

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

ON RECONSIDERATION  
RULING ON MOTION TO DISMISS  
FOR LACK OF JURISDICTION

19 December 2007

After a hearing on 4 June 2007, the Commission granted a Defense Motion to Dismiss for Lack of Jurisdiction. Thereafter, the Government moved the Commission to reconsider that dismissal, and to hear evidence regarding the accused's activities that would make him subject to the jurisdiction of a military commission, i.e. the Government sought to show the Commission directly that the accused was an alien unlawful enemy combatant, as defined in the Military Commissions Act (M.C.A.) §948a(1)(i). The Commission granted the Motion for Reconsideration, and a hearing was held at Guantanamo Bay on 5 and 6 December 2007, at which the Government presented testimonial evidence from Major Hank Smith, U.S. Army, FBI Special Agent George Crouch, and DoD Special Agent Robert McFadden. The Defense offered the testimony of Professor Brian Williams of the University of Massachusetts at Dartmouth, Mr. Said Boujaadia, a detainee being held at Guantanamo Bay, and the stipulated testimony of Mr. Nasser al Bahri of Sana'a, Yemen. Both sides offered documentary and photographic evidence. The Defense concedes that Mr. Hamdan is an "alien" for purposes of the Motion.

The Commission received and considered the *Amicus Curiae* brief filed by Frank Fountain, Madeline Morris and the Duke Guantanamo Defense Clinic.

Having considered this evidence, the Commission finds that the following facts are true:

1. In 1996, the accused was recruited in Yemen to go to Tajikistan for jihad. As a result of difficulty crossing the border into Tajikistan, he remained in Afghanistan. Because of his experience driving vehicles, he soon came in contact with Osama bin-Ladin, and was offered work as a driver.
2. The accused began his work driving farm vehicles on bin-Ladin's farms, and after a probationary period, was invited to join the bin-Ladin security detail as a driver of one of the security caravan vehicles. With the passage of additional time, the accused became bin-Ladin's personal driver sometime in 1997, and continued in that capacity until the fall of 2001.
3. On occasion, the accused also served as a personal bodyguard to bin-Ladin. It was customary to rotate bodyguards as a security measure, and the accused engaged in this rotation. Bodyguards not actually protecting bin-Ladin would serve as fighters, receive training at al-Qaeda training camps, serve as emirs of al-Qaeda guesthouses, and perform other duties during their rotations away from body guarding duties.
4. During this period as bin-Ladin's personal driver and sometimes bodyguard, the accused pledged *bayat*, or "unquestioned allegiance" to bin-Ladin. The *bayat* extended to bin-Ladin's

campaign to conduct jihad against Jews and crusaders, and to liberate the Arabian Peninsula from infidels, but the accused reserved the right to withdraw his *bayat* if bin-Ladin undertook a mission he did not agree with. The accused told investigators after his capture that there were some men in bin-Ladin's company who did not agree with everything bin-Ladin did or proposed to do.

5. The accused was aware of two of bin-Ladin's *fatwas*, including the 1998 fatwa issued by the International Islamic Front for Jihad against the Jews and Crusaders, and which called upon all Muslims to "kill Americans and their allies, both civilian and military . . . in any country where it is possible, to liberate Al-Aqsa Mosque and the Holy Mosque from their grip, and to expel their armies from all Islamic territory ..."

6. During the years between 1997 and 2001, the accused's duties sometimes included the delivery of weapons to Taliban and other fighters at bin-Ladin's request. On these occasions, he would drive to a weapons warehouse, present a document that contained bin-Ladin's order, and his vehicle would be loaded with the required weapons. He then delivered the weapons to fighters or elsewhere as directed by bin-Ladin. On at least one occasion, he took weapons to an al-Qaeda base in Kandahar.

7. As bin-Ladin's driver and bodyguard, the accused always carried a Russian handgun. It is not unusual for men in Afghanistan to carry weapons, and the accused had a Taliban-issued permit to carry weapons when he was apprehended. His duty in case of attack was to spirit bin-Ladin to safety, while the other vehicles in the convoy were to engage the attackers.

