UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**P-009** **Government Reply** to Defense Opposition to Government Motion for Reconsideration **16 October 2008**

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

2. **Reply**: The Defense opposition to the Government's motion for reconsideration advances three main arguments, which this reply will address below. As an initial matter, however, it is necessary to address some of the preliminary allegations made by the Defense in its opposition.

a. Preliminary matters.

In the overview section of the opposition brief, the Defense claims the Government's motion is "nothing more than 'sour grapes'". P-009 Defense Opposition to Prosecution's Motion for Reconsideration (hereinafter P-009 Opposition)(10 Oct 2008) at 2. Further, the Defense contends that the Government seeks to obtain a longer sentence by "changing the evidence and information" considered by the members, because it wants to avoid releasing the accused in December 2008. *Id.* Each of these contentions is false.

First, the Government does not seek to obtain a longer sentence. As noted in the Government's opening brief, if the military judge were to grant the requested relief, "the Government will not seek a sentence greater than the 66-month sentence previously adjudged." P-009 Government Motion for Reconsiderations (Corrected)(24 Sep 2008) at 1 n.1. Further, as the Government requests that the original members be reassembled, correctly instructed, and permitted to resume deliberations, the members would be free to impose a sentence of 142 days (or less). Second, the Government in no way seeks to "change the evidence," as asserted by the Defense. To the contrary, the Government's proposed remedy does not involve reopening the fact-finding portion of the trial, nor does it seek to reopen the evidence presentation or argument from the

sentencing phase of the trial. Rather, the Government merely seeks to return to the point at which the error was made, and to remedy that error. The Government contends that the error may be remedied by correctly instructing the members and permitting them to resume deliberations on sentence.

Third, the Government's motion in no way relates to whether the accused could or should be detained as an enemy combatant beyond the point at which he will be found to have served his sentence from the military commission.. Rather, the Government seeks to correct an error of law that occurred during the trial of this war crimes case, and to determine how long and on what basis the accused should be confined as a result of his multiple convictions in that case.[1]

b. Waiver.

The Government has neither waived nor forfeited the issue of the accused's entitlement to sentence credit, as the Defense mistakenly contends. The Government clearly objected to awarding the accused sentence credit for time in detention prior to trial. *See D-019 Government Response to Defense's Motion for Relief from Punitive Conditions of Confinement and for Confinement Credit, or Alternatively Abatement (11 Apr 2008) ¶2.b, at 1.* Once the Commission ruled against the Government on that point, it was not necessary for the Government to continue objecting, on the same grounds, to the sentencing instructions that incorporated the erroneous ruling. *See United States v. Sandoval*, 18 M.J. 55, 65 (C.M.A. 1984); *E. R. Squibb & Sons v. Lloyd's*, 241 F.3d 154, 167 (2d Cir. 2001)(citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 119-21 (1998) and 9A Charles A. Wright and Arthur R. Miller, Federal Practice & Procedure § 2553 at 411 (2d ed. 1995 & 1997 Supp.)). Accordingly, the Government preserved its objection to the Military Judge's erroneous ruling on the issue of administrative credit for pretrial detention. That objection necessarily encompassed an objection to the erroneous instruction by the Commission to the members on that same issue.

c. Authority to order sentence credit.

[1] The Government notes that the Defense repeatedly hurls the phrase "the Administration" as an epithet directed at the Prosecution. *See, e.g.*, P-009 Opposition at 1, 2. For the record, all motions in this matter have been filed in the sole, independent discretion of the Office of Military Commissions-Prosecution, under the direction and guidance of the Chief Prosecutor.

The Defense argues that the failure of either the M.C.A. or the R.M.C. expressly to prohibit sentence credit compels the conclusion that this military commission possesses such authority. The Defense contends, citing *United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999), that sentence credit has "a long history in military law," and that the absence of any reference to sentence credit in the U.C.M.J. or Rules for Courts-Martial has not prevented courts-martial from awarding administrative sentence credit on due process grounds. Further, the Defense argues that the broad discretion granted to military commissions to adjudge punishments under the M.C.A., *see* 10 U.S.C. § 948d(d) and R.M.C. 1002, supports the conclusion that the military judge has authority to award sentence credit. The Defense is mistaken.

