words, if the common plan (to provide material support) does not entail the commission of a crime, then JCE as a theory of extended liability is simply irrelevant. This is the correct result in this case.

2. JCE is irrelevant in determining whether the MST charge violated the *Ex Post Facto* clause

If, however, contrary to the weight of the historical evidence and our judicial tradition of strictly policing military jurisdiction, this Court concludes (or assumes) that MST is a law of war offense, then Hamdan's challenge to his MST conviction turns on the second and third grounds for this appeal identified above (at pp. 2-3), *i.e.*, (2) whether MST was a war crime at the time of the alleged conduct (February 1996 – November 2001); and (3) whether the prosecution violated Equal Protection principles applicable in a criminal prosecution in any American court.

If this Court concludes that MST is a law of war offense, then it should ground that determination in the only legal authority that can plausibly support that conclusion, the MCA of 2006. That is, to protect the legitimacy of this process and preserve the fragile edifice of international law, this Court should at most proceed incrementally to recognize the evolutionary nature of international law, rather than accept the wholesale revisionist history promoted by the Prosecution. In other words, *at most*, the Court should hold that MST only became a recognized war crime in or about October 2006, when Congress passed the MCA defining it as such with sufficient precision to place potential defendants on notice of its elements. This is essential to preserve the universally recognized legal principle of *nullum crimen sine lege* ("no crime without law"). *See Milutnovic, supra*, at ¶ 37 (referring to *nullum crimen sine lege* as a "principle of justice" recognized by the International Military Tribunal at Nuremberg). In *Milutnovic*, the

ICTY Appeals Chamber stated that "[i]t follows from this principle that a criminal conviction can only be based on a norm which existed at the time the acts or omission with which the accused is charged were committed. The Tribunal must further be satisfied that the criminal liability in question was *sufficiently foreseeable* and that the law providing for such liability must be *sufficiently accessible at the relevant time* for it to warrant a criminal conviction." *Id*. (emphasis added). This concept of adequate notice is a fundamental judicial guarantee under international law that this Court has already recognized and applied:

> No serious legal authority would contest the notion that one of the most indispensable and important judicial guarantees among civilized nations honoring a tradition of due process and fundamental fairness is the right to adequate notice and an opportunity to be heard in regard to allegations which might result in criminal sanctions. The M.C.A. did not exist until 2006. . . . We need not speculate on how Mr. Khadr's personal participation in his 2004 C.S.R.T. evaluation may have been impacted had he been on notice of the potential criminal liability the C.S.R.T.'s findings could impose upon him [under the Government's proposed interpretation of the M.C.A.]. Such lack of notice offends our most basic notions of due process; therefore, it also violates Common Article 3.

United States v. Khadr, CMCR Case No. 07-001 (24 September 2007) at 15.

Under this approach – in which MST is deemed a war crime only as of 2006 – Hamdan's conviction must be vacated as the product of an illegal prosecution prohibited by the *Ex Post Facto* Clause of the Constitution and the *nullum crimen sine lege* principle of international law. *See* Hamdan Merits Brief (15 October 2009) at 5-12. The JCE theory of liability has no relevance in this context either, and cannot operate to sustain the validity of the MST conviction. A theory of imputed liability like JCE – which is a means of extending culpability to reach all those who intentionally participate in a common plan that has a criminal objective – simply has no application in a situation where the underlying objective or conduct (MST) is not a crime at

the time the common plan is implemented. As with the broader question of whether MST has ever been a war crime, one cannot be a remote or secondary offender on a JCE theory when there is no crime of which any member of the group can be the primary offender (i.e., the physical perpetrator). Accordingly, as a logical and a legal matter, the JCE theory of liability has no relevance to the issues before the Court on this appeal.

C. JCE is Neither Fully Defined Nor Universally Accepted As a Theory of Liability

In considering whether JCE has any impact on the issues on appeal in this case, it is important to note that the second assumption in the specified question – "that joint criminal enterprise is a theory of individual criminal liability under the law of armed conflict" – remains a subject of substantial controversy and disagreement among scholars and international jurists. Indeed, as discussed in Section I.D, *infra*, it was rejected as a theory of liability by the commission that tried Hamdan.

