

UNITED STATES OF AMERICA)	
)	
v.)	PROSECUTION RESPONSE TO
)	DEFENSE MOTION FOR DISMISSAL
)	(LACK OF PERSONAL
)	JURISDICTION)
SALIM AHMED HAMDAN)	15 October 2004
)	

1. Timeliness. This Prosecution response is being filed within the time frames and guidance established by Presiding Officer Memorandum (POM) 4-2.

2. Relief Sought. The Defense motion should be denied because the Military Commission has personal jurisdiction over the Accused, and has authority to try the Accused without a formal declaration of war by Congress.

3. Facts in Agreement. The Prosecution does not agree with or stipulate to any of the Defense’s facts as alleged. The Prosecution will continue to work with the Defense to obtain a stipulation of fact.

4. Statement of Facts. The Prosecution alleges the following additional facts:
 - a. That on September 18, 2001, Congress passed a resolution authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.” (Authorization for Use of Military Force, 115 Stat. 224; hereinafter “the AUMF”)
 - b. The Accused was born in Yemen. In 1996 he left Yemen utilizing a fraudulent passport and attempted to travel to Tajikistan to engage in *jihad*. (Accused’s FBI 302 from July 02 (Attached))
 - c. Unable to join up with the Tajikistan *jihad*, the Accused eventually went to a Jalalabad guesthouse where he agreed to have a personal meeting with Usama bin Laden. His goal in meeting with bin Laden was to join in *jihad* with bin Laden (Accused’s FBI 302 from July 02 and CITF Form 40 of May 03 (Attached))
 - d. Prior to meeting with Usama bin Laden, the Accused was aware of bin Laden’s goal to “expel the infidels from the Arabian Peninsula.” (Accused’s CITF Form 40 from May 03)
 - e. After brief stops at the Jihad Wal and Khaldan terrorist training camps, the Accused met personally with Usama bin Laden at bin Laden’s compound in Qandahar, Afghanistan (AF). (Accused’s FBI 302 from July 02)
 - f. The Accused agreed to live at the bin Laden compound and serve as a driver. (Accused’s FBI 302 from July 02)

- g. After an eight-month observation period conducted by Saif al Adel, the head of al Qaida security, the Accused was picked to serve as bin Laden's personal driver and bodyguard. (Accused's Form 40 from May 03). The Accused continued to serve in this capacity (absent a few leaves of absence) until his capture in November of 2001. (Accused's Form 40 of May 03)
- h. While serving as bin Laden's personal driver and bodyguard, the Accused pledged "conditional bayat" to bin Laden agreeing to provide full support of the "jihad against the Crusaders and Jews." (Accused's Form 40 of May 03)
- i. While serving the al Qaida organization, the Accused transported weapons and ammunition provided by the Taliban to al Qaida compounds in Qandahar. (Accused's Form 40 of May 03)
- j. While serving as Usama bin Laden's driver and bodyguard, the Accused trained on several occasions at the al Farouq terrorist training camp on the use of various weapons. (Accused's Form 40 of May 03)
- k. The Accused was with Usama bin Laden and was one of the people responsible for his safe transport and overall safety during the time periods of the U.S. Embassy bombings in 1998 and the attacks of September 11th. (Accused's FBI 302 of July 02 and Form 40 of May 03)
- l. The Accused attended many speeches and press conferences given by Usama bin Laden where bin Laden described the "war against America" and the duty of Muslims to fight Americans. (Accused's Form 40 of May 03)
- m. The Accused had knowledge of Usama bin Laden's 1996 Declaration of War and the 1998 fatwa against America. With this knowledge, he continued to serve as Usama bin Laden's driver and bodyguard. (Accused's Form 40 of May 03)
- n. The accused observed Mullah Bilal experimenting with explosives in Qandahar, AF in the months prior to the USS COLE attack. Bilal was an al Qaida member who worked for bin Laden. Bilal admitted to Hamdan that he was directly involved in the USS COLE attack. (Accused's FBI 302 of 6 August 02 (Attached))
- o. The Accused viewed portions of the USS COLE al Qaida recruiting video and believed this video was produced by al Qaida to spread throughout the world enthusiasm for the cause. (Accused's Form 40 of May 03)
- p. The Accused was an al Qaida member and he experienced "uncontrollable enthusiasm" as a result of being with bin Laden. (Accused's Form 40 of May 03).
- q. The Accused was present shortly after the attacks of September 11th when Usama bin Laden discussed these attacks with Khalid Sheikh Muhammad (Mukhtar). Bin Laden thanked God for the success of the operation and asked God to reward Mukhtar for his work and role in the September 11th operation. (Accused's Form 40 of May 03)

