

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 17, 2014
CORRESPONDENTS' REPORTS

UNITED STATES OF AMERICA¹

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Overview – United States Enforcement of International Humanitarian Law

At the start of 2014, roughly 38,000 US military personnel remained in Afghanistan, down from the peak of 101,000 in June of 2011.² In May, President Barack Obama announced a plan to withdraw all remaining American troops from Afghanistan by the end of 2016.³ At the end of 2014, President Obama declared the end of the combat mission in Afghanistan while leaving some 16,000 US troops to assist the Afghan government with training and advising Afghan security forces and to protect the US embassy in Kabul.⁴

While reducing its presence in Afghanistan, 2014 saw the return of the US military to Iraq. The President of Iraq requested US assistance to help counter the threat posed by the Islamic State of Iraq and Syria (ISIS).⁵ In 2014, ISIS seized land from northern Syria to central Iraq, including Raqqa and Mosul, gaining access to oil fields in both countries.

As a result, in September, President Obama approved the deployment of 350 US troops to Iraq to train and advise Iraqis and Kurds fighting ISIS forces.⁶ Though the White House has

¹ This entry was prepared by Chris Jenks, Assistant Professor of Law and Criminal Justice Clinic Director, SMU Dedman School of Law and Ken Haesly, JD Candidate, SMU Dedman School of Law. Special thanks to Cassie DuBay of the SMU Underwood Law Library for her assistance.

² 'How many U.S. troops are still in Afghanistan?', *CBS News* (online), 9 January 2014

² 'How many U.S. troops are still in Afghanistan?', *CBS News* (online), 9 January 2014 <<http://www.cbsnews.com/news/how-many-us-troops-are-still-in-afghanistan/>>.

³ Mark Landler, 'U.S. Troops to Leave Afghanistan by End of 2016', *New York Times* (online), 27 May 2014 <<http://www.cbsnews.com/news/how-many-us-troops-are-still-in-afghanistan/>>.

⁴ The White House, 'Statement by the President on the End of the Combat Mission in Afghanistan' (Statement, 28 December 2014) <<https://www.whitehouse.gov/the-press-office/2014/12/28/statement-president-end-combat-mission-afghanistan?>>.

⁵ 'Isis Rebels Declare 'Islamic state' in Iraq and Syria', *BBC News* (online), 30 June 2014 <<http://www.bbc.com/news/world-middle-east-28082962>>.

⁶ Karen DeYoung, 'Obama approves deployment of 350 more troops to Iraq', *The Washington Post* (online), 2 September 2014 <<https://www.washingtonpost.com/world/national-security/obama->

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stated the forces will not serve in a combat role, they will be helping to direct a US air campaign against ISIS forces in northern Iraq.⁷ To facilitate that, President Obama announced the formation of an international coalition to counter ISIS, stating that '[o]ur objective is clear: We will degrade, and ultimately destroy, [ISIS] through a comprehensive and sustained counterterrorism strategy.'⁸ By the end of the month, the US began attacking ISIS targets in Syria with cruise missiles and air strikes.⁹ Of note, unlike in Iraq, the US did not have the permission of the Assad government in Syria to launch airstrikes against ISIS targets there, though the US did notify Assad before the September attacks began. In November, President Obama indicated that he would seek 'specific authorization' from Congress for a military campaign against ISIS. At the same time, President Obama authorized the deployment of 1500 more American troops to Iraq, doubling the amount of US forces there.¹⁰

ISIS attacks in Iraq were made possible, at least in part, by the worsening ongoing non-international armed conflict in Syria. The Syrian Observatory for Human Rights reported that the conflict claimed the lives of more than 76,000 people in 2014, including more than 3,500 children, making it the deadliest year in Syria since the conflict began in 2011.¹¹ By the end of 2014, some 4 million Syrians had fled the country, prompting the United Nations to develop the Syria Regional Response Plan.¹²

Throughout 2014, the Syrian government participated in efforts to reduce its stockpile of chemical weapons.¹³ But in September the Organisation for the Prohibition of Chemical Weapons issued a report which found that chlorine was used as a weapon 'systematically and repeatedly' in attacks on three villages in northern Syria in 2014.¹⁴ Noting that the report referenced witness accounts of helicopters being used in the attacks, US Secretary of State John Kerry claimed that there were strong indications of 'Syrian Regime culpability' for the

[approves-deployment-of-350-more-troops-to-iraq/2014/09/02/b05aa99a-3306-11e4-a723-fa3895a25d02_story.html](https://www.whitehouse.gov/blog/2014/09/10/president-obama-we-will-degrade-and-ultimately-destroy-isil)>.