Though developed and employed within the ICTY, the JCE doctrine "has proven controversial in the international community." Catherine H. Gibson, *Testing the Legitimacy of the Joint Criminal Enterprise Doctrine in the ICTY: a Comparison of Individual Liability for Group Conduct in International and Domestic Law*, 18 DUKE J. OF COMP. AND INT'L L. 521, 521 (Spring 2008); *see also* Allen O'Rourke, *Joint Criminal Enterprise and Branin: Misguided Overcorrection*, 47 HARV. INT'L L.J. 307, 314-15 (Winter 2006) (describing controversies over the requirements of JCE and the scope of its application). Commentators have pointed out, for example, that the doctrine, "if not limited appropriately, ha[s] the potential to lapse into [a] form[ ] of guilt by association, thereby undermining the legitimacy and the ultimate effectiveness of international criminal law." A. Danner & J. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93

CAL. L. REV. 75, 79 (January 2005) (arguing, among other things, that "the scope of the enterprise and the defendant's relationship to it should be defined more precisely"); *see also* M. Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUMBIA L. REV. 1751, 1790-91, 1800 (October 2005) ("Enterprise participation, as developed by the ICTY, contains no . . . clear threshold for corralling a person into the status of participant in others' crimes. . . . Even acting in perfectly good conscience, prosecutors do not currently have any clear criteria for defining the enterprise and its membership.")

Even within the ICTY, the doctrine is not universally accepted. For example, in July 2005, the Association of Defense Counsel of the ICTY ("ADC-ICTY") filed an amicus brief in the *Brdjanin* case stating that it "has viewed with alarm the Appeals Chamber's creation and expansion of the doctrine of joint criminal enterprise ("JCE"). The ADC-ICTY disagrees with, but accepts as binding precedent, the decision in *Tadic* that JCE was part of customary international law, and the decision in *Ojdanic* that JCE is included in Article 7(1) despite its omission from the language of the Statute." *Brdjanin*, *supra*, Amicus Brief of Association of Defense Counsel – ICTY at 3 (5 July 2005) (footnotes omitted).

The Rome Statute establishing the International Criminal Court (which opened for signing after the 1999 *Tadic* decision) does not expressly recognize JCE as a form of liability, although in Article 25(3)(d) it does provide for criminal responsibility where an accused "contributes to the commission or attempted commission of . . . a crime by a group of persons acting with a common purpose." However, this language has been interpreted by the ICC to refer to a species of *accessorial* liability, not to the *principal* liability of a co-perpetrator that the ICTY has imposed pursuant to its JCE theory. *See Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges (Trial Chamber, 29 January 2007) at

¶¶ 320-21 (describing the "common purpose" language in the Rome Statute as giving rise to "forms of accessory, as opposed to principal, liability"). In *Lubanga*, the ICC Trial Chamber held that the framers of the Rome Statute did not adopt the jurisprudence of the ICTY on JCE. Instead, they embraced a concept of co-perpetration "jointly with or through another person" only where the defendant retained some element of control over the commission of the crime. *Id*. at ¶¶ 341-42 (explaining that "the concept of co-perpetration embodied in article 25(3)(a) of the Statute coincides with that of joint control over the crime. . . . Hence, although none of the participants has overall control over the offense because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.") This emphasis on "joint control" hews much more closely to the fundamental legal principle of personal responsibility, and describes a dramatically different (and more restrictive) form of extended liability than the JCE theory developed in the ICTY.

In addition, extending criminal responsibility by means of a JCE theory is at odds with the plurality's guidance in *Hamdan* (relying on Winthrop), that "under the common law governing military commissions, it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt." *Hamdan*, 548 U.S. at 604 (plurality). That language is difficult to reconcile with any expansive form of JCE.

In light of this unsettled jurisprudence, the better position is that JCE has <u>not</u> been definitively adopted as a form of liability in the law of armed conflict, and any effort to expand criminal liability to the accused in this case by means of JCE cannot be justified.

D. The Military Judge Excluded JCE as a Theory of Liability and Prohibited the Government from Proceeding to Trial on that Theory

Finally, it must be noted that even if JCE is deemed to exist as an established doctrine under the law of armed conflict, it cannot provide any legal or evidentiary basis to uphold the MST conviction at issue here. In the trial of this case there was no effort by the Prosecution to prove the elements of JCE, no evidence or argument directed to the issue, no instructions provided to the commission members on the necessary elements, and no findings by the commission members with respect to a common plan or JCE. Instead, there was a pretrial ruling by the Military Judge that expressly excluded JCE as a theory of liability in connection with the Conspiracy charge. AE 211 (Ruling on Motion to Dismiss Conspiracy, 1 June 2008). In that Ruling – which was not appealed by the Prosecution – the Military Judge ruled that "the Government may not proceed to trial on its 'enterprise' theory of criminal liability." AE 211 at 4. That decision was based on the Commission's interpretation of the MCA:

> The Commission . . . attributes to the Congress an intent to import the traditional definition of the offense [Conspiracy]. Congress was certainly aware of the RICO statute and its treatment of criminal enterprise, and did nothing to suggest that it intended to depart from the traditional construction of conspiracy in enacting the MCA.