5. Legal Authority

- a. President's Military Order (PMO) of November 13, 2001
- b. Authorization for Use of Military Force, 115 Stat. 224
- c. Ex parte Quirin, 317 U.S. 1 (1942)
- d. In re Yamashita, 327 U.S. 1 (1946)
- e. 18 U.S.C. §821
- f. Ex parte Vallandigham, 68 U.S. (1 Wall.) 243 (1864)
- g. Johnson v. Eisentrager, 339 U.S. 763 (1950)

- h. Hirota v. MacArthur, 338 U.S. 197 (1948)
- i. Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956); *cert denied*, 352 U.S. 1014 (1957)
- j. Reid v. Covert, 354 U.S. 1 (1957)
- k. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004)(plurality opinion)
- l. United States v Curtiss-Wright Export Corp., 299 U.S. 304 (1936)
- m. Cumulative Digest of United States Practice in International Law 1981-1988 (1995)
- m. Verano v DeAngelis Coal Co. 41 F.Supp 954, (M.D.Pa.1941).
- n. United States v. Hirabayashi, 46 F. Supp. 657, (D. Wash. 1942)
- o. The Prize Cases, 67 U.S. 635 (1862)
- p. United States v. Rockwood, 48 M.J. 501 (Army Ct. Crim. App. 1998)

6. Legal Analysis

- a. The President has the Authority to Convene Military Commissions and Designate Those Available for Commission Trial

Since the founding of this Nation, military commissions have been employed by the Commander in Chief during wartime to try violations of the laws of war. More than 50 years ago, the Supreme Court rejected a slew of challenges to that historic practice, establishing beyond cavil its constitutional validity. Ex parte Quirin, 317 U.S. 1 (1942), In re Yamashita, 327 U.S. 1 (1946); Johnson v. Eisentrager, 339 U.S. 763 (1950).

On September 11, 2001, the al Qaida terrorist network launched a coordinated attack on the United States, killing approximately 3000 persons. Congress responded by passing a resolution authorizing the President:

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force, Pub. L. 107-40 section 1-2, 115 Stat. 224 (2001) (“AUMF”).

Consistent with historical practice, on 13 November 2001, the President issued a Military Order establishing military commissions to try detainees such as the Accused for violations of the laws of war and other applicable laws. In doing so, the President expressly relied on “the authority vested in me . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and sections 821 and 836 of title 10, United States Code.”¹ Detention, Treatment, and Trial of Certain Non-

¹ Sections 821 and 836 are, respectively , Article 21 and 36 of the Uniform Code of Military Justice (UCMJ).

Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) (hereinafter “Military Order”).

Article 21 of the UCMJ specifically provides for the trial of “offenders or offenses that by statute or by the law of war may be tried by military commissions.” The procedures to be utilized during these commission proceedings rest within the sole control of the President. UCMJ Article 36. Exercising this authority, the President made a determination that it was not practicable to utilize rules and procedures generally recognized in United States federal district courts and he provided that the Secretary of Defense would issue the implementing rules of procedure to be used at military commissions. Acting upon this delegation, the Department of Defense has issued several implementing Orders, Instructions and Regulations.

