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March 24, 2011

Via Hand Delivery

Hon. Robert M. Gates
Secretary of Defense
1000 Defense Pentagon
Room 3E718
Washington, DC 20301-1000

Re: Al Bahlul Litigation

Dear Secretary Gates:

On behalf of the Seminole Tribe of Florida, I am writing to formally request that the Department of Defense withdraw certain highly offensive and historically inaccurate statements about the Seminole Tribe contained in a brief filed with the United States Court of Military Review in United States v. Ali Hamza Ahmad Suliman, Al Bahlul, CMCR Case No. 09-001.

In the brief filed on March 11, 2011 (copy enclosed), the government asserts:

> Ambrister and Arbuthnot, both British subjects without any duty or allegiance to the United States, were tried and punished for conduct amounting to aiding the enemy. Examination of their case reveals that their conduct was viewed as wrongful,

> in that they were assisting unlawful hostilities by the Seminoles and their allies. Further, not only was the Seminole belligerency unlawful, but, much like modern-day al Qaeda, the very way in which the Seminoles waged war against the U.S. targets itself violated the customs and usages of war. Because Ambrister and Arbuthnot aided the Seminoles both to carry on an unlawful belligerency and to violate the laws of war, their conduct was wrongful and punishable.

Brief at 25 (emphasis added).

This characterization of the so-called "Seminole belligerency" is a troubling example of revisionist history. The historical record is clear that General Andrew Jackson engaged in a campaign of extermination against the Seminole Indians in Florida. General Jackson's invasion of Spanish-held Florida in 1818 included attacks against unarmed Seminoles, the burning of crops and the destruction of whole villages. Characterizing Seminole resistance to these and other attacks as "unlawful" demonstrates a profound ignorance about both American history and the laws of war. Moreover, the comparison of Seminole tactics to al Qaeda tactics is inaccurate and insulting, especially in the context of our ancestors' resistance to an invading army engaging in a campaign of ethnic cleansing and other atrocities.

After he became president in 1829, Jackson pushed through Congress legislation known as the Indian Removal Act, which authorized "removal" of Seminole and other Indians to lands west of the Mississippi. As I am sure you are aware, this forced removal became the infamous "Trail of Tears," which resulted in the deaths of thousands of Indian men, women and children. Many of our ancestors were removed to Oklahoma against their will. Many died on their way.

Even after Jackson left office, the United States fought the Seminoles for decades in an effort to entirely eliminate the Tribe's presence in Florida.

SEMINOLE TRIBE OF FLORIDA

While many Seminoles died or were forced to relocate, some Seminoles successfully resisted and were able to hold out in the Everglades. The members of the modern Seminole Tribe of Florida are the descendants of the Seminoles who successfully resisted the efforts of Jackson and others to force them from their homeland. However, the remaining Seminoles faced more than a century of isolation and poverty and did not achieve economic success until late in the 20th Century.

Notwithstanding this history, many members of the Seminole Tribe have proudly served and continue to serve in the United States Armed Forces. The Seminoles are proud to be citizens of the United States, as well as members of the Seminole Tribe, and recognize the great progress this nation has made in correcting and learning from the injustices of the past. It is perhaps for this reason that the statements made in the government's brief are particularly troubling. Rather than reflect the progress that has been made, the statements appear to be an effort to turn back the clock and rewrite history. We hope that you will agree that such a flagrant and offensive misstatement of history should not be allowed to stand.

Thus, on behalf of the approximately 3,600 members of the Seminole Tribe of Florida, I call on you to take appropriate steps to cause the withdrawal of the portion of the Al Bahlul brief that describes the Seminoles' resistance as unlawful and compares the Tribe's tactics to those used by al Qaeda.

We look forward to your response.

Sincerely,

Jim Shore
General Counsel
Seminole Tribe of Florida

cc: President Barack Obama
Secretary of the Interior Ken Salazar

UNITED STATES, **Appellee,** **v.** **ALI HAMZA AHMAD SULIMAN, AL BAHLUL,** **Appellant.**	**IN THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW** APPELLEE'S RESPONSE TO THE SPECIFIED ISSUES CMCR Case No. 09-001 Tried at Guantanamo Bay, Cuba 7 May 2008 – 3 Nov 2008 before a Military Commission convened by Hon. Susan J. Crawford Presiding Military Judge Colonel P. Brownback, JA, USA Colonel R. Gregory, USAF Date: 11 March 2011

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

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Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, (Alfred A. Knopf: New York, 1992) 14
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Wm. E. Birkhimer, MILITARY GOVERNMENT AND MARTIAL LAW, 3d ed. (Franklin Hudson Pub. Co.: Kansas City, Mo., 1914) at 196-97 26

I. FIRST SPECIFIED ISSUE

Assuming that Charges I, II, and III allege underlying conduct (e.g., murder of protected persons) 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 Charges I through III constitute offenses triable by military commission and whether those charges violated the Ex Post Facto clause of the Constitution? See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 611 n.40 (2006).

A. ACCEPTANCE OF THE JOINT CRIMINAL ENTERPRISE THEORY OF LIABILITY, BOTH DOMESTICALLY AND ABROAD, SUPPORTS THE GOVERNMENT'S ARGUMENT THAT APPELLANT'S CONVICTION FOR CONSPIRACY VIOLATES NEITHER *EX POST FACTO* PRINCIPLES NOR THE PRINCIPLE OF *NULLUM CRIMEN SINE LEGE.*

Appellant stands convicted of conspiring with Usama bin Laden and others to murder protected persons, attack civilians, attack civilian objects, murder in violation of the law of war, destroy property in violation of the law of war, commit terrorism and provide material support to terrorism. In addition, he stands convicted of soliciting others to commit these offenses, and of personally providing material support to the international terrorist organization al Qaeda, with the knowledge that al Qaeda had engaged in or was engaging in terrorism. At the time he committed those offenses, between February 1999 and December 2001, his conduct was criminal under both U.S. domestic law and international law. Consequently, his conviction violated neither the *ex post facto* principle nor the international principle of legality, *nullum crimen sine lege*.

Legislating under its explicit constitutional power to "define and punish . . . Offences against the Law of Nations," U.S. Const., Art. I, § 8, cl. 10. Congress found that the offenses specified in § 950v(b) of the Military Commissions Act of 2006 ("2006 MCA"), 10 U.S.C. §§

948 et seq. (2006), including conspiracy, "have traditionally been triable by military commissions," *id.* § 950p(a), and that the 2006 MCA did not "establish new crimes that did not exist before its enactment, but rather codifie[d] those crimes for trial by military commission." *Id.* Congress thus concluded that conspiracy to aid al Qaeda in its commission of war crimes was a proper basis for criminal liability under the laws of war as they existed when Appellant served as al Qaeda's chief propagandist. International tribunals holding individuals accountable for participation in a joint criminal enterprise provide further support for Congress' conclusion.

International tribunals have accepted participation in a joint criminal enterprise ("JCE") as a legitimate mode of individual criminal liability. *E.g. Prosecutor v. Tadic*, IT-94-1-A, Judgment, Appeals Chamber (Jul. 15, 1999) ¶¶ 190-225. *See also Prosecutor v. Vasiljevic*, IT-98-32-A, Judgment, Appeals Chamber (Feb. 25, 2004) ¶ 100. In substance, JCE largely mirrors the definition of conspiracy under 10 U.S.C. § 950v(b)(28) (2006) of the 2006 MCA. To hold an accused criminally liable under the basic JCE theory, the prosecution must first prove the *actus reus* component, which requires: (1) a common plan; (2) involving a plurality of persons; and (3) a contribution to the execution of the underlying crimes by the accused. *Tadic* at ¶ 227. Next, the prosecution must prove that the accused shared an intent to perpetrate the crime(s). *Id.* at ¶ 228.