⁷ Ibid.

⁸ The White House, 'President Obama: "We Will Degrade and Ultimately Destroy ISIL"' (Statement, 10 September 2014) <<https://www.whitehouse.gov/blog/2014/09/10/president-obama-we-will-degrade-and-ultimately-destroy-isil>>. To the end, in October, the US military named the coalition efforts Operation Inherent Resolve. See Operation Inherent Resolve, <<http://www.inherentresolve.mil/>>.

⁹ Craig Whitlock, 'US Begins Airstrikes Against Islamic State in Syria', *Washington Post* (online), 23 September 2014 <https://www.washingtonpost.com/world/national-security/us-begins-airstrikes-against-islamic-state-in-syria/2014/09/22/8b677e26-42b3-11e4-b437-1a7368204804_story.html>.

¹⁰ Helene Cooper and Michael D Shear, 'Obama to Send 1,500 More Troops to Assist Iraq', *New York Times* (online), 7 November 2014, <<http://www.nytimes.com/2014/11/08/world/middleeast/us-to-send-1500-more-troops-to-iraq.html>>.

¹¹ Rick Gladstone and Mohammad Ghannam, 'Syria Deaths Hit New High in 2014, Observer Group Says', *New York Times* (online), 1 January 2015 <<http://www.nytimes.com/2015/01/02/world/middleeast/syrian-civil-war-2014-deadliest-so-far.html>>. The Syrian Observatory put the total number of dead in the conflict as of the start of 2015 at 206,603.

¹² United Nations, 'Syria Regional Response Plan 2014' <<http://www.unhcr.org/syriarrp6/>>.

¹³ Arms Control Association, 'Timeline of Syrian Chemical Weapons Activity 2012-2015', <<https://www.armscontrol.org/factsheets/Timeline-of-Syrian-Chemical-Weapons-Activity>>.

¹⁴ Organisation for the Prohibition of Chemical Weapons, 'OPCW Fact Finding Mission: "Compelling Confirmation" That Chlorine Gas Used as a Weapon in Syria,' 10 September 2014 <<https://www.opcw.org/news/article/opcw-fact-finding-mission-compelling-confirmation-that-chlorine-gas-used-as-weapon-in-syria/>>; see also Human Rights Watch, 'Syria: Strong Evidence Government Used Chemicals as a Weapon', 31 May 2014 <<https://www.hrw.org/news/2014/05/13/syria-strong-evidence-government-used-chemicals-weapon>>.

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attacks.¹⁵ Though the use of chemical weapons in Syria crossed what President Obama had stated in 2012 was a 'red line',¹⁶ there was no US action against Syria as a result.¹⁷

During 2014 the United States also continued to conduct drone strikes in several parts of the world. According to the Bureau of Journalism, in 2014 the US conducted at least 25 strikes in Pakistan, 17 strikes in Yemen and 3 in Somalia.¹⁸

United States involvement in the various armed conflicts discussed above involve the application, and at times violation, of International Humanitarian Law (IHL). This report begins by discussing a civil suit in which former detainees allege US government contracted interrogators tortured them in Iraq followed by cases in which the US Department of Justice prosecuted US citizens for IHL violations. This report then discusses examples of the US military exercising court-martial jurisdiction over its service members. The court-martial cases are illustrative of how the US uses its military justice system during armed conflict in response to offenses by its service members against protected persons, often Iraqi and Afghan nationals.¹⁹ The 2012 report explains the US military justice practice.²⁰

Since US detention practice flows from its involvement in armed conflict and involves IHL issues, this report includes detainee legal challenges in US federal courts, the trial and appellate results from the Military Commissions held at Guantanamo Naval Station Guantanamo Bay in Cuba (Guantanamo), and other notable events related to detention, including interrogation, treatment conditions, periodic reviews and transfers. The 2013 report explained the litigation avenues for those detained at Guantanamo to challenge their detention and/or conditions of confinement while this report briefly details the Military Commission process²¹.