The authority of a military judge to award administrative sentence credit for pretrial confinement does not have a "long history in military law." To the contrary, "there was **no automatic credit** for pretrial confinement **as recently as 1982**." *Rock*, 52 M.J. at 156 (emphasis added) (citing *United States v. Davidson*, 14 M.J. 81 (C.M.A. 1982)).[2] More to the point, however, *no decision* supports the proposition that administrative credit is appropriate for pretrial detention when an accused is initially and concurrently detained as an enemy combatant.

As explained in the Government's opening brief, the accused has been *lawfully* detained, from his capture in 2001 up until the present day, as an enemy combatant. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004)(plurality op.) ("The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'"); *see also Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008)("The law must accord the Executive substantial authority to apprehend and

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[2] Further, the Court of Military Appeals, now the Court of Appeals for the Armed Forces, has never held that due process requires a military accused be given day-for-day administrative credit for pretrial confinement. Rather, when the Court of Military Appeals held an accused was entitled to day-for-day credit for legal pretrial confinement, it based its decision on a Department of Defense instruction that required such credit. *Id.*; *see also United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Were this court to hold that due process requires the accused be given sentence credit for the time he spent in detention prior to trial, not only would such a decision be completely without precedent, but it would also logically imply that United States service members had been routinely denied due process in courts-martial from before the founding of the Republic until the *Allen* decision in 1984.

detain those who pose a real danger to our security."). Because the accused has been detained throughout these proceedings as an enemy combatant in an ongoing armed conflict with al Qaeda, the incidental fact that the accused was also being prosecuted for a violation of the law of war during part of that time period did not transmogrify his wartime detention as an enemy combatant into pretrial confinement, such as might be imposed upon a soldier or civilian being tried for a drunk driving offense. As such, any precedents concerning pretrial detention cited by the Defense on the question of *Allen* credit are inapposite to the accused's situation.[3]

Finally, the Defense's reliance on 10 U.S.C. § 948d(d) and R.M.C. 1002 is misplaced. The Government does not dispute that the military commission has broad discretion, within authorized limits, to adjudge punishments. The discretion to adjudge the appropriate punishment, however, is distinct from the military judge's authority to award credit against that sentence for time spent in pretrial detention as an enemy combatant. If the members wish to sentence the accused to 142 days confinement, then they may choose to do so. First, however, they should be properly instructed on the law and allowed to deliberate on sentence in light of a correct charge.

d. Statutory and regulatory obstacles.

The Defense contends that 10 U.S.C. § 950a, and three Rules for Military Commissions (1008, 1009(a), and 1102(c)) prohibit the relief sought by the Government. The Defense is mistaken.

First, it should be noted none of the provisions cited by the Defense supports the proposition that the military judge has

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[3] The Defense also misleadingly cites Article 75 of Additional Protocol I to the Geneva Conventions for the proposition that administrative credit is required in order to avoid the accused being punished without a conviction pronounced by "an impartial and regularly constituted court." P-009 Opposition at 17 n.4. As an initial matter, we note once again that the United States has repeatedly refused to ratify Additional Protocol I. *See* President Ronald Reagan, Letter of Transmittal to the Senate of Protocol II additional to the Geneva Conventions of 12 August 1949, concluded at Geneva on June 10, 1977 (Jan. 29, 1987) ("We must not, and need not, give recognition and protection to terrorist groups as the price for progress in humanitarian law. . . . The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors."). Moreover, the Defense cites no authority whatsoever for the proposition that detention as an enemy combatant - *approved* by the Supreme Court in *Hamdi* - constitutes a "penalty" or punishment prohibited by Additional Protocol I.

any authority to award sentence credit for detention as an enemy combatant. Of course, no such authority exists.

Second, 10 U.S.C. § 950a is inapplicable to this motion for reconsideration. That section provides a sentence "may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." 10 U.S.C. § 950a(a). That section is located in subchapter VI of the M.C.A., and is entitled "Post-Trial Procedure and Review of Military Commissions." The provisions in that subchapter concern review of military commission verdicts by the convening authority, rehearings ordered by the convening authority, and appeals to the Court of Military Commission Review, the U.S. Court of Appeals, and the Supreme Court. Trial proceedings, such as the present one, are the subject of subchapters IV and V, which are *not* governed by section 950a(a) or subchapter VI. Accordingly, any limits section 950a(a) may impose on another court's ability to correct an error of law by the military commission are inapplicable with respect to the military commission's *own authority* to correct such legal errors at the appropriate stage of the process, while still in control of the record of case. Rather, a military judge may on his own authority "change his ruling [on a question of law] at any time during the trial." 10 U.S.C.§ *949l*(b)(2), and the law encourages timely correction of error at its source.