Although JCE, unlike conspiracy, is not an independent criminal offense, *see* Jacob A. Ramer, "Hate by Association: Joint Criminal Enterprise Liability for Persecution," 7 CHICAGO-KENT JOURNAL OF INT'L & COMP. L. 31, 61-67 (Spring 2007), the underlying conduct and substantive elements mirror the MCA's requirements for conspiracy: that an individual must conspire to commit one of the war crimes specified in the MCA and knowingly take an overt

action in furtherance of the conspiracy. 10 U.S.C. § 950v(b)(28). Although an individual charged under a JCE theory would be charged with the underlying war crime, and not conspiracy, the proof requirements would be nearly identical to those under the 2006 MCA. Prosecutors would need to show that he was part of a common plan to commit the charged war crime and contributed to the execution of the plan. It is the content of the proscribed conduct that demonstrates international practice, and the Court should not be deceived by the differing labels used to describe the offenses. Congress' judgment that military commissions could try conspiracies to commit war crimes thus does not stand alone, as international tribunals have made an analogous judgment with respect to joint criminal enterprises.

B. CONSISTENT WITH THE PRINCIPLE OF *NULLUM CRIMEN SINE LEGE*, WHICH IS A PRINCIPLE OF JUSTICE DESIGNED TO PREVENT PUNISHMENT FOR ACTS THAT ONE COULD REASONABLY BELIEVE TO BE LAWFUL AT THE TIME COMMITTED, IT WAS FORESEEABLE AND ACCESSIBLE TO APPELLANT AT THE TIME OF THE CHARGED OFFENSES THAT THE CONDUCT OF WHICH HE STANDS CONVICTED WAS PUNISHABLE.

It is instructive to turn to the Judgment of the International Military Tribunal at Nuremberg, because that tribunal found that a conspiracy charge – conspiracy to commit Crimes against Peace – did not violate the principle of *nullum crimen sine lege*. In 1946, there was no international precedent for charges of either Crimes against Peace or conspiracy to commit such crimes to which the Prosecution could point. Nevertheless, the Tribunal found that neither Crimes against Peace nor conspiracy to commit such crimes violated the principle of *nullum crimen sine lege*. Observing that "the maxim *nullum crimen sine lege* is . . . in general a principle of justice," 22 Trial of the Major War Criminals (1947) at 411, the Tribunal held that such charges were lawful. After examining the predicate facts related to the German preparation for and initiation of the war, the Tribunal held that, "the attacker must know that he is doing

wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished." *Id.* at 462.

Since then, other international criminal tribunals have continued to follow this approach. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") has held that "the purpose of [the *nullum crimen sine lege* principle] is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credulity to contend that the accused would not recognize the criminal nature of the acts alleged in the indictment." *Prosecutor v. Delalic*, IT-96-21-A, Judgment, Appeals Chamber, (Feb. 20, 2001) at ¶ 179 (quoting and affirming judgment of Trial Chamber). Likewise, the Special Court for Sierra Leone has held that

> "[i]n interpreting the principle *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance. In other words, it must be 'foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable."

Prosecutor v. Hinga Norman, SCLC-200-14-AR72(E), Special Court for Sierra Leone (Appeals Chamber), Decision on Prelim. Mot. Based on Lack of Jurisdiction (Child Recruitment), ¶ 25 (quoting *Prosecutor v. Hadzihasanovic*, IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, Trial Chamber (Nov. 12, 2002), at ¶ 62).

Given the well established international principle that one may be held criminally culpable for crimes committed as part of a Joint Criminal Enterprise, "it strains credulity," *Delalic* at ¶ 179, that Appellant did not know he could be held responsible for what he was doing. To borrow a phrase from the IMT Judgment, "far from being unjust to punish him, it

would be unjust if his wrongs were allowed to go unpunished." On the facts of record in this case, it is beyond any doubt that Appellant was part of a common plan involving a plurality of persons with whom he shared an intent to commit violations of the law of war, and that he contributed to the execution of that common plan, which resulted in the attacks on USS COLE and in the shocking atrocities of September 11, 2001. Consequently, at the time the accused engaged in the conduct of which he now stands convicted, his conduct was unlawful and he was on notice that he risked criminal liability. His conduct was not innocent at the time it was committed, and his punishment for those acts, therefore, does not violate the principle of *nullum crimen sine lege*.

C. NOTWITHSTANDING APPELLANT'S CONTENTION TO THE CONTRARY, THERE EXISTS A BROAD INTERNATIONAL CONSENSUS ON THE ILLEGALITY OF CONSPIRATORIAL TYPE CONDUCT, ESPECIALLY FOR THE PURPOSE OF COMMITTING SERIOUS VIOLENT CRIMES LIKE THOSE COMMITTED BY AL QAEDA.

Conspiracy-like liability is broadly accepted as an independent substantive offense by nations around the world, permitting this Court to conclude that the accused had adequate notice of the wrongfulness and criminality of his actions. *See, e.g.*, Tom Stenson, *Inchoate Crimes and Criminal Responsibility Under International Law,* 1 J. OF INT'L LAW & POLICY (Univ. of Penn., 2006-07), available at http://www.law.upenn.edu/journals/jil/jilp/articles/1-1_Stenson_ Thomas.pdf (last visited Mar. 9, 2011); Alex Obote-Odora, *Conspiracy to Commit Genocide; Prosecutor v. Kambanda and Prosecutor v. Alfred Musema*, MURDOCH U. ELECTRONIC J. L., Mar. 2001, at ¶10-27, *available at* http://www. murdoch.edu.au/elaw/issues/v8n1/obote-odora81.html (last visited Mar. 9, 2011); Edward M. Wise, *RICO Thirty Years Later: A Comparative Perspective*, 27 SYRACUSE J. INT'L L.& COM. 303 (2000)(describing the current

status of conspiracy law in civil law jurisdictions); Alexander D. Tripp, *Margins of the Mob: A Comparison of Reves v. Ernst & Young with Criminal Association Laws in Italy and France*, 20 FORDHAM INT'L L.J. 263 (1996)(contrasting the RICO statute with Italian and French group criminality statutes).

At a minimum, the concept of conspiracy as an independent offense exists throughout the Common Law jurisdictions, that is to say the United Kingdom and her former colonies and possessions – the United States, Canada, Australia, New Zealand, and India, to name but a few. In addition, the Court may look to influential civil law jurisdictions like France, Italy, Germany and Spain, which have left indelible marks on the Civil Law systems of the world, as evidence that conspiracy-like offenses also exist in Civil Law jurisdictions.

As Professor Wise explains in his article, *RICO Thirty Years Later: A Comparative Perspective,* while "there are not exact equivalents outside the common law world to our doctrine of conspiracy," there are "functional equivalents" in the Civil Law world that achieve many of the same practical results. *Id.* For example, Prof. Wise notes that Italian law

> achieves many of the same practical results as Anglo-American doctrines of conspiracy; in part by stretching the law of attempt to cover cases of inchoate criminality that we would treat as cases of conspiracy; in part by extending the concept of complicity to include cases of 'moral complicity,' which can have the same effect as the *Pinkerton* rule; in part by employing the provisions of the Italian Penal Code that proscribe membership in a criminal association.