AE 211 at 3. That reasoning applies equally to the MST charge as defined in the MCA, and to the sections of the statute that address forms of liability (§§ 950q – t, on principals, accessories, attempts, etc.). In implementing that Ruling, the Military Judge struck out all allegations in the Conspiracy charge that referred to an "enterprise," a "common criminal purpose," and any specific target, objective, victim, or goal of any shared undertaking or plan. *Id*. at 4. Ultimately, the commission members found Mr. Hamdan "not guilty" of entering into any agreement to

commit specified offenses (attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, and terrorism). AE 326.

Similarly, the MST charge of which Hamdan was found guilty contains no reference to an "enterprise," a "common criminal purpose," or any specific target, objective, victim, or goal. The specifications of the MST charge do not refer to a plurality of persons, to any shared objective or common plan, or to any geographic, temporal, or other limits to a common plan. The only evidence that commission members heard at trial that could be characterized as relating to a common plan was introduced by the Prosecution in connection with the Conspiracy charge that the commission members rejected, *i.e.*, the allegation that Hamdan had entered into an agreement with others to commit certain criminal acts. The commission members correctly rejected that allegation because, in fact, the Prosecution's case amounted to nothing more than argument, not evidence. The Prosecution asked the commission members to *infer* an agreement based simply on Hamdan's admitted proximity to al Qaeda members. The commission members, acting on the Military Judge's instructions regarding the standard of proof in a criminal prosecution, declined to do so.

Under these circumstances, even if one assumes JCE is a theory of individual criminal liability that forms part of the law of armed conflict, there is no basis whatever – in the charges, the evidence presented at trial, the findings of the commission members, or the rulings of the Military Judge – to conclude that the MST conviction of Mr. Hamdan could be upheld on a JCE theory. In fact, as noted above, at the only point in the proceedings where the JCE theory was litigated, the Military Judge ruled that it was not a form of liability that Congress intended to create, and that the Prosecution could "not proceed to trial" on that theory. AE 211 at 4. Accordingly, the MST conviction in this case cannot be sustained on a JCE theory of liability.

II. The Offense of Aiding the Enemy Is Limited to Those Who Have Betrayed an Allegiance or Duty to a Sovereign Nation

The answer to the second specified question is "yes." That is, only individuals who have violated a duty of loyalty or allegiance to the charging sovereign may be convicted of the offense of aiding the enemy. Logic, law, and history all compel this conclusion. The gravamen of the crime of "aiding the enemy," as it is interpreted in the Military Commissions Act of 2009 ("2009 MCA"), the Military Commissions Act of 2006 ("2006 MCA"), the Manual for Military Commissions ("MMC"), the Uniform Code of Military Justice ("UCMJ"), and the unbroken tradition of military commission practice, is a breach of a duty of allegiance to the United States. It follows that any individual who has no such duty, including foreign nationals like Mr. Hamdan who neither reside in nor otherwise adhere to the United States, cannot be convicted of the crime.

First, solely as a matter of logic, the crime of "aiding the enemy" cannot be construed as applying to an "enemy" himself – that is, one who is a citizen of, resident of, or otherwise adheres to a state or entity against which the United States is at war. To interpret the crime otherwise would make all alien enemy combatants – privileged or unprivileged – guilty of war crimes simply by virtue of taking up arms against the United States, regardless of whether their conduct is lawful or unlawful under the laws of war. For that reason alone, individuals found to be "alien unlawful enemy combatants," without any ties to the United States that would otherwise create a duty of allegiance, cannot be convicted of "aiding the enemy."