Cases – United States Courts of Appeal

- *Al Shimari v CACI Premier Technology Inc, et al*, 758 F 3d 516 (4th Cir, 2014)
<http://ccrjustice.org/sites/default/files/assets/2014_06_30_AlShimari_4thCirOpinion.pdf>

On 30 June, the US Court of Appeals for the Fourth Circuit ruled that subject matter jurisdiction exists for a federal court to consider certain civil claims seeking damages against an American corporation for the torture and mistreatment of foreign nationals at the Abu Ghraib prison in Iraq.

In 2008, the Center for Constitutional Rights (CCR) filed a federal lawsuit under the Alien Tort Statute (ATS) and federal question jurisdiction against US-based government

¹⁵ 'Sec. of State John Kerry Voices Concern over Syria Chemical Weapons,' *CBS News* (online), 21 September 2014 <<http://www.cbsnews.com/news/sec-of-state-john-kerry-voices-concern-over-syria-chemical-weapons/>>.

¹⁶ White House, 'Remarks by the President to the White House Press Corps,' (Remarks, 20 August 2014 <<https://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps/>>.

¹⁷ S A Miller, 'Panetta Decries Obama 'red line' Blunder on Syria,' *Washington Times* (online), 7 October 2014 <<http://www.washingtontimes.com/news/2014/oct/7/panetta-decries-obama-red-line-blunder-syria/>>.

¹⁸ Bureau of Investigative Journalism, 'Get the Data: Drone Wars', <<https://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/>>.

¹⁹ Correspondents' Reports - United States of America, (2013) 16 *YIHL*.

²⁰ Correspondents' Reports - United States of America, (2012) 15 *YIHL*.

²¹ Correspondents' Reports - United States of America, (2013) 16 *YIHL*.

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contractor CACI, alleging that CACI directed and participated in illegal conduct while providing interrogation services to the US military at Abu Ghraib.²² Four Iraqi civilian plaintiffs who had been detained at Abu Ghraib between 2003 and 2004 alleged that CACI contractors violated US and international law by subjecting the detainees to torture and inhuman or degrading treatment.²³

While there is considerable procedural history to the litigation, most relevant to this entry is that, in 2013, the US District Court for the Eastern District of Virginia dismissed CCR's claims, ruling that the ATS did not provide jurisdiction. The Court of Appeals for the Fourth Circuit disagreed, holding that the ATS provides a jurisdictional basis for the plaintiffs' allegations of violations of international law, despite the presumption against extraterritorial application of acts of Congress. The Court of Appeals remanded the case back to the district court for further proceedings.

Cases – United States District Courts

- *United States v Slough*, 2015 WL 1872002 (D D C) (Trial Order)
<https://www.washingtonpost.com/world/national-security/verdict-expected-in-blackwater-shooting-case/2014/10/22/5a488258-59fc-11e4-bd61-346aee66ba29_story.html>

On 22 October, following an eleven week trial in the US District Court for the District of Columbia, a jury found four former Blackwater Worldwide security contractors guilty of 31 homicides and attempted homicides resulting from their shooting unarmed Iraqi civilians in Baghdad in 2007. The defendants belonged to a security team, Raven 23, which provided support for other Blackwater security teams and for US government personnel in Iraq. On 16 September 2007, Raven 23 was clearing a path for another Blackwater team evacuating a US official from a nearby car bombing. While attempting to stop traffic in Baghdad's Nisour Square, defendant Nicholas Slatten fired at the driver of a stationary sedan, killing him instantly. Other members of Raven 23 quickly joined in, firing machine guns and throwing grenades into the crowd in the square.

US efforts to investigate and prosecute the security team faced a number of challenges and delays.²⁴ Ultimately, the US Attorney for the District of Columbia charged four members of Raven 23 with the deaths of 14 Iraqis and the wounding of 17 others.