Wise, at 313-14 (citing, *inter alia*, Elisabetta Grande, *Accordo Criminoso e Conspiracy: Tipicita e Stretta Legalita enll'Analisi Comparata* (1993)). Prof. Wise goes on to explain

> In other civil law countries, as in Italy, one of the doctrines that partially serves the functions of our concept of conspiracy is the doctrine that permits penalization of membership in a criminal association or organization. Even though these

countries reject the concept of conspiracy, they do, at least in some instances, admit the possibility of punishing participation in a criminal association.

Wise, at 314. *See also* Tripp, at 297-98, n.21 & n.299 (citing criminal association provisions of the criminal laws of Belgium, Ethiopia, Monaco, Portugal and Turkey, and explaining that Article 416 of the Italian Penal Code makes it a crime for three or more people to associate for the purpose of engaging in criminal activity).[1]

Thereafter, Prof. Wise provides a lengthy review of French criminal law, focusing especially on the crime of *association de malfeiteurs*, or association of wrongdoers, which dates back to 1810, and is currently located in Article 450-1 of the French Penal Code. *Id.* at 315. This offense is punishable even when not accompanied or followed by any other crime. *Id.* (citing Art. 267, Fr. Penal Code (1810)); Tripp at 308 (citing Philip Salvage, *Complicite*, 1 JURIS-CLASSEUR PENAL 15-16 (1996)). While this offense originally was understood to require a fairly large, permanent, hierarchical organized group, those requirements were eliminated in 1893, and, "as currently defined in Article 450-1 of the revised French Penal Code of 1994, the offense comes even closer to our concept of conspiracy." Wise at 315-16.[2] As noted in the Government's opening brief in

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[1] "Under this provision [Art. 416, Italian Penal Code] *agreement* to commit a crime is not in itself punishable. Article 115 of the Italian Penal Code bars that. Article 416 requires an *association*. The association need not have a specific structure, but it must be a more or less permanent group of three or more persons, committed not to perpetrating a single crime, but to an open-ended course of criminal conduct." Wise at 317 (emphasis added). The al Qaeda conspiracy that Appellant joined and participated in qualifies as such an association.

[2] Article 450-1 of the French Penal Code of 1994 provides: "An association of wrongdoers (association de malfeiteurs) is any group formed or agreement made with a view to the preparation, evidenced by one or more overt acts, of one or more crimes or one or more misdemeanors (delits) punishable by ten years' imprisonment. Participation in an association of wrongdoers is punishable by ten years' imprisonment and a fine of one million francs." Wise at 316 (citing French Penal Code, Art. 265 (American Series of Foreign Penal Codes, vol. 1, Gerhard O. W. Mueller, ed., 1960); French Penal Code of 1994, at Art. 267 (American Series of Foreign Penal Codes, vol.

this case, the French imported this provision into their post World War II war crimes legislation.

In addition, the 1810 French Penal Code penalized "every attempt or plot, the object of which shall be . . . to destroy the government." Fr. Penal Cod Art. 87 (1810).[3] The Code went on to provide that "such a plot exists whenever the purpose of acting is concerted and resolved upon, between two or more conspirators, though there may not have been an attempt." *Id.* at Art. 89. Indeed, the French Penal Code of 1810 went so far as to punish an individual who proposed such a plot, even where no agreement resulted. *Id.* at Art. 90. Further on, in a section concerning "Crimes Tending to Disturb the State by Civil War, Illegal Employment of the Armed Forces, Public Devastation and Pillage," the Code outlawed "every attempt or plot, the object of which shall be . . . to carry devastation, massacre and pillage into one or more communes." *Id.* at Art. 91. In more modern times, the 1994 French Penal Code continued to sanction plotting attacks against the institutions of the Republic or the integrity of the national territory, and defined plotting as "consisting of a resolution agreed to by two or more to commit an

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31, Edward A. Tomlinson, trans., 1999)). A collection of world laws may be found at http://www.lexadin.nl/wlg/legis/nofr/legis.php .

[3] Available at http://www.napoleon-series.org/research/government/france/penalcode/ c_penalcode3a.html (last visited Mar. 10, 2011). Also available in French at http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719&dateTexte=20110310 (last visited Mar. 10, 2011).

attack where the resolution was put into effect by one or more material actions." Fr. Penal Code, Art. 412-1, 412-2 (1994).[4]

In certain circumstances, the Spanish Penal Code also punishes conspiracy, which it defines as two or more persons who join together to carry out a plan to commit an offense and resolve to carry it out. Sp. Penal Code, Art. 17.[5] Conspiracy is punishable as an offense when the object of the conspiracy is: to commit crimes against the Crown, *id.* at Art. 488; to commit rebellion, *id.* at Art. 477, and to commit the crime of illicit association, *id.* at Art. 519. Illicit associations are those that have as their object the commission of some crime, employ violent means, or are armed bands or terrorist organizations. *Id.* at Art. 515.[6]

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[4] ART. 412-1: *(Act no. 92-1336 of 16th December 1992 Article 364 and 373 Official Journal of 23rd December 1992 in force 1 March 1994)(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)* An attack consists of the commission of one or more acts of violence liable to endanger the institutions of the Republic or violate the integrity of the national territory. Attack is punished by thirty years' criminal detention and a fine of €450,000. The penalty is increased to life criminal detention and a fine of €750,000 where the attack was committed by a person holding public authority. The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out in the present article.

ART. 412-2: *(Ordinance no. 2000-916 of 19 September 2000 Article 3 Official Journal of 22 September 2000 in force 1 January 2002)* Plotting consists of a resolution agreed upon by two or more to commit an attack where the resolution was put into effect by one or more material actions. Plotting is punished by ten years' imprisonment and a fine of €150,000. The penalty is increased to twenty years' criminal detention and a fine of €300,000 where the offence was committed by a person holding public authority.

[5] Available at http://abogadospenal.fullblog.com.ar/codigo-penal-espanol---texto-integro-actualizado-2-121244071996.html (last visited Mar. 10, 2011). Art. 17 provides: "1. La conspiración existe cuando dos o más personas se conciertan para la ejecución de un delito y resuelven ejecutarlo. 2. La proposición existe cuando el que ha resuelto cometer un delito invita a otra u otras personas a ejecutarlo. 3. La conspiración y la proposición para delinquir sólo se castigarán en los casos especialmente previstos en la Ley."

(Trans: 1. Conspiracy exists when two or more persons join together to carry out a crime, and resolve to carry it out. 2. Solicitation exists when he who has resolved to commit an offense invites one or more other persons to carry it out. 3. Conspiracy and solicitation to commit a criminal offense is punished only in those instances specially called for in the Law.)