8. The accused received small arms and other training at al-Farouq training camp.

9. The accused became aware, after the al-Qaeda attacks on the U.S. embassies in Africa, and after the USS Cole attack, that bin-Ladin and al-Qaeda had planned and executed those attacks. No evidence was presented that the accused was aware of the attacks in advance, or that he helped plan or organize them.

10. Osama bin-Ladin told the accused that he wanted to demonstrate that he could threaten America, strike fear, and kill Americans anywhere. On hearing this declaration, the accused felt "uncontrollable enthusiasm."

11. In the days before 9/11, Osama bin-Ladin told the accused to get ready for an extended trip. After the 9/11 attacks, the accused drove bin-Ladin and his son on a ten-day jaunt around Afghanistan, visiting several cities, staying in different homes or camping in the desert, and otherwise helping bin-Ladin escape retaliation by the United States. During this period, he learned that bin-Ladin had been responsible for the attacks.

#### THE ANSAR BRIGADE

12. Between the early 1990's and the fall of 2001, there was in Afghanistan a bona fide military fighting force composed primarily of Arabs, known as the Ansars. This force engaged the

Soviets during their occupation of Afghanistan. They were subject to a rigid command structure, were highly disciplined, usually wore a uniform (or uniform parts), and carried their arms openly. The Ansar uniforms usually consisted of either completely black attire or traditional military camouflage uniform parts.

13. Taliban leaders did not permit the Ansars to operate independently. As a result, the Ansars were integrated with, subject to the command of, and usually formed the elite fighting troops of, the Taliban army.

14. The Taliban had a conventional fighting force that may well be described as a traditional army. They possessed aged-but-functional battle tanks, helicopters, artillery pieces and fighter aircraft. The Ansars comprised up to 25% of the Taliban army.

15. Osama bin-Ladin contributed forces to the Ansars, and provided them with weapons, funding, propaganda and other support.

16. By 1997, al-Farouq training camp, and several other training camps, were under the symbolic control of bin-Ladin.

17. The Ansars were primarily motivated by the desire to expel the Soviets and other foreigners from Afghanistan, but also fought against the Northern Alliance. Some of the Ansar units rejected bin-Ladin's calls for war against America, and the attacks of 9/11.

18. During the U.S. invasion of Afghanistan in the fall of 2001, the Ansars were engaged in the defense of Kandahar.

#### 24 NOVEMBER 2001

19. On 24 November 2001, U.S. forces were operating in the vicinity of Takta Pol, a small Afghan village astride Highway 4, which ran between Kandahar and the Pakistani border. Major Hank Smith had under his command a small number of Americans and six to eight hundred Afghans he referred to as his Anti-Taliban Forces (ATF). Their mission was to capture Takta Pol from the Taliban and prevent arms and supplies from Pakistan from entering Kandahar by means of Highway 4.

20. Highway 4 was the main, and perhaps the only, road between Kandahar and the Pakistan border. It was a significant supply route for people and materials transiting between Pakistan and Kandahar.

21. During the battle for control of Takta Pol and Highway 4, U.S. and coalition forces fought all night with the Taliban forces in the area. A U.S./ATF negotiating party attempting negotiations under a flag of truce was ambushed by Taliban forces, and the U.S. and coalition troops engaged the Taliban in combat, taking casualties. The Taliban forces engaged against coalition forces at Takta Pol did not wear uniforms or any distinctive insignia.