That is, moreover, clearly Congress's understanding of the crime. The "allegiance" requirement is explicit in both the 2006 MCA and the 2009 MCA. *See* 2006 MCA, 120 Stat. 2600, 2630, P.L. 109–366, § 950v(b)(26) (October 17, 2006) (defining "Wrongfully Aiding the Enemy" to include "breach of an allegiance or duty to the United States" as an element); 2009 MCA, 10 U.S.C. § 950t(26) (same); *see also* MMC Part IV, ¶ 5(26)(b)(3) (specifying as element

of the crime the fact that "[a]t the time of the accused's actions, the accused had an allegiance or duty to the United States").

For similar reasons, the UCMJ's version of "aiding the enemy," 10 U.S.C. § 904 (Article 104), does not reach enemy subjects owing no allegiance to the United States. *Hamdan v. Rumsfeld*, 548 U.S. 557, 601 n.32 (2006) ("[T]he crime of aiding the enemy may, in circumstances where the accused owes allegiance to the party whose enemy he is alleged to have aided, be triable by military commission pursuant to Article 104 of the UCMJ."). A contrary construction of the Article that included no "duty of allegiance" requirement would lead to absurd results. It would mean that every citizen of an enemy state employed in industries supplying "arms, ammunition, supplies, money, or other things" to the enemy state's armed services could be tried by military commission for a capital crime. Under the same logic, every enemy civilian[7] who merely "communicates or corresponds with or holds any intercourse with" members of their own armed forces (including, presumably, their family members), "either directly or indirectly," could also be tried by military commission. 10 U.S.C. § 904. It is inconceivable that Congress intended courts-marshal jurisdiction to extend that broadly.

Instead, courts have consistently recognized that violations of Article 104 are closely related to the crime of treason, which requires the violation of a duty of allegiance to the United States for conviction. *See e.g. United States v. Batchelor*, 22 C.M.R. 144, 157 (1956) (Article 104 "closely akin to treason"); *United States v. Wiltberger*, 18 U.S. 76, 97 (1820) ("Treason is a breach of allegiance"); *Carlisle v. United States*, 83 U.S. 147, 154 (1872) "The acts of aid and comfort which will defeat a suit must be of the same general character with those necessary to

[7] Civilians are subject to Article 104 regardless of whether they are otherwise subject to military law. *See* Manual for Courts-Marshal ("MCM"), ¶ 28(c)(1); *see also United States v. Hunt*, 22 C.M.R. 814, 818 (AFCMR 1956) ("Article 104, relating to aiding the enemy, applies to all persons whether or not subject to the Code").

convict of treason, where the offence consists in giving aid and comfort to the enemies of the United States"); *see also e.g. United States v. Sloan*, 35 M.J. 4, 12 n.6 (CMA 1992) (explaining the crimes subject to pay forfeiture under 5 U.S.C. § 8312 as "such misdeeds as aiding the enemy, spying, treason, sedition, and other like offenses that relate to undermining the very government from whom the accused would purport to receive retired pay"). Because "aiding the enemy" is a military correlate of the civilian crime of treason, it shares the key element of a breach of allegiance to the sovereign.[8]

Indeed, the Supreme Court made that rule explicit in *Young v. United States*, 97 U.S. 39 (1877), a case in which a non-resident alien, Alexander Collie (a citizen and resident of Great Britain), sought the recovery of property belonging to him that had been seized by Union forces during the Civil War. The factual and procedural background of *Young* is somewhat complex, but the import of its holding for this appeal is not.

In exchange for cotton, Collie had supplied the rebellious state of North Carolina with guns and other materiel that contributed significantly to the Confederacy's war effort. Subsequently, the Union forces seized cotton that Collie had acquired before it was transported to England, pursuant to the law of war that permitted seizure of all enemy property that potentially contributed to its war effort. (The Court held that non-resident aliens who supplied war materiel like Collie were in fact an "enemies" for purposes of the seizure rule.) Technically, virtually all cotton belonging to individuals living in the Confederate states was subject to the

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[8] The story of PFC Dale Maple, "the first American-born Soldier in the history of the Army 'ever to be found guilty of a crime that fits the Constitutional definition of treason,'" illustrates the very close relationship between the two crimes. As former Chief Prosecutor Fred L. Borch III recounts in a recent article, after Maple assisted the attempted escape of two German prisoners of war, he was indicted for treason in federal court. The Army took jurisdiction over him but could not charge him with treason because it was not an offense under the Articles of War. Instead, Maple was charged with two specifications of "aiding the enemy" under then-Article 81, because "[t]hat article was the 'military statute that most nearly approximate[d] the civil treason law.'" Fred Borch III, "Tried for Treason: The Court-Martial of Private First Class Dale Maple," *The Army Lawyer* 4, 5 (November 2010) (cites omitted).