[6] Artículo 515: Son punibles las asociaciones ilícitas, teniendo tal consideración: 1. Las que tengan por objeto cometer algún delito o, después de constituidas, promuevan su comisión, así como las que tengan por objeto cometer

Similarly, Afghanistan criminalized both instigating a crime and alliances in crime, Afghan Penal Code, Art. 49 & 50,[7] and Yemen punishes anyone who incites another to disobey the law, and anyone who provokes or participates in a criminal collaboration to commit any of certain specified crimes, . . . even if such action did not lead to any consequential impact. Rep. of Yemen, Republican Decree for Law No. 12, for the Year 1994, concerning Crimes and Penalties, Art. 129, 135.[8]

In addition, the South Asian Association for Regional Cooperation Regional Convention on Suppression of Terrorism recognized that, at least as early as 1987, terrorism, conspiracy to commit terrorism, and aiding, abetting, or counseling terrorism were all cognizable crimes, susceptible of extradition and prosecution. That Convention says, in pertinent part:

> any of the following offences . . . shall be regarded as terroristic . . .: . . . e) Murder, manslaughter, assault, causing bodily harm, kidnapping, hostage-taking and offences relating to firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property; f) an attempt or

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o promover la comisión de faltas de forma organizada, coordinada y reiterada. 2. Las bandas armadas, organizaciones o grupos terroristas. . . 5.º Las que promuevan la discriminación, el odio o la violencia contra personas, grupos o asociaciones por razón de su ideología, religión o creencias, la pertenencia de sus miembros o de alguno de ellos a una etnia, raza o nación, su sexo, orientación sexual, situación familiar, enfermedad o minusvalía, o inciten a ello.

(Trans: The following illicit associations are punishable: 1. Those that have for their object to commit some crime or, after being formed, instigate its commission, as well as those that have as their object to commit or instigate the commission of minor offenses in an organized, coordinated and repeated fashion. 2. Armed bands, terrorist organizations or groups. . . . 5. Those which instigate discrimination, hate or violence against persons, groups or associations for reasons of ideology, religion or beliefs, affiliation of its members or of one of them with an ethnicity, race or nation, sex, sexual orientation, family situation, illness or disability, or incite to the same.)

[7] Available at http://www.asianlii.org/af/legis/laws/clc1976ogn347p19761006135507l5a429.txt/cgi-bin/download.cgi/download/af/legis/laws/clc1976ogn347p19761006135507l5a429.pdf (Last viewed Mar. 10, 2011).

[8] Available at http://www.unhcr.org/refworld/country,LEGAL,,LEGISLATION,YEM,4562d8cf2,3fec62f17,0.htm l (last visited Mar. 10, 2011).

> conspiracy to commit an offence described in subparagraphs (a) to (e), aiding, abetting or counseling the commission of such an offence or participating as an accomplice in the offences so described."

SAARC REGIONAL CONVENTION ON THE SUPPRESSION OF TERRORISM, Nov. 4, 1987, on deposit with Sec'y Gen'l, So. Asian Assoc. for Regional Coop, available at http://treaties.un.org/ doc/ db/Terrorism/Conv18-english.pdf (last visited Mar. 11, 2011).

In 1999, the member states of the Organization of the African Union ("OAU") adopted the Convention on the Prevention and Combating of Terrorism. In defining "terrorist act," Article 1 of Part I of the Convention roughly mirrors 18 USC § 2331, but explicitly adds: "any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, *conspiracy*, organizing, or procurement of any person, with the intent to commit any [terrorist act]." CONVENTION ON THE PREVENTION AND COMBATING OF TERRORISM, July 14, 1999, 2219 U.N.T.S. 179(emphasis added). With the Convention's agreement to "arrest the perpetrators of terrorist acts and try them in accordance with national legislation, or extradite them in accordance with the provisions of this Convention," the OAU member states recognized the criminal nature of a very broad range of activities in support of terrorism.

The European Convention on the Suppression of Terrorism, Jan. 27, 1977, 1137 U.N.T.S. I-17828 at art. 1, aiming to promote extradition of those who commit or support terrorist acts, recognized not only kidnapping, hostage taking, and bombing, but "participation as an accomplice" in such activity."

Finally, the United Nations Convention Against Transnational Organized Crime, Reg. No. I-39574, Multinational Treaties Deposited with the Secretary General, adopted by U.N. Gen.

Ass., U.N. Doc. A/RES/55/25 (Nov. 15, 2000), entered into force Sep. 29, 2003, to which 159 states are party, demonstrates a broad international consensus that participating in a criminal association /conspiracy to commit serious crimes was wrongful and criminal. That Convention obligates each state party to adopt measures to establish the following as criminal offenses, when committed intentionally:

> (a) Either or both of the following as criminal offences *distinct from those involving the attempt or completion of the criminal activity*:
>
> (i) Agreeing with one or more persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
>
> (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in: (a) criminal activities of the organized criminal group; or (b) other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;
>
> (b) Organizing, directing, aiding, abetting, facilitating or counseling the commission of serious crime involving an organized criminal group.

Id. at Art. 5 (emphasis added). This Convention, adopted by the U.N. General Assembly in November 2000, is evidence of a pre-existing consensus on this question. Indeed, as early as 1994, a World Ministerial Conference on the subject of the Convention recommended to the U.N. General Assembly a draft resolution that said, "Substantive legislation penalizing participation in criminal associations or conspiracies and imposing criminal liability on corporate bodies should be considered by States . . . ." U.N. Doc. A/49/748 (Dec. 2 1994) at 10.

Based on the foregoing, this Court may conclude that, at the time Appellant engaged in the conduct for which he now stands convicted, there was widespread acceptance by states

throughout the world that such conduct was wrongful and criminal. Consequently, Appellant was on notice his conspiratorial and inciting conduct was criminal, and his conviction on these charges violates neither the *ex post facto* principle nor the international law principle of legality, *nullum crimen sine lege*.

D. THE UNITED STATES HAS LONG CONSIDERED CONSPIRACY AND SOLICITATION TO BE VIOLATIONS OF THE LAWS OF WAR, PUNISHABLE BY MILITARY COMMISSION.

In addition to this broad international consensus, it is also the case that conspiracy and solicitation have long been criminal under U.S. law and punishable by U.S. military commissions. First, as noted in the Government's opening brief at page 28, the military commission trial of those responsible for the assassination of President Abraham Lincoln was on a charge of conspiracy. Benn Pittman, ed., *The Assassination of President Lincoln and the Trial of the Conspirators* (More, Wilstach & Baldwin: Cincinnati, 1865) at 18. Related to this precedent is the opinion of Attorney General Speed, also cited in the Government's opening brief, in which General Speed both approves of the military commission trial for the Lincoln conspirators, and opines that joining with banditti, jayhawkers and marauders – i.e. participating in a joint criminal enterprise – is sufficient to commit a crime under the laws of war. 11 Op. Att'y Gen. 297 (Jul. 1865).

Notwithstanding the view expressed by the four-justice plurality in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Government continues to assert both that conspiracy to commit violations of the law of war is an offense traditionally triable by military commission, and that Colonel Winthrop's treatise MILITARY LAW AND PRECEDENTS supports that position. *See* William Winthrop, MILITARY LAW AND PRECEDENTS, 2d ed. (Gov. Printing Off.: Washington,

D.C., 1920) at 842 (describing conspiracy as both a crime against society and a violation of the laws of war). Not only were conspiracy and conspiracy-like charges tried by military commissions during the Civil War, but such charges were also tried by U.S. military commissions during the Philippine Insurrection. *E.g.* Hdqrs., Div. of the Philippines, Gen. Orders, No. 174 (Jul. 19, 1901) at 2 (conspiring with insurgents); Hdqrs., Gen. Orders, No. 278 (Sep. 14, 1901) at 4 (combining and conspiring with band of armed outlaws).

Turning to more modern times, although the International Military Tribunal at Nuremberg ultimately rejected independent charges of conspiracy to commit War Crimes and crimes against humanity, the history of the Nuremberg prosecutions illustrates that is has been the consistent position of the United States Government that conspiracy to commit war crimes is itself a crime. Just as the U.S. Government charged and convicted the petitioners in *Ex Parte Quirin*, 317 U.S. 1 (1942), with conspiracy to commit war crimes, it likewise subsequently pursued charges of conspiracy to commit war crimes against the Nazis at Nuremberg. Indeed, the American prosecutors charged the defendants with conspiracy to commit war crimes and the lead U.S. prosecutor, Justice Robert Jackson, even argued for conviction on those charges in his closing argument on the merits. 1 Trial of the Major War Criminals Before the International Military Tribunal (1947) at 29 (Indictment); Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, (Alfred A. Knopf: New York, 1992) at 492.