The Defense’s assertion that the President’s Determination of July 3, 2003 (directing the Accused by subject to trial by military commission; hereinafter “Presidential Determination”) is clearly wrong. The President has the authority to conduct military commissions to try offenders and offenses of the law of war. Ex parte Quirin, 317 U.S. 1, 28 (1942). Under the Constitution, the President has inherent authority as Commander in Chief to conduct military commissions, presumably without additional authority to wage war being conferred upon him by Congress. *Id.* at 28-29 (finding that addressing not directly required because Congress had supported the creation of military commissions). With respect to these presently created commissions a plurality of the Supreme Court just months ago held, “The capture and detention of lawful combatants and the capture, detention, *and trial* of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’” and such actions fall within the congressional authorization delineated in the AUMF. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (plurality opinion), citing Ex parte Quirin, 317 U.S., at 28 (emphasis added).

Since Ex parte Quirin, “there can be no doubt of the constitutional and legislative power of the president, as Commander in Chief of the armed forces, to invoke the law of war by appropriate proclamation; to define within constitutional limitations the various offenses against the law of war, and to establish military commissions with jurisdiction to try all persons charged with defined violations.” Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956).

b. The Presidential Act of Determining Who is Subject to Trial by Military Commission is an Executive Act Not Subject to Review

The Defense argues that the charge should be dismissed because the Accused is not “properly before the reach” of this Military Commission. Defense Motion at 3. The Defense’s justification for this argument is that the President’s determination “in not supported in either fact or law.” *Id.* at 4. The Defense cites no legal authority in support of this argument. Instead he relies primarily on his client’s denial of the facts in an attached affidavit as the ground for dismissal.

A trial by military commission ordered by the President in the declared exercise of his powers as Commander in Chief under Article II of the Constitution, is not to be set aside by the courts without clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted. Quirin, 317 U.S. at 25; Yamashita, 327 U.S. at 8 (by Congress' codification of the Articles of War, military commissions "are not courts whose ruling and judgments are made subject to review by this Court," citing Ex parte Valandingham, 68 U.S. (1 Wall.)). Military Commissions are tribunals whose determinations are reviewable by military authorities either as provided in military orders constituting such tribunals or as provided in the Articles of War. Yamashita at 8. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. Id. If military tribunals have lawful authority to hear, decide, and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities that are alone authorized to review their decisions. Id.

c. The Presidential Determination that this Accused should be subject to Trial by Military Commission is Factually Supported

Even if the Presidential determination is subject to review by this Commission or some other judicial body, the President's decision that the Accused be tried by a military commission is amply supported by the facts. See Factual Assertions in Section 4 and Attached supporting investigative summaries of statements of the Accused. These summarized statements of the Accused, as well as other supporting evidence, were presented to the President in the form of an Evidence Summary prepared by the Criminal Investigation Task Force (Attached). Based on reviewing this summary, the President made his determination that the Accused should be subject to his Military Order and be triable by military commission. While we concede that the Defense should be provided an opportunity to contest these facts, the appropriate forum for this is a full and fair military commission trial on the merits where both sides are provided the opportunity to present probative evidence.

d. Military Commissions Do Not Require a Formal Declaration of War by Congress

Citing Reid v. Covert, 354 U.S. 1 (1957), the Defense asserts that it is "well settled that a commission's jurisdiction is limited to a time of war." Defense Motion at 4. The Reid case is distinguishable as:

- (1) it is uncontested that the Accused were two civilian wives of service members, not an unlawful enemy combatant seized in response to an attack on the United States;
- (2) the civilian wives were tried at courts-martial, not military commissions; and

- (3) the civilian wives were United States citizens who enjoyed constitutional rights that this Accused is not entitled to (see Prosecution Motion Response on Equal Protection)

The analysis in Reid was based upon the Constitution applying in its entirety to the traditional murder trials of these two United States citizens. Id at 19. The holding was very specific that a UCMJ statute “cannot be framed by which a *civilian* can lawfully be made amenable to the military jurisdiction in time of peace.” Id at 34 quoting Winthrop, Military Law and Precedents (2d ed., Reprint 1920), 107. Hamdan is neither a civilian nor is this a time of peace.