The jury rejected the security teams' claims that they were acting in self-defense and were the target of incoming AK-47 gunfire and a possible suicide car bomber. The jury found Slatten guilty of murder, and he faces a mandatory sentence of life in prison.²⁵ The jury found the other defendants – Paul Slough, Evan Liberty, and Dustin Heard²⁶ – guilty of various counts of manslaughter and attempted manslaughter, and of using military firearms while committing a felony.²⁷ Slough, Liberty, and Heard – who, like Slatten, are US military

²² Center for Constitutional Rights, 'Al Shimari v. CACI et al. - At a Glance', *Center for Constitutional Rights*, <<http://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al>>.

²³ *Ibid.*

²⁴ Quynhanh Do, 'Behind the Blackwater Trial', *New York Times* (online), 22 October 2014 <<http://www.nytimes.com/video/us/100000003049962/behind-the-blackwater-trial.html>>.

²⁵ *United States v Slatten*, 22 F Supp 3d 9, (DDC 2014).

²⁶ Prosecutors dropped three counts of using military firearms while committing a felony against Heard after jurors became deadlocked on them.

²⁷ *United States v Slough*, 2015 WL 1872002 (DDC) (Trial Order); *United States v Slough, et al*, 51 F Supp 3d 1 (DDC, 2014).

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veterans – face a mandatory minimum of 30 years in prison. Defense attorneys for the men indicated they would appeal, and US District Judge Royce C Lamberth ordered the men to be confined pending sentencing.

- *United States v Green* (2014) (Sixth Circuit) Epilogue
<<http://www.cnn.com/2014/02/18/us/soldier-steven-green-suicide/>>

On 14 February, Steven Green died after hanging himself while incarcerated in a United States Penitentiary in Tucson, Arizona. As discussed in the 2011 report, Green, formerly a US Army soldier, was serving multiple consecutive life sentences for his role in orchestrating the 2006 rape and murder of a 14-year-old Iraqi girl, followed by the murder of the girl's parents and her six year old sister, in Mahmudiyah, Iraq.

Cases – United States Military Courts – United States Army

- *United States v Morlock* [2014] US Army Court of Criminal Appeals (30 April 2014)
2014 WL 7227382

On 30 April, the Army Court of Criminal Appeals (ACCA) affirmed modified findings and the approved sentence against Morlock, an enlisted soldier (Specialist), whom the United States Army court-martialed and convicted in 2011 for his role on the 'kill team', an informal group of US Army Soldiers who murdered Afghan civilians for sport and attempted to portray the killings as legitimate. The 2011 entry more fully describes the kill teams' actions and its other members.²⁸

Between 2009-2010, while serving at Forward Operating Base Ramrod in the Kandahar Province of Afghanistan, Morlock and other US service members implemented a plan by which they would kill unarmed Afghan civilians and then falsely report that the civilians were both armed and demonstrated hostile intent.²⁹ At trial, Morlock pled guilty to conspiracy and three specifications of murder. A military judge sentenced him to be reduced to the lowest enlisted grade, to forfeit all pay and allowances, to confinement for life with the possibility of parole and to be dishonorably discharged. Pursuant to a pre-trial agreement, the convening authority approved 22 years of confinement and the rest of the adjudged sentence. On appeal, the ACCA reassessed the findings of guilt due to the failure of the military judge at trial to resolve an inconsistency in Morlock's plea. Morlock had pleaded guilty to, among other charges, murdering a 15-year-old Afghan civilian "by means of throwing a grenade at him and shooting him with firearms." Following that shooting, Morlock made a radio call to his squad leader, US Army Staff Sergeant Calvin Gibbs, leader of the kill team. When Gibbs arrived at the scene, he fired two shots into the victim at close range. During the providence inquiry portion of Morlock's guilty plea for the murder of the 15-year-old, the military judge introduced various causal explanations, including a theory that Morlock's false report may have been the proximate cause of the victim's death because it was reasonably foreseeable that SSG Gibbs would arrive and deliver a 'coup de grace'.³⁰ This alternative theory

²⁸ *United States v Morlock*, 2014 WL 7227382, at *1 (Army Ct Crim App, 2014).

²⁹ Chris McGreal, "Kill Team" US platoon commander guilty of Afghan murders, *The Guardian* (online), 10 November 2011 <<http://www.theguardian.com/world/2011/nov/11/kill-team-calvin-gibbs-convicted>>.