seizure rule, because, as the Court noted, "'the life of the Confederacy depended as much upon its cotton as it did upon its men,.'" 97 U.S. at 61 (citation omitted). Nevertheless, in recognition of the fact that some owners of cotton remained loyal to the Union, Congress passed the Captured and Abandoned Property Act, 12 Stat. 820 (March 12, 1863), that authorized seizure of all enemy property but also permitted individuals who had "never given any aid or comfort to the present rebellion" to file claims for recovery of their property after the cessation of hostilities. *Id*. Subsequently, in 1868, President Johnson issued a blanket pardon to all who had participated directly or indirectly on the side of the rebels, including those who had committed treason by virtue of their participation. That pardon was subsequently construed to eliminate the loyalty requirement of the 1863 law, thus allowing Confederate citizens to recover their seized property regardless of whether they had "given aid or comfort" to the Confederacy.

Against this background, the issue in *Young* was whether a non-resident alien like Collie who had given such "aid and comfort" could recover his seized property under the 1868 pardon in the same manner as Confederate citizens. The Court held that he could not. First, the Court noted that it had already held that *resident* aliens owed a temporary duty of loyalty to the United States during the period of their residency. *Carlisle*, 87 U.S. at 154. Accordingly, resident aliens who had provided aid and comfort to the rebels were guilty of treason,[9] were therefore included within the 1868 pardon, and could sue for return of their property to the same extent as Confederate citizens who had committed treason. *Young*, 97 U.S. at 62 (*citing Carlisle*, *supra*). However, the Court went on to hold that *non-resident* aliens such as Collie, who had never established temporary residence in the United States, owed no such duty of loyalty, even though

[9] This principle was applied in military commissions as well. *See e.g.* G.O. No. 153 (June 29, 1901) (accused, "a Belgian citizen, enjoying as such certain privileges of a neutral and the protection of authorities of the United States" while present in the Philippines under the United States occupation, convicted of "Relieving the enemy with money, in violation of the laws of war").

his acts of "aid and comfort" to the enemy would have constituted treason had they been performed by a citizen. *Id*., at 64 ("Had these things been done by a citizen of the United States, he would have been guilty of treason."). Collie therefore, "having been a non-resident alien, was not a traitor," *id*., at 63, and because he was not a traitor, he was not a beneficiary of the 1868 pardon. "A pardon of an offence removes the offending act out of sight; but, if there is no offence in the eye of the law, there can be no pardon." *Id*., at 68.

Thus, for purposes of this Court's specified question, the crucial holding of *Young* is the reason *why* Collie could not be convicted of the criminal act of treason, even though his act of "aid and comfort" would have been treason if committed by a citizen or resident alien. That reason was that, as a non-resident alien, he owed no duty of allegiance to the United States and therefore committed no criminal act.

In sum, absent a duty of loyalty to the United States – which non-resident aliens do not possess – the act of providing aid or comfort to the enemy is not a crime. *A fortiori*, there is no basis for the proposition that "aiding or providing support for the enemy" by a non-resident enemy alien was the factual equivalent of any crime, including the crime of material support for terrorism.

The historical record is entirely consistent with this holding, because in every case in which aiding the enemy or its equivalent was charged, the accused owed a duty of loyalty to the United States.

Thus, in his discussion of the Civil War-era commissions, Winthrop points out that "Treason" was the name commonly given to many of the law of war offenses tried by military commissions, and of the offenses he lists, the majority are crimes of breached allegiance, including, *inter alia*, "aiding the enemy" (which is committed through various specified and

unspecified “disloyal acts”). Winthrop, *Military Law and Precedents* (2nd ed. 1920) 840-41(“aiding the enemy by harboring his spies, emissaries, &c., assisting his people or friends to cross the lines into his country, acting as guide to his troops, aiding the escape of his soldiers held as prisoners of war, secretly recruiting for his army, negotiating and circulating his currency or securities--as confederate notes or bonds in the late war, hostile or disloyal acts, or publications or declarations calculated to excite opposition to the federal government or sympathy with the enemy, &c.”) (citations omitted). Consistent with Winthrop’s characterization, many of the commission records, including the commission cases cited by the government in its brief on the merits, state this duty explicitly either by reciting the accused’s citizenship and breach of allegiance to the United States or by less formal language to the same effect.[10]