Ultimately, the International Military Tribunal rejected the charges of conspiracy to commit War Crimes and Crimes against Humanity, accepting an independent conspiracy charge only for Crimes against Peace. 22 Trial of the Major War Criminals at 469. That decision, however, should not be understood as a categorical rejection of the legitimacy of conspiracy

charges in international law. First, the IMT Judgment was a compromise decision, designed to attract the support of all the judges, not an abstract analysis of conspiracy as an offense in international law. While the French Judge, M. Donnedieu de Vabres, initially objected that conspiracy was not an offense known to international law, he was challenged by his judicial colleagues. Taylor at 500. It appears that at least the British and Russian judges did not share M. de Vabre's concerns about conspiracy. Taylor at 551. The American judge, Mr. Francis Biddle, then crafted a compromise that could attract the support of all the judges. In that compromise, the French judge, despite his initial objection to the entire concept of conspiracy, agreed to at least one manifestation of conspiracy as an independent crime, viz. conspiracy to commit Crimes against Peace. By the same token, to avoid further disagreement over the legitimacy of conspiracy, Judge Biddle fashioned a decision that rejected the charges of conspiracy to commit War Crimes and Crimes against Humanity that relied on the language of the London Charter establishing the IMT. Taylor, at 551-52; 22 Trial of the Major War Criminals 469. Consequently, the IMT's rejection of the charges of conspiracy to commit War Crimes and Crimes against Humanity was based on a careful parsing of the language of the London Charter as part of a larger compromise judgment.

Nor was the London Charter itself an abstract academic document addressing the legitimacy of conspiracy as an independent charge. Rather, it was a political document negotiated among the four Allied Powers. As the historical record demonstrates, the United States Government initially proposed to include conspiracy to commit War Crimes and Crimes against Humanity as independent offenses under the Charter, but in the course of negotiations amongst the parties, that language was changed in such a way that it later permitted Judge Biddle

to parse it to advantage in fashioning his compromise judgment for the IMT. Taylor at 75-80. In short, the IMT's rejection of the charge of conspiracy to commit War Crimes and Crimes Against Humanity tells this Court little about the legitimacy of such charges. On the other hand, the history of the War Crimes conspiracy charge before the IMT demonstrates the consistent *American* view that such conduct constitutes an independent criminal offense.

Nor is the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), an impediment to this Court finding that conspiracy is an offense under the law of war. In *Hamdan*, only four Justices would have held that conspiracy was not a recognized violation of the law of war in the absence of congressional legislation, and thus not triable by the military commissions as then-constituted. *See id.* at 602-04.[9] It is, however, well-established that the opinion of plurality does not constitute a holding of the Court. *E.g., Horton v. California*, 496 U.S. 128, 136 (1990). Accordingly, the Supreme Court has never held that conspiracy is not an offense against the law of war.

To the extent that *Hamdan* says anything about the issue, it reflects the Court's broad agreement that this is a matter within Congress' authority under the Law of Nations Clause. Three justices would have expressly held conspiracy to be a violation of the law of war. *Hamdan*, 548 U.S. at 697-98 (Thomas, J., dissenting). Justice Kennedy, who declined to join the plurality, expressly noted that "Congress, not the Court, is the branch in the better position to undertake the sensitive task" of determining whether conspiracy is a war crime. *Id.* at 655

[9] Justice Kennedy specifically declined to adopt the plurality's view, noting that the question was one for Congress to determine. *Hamdan,* 548 U.S. at 653-54 (Kennedy, J., concurring in part).

(Kennedy, J., concurring)(internal quotation marks omitted). And the plurality emphasized, in reaching their conclusion, that Congress had not expressly determined that conspiracy was a law of war violation. *Id.* at 601 (emphasizing "there is no suggestion that Congress, in exercise of its constitutional authority to 'define and punish . . . Offences against the Law of Nations,' U.S. Const., Art. I, § 8, cl. 10, positively identified 'conspiracy' as a war crime"). Thus, it is not even clear that the four justices comprising the plurality would continue to adhere to this view now that Congress has acted pursuant to its constitutional powers, and *Hamdan* should be read as recognizing Congress' discretion over the issue.

In addition, the plurality's view is not an accurate description of conspiracy and the law of war and, in any event, that matter is hardly so clear as to preclude the exercise of congressional power under the Law of Nations Clause. Throughout the history of the United States, individual enemy combatants have been tried before military commissions for conspiring to commit war crimes. Both the Nazi saboteurs in *Quirin*, 317 U.S. at 23, and the saboteur in *Colepaugh v. Looney*, 235 F.2d 429, 431-33 (10th Cir. 1956), were charged with conspiracy. Colonel Winthrop, widely considered to be "the Blackstone of Military Law.," authored an authoritative treatise which recognized conspiracy to be an offense against the law of war and triable by military commission. *Reid v. Covert*, 354 U.S. 1, 19 (1957). COL Winthrop also listed examples of conspiracies against the law of war triable by military commission. Winthrop at 839 & n.5. Given this history, there was ample precedent from which Congress might reasonably conclude that conspiracy was a recognized violation of the law of war. In such circumstance, it is for Congress to "define" what the law of war requires, *Hamdan,* 548 U.S. at

653-54 (Kennedy, J., concurring in part), and that determination is entitled to substantial deference.

Appellant has provided no basis for the court to second-guess Congress' conclusion that conspiracy to commit war crimes has "traditionally been triable by military commissions." *Cf. The Paquete Habana*, 175 U.S. 677, 700 (1900)(court construes customary international law *de novo* only in the absence of a "controlling executive or legislative act or judicial decision"). That conclusion, and Section 950v(b)(28) of the 2006 MCA more specifically, fall well within Congress' power to "define and punish . . . Offences against the Law of Nations." U.S. Const., Art. I, § 8, cl. 10 The JCE theory applied by international tribunals provides valuable confirmation of Congress' conclusion. Insofar as Appellant and his co-conspirators were engaged in a joint criminal enterprise to commit various violations of the laws of war in an armed conflict with the United States, he was on more than adequate notice that he was subject to prosecution for conspiracy at a U.S. military commission should he ever be captured. Consequently, his convictions for conspiracy, solicitation and material support for terrorism are not *ex post facto* and should be affirmed.

II. SECOND SPECIFIED ISSUE

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).

A. AIDING THE ENEMY CONTAINS NO ELEMENT OF BREACH OF DUTY; TO BE SANCTIONABLE, AN ACCUSED'S CONDUCT MUST MERELY BE WRONGFUL, WHICH IT MAY BE NOT ONLY WHERE THE ACCUSED HAS BREACHED A DUTY, BUT ALSO WHERE THE ACCUSED HAS AIDED AN ENEMY WHO IS ENGAGED IN

AN UNLAWFUL BELLIGERENCY OR IS WAGING WAR IN VIOLATION OF THE LAWS OF WAR.