³⁰ The providence inquiry is part of the process by which a US service member pleads guilty. The inquiry is a lengthy questioning of the accused, under oath, by the military judge about the nature of

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substantially changed the fundamental premise of Morlock's culpability. Under *United States v Garcia*, 44 MJ 496 (CAAF, 1996), the military judge should have resolved the inconsistency or rejected the plea, which he failed to do. The ACCA resolved this issue by affirming a finding of guilt for attempted premeditated murder, relying upon *United States v. Redlinski*, 58 MJ 117, 119 (CAAF, 2003) and Article 80, UCMJ to find that the trial record 'objectively and overwhelmingly' supported such a conclusion. The ACCA reassessed the sentence on the basis of the error by the military judge in the providence inquiry, and relying on *United States v Winckelmann*, 73 MJ 11 (CAAF, 2013), affirmed the sentence as approved by the convening authority.

- *United States v Bram* [2014] US Army Court of Criminal Appeals (29 September 2014) 2014 WL 7227952

On 29 September, the ACCA affirmed the findings and sentence against Bram, a non-commissioned officer, whom the United States Army court-martialed in 2011 for his role on the 'kill team'.³¹

Between 2009-2010, while serving at Forward Operating Base Ramrod in the Kandahar Province of Afghanistan, Bram and other US service members developed a plan by which they would shoot and kill Afghan motorcyclists and then falsely report that they were both armed and demonstrated hostile intent.³² Purportedly frustrated with his unit's inability to adequately respond to the suspected use of motorcycles by insurgents to trigger improvised explosive device attacks against US patrols, Bram developed a plan by which US service members would shoot and kill the next fleeing motorcyclist who failed to stop when directed to do so. Bram solicited two other members of the unit to shoot and kill motorcyclists regardless of whether they were armed or posed a threat. Following the shootings, Bram planned to drive to the scene, creating dust clouds he would use to conceal planting of an AK-47 on the victim's body. At trial, and contrary to his pleas, an enlisted panel found Bram guilty of conspiracy to commit assault and battery, failure to obey a general order, dereliction of duty, maltreatment of a subordinate, assault consummated by battery, obstruction of justice, and solicitation of another to commit murder. The panel sentenced Bram to be reduced to the lowest enlisted grade, to be confined for five years, and to be dishonorably discharged. The convening authority approved the sentence as adjudged. On appeal, Bram argued that the panel at trial should have been instructed on the defenses of mistake of fact and justification as the evidence established that Bram believed the target to be killed was a member of the Taliban capable of detonating an explosive device against US forces.

The ACCA disagreed, finding both a lack of reasonableness and honest belief that the targets were legitimate, given Bram's plan to use the vehicle dust to conceal planting a weapon. The ACCA affirmed the findings and sentence. In October, appellate defense

the offenses to which the accused is pleading guilty. For more on the US military justice guilty plea process, see the 2012 Report.

³¹ *United States v Bram*, 2014 WL 7227952 (Army Ct Crim App, September 2014). The 2011 report more fully describes the kill team's actions and its other members – Correspondent's Report – United States of America (2011) 14 *YIHL*. See *United States v Morlock*, 2014 WL 7227382, at *1 (Army Ct Crim App, 2014).

³² McGreal, above n 29.

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counsel for Bram filed a motion for reconsideration. In November, the ACCA once again affirmed the sentence.³³

- *United States v Barbera* [2014] US Army Fourth Judicial Circuit, Joint Base Lewis-McCord, Washington (20 November)
<<https://www.scribd.com/doc/256505628/November-2014-summary-of-Army-Court-Martials>>

On 20 November, the US Army court-martialed Barbera, a non-commissioned officer (sergeant first class) for communicating a threat to the wife of a reporter investigating the shooting deaths of three Iraqi civilians and the resulting Army investigation. In 2007, while serving as a squad leader in the 82nd Airborne Division near As Sadah village, roughly 50 miles northeast of Baghdad, Barbera shot and killed two unarmed, deaf, brothers, 15 and 14 years old, who were herding cattle near Barbera's five soldier reconnaissance team's hide site. Barbera's shooting compromised his reconnaissance team's location and he ordered them to relocate, during which Barbera ordered another member of team to engage a third unarmed Iraqi civilian walking towards them, killing the civilian. The third Iraqi civilian was a cousin of the two brothers and also deaf. Barbera did not report the shootings to his unit and thus no investigation was conducted while the unit was in Iraq.