More generally, *any* individual who had been a United States citizen at the time of the secession, and thereafter adhered to the Confederacy, by that very act breached his or her duty of allegiance, because the Union courts continued to consider such individuals to be citizens of the United States (albeit rebellious ones). The United States never recognized the Confederacy as a separate sovereign, *Ford v. Surget*, 97 U.S. 594, 605 (1878), and so inhabitants of the seceding states were deemed to be citizens subject to a citizen’s duty of allegiance. *The Prize Cases*, 67 U.S. 635, 673-74 (1862) (“[T]he citizens [in the Confederate States] owe supreme allegiance to the Federal Government. . . . They have cast off their allegiance and made war on their

[10] *See* Gov’t Merits Brief, at 15-16; War Dep't., G.M.O.C., No. 93 (1864) (charging “James A. Powell . . . a citizen of the State of Missouri and owing allegiance to the government of the United States”); Hdqrs. Dep't. of Kentucky, G.C.M.O., No. 108 (1865) (charging “Henry C. Magruder, a citizen of the United States, and owing allegiance thereto”); Hdqrs. Dep't. of the Mississippi, G.O. No. 9 (1862) (charging John W. Montgomery with “commit[ting] treasonable acts against the Government of the United States”); War Dep't., G.O. No. 51 (1866) (charging “James Harvey Wells, alias William Henry, citizen”); Hdqrs. Dist. of the Border, Special Orders, No. 39 (military commission indictment of John West Wilson for, *inter alia*, “violat[ing] his said oath of allegiance by taking up arms as a guerilla and insurgent against the law of the United States”).

Government, and are none the less enemies because they are traitors"); *Texas v. White*, 74 U.S. 700, 726 (1868), *rev'd in part on other grounds*, *United States v. Morgan*, 113 U.S. 476, 496 (1885) (Texas ordinance of secession was "utterly without operation in law" and "[t]he obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired" regardless of the ordinance). Thus, a breach of allegiance was implicit in every Confederate citizen's act of support for the rebellion.[11]

The legal landscape was much the same during the Philippine insurrection. At the time of the insurrection, the Philippines were American territory and, by virtue of that fact, as well as by virtue of the United States' status as an occupying power, the indigenous people (including the rebels) owed it their allegiance.[12] For example, Filipinos were tried for "treason," which presupposed a duty of allegiance to the United States, in connection with their guerrilla activities.[13] Alternatively, the guerillas could be treated as "war-traitors" or "war-rebels," that is,

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[11] Notwithstanding the legal status of Confederate citizens who assisted the rebel cause as criminals and traitors, the Union forces abided by the law of war and granted the Confederate military privileged belligerent and prisoner-of-war status. This was a matter of policy, however, and not legal obligation, as numerous courts recognized. *See The Prize Cases*, 67 U.S. at 673; *Williams v. Bruffy*, 96 U.S. 176, 186-87 (1877) (concession of belligerent rights "made in the interests of humanity . . . . But . . . to what extent they shall be accorded to insurgents depends upon the considerations of justice, humanity, and policy controlling the government."); *United States v. Greathouse*, 26 F. Cas. 18, 23 (C.C. N.D.Cal. 1863) (Field, Cir. J.) ("As a matter of policy and humanity, the government of the United States has treated the citizens of the so-called Confederate States, taken in open hostilities, as prisoners of war, and has thus exempted them from trial for violation of its municipal laws.").

[12] All of the military commission cases cited herein are set out in the Appendix to Mr. al Bahlul's parallel brief in his appeal. In order to avoid duplication of these voluminous records, Mr. Hamdan respectfully directs the Court to that Appendix rather than attaching them to this brief.