The answer to the Court's second question is, no; the offense of aiding the enemy is not limited only to those who have betrayed an allegiance or duty to a sovereign. Historically, the offense of Aiding the Enemy has also been applied to situations in which a person providing aid or support to an enemy has done so in violation of some duty other than a duty of allegiance to a sovereign, namely a duty not to provide aid or support to an enemy waging an unlawful belligerency, or who is waging a belligerency that violates the laws and customs of war. Indeed, this notion of the offense of aiding the enemy as requiring either a breach of a duty of allegiance, or otherwise wrongful conduct, such as aiding entities that wage unlawful war or wage war in an unlawful manner, is reflected in the architecture of the Military Commissions Act. Unlike the Uniform Code of Military Justice ("UCMJ"), the 2006 MCA does not incorporate, either directly or by reference, Article 104, UCMJ. Instead, the 2006 MCA separately enumerates the two variants of that offense as "Wrongfully Aiding the Enemy," 10 U.S.C. § 950v(b)(26) (2006) (in breach of an allegiance of duty to the United States), and as "Material Support for Terrorism," 10 U.S.C. § 950v(b)(25) (2006) (providing material support to an international terrorist organization engaged in hostilities against the United States, i.e., to an entity waging an unlawful war using unlawful means).

The offense of Aiding the Enemy codified in Article 104, UCMJ, 10 U.S.C. § 904, is, on its face, open-ended and does not explicitly require a breach of a duty. In practice, however, trials by court-martial or military commission for Aiding the Enemy have generally involved some breach of duty, at least implicitly. Where the persons tried for this offense were U.S. citizens, or otherwise owed the United States some duty, the offense implicitly involved the

breach of a duty. In other instances, such as the trial of British subjects Ambrister and Arbuthnot, described below, the persons tried for Aiding the Enemy were punished not for breaching a duty to the United States, which they did not owe, but for wrongfully supporting an unlawful enemy who conducted its belligerency in an unlawful manner.

These two applications of the offense of Aiding the Enemy, each involving a different type of wrongful conduct, are reflected in the architecture of the 2006 MCA. The 2006 MCA does not provide for a blanket offense of "Aiding the Enemy," akin to Article 104, UCMJ.[10] Instead, it codifies two concepts of Aiding the Enemy as two separate offenses. The offense of "Wrongfully Aiding the Enemy," 10 U.S.C. § 950v(b)(26) (2006), requires that the aid be provided "in breach of an allegiance of duty to the United States." By contrast, "Material Support for Terrorism," 10 U.S.C. § 950v(b)(25) (2006), is, in essence, the variant of aiding the enemy that involves the wrongful provision of aid to an unlawful enemy who conducts its belligerency in an unlawful manner. The Material Support for Terrorism offense prohibits the provision of "material support or resources to an international terrorist organization engaged in hostilities against the United States." *Id.* Such an organization can be considered to be waging an unlawful war, i.e. without the authority to engage in hostilities under international law, and to be doing so by using unlawful means, e.g. terrorism. Providing material resources and support to such an organization engaged in hostilities against the United States is, in essence, equivalent to

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[10] Indeed, the Military Commissions Act of 2006 specifically excluded UCMJ Article 104 from applying to military commissions created by the 2009 Act. Military Commissions Act of 2006, Pub. L. 109-336, Sec. 4(a)(2). The Military Commissions Act of 2009 did include Article 104 within the jurisdiction of military commissions as reformed by the 2009 Act, Military Commissions Act of 2009, Pub. L. 111-84, Sec. 1802 (codified at 10 U.S.C. § 948d), but did not repeal the explicit exclusion of Article 104 in the 2006 Act. The intent of the 2009 Congressional reforms to military commissions with respect to the applicability of Article 104 is at best unclear.

aiding an enemy who violates the law of war – a crime traditionally punishable under the name "Aiding the Enemy." As such, it was reasonable for Congress to conclude that "Material Support for Terrorism," albeit not under that name, is among the "offenses that have traditionally been triable under the law of war or otherwise triable by military commission," 10 U.S.C. § 950p(a) (2006).

It is important to note that Appellant was not charged with aiding the enemy under either Article 104, UCMJ, or the 2006 MCA. The relevance of Aiding the Enemy to this case, therefore, lies in the extent to which Appellant's material support for terrorism can legitimately be characterized as equivalent to conduct constituting the offense of Aiding the Enemy, as historically punished under the laws of war by military commissions. Insofar as Appellant's material support for terrorism is legitimately characterized as equivalent to conduct constituting Aiding the Enemy, it does not violate the *ex post facto* principle to hold him criminally liable for that material support. In examining this issue, the key inquiry is whether the accused's conduct was criminal at the time he committed it, so that he was on notice of his potential criminal culpability. Accordingly, the focus of this *ex post facto* analysis should be on Appellant's conduct, not its characterization under one particular label of offense or another.

The offense of Aiding the Enemy, currently codified at Article 104, UCMJ, and its predecessors in the Articles of War dating as far back as 1776, do not contain any element requiring the breach of a duty of loyalty or allegiance to the United States. 10 U.S.C. § 904; MANUAL FOR COURTS-MARTIAL ("MCM")(1998), Part IV, ¶28.b. This is important, because it is the text of a criminal statute that contains the elements of the crime. Additionally, in military practice, the President has carefully and deliberately listed the elements for each offense under

the Uniform Code in the MANUAL FOR COURTS-MARTIAL, and military courts "have generally accepted the President's explanation of these elements as defining what is required to obtain a conviction . . . ." *United States v. Zachary*, 61 M.J. 663, 668 (A.C.C.A. 2005). Breach of a duty or allegiance is found in neither the statute itself nor the MCM's list of elements.

The original version of this statute, enacted by the Continental Congress in 1775 as part of the Articles of War, limited application of the offense to members of the Continental Army. 2 Journal of the Continental Congress, 1774-1779 (Jun. 30, 1775), at 116.[11] The very next year, however, Congress re-enacted these provisions of the Articles of War, but this time without limiting their application only to members of the Continental Army. From that point forward, the offense of Aiding the Enemy in U.S. law has never again been limited merely to service members. Nor has the offense ever contained any element of breach of duty or allegiance.

As in all criminal offenses (barring strict liability offenses), to aid the enemy the perpetrator must have a general criminal intent to commit the acts forming the basis of the crime. In other words, the conduct must be wrongful. It is this requirement that the conduct be wrongful – which may, in some circumstances, manifest itself as a breach of a duty or allegiance to the prosecuting sovereign – that leads Appellant to mistakenly conclude that Aiding the Enemy contains an element of breach of duty or allegiance. Breaching a duty or allegiance to the

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[11] Art. XXVII: Whosoever belonging to the continental army, shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbour or protect an enemy, shall suffer such punishment as by a general court-martial shall be ordered. Art. XXVIII: Whosoever belonging to the continental army shall be convicted of holding correspondence with, or of giving intelligence to, the enemy, either directly or indirectly, shall suffer such punishment as by a general court-martial shall be ordered.

prosecuting sovereign is just one way in which a perpetrator's conduct might be wrongful, but it is not the only way. A perpetrator's conduct might also be wrongful if, for example, it aids the enemy to commit war crimes, or aids the enemy to carry on unlawful belligerency, both of which are the case here.