In 2009, after re-deploying to the United States, a member of the reconnaissance team submitted a statement to Army criminal investigation command (CID) detailing the incident in Iraq. The CID investigated the allegation, interviewing members of the reconnaissance team, unit leaders, the victims' families and residents of As Sadah. They also exhumed and autopsied the boys' bodies. But, not finding any bullets in any of the bodies, the forensic pathologist could not determine the manner of death. The boys' families claimed to have removed bullets and bullet fragments from the boys' bodies while cleaning and preparing them for burial. The CID investigation found probable cause that Barbera committed murder and made false official statements. The Major General commanding the 82nd Airborne Division elected to not prosecute Barbera, instead issuing him a letter of reprimand, which was filed locally and not made part of Barbera's permanent personnel file. In 2011, Carl Prine, a journalist with the Pittsburgh Tribune-Review (Trib) began investigating the shooting and the US Army's response. After learning of Prine's inquiries, Barbera telephone Prine's wife and told her that for her own personal safety she needed to tell Prine to stop working on the story. The Trib published Prine's article in 2012 and the story received several awards and generated renewed interest in both the 2007 shootings and the Army's investigation.³⁴ Eleven months after the Trib published Prine's story, the US Army reopened its investigation and in April, 2014, preferred charges against Barbera for murder, obstructing the initial investigation, and for communicating a threat to Prine's wife.³⁵ The US Army then

³³ *United States v Bram*, Summary Disposition on Reconsideration (Army Ct Crim App, November 2014), <[https://www.jagcnet.army.mil/Portals/Files/ACCAOther.nsf/SD/C8C0A0C1EDB3774C85257D9A0078A9F5/\\$FILE/sd-bram,%20dd.pdf](https://www.jagcnet.army.mil/Portals/Files/ACCAOther.nsf/SD/C8C0A0C1EDB3774C85257D9A0078A9F5/$FILE/sd-bram,%20dd.pdf)>.

³⁴ Carl Pine, 'Five-year legacy of Iraq mission gone awry', *Trib Live* (online), 1 December 2012 <<http://triblive.com/investigative/specialprojects/rulesofengagement/3053158-74/army-barbera-team>>.

³⁵ Marua Grunlund, 'Former Staten Island Soldier Accused of Murdering Civilians While in Iraq, Report Says', *Silive.com*, 26 April 2014 <http://www.silive.com/news/index.ssf/2014/04/staten_islander_accused_of_war.html>.

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held a pretrial hearing pursuant to Article 32 of the Uniform Code of Military Justice.³⁶ The results of that hearing led the commanding general to withdraw the murder charges without prejudice, allowing for them to be refilled in the future. A US Army spokesman issued a statement that a major factor in the decision to dismiss the murder charges was the current chaotic situation in Iraq, where ISIS forces control large areas of the country. As a result, it was impossible for prosecutors and the defense counsel for Barbera to travel there to contact and obtain testimony from the boys' parents and other potential witnesses. While the Army was prepared to prosecute Barbera for obstruction and communicating a threat, Barbera offered to plead guilty to communicating the threat in exchange for the obstruction charge being dismissed. The Army agreed. Barbera pleaded guilty to communicating a threat for which the military judge sentenced him to be reduced one grade to Staff Sergeant and to forfeit \$1000 a month for 10 months. The military judge did not impose confinement or discharge Barbera from the Army.