22. After an overnight battle on 23-24 November, the Taliban vacated the town, and coalition forces entered Takta Pol the morning of 24 November 2001. They swept and secured the town, and set up a road block south of town to intercept troops, munitions or other war materials, and explosive vehicles before they entered the town. The road block was also intended to prevent munitions and war materials from being carried toward Kandahar.
23. After capturing the town of Takta Pol, and while securing the town and establishing his road blocks, Major Smith and his ATF continued to receive rocket or mortar fire from outside the town.
24. At the same time, Kandahar to the north was occupied by a large number of Taliban forces. Coalition forces, including Major Smith's forces, were preparing to participate in a major battle for control of Kandahar, which was already under way.
25. During the late morning or early afternoon of 24 November, a vehicle stopped at the road block engaged Major Smith's ATF in gunfire. Two men, apparently Egyptians, from the vehicle were killed, and an occupant later identified as Mr. Said Boujaadia was captured.
26. On hearing the gunfire, Major Smith proceeded to the road block, arriving within 3-15 minutes of the firing. By the time he arrived, the accused, driving a different vehicle, had also been stopped at the roadblock. His vehicle carried two SA-7 missiles, suitable for engaging airborne aircraft. The missiles were in their carrying tubes, and did not have the launchers or firing mechanisms with them.
27. The accused was captured while driving north towards Kandahar from the direction of the Pakistani border. The vehicle carrying Mr. Boujaadia and the two Egyptian fighters was also traveling north, towards Kandahar when it was stopped.
28. The only operational aircraft then in the skies were U.S. and coalition aircraft providing close air support and other support for coalition troops on the ground.
29. Major Smith's ATF did not have any surface-to-air missiles in their inventory because the Taliban had no operational aircraft in the skies. There was no need for missiles that had no target.
30. After consulting with higher headquarters, Major Smith's forces photographed the two missiles on the tailgate of one of their vehicles, and destroyed the missiles to prevent them or their explosives from being used against Coalition forces.
31. Major Smith took control of the accused from the Afghan forces who, he feared, would kill the accused if he remained in their control. The accused was fed, protected and otherwise cared for while he was in U.S. custody. A Medic checked on him several times a day, and Major Smith visited him at least once a day until he was evacuated by helicopter a few days after his capture.
32. At the time of his capture, the accused was wearing traditional Afghan civilian clothes, and nothing suggestive of a uniform or distinctive emblem.

## DISCUSSION OF LAW

The personal jurisdiction of a military commission is limited to those who are found to be “alien unlawful enemy combatants,” defined in the M.C.A. as those who have “engaged in hostilities or who ha[ve] purposefully and materially supported hostilities against the United States or its co-belligerents, who [are] not a lawful enemy combatant[s]. . . .” M.C.A. §948a(1)(i). Mr. Hamdan may only be tried by this Commission if he falls within this definition. The burden is on the Government to demonstrate jurisdiction over the accused by a preponderance of the evidence R.M.C. 905(c)(1). This Commission assumes that Congress intended to comply with the International Law of Armed Conflict when it enacted the Military Commissions Act and chose this definition of “unlawful enemy combatant”. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

International Law scholars and experts have long debated the exact meaning of Law of Armed Conflict terms such as “hostilities” and “direct participation”. Professor Dinstein explains “It is not always easy to define what active participation in hostilities denotes. Usually, the reference is to ‘direct’ participation in hostilities. However, the adjective ‘direct’ does not shed much light on the extent of participation required. For instance, a driver delivering ammunition to combatants and a person who gathers military intelligence in enemy-controlled territory are commonly acknowledged to be actively taking part in hostilities.” Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 27 (Oxford University Press 2004).

It is ironic that Professor Dinstein should have chosen the “driver delivering ammunition to combatants” as his example of someone who is obviously taking an active part in hostilities. Other scholars have debated the scenario of a driver delivering ammunition, and held that the issue of ‘direct participation’ should depend on how close the driver actually is to the ongoing hostilities. See International Committee of the Red Cross, *Summary Report, Third Expert Meeting on the Notion of Direct Participation in Hostilities*, Geneva, 32-33, (2005), [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2005\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf). where one expert argued that “a distinction had to be made between driving the same ammunition truck close to the front line, which would constitute “direct” participation, and driving it thousands of miles in the rear, which would not.” Even after making this distinction, it is widely acknowledged that driving “close to the front line” is direct participation.