Further, section 950a is identical to Article 59, U.C.M.J., 10 U.S.C. § 859, which was also placed in a subchapter entitled "Post-Trial Procedure and Review". Article 59, U.C.M.J. is understood to establish an appellate standard of review. *See, e.g., United States v. Czachorowski*, 66 M.J. 432, 437 (C.A.A.F. 2008).

Third, R.M.C. 1008 is inapplicable to the situation under consideration. That rule concerns the conditions under which a sentence that is *proper on its face* may be impeached. In this case, the Government does not seek to impeach a sentence. Rather, the Government seeks to have the commission reconsider and reverse its ruling that the accused is entitled to sentence credit. Because the members may well have factored the erroneous instruction on credit into their 66-month sentence, once the commission concludes it is without authority to order sentence credit and that it, therefore, incorrectly instructed the members, the sentence of the military commission is facially erroneous.

Further, the rule against impeachment of verdicts derives from "'[l]ong-recognized and very substantial concerns'" about protecting "'jury deliberations from intrusive inquiry.'" *United States v. Dugan*, 58 M.J. 253, 256 (C.A.A.F. 2003) (quoting *Tanner v. United States*, 483 U.S. 107, 127 (1987)). "'The purpose of this rule is to protect freedom of deliberation, protect the stability and finality of verdicts, and protect court members from annoyance and embarrassment.'" *Id.* (quoting *United States v. Loving*, 41 M.J. 213, 236 (C.A.A.F. 1994) (internal quotation marks omitted)). In this case, there is no need to pierce the veil of the members' deliberations to see that their sentence was the product of legal error and therefore invalid.

Fourth, R.M.C. 1009(a) is likewise inapplicable in this case. That rule contemplates a situation in which the commission members, having reached a lawful sentence, seek to reconsider it. In this case, the members' original sentence is invalid as the product of legal error that precedes their deliberations. It should be set aside and the members reassembled to resume deliberations in order to arrive at a lawful and valid sentence. Indeed, the remedy sought by the Government is more akin to *clarification* of the sentence under R.M.C. 1009(c). That rule permits the military judge to reassemble the members to clarify any ambiguity in the sentence. While that situation is not precisely the present situation, the erroneous sentence credit instruction has introduced ambiguity into the sentence rendered by the members. They should be reassembled, correctly instructed and permitted to clarify the sentence they intended the accused to serve, under a correct understanding of the law.

Fifth, R.M.C. 1102(c) is also inapplicable in this case. The Government does not seek to increase the severity of the sentence adjudged. *See* P-009 Government Motion for Reconsiderations (Corrected) at 1 n.1.

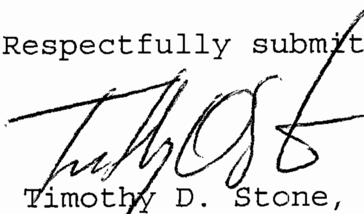
e. This effort is not a "waste of time". According to the Defense, correctly instructing the members would be "a pointless exercise and a vast waste of time, money, and effort." P-009 Opposition at 9. That is incorrect. The Government is concerned, both as a matter of principle, and because other judges may look to the Military Judge's ruling in this case for persuasive authority, that the accused should not receive administrative credit for his detention as an enemy combatant. The Government has a compelling interest in correcting such an error in one of the first war crimes prosecutions in the past 50

years. Moreover, to the extent the Military Judge determines that his prior ruling on this subject was erroneous, the Military Judge may also consider whether the legal error could be corrected without the need to recall the members. Any logistical difficulties or considerations associated with recalling the members should not stand in the way of correcting legal error in this case, but rather can be addressed by the parties once the legal error has been corrected.

3. **Conclusion**. For the foregoing reasons, the military judge should reconsider his erroneous ruling and instruction, and properly find that the accused is not entitled to administrative credit against his adjudged sentence for time spent in detention as an enemy combatant prior to trial. Further, because the members were instructed to the contrary, and -- based on their questions to the military judge -- their sentence was likely influenced by that erroneous instruction, the military judge should set aside the sentence as invalid due to an error of law, reassemble the members, correctly instruct them, and thereafter direct the members to again deliberate on sentence in light of the corrected instructions. The government is indifferent as to the sentence adjudged; it is critical, however, to this and future cases, that this sentencing principle be clarified.

4. **Oral Argument**: Pursuant to R.M.C. 905(h), the Government requests oral argument.

Respectfully submitted,



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