1. **The 1818 military commission trial of two British subjects, Ambrister & Arbuthnot for providing aid, comfort and supplies to the enemy during the Seminole War demonstrates that Aiding the Enemy does not require breach of a duty or allegiance to the prosecuting sovereign.**

That the historical offense of Aiding the Enemy does not require the breach of a duty or allegiance to the United States, but could also involve other wrongful conduct, is illustrated by the military trial and punishment in 1818 of Robert C. Ambrister and Alexander Arbuthnot, both British subjects residing in Spanish Florida. Both men were tried by a military tribunal for, *inter alia*, aiding, comforting and supplying the Seminoles in their war against the United States. American State Papers: Military Affairs, vol. 1, at 721.[12] Both were convicted and subsequently executed for their crimes, with the approval of the commanding general, Major General Andrew Jackson. *Id.* at 735.

A number of leading figures shared the view that the conduct of Ambrister and Arbuthnot was illegal. In his annual State of the Union message to Congress, President James Monroe said, directly referring to Ambrister and Arbuthnot:

> Men who thus connect themselves with savage communities and stimulate them to war, which is always attended, on their part, with acts of barbarity the most

[12] American State Papers can be found online at http://memory.loc.gov/ammem/amlaw/lwsp.html.

> shocking, deserve to be viewed in a worse light than the savages. They would certainly have no claim to an immunity from the punishment, which, according to the rule of warfare practiced by the savages, might justly be inflicted on the savages themselves.

Annals of Congress, 15th Cong., 2d Sess. at 13. Likewise, Secretary of State John Quincy Adams defended the legality of General Jackson's actions in a letter, intended to be shown to the Spanish Government by the U.S. ambassador to Spain:

> . . . that the two Englishmen executed by order of General Jackson were not only identified with the savages, with whom they were carrying on the war against the United States, but that one of them was the mover and fomenter of the war, which, without his interference and fake promise to the Indians of support from the British Government, it never would have happened; that the other was the instrument of war against Spain as well as the United States, commissioned by MacGregor . . . General Jackson possessed of their persons and of the proofs of their guilt, might, *by the lawful and ordinary usages of war*, have hung them both without formality of trial; that, to allow them every possible opportunity of refuting the proofs or of showing any circumstance in extenuation of their crimes, he gave them the benefit of trial by court-martial of highly respectable officers.

American State Papers: Foreign Affairs, vol. 4, at 539-45 (Ltr from Sec'y J. Q. Adams to G. W. Erving, Minister Plenipotentiary to Spain, Nov. 28, 1818)(emphasis added).[13]

General Jackson's actions in the case of Ambrister and Arbuthnot were not without controversy. In fact, the Military Affairs Committees of both houses of Congress investigated the case as part of a larger inquiry into General Jackson's actions during the Seminole War, which also very controversially involved his seizure of Spanish forts – including at Pensacola, the capital of Spanish Florida – and his expulsion of the Spanish Governor. While a majority of

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[13] Since Secretary of State Adams wrote these words, international law has come to require a fair and impartial trial before punishment for war crimes may be imposed. Nevertheless, the point remains that if Ambrister and Arbuthnot were subject to summary execution for their conduct, under the law of war as it existed in their day, then certainly that conduct is unlawful and may today be the subject of war crimes charges.

both committees concluded that General Jackson's actions were unlawful and should be condemned, Am. State Papers: Mil. Aff., vol.1, at 735, the entire House of Representatives, after lengthy debate, rejected the committee's proposed resolution disapproving of Jackson's actions. Annals of Congress, 15th Cong., 2d Sess. at 1132-1137 (February 1819).[14] Therefore, while General Jackson's actions were not without controversy, in the end, his actions were supported by the President and Secretary of State, and the House of Representatives expressly voted down a resolution of disapproval.

Ambrister and Arbuthnot, both British subjects without any duty or allegiance to the United States, were tried and punished for conduct amounting to aiding the enemy. Examination of their case reveals that their conduct was viewed as wrongful, in that they were assisting unlawful hostilities by the Seminoles and their allies. Further, not only was the Seminole belligerency unlawful, but, much like modern-day al Qaeda, the very way in which the Seminoles waged war against U.S. targets itself violated the customs and usages of war. Because Ambrister and Arbuthnot aided the Seminoles both to carry on an unlawful belligerency and to violate the laws of war, their conduct was wrongful and punishable.

While neither Ambrister nor Arbuthnot were charged with violating the Articles of War *per se*, and it is not even clear at this juncture whether the military tribunal that tried them was a

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[14] The vote in the Committee of the Whole was 57 in favor of adopting of the resolution, 98 opposed. The full House then voted to concur in the rejection of the resolution by the Committee of the Whole by a vote of 108 to 62 with respect to the case of Arbuthnot and 107 to 63 with respect to the case of Ambrister. The Senate adjourned without ever voting on the resolution of disapproval put forth by its committee.

court-martial or a military commission,[15] their conduct was, nevertheless, tantamount to Aiding the Enemy under the Articles of War, and is, therefore, indicative that Aiding the Enemy does not require breach of a duty or allegiance to the prosecuting sovereign. Further, even if the Ambrister and Arbuthnot case sheds no light on whether Aiding the Enemy *per se* requires breach of a duty, that case is at least evidence of the fact that the United States has punished conduct similar to Appellant's material support for terrorism before military tribunals.

2. 1871 Opinion of the Attorney General concerning the appropriateness of trial by military tribunal for persons caught providing supplies to the Comanche Indians in New Mexico further supports conclusion that Aiding the Enemy does not require breach of any duty, but merely wrongful conduct.

Further supporting the conclusion that Aiding the Enemy does not in all circumstances require a breach of duty or allegiance to the prosecuting sovereign is the opinion of U.S. Attorney General Akerman in July 1871. The U.S. Army had captured individuals engaged in unlawful traffic with hostile Indians in New Mexico, including supplying them with ammunition. The Secretary of War asked the Attorney General what he should do with the prisoners. In reply, Attorney General Akerman said:

> [I]f the Indians to whom the captured persons were thus supplying ammunition, &c., were in open and notorious hostility to the United States at the time, and,

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[15] In his treatise, COL Winthrop criticized General Jackson's execution of Ambrister in the face of a sentence to whipping and hard labor by the tribunal. His criticism is based on the proposition that a court-martial convening authority is legally prohibited from increasing the severity of the sentence adjudged by the court. He clearly was of the view that the Ambrister tribunal was a court-martial. Winthrop, at 465. Another noted author on military law, Major William E. Birkhimer, however, took the view in his treatise on military law. He wrote that the Ambrister and Arbuthnot tribunal was a military commission whose verdict and sentence were merely advisory under the law of war. It is worth noting here that Winthrop's criticism of Jackson is limited to his execution of Ambrister; he offers no criticism that the charges were invalid because the accuseds lacked any duty or allegiance to the United States. Wm. E. Birkhimer, MILITARY GOVERNMENT AND MARTIAL LAW, 3d ed. (Franklin Hudson Pub. Co.: Kansas City, Mo., 1914) at 196-97.

> therefore, properly came within the description of public enemies, the parties apprehended would seem to be amenable to trial and punishment by court-martial under the 56th article of war, which applies to persons who are not, as well as to persons who are, in the military service.

13 Op. Att'y Gen. 470 (Jul. 19, 1871) at 4. He then goes on to conclude, "[W]here the parties apprehended have not only been engaged in unlawful traffic with the Indians, but in violating the articles of war (e.g., relieving the enemy with ammunition, &c.) they may be tried and punished by court-martial . . . ." *Id.* at 6. While Attorney General Akerman was careful explicitly to premise his opinion that the prisoners might be tried by court-martial on the existence of "open and notorious" hostilities between the Indians and the United States, he makes no reference to any prerequisite breach of duty or allegiance to the United States. From this silence, the Court may deduce that Aiding the Enemy does not contain an element of breach of duty or allegiance to the prosecuting sovereign.