Writing in the Chicago Journal of International Law, Professor Michael Schmitt acknowledges that the meaning of direct participation is “highly ambiguous.” He concludes, however, that “The Commentary appears to support the premise of a high threshold: “[d]irect participation in hostilities implies a *direct causal relationship* between the activity engaged in and the *harm done* to the enemy at the *time and the place where the activity takes place*.” It also describes direct participation as “acts which by their nature and purpose are *intended to cause actual harm* to the personnel and equipment of the armed forces” and defines hostilities as “acts of war which are intended by their nature or their purpose to *hit specifically* the personnel and the matériel of the armed forces of the adverse Party.” ’ Michael N. Schmitt, *Direct Participation*

*in Hostilities by Private Contractors or Civilian Employees*, Chicago Journal of International Law, 511, 531, 533 (2004)(internal citations omitted; italics in original).

Jean-Francois Quguiner, in a working paper sponsored by Harvard University's Program on Humanitarian Policy and Conflict Research, addresses the term "direct participation" as contained in Article 51 of Additional Protocol I to the Conventions, and notes that direct participation has been held to be broad enough to encompass "direct logistical support for units engaged directly in battle such as the delivery of ammunition to a firing position." Jean-Francois Quguiner, *Direct Participation in Hostilities Under International Humanitarian Law* 4 (2003), <http://www.ihlresearch.org/ihl/pdfs/briefing3297.pdf>.

## APPLICATION AND CONCLUSION

The Commission finds that "hostilities" were in progress on the 24<sup>th</sup> of November 2001 when the accused was captured with missiles in his car. Major Smith and his Anti-Taliban Forces were actively engaged in a firefight with Taliban forces on the night of 23-24 November, had taken casualties, and had been attacked while attempting to negotiate under a flag of truce. Even after capturing the town of Takta Pol and while securing it, they continued to receive mortar or rocket fire from troops in the distance. In addition, the Battle of Kandahar was already under way, with a larger contest expected in the near future, for control of the city. Both the local battle for control of Takta Pol and the ongoing battle for the more distant Kandahar amount to "hostilities."

The Commission also finds that the accused directly participated in those hostilities by driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to both ongoing combat operations. The fact that U.S. and coalition forces had the only air assets against which the missiles might have been used supports a finding that the accused actively participated in hostilities *against the United States and its coalition partners*. Although Kandahar was a short distance away, the accused's past history of delivering munitions to Taliban and al-Qaeda fighters, his possession of a vehicle containing surface to air missiles, and his capture while driving in the direction of a battle already underway, satisfies the requirement of "direct participation." If the two vehicles stopped within minutes of each other at Major Smith's road block were in fact traveling together, a point of dispute during the hearing, it is arguable that the accused was also traveling towards the battle in the company of enemy fighters. Taken together, the evidence presented at the hearing supports a finding that the accused "engaged in hostilities, or . . . purposefully and materially supported hostilities against the United States or its co-belligerents...." M.C.A. §948a(1)(i).

The Government also argues that the accused "purposefully and materially supported hostilities" by (1) serving as the personal driver and bodyguard of the al-Qaeda mastermind Osama bin-Ladin, (2) continuing to work for bin-Ladin after he became aware that bin-Ladin had planned and directed the USS Cole bombing, the attacks on the two U.S. Embassies in Africa, and the 9/11 attacks on the United States; and (3) by driving bin-Ladin around Afghanistan after the attacks of 9/11, in an effort to help him avoid detection and punishment by the United States. While these arguments may well provide grist for the debates of future generations of Law of

Armed Conflict Scholars, the Commission does not reach them here. Having found that the accused drove a vehicle to and towards the battle field, containing missiles that could only be used against the United States and its co-belligerents, the Commission finds that the accused meets the first half of the definition of unlawful enemy combatant.

The final element of M.C.A. §948a.(1)(i)'s definition of alien unlawful enemy combatant is that the accused must not have been "a lawful combatant." The M.C.A. defines "lawful combatant" in §948a(2) to include:

(A) a member of the regular forces of a State party engaged in hostilities against the United States;

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

The Defense does not argue that the accused is entitled to lawful combatant status under any of these alternatives. After an examination of the evidence presented, the Commission agrees. Alternatively, the Defense has urged the Commission to find the accused entitled to lawful combatant/ Prisoner of War status under alternative definitions contained in the Third Geneva Convention.