• *Sgt Bowe Bergdahl Update*

On 31 May, the United States recovered Bergdahl, a non-commissioned officer (Sergeant), as part of a prisoner exchange with the Taliban. The Taliban captured Bergdahl in 2009 after he went missing from his base in Paktika Province, Afghanistan. In exchange for Bergdahl, the United States released the 'Taliban Five', five purportedly high-ranking members of the Taliban whom the US had detained at Guantanamo since 2002. Members of the US military took possession of Bergdahl in Afghanistan, while the captured Taliban were released to Qatar, where they will be subject to a travel ban for at least a year. The US Army has assigned a major general to investigate the circumstances of Bergdahl's initial disappearance from his base. A number of aspects of the exchange proved highly controversial in the United States, including whether the President of the United States required Congressional approval in advance of the exchange,³⁷ whether US service members were killed searching for Bergdahl³⁸ and whether the released Taliban members will return to the battlefield.³⁹ The exchange freed the only American service member held captive resulting from the armed conflict in Afghanistan as well as the last members of the Taliban in Guantanamo. Their release avoids a looming challenge to US law of war detention authority in Afghanistan, particularly concerning the Taliban. President Obama declared an end of the US' role in the armed conflict in Afghanistan effective December 31, 2014. While the US can claim to be fighting al Qaeda in various places around the world, the only place in which the US is fighting the Taliban, and thus can credibly reference the law of armed conflict in regards to their detention, is Afghanistan.⁴⁰ But if in fact the US is no longer detaining members of the Taliban, questions on their detention are rendered moot.

³⁶ Jim Wilhelm, 'Army Recon Leader Charged with Murders of Two Iraqi Boys Says He Doesn't Kill "For No Reason"', *Trib Live* (online), 28 April 2014 <<http://triblive.com/news/editorspicks/6020576-74/barbera-bajema-testified>>.

³⁷ US Government Accountability Office, 'Department of Defense—Compliance with Statutory Notification Requirement', 21 August 2014 <<http://www.gao.gov/assets/670/665390.pdf>>.

³⁸ Michael Martinez, Michaela Pearson and Dana Ford, 'The six soldiers at center of Bowe Bergdahl debate', *CNN* (online), 5 June 2014 <<http://www.cnn.com/2014/06/05/us/bergdahl-killed-soldiers-profiles/index.html>>.

³⁹ *Ibid.*

⁴⁰ Chris Jenks, 'Bergdahl trade more about Guantanamo', *USA Today* (online), 8 June 2014 <<http://www.usatoday.com/story/opinion/2014/06/08/bowe-bergdahl-deal-release-taliban-prisoners-column/10199449/>>.

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Cases – United States Military Courts – United States Marine Corps

- *United States v Hutchins* (2014) <<http://www.nbcsandiego.com/news/local/Marine-Sgt-Hutchins-Enlists-Civilian-Attorney-for-War-Crimes-Retrial-271322321.html>>

In August, the United States Marine Corps announced the retrial of Hutchins, a non-commissioned officer (sergeant), for his role in the 2006 kidnapping and murder of a retired Iraqi policeman in Hamdania, Iraq. As discussed in the 2011 report, contrary to his pleas, a military panel in 2007 found Hutchins guilty of unpremeditated murder, conspiracy to commit murder, making a false official statement and larceny while acquitting him of kidnapping, assault and housebreaking. The panel sentenced Hutchins to be reduced to the lowest enlisted grade, confined for 15 years, dishonorably discharged and to receive a reprimand. The general court-martial convening authority approved the reduction and punitive discharge, reduced the confinement to 11 years and disapproved the reprimand. In 2010, the Navy-Marine Court of Appeals (NMCCA) set aside the findings and sentence and authorized a rehearing on the grounds that the military judge at trial improperly severed the attorney client relationship between Hutchins and one of his military defense counsel by allowing that counsel to separate from the Marine Corps right before the trial.⁴¹ In 2011, the Court of Appeals for the Armed Forces (CAAF) ruled that not only had the attorney client relationship been improperly severed, but also that Hutchins was prejudiced as a result and returned the record of trial to the United States Navy for remand to NMCCA.⁴² In 2012, the NMCCA reaffirmed the trial findings and sentence, following which CAAF again granted review.⁴³ In 2013, CAAF again reversed the NCMCCA, holding that Navy criminal investigators violated Hutchins' constitutional rights by seeking (and obtaining) his consent to search his belongings after he had invoked his right to counsel.⁴⁴ The CAAF again returned the case to the United States Navy, which in turn announced that Hutchins would be retried in 2015.⁴⁵ In addition to Hutchins, the United States Navy prosecuted six other Marines and a Navy corpsman for their roles in what is colloquially known as the Hamdania Incident.