The President of the United States has expressly declared, in his Military Order of November 13, 2001-Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, that “International terrorists, including members of the al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States *on a scale that has created a state of Armed Conflict that requires the use of the United States Armed Forces.*” The President also determined that the individuals subject to his order were to be tried for violations of the laws of war and other applicable laws by military tribunals. See President’s Military Order of November 13, 2001, section 1(a) & 1 (e).

The President, in his constitutional role as Commander-in-Chief, and through his broad authority in the realm of foreign affairs, has the full authority to determine when the Nation has been thrust into a conflict that must be recognized as a war and treated under the laws of war. See United States v Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). The President’s decision to recognize that an armed conflict exists is a political question. “The Courts have also treated the fundamental issue of whether an armed conflict is taking place for purposes of international or domestic law as a question to be decided by the political branches.” See Cumulative Digest of United States Practice in International Law 1981-1988 at 3444 (1995). “It is the well-settled law that the existence of a condition of war must be determined by the political department of the government; that the courts take judicial notice of such determination and are bound thereby.” Verano v DeAngelis Coal Co. 41 F.Supp 954, 954 (M.D.Pa.1941).

The President, in his order of 13 November 2001, declared that he was acting pursuant to both his authority as Commander-in-Chief of the Armed Forces under the Constitution and under the “Authorization for Use of Military Force” given him by Congress. Congress, in its Joint Resolution to “authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States” also found that the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States, and expressly authorized the President to use “all necessary and appropriate force *against those nations, organizations, or persons* he determines planned, authorized, committed or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” See AUMF (emphasis added). It has therefore been clearly established that both the President and Congress recognize the President’s inherent authority as Commander-in-Chief to prosecute an armed conflict against not only nations, but organizations and persons as well.

“War powers are to be construed broadly...” and “the power to wage war is the power to wage war successfully.” See United States v. Hirabayashi, 46 F. Supp. 657, 661 (D. Wash. 1942) citing Hamilton v. Kentucky Distilleries & Warehouse Co. 251 U.S. 146 (1919). Under his war powers as Commander-in-Chief, the President has the constitutional authority to determine that an armed conflict exists.

The Prize Cases, 67 U.S. 635 (1862), recognize that the President's declaration of a blockade - of the Confederate ports - is an act of war which is conclusive of the question of whether a state of war exists, whether or not war is formally declared by Congress. *Id.* at 668. The court saw no difference between the nature of that war - between nations, or between a nation and insurgents. Similarly, we are not bound by formality here. See United States v. Rockwood, 48 M.J. 501, 508 n.14 (Army Ct. Crim. App. 1998) (“when courts have decided whether ‘time of war’ exists for various purposes, they have generally looked to both the fact of actual hostilities and the recognition of such a state, not necessarily through a declaration of war, by the executive and legislative branches.”)

Most recently, a Plurality of the Supreme Court held in Hamdi v. Rumsfeld that the detention of combatants captured during combat in Afghanistan “is so fundamental and accepted an incident of war” as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use by issuing the AUMF. 124 S. Ct. 2633. In the very next sentence, the Court also recognized that the “capture, detention, and *trial* of unlawful combatants, by ‘universal agreement and practice’ are ‘important incident[s] of war.’” *Id.* (citing Quirin, 317 U.S. at 28) (emphasis added). Considering that Congress’s AUMF constituted “explicit congressional authorization for the detention of individuals”, and that “it is of no moment that the AUMF does not use specific language of detention”, it is clear that the Court considers the AUMF to be the functional equivalent of a declaration of war. See *id.* Accordingly, the Court also presumes the President has congressional authorization to conduct military commissions as another “incident of war” and in accordance with 10 U.S.C. section 821. Therefore, it is apparent that the Congress need not issue a formal declaration of war in order for the President to lawfully direct the Accused be tried by a military commission.