#### ARTICLE 5 STATUS ISSUE

This Commission has elsewhere granted a Defense Motion to determine the accused's status under Article 5 of the Third Geneva Convention. The Defense has argued that the accused may have been a lawful combatant, and therefore entitled to Prisoner of War status, under any of the following subsections of Article 4.A of the Third Geneva Convention:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: [recitation of the conditions is omitted here].

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall

provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law,

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

The Commission has searched carefully through the evidence presented by the Defense, and finds nothing that would support a claim of entitlement to lawful combatant or Prisoner of War Status under options (1) or (2) above. While the Defense showed, through the testimony of Professor Williams, that the Ansars were “members of the armed forces of a Party” or members of a militia or volunteer corps “forming part of such armed forces” there is no evidence that the accused was a member of the Ansars or any other militia or volunteer corps.

Nor is there any evidence before this Commission suggesting that the accused qualifies for Prisoner of War status under option (4) a civilian accompanying the armed forces. He fails to fit into any of the suggested categories of civilians who might properly accompany the armed forces, or any similar categories of persons, there is no evidence that he “accompanied” such forces, or that he was properly identified as required by the rule. Indeed, it is clear that even civilians who fall into this category can forfeit their entitlement to prisoner of war status by directly participating in hostilities.

With respect to categories (5) and (6) above, there is likewise no evidence that the accused was a member of a merchant marine or civil aircraft crew, or that he engaged in the traditional *levee-en-masse*. The Commission is left to conclude that the accused has not presented any evidence from which it might find that he was a lawful combatant, or that he is entitled to Prisoner of War Status under any Geneva Convention Category. The Commission concludes, then, that he is an alien unlawful enemy combatant, and not a lawful combatant entitled to Prisoner of War protection. The accused is subject to the jurisdiction of this Commission.

## CONSTITUTIONAL ARGUMENTS

Notwithstanding this finding of jurisdiction under the Military Commissions Act and the Law of International Armed Conflict, the Defense has raised three Constitutional objections to this Commission’s exercise of jurisdiction over him. These are summarized briefly below:

Ex Post Facto: The Defense argued, in its May 2007 Motion to Dismiss, that it would be a violation of the Constitutional prohibition against *ex post facto* laws to give a Combat Status Review Tribunal (CSRT) determination “additional force after the fact,” by making them determinative of the accused’s status before a military commission. Motion to Dismiss at 11.



The Defense objected that when Congress passed the M.C.A., and retroactively expanded the effect of a CSRT determination, it deprived detainees of the defense of lawful combatancy by making the CSRT finding “determinative” of military commission jurisdiction over the accused. The Defense also argued that subjecting a detainee to military commission jurisdiction constitutes a “punishment” because it subjects a defendant to “higher penalties and disadvantageous evidentiary rules, among other limits on due process.” The Defense argued that Mr. Hamdan did not know at the time of the CSRT that its determination would be used to subject him to a criminal proceeding before a military commission, and thereby deprived him of a meaningful opportunity to contest the evidence.

The Court notes at the outset that the United States Court of Appeals for the D.C. Circuit has held that the Constitution of the United States does not protect detainees held at the U.S. Naval Base, Guantanamo Bay. *Boumediene v. Bush* 375 U.S. App. D.C. 48 (2007). In that case, the Court of Appeals concluded a lengthy discussion about the entitlement of aliens to Constitutional rights with this summary: “Precedent in this circuit also forecloses the detainees’ claims to constitutional rights. In *Harbury v. Deutch*, 344 U.S. App. D.C. 68, 233 F.3d 596, 604 (D.C. Cir. 2000), *rev’d on other grounds sub nom. Christopher v. Harbury*, 536 U.S. 403, 122 S. Ct. 2179, 153 L. Ed. 2d 413 (2002), we quoted extensively from *Verdugo-Urquidez* and held that the Court’s description of *Eisenstrager* was “firm and considered dicta that binds this court.” Other decisions of this court are firmer still. Citing *Eisenstrager*, we held in *Pauling v. McElroy*, 107 U.S. App. D.C. 372, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960) (per curiam), that “non-resident aliens . . . plainly cannot appeal to the protection of the Constitution or laws of the United States.” The law of this circuit is that a “foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.” *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 337 U.S. App. D.C. 106, 182 F.3d 17, 22 (D.C. Cir. 1999); *see also 32 County Sovereignty Comm. v. U.S. Dep’t of State*, 352 U.S. App. D.C. 93, 292 F.3d 797, 799 (D.C. Cir. 2002). In light of this holding, all of the Defense’s arguments are deemed to be without merit” (*emphasis in original*). In light of this current state of the law in the Circuit under which military commissions are reviewed, all of this accused’s Constitutional arguments are also deemed to be without merit.