[13] See e.g. Headquarter Division of the Philippines, General Order ("G.O.") No. 31 (June 11, 1900) (reproduced in Hearings before the Senate Committee on the Philippines, "Charges of Cruelty, Etc., to the Natives of the Philippines," Senate Sess. 57:1, Doc. No. 331, Part 2 (1902)), at 1014, 1016; , G.O. No. 129 (Manila., P. I., November 26, 1900), Sen. Doc. 331, at 1068 (Filipino accused tried for a "Violation of the laws of war" after taking an oath of allegiance to the United States and then rejoining the guerillas); G.O. No. 357 (November 18, 1901) ("Treason"; an American servicemen, deserted and gave "aid and comfort" to the enemy). Hereafter, "Headquarters Division of the Philippines" is the issuing authority and Manila, Philippine Islands ("P.I.") the location of issuance unless otherwise specified, and will be omitted from the cites for the sake of brevity. Also, where reports of military commissions were attached as exhibits to the Hearings before the Senate Committee on the Philippines, Report on "Charges of Cruelty, Etc., to the Natives of the Philippines," Senate Sess. 57:1, Doc. No. 331, Part 2 (1902)), the page cite to the Senate record will be given and the Senate Committee report will be abbreviated as "Sen. Doc. 331"

individuals who flouted their duty of allegiance to the occupying power by taking up arms on behalf of the former government.[14]

Moreover, as during the Civil War, these overlapping bases for military commission jurisdiction led to "hybrid" commissions in which the nature of the offense tried (municipal, martial, or law of war) was often difficult to determine.[15]

Nevertheless, regardless of any other complications, it is clear that in every case charging "aiding," "relieving," "communicating" or "holding correspondence with" the enemy in violation of the laws of war, the charge invariably specified either a sworn oath of allegiance or facts that established such a duty of allegiance by operation of law (primarily commission of the crime while in territory occupied by the United States).[16]

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[14] As one military commission explained the consequences of breaching this duty, "[p]ersons who rise in arms against an occupying or conquering army and conspire against the authority established by the same within the occupied territory, are regarded by the laws of war as war-rebels, and if captured, may suffer death, 'whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not.'" G.O. No. 130 (November 26, 1900), Sen. Doc. 331, at 1070, 1071; *see* G.O. No. 112 (June 5, 1901) (charging "Being a war traitor" and "Violation of the laws of war" based on prior oath of allegiance); G.O. No. 204 (Manila, P.I., August 2, 1901), Sen. Doc. 331, at 1234 (characterizing accused as "war-traitor"); G.O. No. 137 (June 22, 1901) (charge of "Being a war traitor"); G.O. No. 174 (July 19, 1901) (charge of "Being a war rebel" based on violation of oath of allegiance to the United States); G.O. No. 108 (May 31, 1901) (charge of "War-rebel"; committed "in territory occupied by the United States"); G.O. No. 18 (January 25, 1901) ("Being war rebels": based, *inter alia*, on encouraging others to join rebels while "living and remaining in territory occupied by the United States Army").

[15] See *Hamdan*, 548 U.S. at 596 n.27; *see e.g.* Hdqrs. Department of the Pacific and Eighth Army Corps., G.O. No. 17 (March 14, 1900), Sen Doc. 331, at 1012 (trying accused for common law crimes of burglary, robbery, and assault and battery, "in violation of the laws and usages of war"). Crimes committed in connection with clearly insurrectionary acts (involving large bands of "outlaws" who raided villages under the United States occupation, murdering and forcibly conscripting their residents) were sometimes charged as purely municipal crimes such as "disturbing the peace" and "murder." *See e.g.* G.O. No. 139 (December 10, 1900) Sen. Doc. 331, at 1077 (attack on village by 70 armed men).

[16] *See e.g.* G.O. No. 137 (June 22, 1901) ("Rendering aid and comfort to the enemy"; alleging "violation of his duties as such resident" of United States-occupied territory); G.O. No. 140 (June 25, 1901) ("Violation of the laws of war"; alleging violation of "oath of office and allegiance to the United States"); G.O. No. 141 (June 25, 1901) ("Violation of the laws of war"; alleging violation of "oath of allegiance to the United States"); G.O. No. 204 (August 2, 1901), Sen. Doc. 331, at 1234 (accused characterized as "war-traitor"; charged with "Aiding guerillas" based on providing supplies to insurgents; specifying that conduct occurred at "a place under the military jurisdiction of the United States"); G.O. No. 23 (February 1, 1901), Sen. Doc. 331, at 1108 (accused charged with "violation of the law of war" for distributing rifles to insurgents; alleging both that he had taken an oath of allegiance to the United States and that the conduct occurred "in time of insurrection and within the theater of military operations in said province"); G.O. No. 6 (January 9, 1901), Sen. Doc. 331, at 1092 (charged with

In sum, "aiding the enemy" is an offense of disloyalty. Without a duty of loyalty in the first instance, it is logically impossible to commit the offense. That is why during both the Civil War and the Philippine insurrection, "aiding the enemy" was charged only when there was a duty of allegiance to the United States that forbade such aid.