3. The Philippine Insurrection military commission cases are not a good source for determining whether Aiding the Enemy requires breach of a duty as everyone present in the Philippines at the time owed the United States some duty or allegiance.

Appellant's argument to the contrary notwithstanding, the military commission cases arising out of the Philippine Insurrection do not establish that the offense of Aiding the Enemy requires a breach of duty or allegiance to the prosecuting sovereign as an element, nor are they a good source for divining whether such an element exists. First, while many of the Philippine Insurrection cases that involve providing aid and comfort to the enemy allege the accused had "voluntarily taken and subscribed to the oath of allegiance to the United States," *see, e.g.*, Hdqrs., Div. of the Philippines, Gen. Orders, No. 148 (Dec. 22, 1900) at 1, or similar allegations, these allegations also appear in charges for which there is no reason to believe a breach of duty

or allegiance is required, such as Instigating an Assault, Robbery, Receiving Stolen Property, Kidnapping, et cetera. *Id. See also* Hdqrs., Div. of the Philippines, Gen. Orders, No. 140 (Jun. 25, 1901) at 2-3. Further, because sovereignty over the Philippines had passed to the United States via the peace treaty ending the Spanish-American War, as a factual matter everyone in the Philippines at the time owed the United States some duty. Consequently, if one is looking for examples where Aiding the Enemy is charged in the absence of any duty, one is not going to find such cases in the Philippine Insurrection materials, and must look elsewhere.

However, if the Court concludes, on the basis of other precedents – as the Government believes it should – that Aiding the Enemy does not in all circumstances require a breach of duty or allegiance, then the Philippine Insurrection cases are useful for demonstrating that conduct similar to that constituting material support for terrorism was traditionally punished by U.S. military commission under the law of war.

4. That the seven German defendants in the *Ex Parte Quirin* case were tried by military commission for, *inter alia*, Aiding the Enemy, is further evidence that the offense of Aiding the Enemy does not require breach of a duty.

In more modern times, the United States charged, convicted and executed seven Nazi saboteurs for, among other charges, aiding the enemy in violation of Article of War 81. *Quirin*, 317 U.S. at 23. Only one of the accused even arguably had U.S. citizenship, and might therefore have owed allegiance to the United States. *Id* at 8. The other defendants were all German citizens who made no claim to U.S. citizenship or residency. *Id* This case is further precedent both that the offense of Aiding the Enemy does not require breach of a duty or allegiance, and that conduct amounting violating the law of war has traditionally been sufficient to render one

liable to be punished by U.S. military commissions for Aiding the Enemy.[16] The *Quirin* defendants were charged and convicted of Aiding the Enemy under Article of War 81, not on the basis that they owed the United States any duty or allegiance, but rather because their conduct in support of the German Reich was wrongful in that it violated the law of war.

5. The post World War II military commissions prosecuting the German industrialists for their material support of Nazi war crimes further demonstrates that Aiding the Enemy does not require breach of a duty or allegiance, but that wrongfully aiding an enemy to violate the laws of war is also punishable.

This same principle explains the convictions of certain German industrialists by Allied military commissions following the Second World War. As noted in our opening brief, following the Second World War, both the United States and Great Britain tried various German civilian industrialists for war crimes related to their support of the Nazi regime. Most noteworthy was the *Zyklon B* case, in which both the owner and second-in-charge of the German chemical firm that supplied poison gas to the German SS, for use in killing concentration camp prisoners, were convicted and executed. *Trial of Bruno Tesch and Two Others*, 1 Law Reports of Trials of War Criminals 93, 93-94 (Brit. Mil. Ct., Hamburg, Germany, Mar. 1, 1946) While they were not formally charged with Aiding the Enemy, their conduct is nevertheless analogous, and relevant to this issue. These men did not owe the prosecuting sovereign (the United Kingdom, in that case) any duty or allegiance; they were German citizens selling a product to

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[16] The Supreme Court did not reach the validity of the Aiding the Enemy or Conspiracy charges in *Quirin*, as its determination that the military commission had jurisdiction over the charge alleging violation of the laws of war was sufficient grounds to affirm the District Court's denial of the petition for a writ of habeas corpus. *Ex Parte Quirin*, 317 U.S. 1, 25 (1942). Nevertheless, the *Quirin* commission itself is yet another example of a U.S. military prosecution of persons owing no duty or allegiance to the United States for aiding the enemy.

their government. Nevertheless, their conduct was wrongful, in that they knowingly aided the SS to commit crimes punishable under the law of war. *Id.* at 93.

This understanding of Aiding the Enemy also explains why the Allied powers did not try German industrialists whose support for the German war machine – such as producing tanks – was critical to its ability to make war. The conduct of enterprises such as BMW, while it undoubtedly aided the enemy, was not wrongful; it aided the lawful belligerent activity of the German state, as opposed to its wrongful, criminal activities.

6. Non-citizen Civil War blockade runners were not guilty of Aiding the Enemy because their conduct was not wrongful under the Law of War, as they were neutrals trading with a recognized belligerent power.

Likewise, this principle of wrongfulness explains why the Civil War blockade runners cited by Appellant's brief on the specified issues were not subject to trial and punishment –their conduct was not wrongful. While the Confederate states could certainly be viewed as insurrectionists who were breaching a duty of allegiance to the United States, the United States Government instead chose to treat the Confederacy as a privileged belligerent under the laws of war. As such, those neutrals trading with the Confederacy were aiding a recognized belligerent, rather than an unprivileged belligerency, as was the case with Ambrister and Arbuthnot. Consequently, their conduct was not wrongful.[17] The Union Army did, however, as noted in the

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[17] Further, the Government notes it is questionable mechanically to apply neutrality law as it existed prior to the U.N. Charter to the post-U.N. Charter environment. *See* Adam Roberts, *The Laws of War in the War on Terror*, 79 INT'L L. STUDIES, 174, 180-181 (2003)("[P]articularly when the U.N. Security Council has given approval to one party, the scope for neutrality may be limited or non-existent.").

Government's opening brief, try a number of people for wrongfully providing aid to unlawful guerilla bands.

In view of the foregoing, the offense of Aiding the Enemy does not require in all circumstances a breach of a duty or allegiance to the prosecuting sovereign. Rather, the law requires that the perpetrator's conduct be wrongful, which requirement may be satisfied by a breach of duty or allegiance, or for other reasons. In this case, Appellant's conduct in materially supporting al Qaeda in carrying out terrorism and its associated crimes was clearly wrongful, both because al Qaeda was engaged in an unlawful belligerency against the United States and because its methods were themselves criminal. Such conduct, even by those who owe the prosecuting sovereign no duty or allegiance, has historically been tried and punished by U.S. military commissions, and this historical practice was recognized and reinforced by Congress in its codification of the related offenses of Wrongfully Aiding the Enemy and Providing Material Support for Terrorism in the 2006 MCA.

III. CONCLUSION

Accordingly, the United States respectfully renews its request that his Honorable Court affirm the Appellant's conviction and sentence, as approved by the Convening Authority.

Respectfully submitted,

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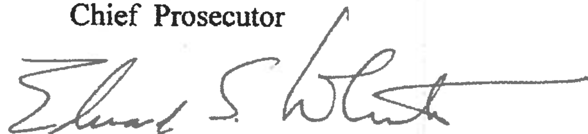

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CERTFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail to Mr. Michel Paradis, detailed appellate defense counsel, on this 11th day of March, 2011.

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