Beyond this, the Commission finds that the *ex post facto* violations the Defense complains of have been cured by the Commission’s refusal to accept the October 2004 CSRT finding as binding, and by holding its own hearing to determine whether the accused would be subject to the jurisdiction of a military commission. At that hearing, the accused was represented by no less than six counsel, had the benefits of an open and public proceeding before a military judge, and at which representatives of the world press, Human Rights groups, and organizations interested in the application of International Humanitarian Law were present. He confronted the witnesses against him, called and presented his own witnesses, and persuaded the Commission to hold open the receipt of evidence so an additional witness on his behalf could be heard. It has long been a principle of the International Law of Armed Conflict that unlawful combatants may be tried for their participation in hostilities by the courts of the Detaining Power, and the United States’ determination to exercise this right against Mr. Hamdan does not involve surprise or the *ex post facto* application of the laws. Schmitt, *supra*, at 521. The Defense argument against the exercise of jurisdiction on the basis of the *ex post facto* clause is rejected.

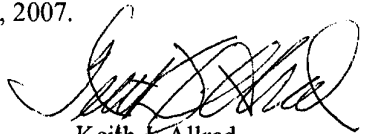
Bill of Attainder: The Defense also argued, in its May 2007 Motion to Dismiss, that the Bill of Attainder Clause “prevents the MCA from authorizing a non-judicial finding of unlawful combatant status.” Defense Motion at 12. This objection, in the Commission’s view, is likewise mooted by the evidentiary hearing held in Guantanamo Bay on 5-6 December. There has been no “non-judicial” finding of unlawful combatant status. There has been no legislative finding that any specific group is unlawful. This Commission, having heard the evidence in a public trial, has determined that the accused is an alien unlawful enemy combatant, subject to the jurisdiction of a military commission, in a ‘regularly constituted court, affording all the necessary “judicial guarantees which are recognized as indispensable by civilized peoples.”’ There is no merit to this argument.

Equal Protection: Because the jurisdiction of the military commission is limited to “alien” unlawful enemy combatants, the Defense challenges its Constitutionality as a violation of the equal protection clause of the United States Constitution. In support of its claim, the Defense cites, *inter alia*, *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *In re Griffiths*, 413 U.S. 717, 721-22 (1973). As before, the United States Court of Appeals for the D.C. Circuit, under which the review of military commissions falls, has expressly ruled that the United States Constitution does not protect detainees at Guantanamo Bay. The accused’s challenge to the exercise of jurisdiction as a violation of the equal protection clause must likewise fail.

#### CONCLUSION

The Government has carried its burden of showing, by a preponderance of the evidence, that the accused is an alien unlawful enemy combatant, subject to the jurisdiction of a military commission. The Commission has separately conducted a status determination under Article 5 of the Third Geneva Convention, and determined by a preponderance of the evidence that he is not a lawful combatant or entitled to Prisoner of War Status. There being no Constitutional impediment to the Commission’s exercise of jurisdiction over him, the Defense Motion to Dismiss for Lack of Jurisdiction is DENIED. The accused may be tried by military commission.

So Ordered this 19<sup>th</sup> day of December, 2007.

  
Keith J. Allred  
Captain, JAGC, U.S. Navy  
Military Judge