As a non-resident alien, Mr. Hamdan owed no such duty to the United States. Accordingly, even assuming *arguendo* that Mr. Hamdan's conduct constituted "material support for terrorism" within the meaning of the statutes that have been enacted subsequently, that conduct could not constitute the offense of "aiding the enemy." The Civil War and Philippine commissions cases therefore provide no support whatsoever for the proposition that "aiding the

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"Relieving and knowingly harboring and protecting the enemies of the United States in time of insurrection, in violation of the laws of war"; specifying that conduct occurred at "a place then, as now, in the theater of active military operations and occupied by the troops of the United States"); G.O. No. 285 (September 20, 1901), Sen. Doc. 331, at 1277 (charges of "Relieving the enemy, in violation of the laws of war" and "Giving intelligence to the enemy, in violation of the laws of war"; alleging that conduct occurred "then as now under the military jurisdiction of the military forces of the United States"); *id*. (charge of "Violation of oath of allegiance in violation of the laws of war"; alleging taking of oath of allegiance to the United States prior to aiding rebels); G.O. No. 174 (July 19, 1901), Sen. Doc. 331, at 1218 (charge of "Aiding and abetting the enemy" based on aid to insurgent forces; conduct occurred at "a place then as now a part of the territory and under the military government of the United States"); *id*. (charge of "Violation of the laws of war" based on violation of oath of allegiance taken prior to conspiring with insurgents); G.O. No. 222 (August 17, 1901), Sen. Doc. 331, at 1241 ("Relieving the enemy, in violation of the laws of war" and "Communicating with the enemy, in violation of the laws of war"; both committed "in territory occupied by U.S. troops"); G.O. No. 174 (July 19, 1901) ("Aiding and abetting the enemy" while "under the military government of the United States"; "Violation of the laws of war" based on violation of "oath of allegiance to the United States"); G.O. No. 204 (August 2, 1901) ("Aiding guerillas"; committed while "under the military jurisdiction of the United States"); G.O. No. 383 (December 9, 1901) ("Violation of laws of war" through specifications alleging distribution of arms to rebels while "under the military government of the United States" and in violation of an "oath of allegiance to the United States"); G.O. No. 121 (June 13, 1901) ("Treachery in office in violation of the laws of war"; specifications of "communication with the enemy" while "in territory occupied by the United States"); G.O. No. 6 (January 9, 1901) ("Relieving and knowingly harboring and protecting the enemies of the United States" and "Holding correspondence with the enemy" while in a place "occupied by the troops of the United States"); G.O. No. 23 (February 1, 1901) ("Violation of the laws of war" for provision of rifles and ammunition to the rebels in violation of "oath to bear true faith and allegiance to the U.S. government"); G.O. No. 55 (March 21, 1901) ("Corresponding with the enemy" while "under the military government of the United States"); G.O. No. 285 (September 20, 1901) ("Relieving the enemy" while "under the military jurisdiction of the United States"); G.O. No. 377 (December 6, 1901) ("Aiding the armed enemies of the United States"; American serviceman who took arms and ammunition to the enemy); G.O. No. 384 (December 9, 1901) ("Violation of the law of war"; accused, "owing allegiance to the United States," provided arms to the enemy).

In some cases the report is too sketchy to draw any conclusions. *See e.g.* G.O. No. 55 (July 15, 1900), Sen. Doc. 331, at 1022 (charge of "Relieving insurgents with arms and food, in violation of the laws of war"; two specifications noted but not set out).

enemy" was simply MST by another name, and they do not save this constitutionally *ultra vires* and *ex post facto* prosecution.

Conclusion

For the reasons set forth above and those submitted in his prior briefs, this Court should vacate the conviction of Salim Hamdan.

Respectfully submitted,

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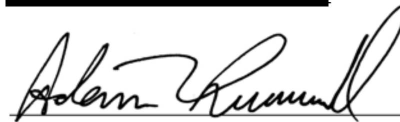

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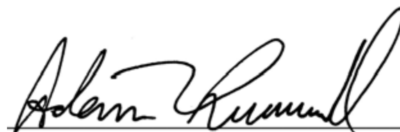
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to Mr. Michel Paradis, counsel for Mr. al Bahlul, and Mr. Francis Gilligan and CAPT Edward White, counsel for the United States, on 24 February 2011.



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