e. The President is not Limited to Solely Fight Prospectively

The Defense contends that “Congress circumscribed the President’s retrospective power to punish” by its “prospective” language in the AUMF. Other than relying on the wording of the AUMF, the Defense cites no authority in support of their position. Disturbingly, the Defense left out of its brief some of the “retrospective” language of the AUMF that authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines *planned, authorized, committed, or aided the terrorist attacks*” or “*harbored such organizations or persons*, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.” (emphasis added). Common sense, logic, and legal precedent all suggest that if Congress used the past tense in describing the enemy they authorized the President to use force against, then undoubtedly he has the authority to hold this enemy accountable for their conduct by directing that they be tried before a military commission. See Yamashita, 327 U.S. at 11-13.

f. A Military Commission has Jurisdiction over Offenders and Offenses That By Statute or the Law of War May be Tried by Military Commission

Buried as almost the last in a series of arguments that lack merit is the Defense assertion that the Accused is charged with committing an act of International Terrorism and that is not a war crime. Defense Motion at 4. First, the charge sheet clearly demonstrates that the Accused is charged with committing a number of war crimes with terrorism being only one of the several war crimes the Accused conspired to commit. These charges were referred by the Appointing Authority, consistent with Military Commission Order No. 1, section 3. The Presidential Determination merely adds qualifying criteria for those he feels based on the current conflict should be subject to the military commission process.

The starting and ending point for this analysis remains Article 21 of the UCMJ which states “[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commission, provost courts, or other military tribunals of concurrent jurisdiction with respect to *offenders* and offenses that by statute or the law of war may be tried by military commissions” The ability to try such offenders rests on the UCMJ provision in and of itself. The Defense cites no authority for the assertion that the Presidential determination --- a manifestation of the President’s executive act to direct a military commission to try the Accused – must itself allege a violation of the law of war. To the contrary, there is substantial legal precedent that the Presidential determination asserting the law of war applies to the Accused is properly a political question, and therefore demands great deference upon judicial review. Yamashita, 327 U.S. at 12-13.

g. The Defense is Correct – The Prosecution has *not yet* proven that the Accused Committed an Offense

The Defense asserts that the “prosecution is under a duty to prove that Mr. Hamdan committed an offense that makes him triable by this commission.” Defense Motion at 5. They state that there are “unsupported allegations” and “no concrete evidence.” *Id.* This is the classic “putting the cart before the horse.” While the Prosecution is under the obligation to prove the accused’s guilt once before a commission at a trial on the merits, we know of no authority that says we must prove our case before the trial starts to show that he is triable by military commission. In the response to a separate Defense motion, the Prosecution provides the supporting authority that the offense charged does in fact state an offense triable by military commission. The Prosecution is confident that when given the opportunity to present evidence to the Commission during a full and fair trial on the merits, the Defense concerns will be alleviated.

7. Defense Proposed Evidence

The Defense has stated that they reserve the right to call the Accused to the stand on this motion and that his testimony would be “solely for the limited purpose of Commission jurisdiction.” Defense Motion at 6. First, this proposal will lead to a trial within a trial if we intend to litigate whether the Accused is in fact guilty or not. Second, the Prosecution is not aware of any Commission law that would permit the Accused to testify for the limited purpose of the motion.

8. Evidence

- a. FBI 302 documenting interview of Accused XXXX
- b. FBI 302 documenting interview of Accused XXXX
- c. CITF Form 40 documenting interview of Accused XXXX

Note that this information is FOUO and Law Enforcement Sensitive and is therefore Protected information pursuant to the Presiding Officer's August 27, 2004 Order.

9. Oral Argument. Oral will be provided if desired.

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Commander, JAGC, USN
Prosecutor