- *United States v Clement* (2014)
<<http://www.wsj.com/articles/SB10001424052702304554004579421612351822156>>

In early March, the Secretary of the Navy approved the administrative separation of Clement, a commissioned officer (captain), for failing to properly supervise Marine Scout Snipers attached to his unit during a 2011 combat deployment to Afghanistan. While on patrol, the Scout Snipers engaged in a series of IHL violations, including urinating on Taliban

⁴¹ *United States v Hutchins*, 68 MJ 623, 624, 631 (N-M Ct Crim App, 2010).

⁴² *United States v Hutchins*, 69 MJ 282, 293 (CAAF, 2011)

⁴³ *United States v Hutchins*, No NMCCA 200800393, 2012 CCA LEXIS 93, at *32, 2012 WL 933067, at *12 (N-M Ct Crim App, 20 March 2012) (unreported).

⁴⁴ *United States v Hutchins*, 72 MJ 294 United States Court of Appeals for the Armed Forces (CAAF, 26 June 2013).

⁴⁵ Jennifer Hlad, 'Retrial for Marine convicted in Iraq killing set for early 2015,' *Stars and Stripes* (online), 15 August 2014 <<http://www.stripes.com/news/us/retrial-for-marine-convicted-in-iraq-killing-set-for-early-2015-1.298558>>.

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corpses, which they videotaped. The Marine Corps' disciplinary action against the Scout Snipers was discussed in both the 2012 and 2013 reports.⁴⁶

Clement was the senior officer on the patrol and served as a radio operator, though claimed he was not aware of the video and was not present during its filming.⁴⁷ In February 2013, the Marine Corps announced criminal charges against Clement, including 'conduct unbecoming an officer and gentleman for failing to properly supervise junior Marines and making false statements to investigators.'⁴⁸ In July 2013, Clement motioned that charges be dismissed because of undue command influence.⁴⁹ In September 2013, the Marine Corps withdrew those charges after a military judge ruled that government attorneys would have to testify about possible senior commander interference with the case.⁵⁰ The Commandant of the Marine Corps, General James Amos, had initially appointed Lt General Thomas Waldhauser to investigate the Scout Sniper incident.⁵¹ Waldhauser claimed that Amos told him that he wanted the Marines involved 'crushed' and that after Waldhauser responded that harsh punishment may not be appropriate, Amos relieved him from investigating duties. A subsequent Inspector General investigation could not substantiate that Amos made the 'crushed' comment, despite Waldhauser telling investigators he remembered the incident 'as if it were yesterday.'⁵²

After withdrawing the criminal charges against Clement, the Marine Corps initiated a Board of Inquiry (BOI) to evaluate whether Clement should continue to serve in the Marine Corps. Among witnesses who testified on Clement's behalf, Marine Corps four star general John Kelly claimed that other, higher ranked, Marine officers and not Clements should be held accountable for the Scout Sniper misconduct.⁵³ In October 2013, the BOI recommended that Clements be administratively separated from the Marine Corps, which Clements appealed. In March, 2014, the Secretary of the Navy approved the BOI's recommendation and separated Clements from the Marine Corps.

⁴⁶ In August, 2014, one of the Scout Snipers, retired Corporal Robert Richards, died of an accidental prescription drug overdose. Gina Harkins, 'Marine Sniper Involved in Controversial Video Found Dead,' *Military Times* (online), 16 August 2014 <<http://www.militarytimes.com/story/military/archives/2014/08/16/marine-sniper-involved-in-controversial-video-found-dead/78548248/>>.

⁴⁷ Hope Hodge, 'Marine 4-Star General Offers Powerful Testimony of Accused Officer,' *Military Times* (online), 17 October 2013 <<http://www.militarytimes.com/story/military/archives/2013/10/17/marine-4-star-general-offers-powerful-testimony-in-defense-of/78543026/>>.

⁴⁸ 'Two More Marines Charged Over Corpse Urination Video,' *Associated Press* (online), 8 February 2013 <<http://www.nydailynews.com/news/crime/marines-charged-corpse-urination-video-article-1.1259330>>.

⁴⁹ *United States v Clements*, 'Defense Motion for Dismissal Due to Unlawful Command Influence by the Commandant of the Marine Corps', Navy-Marine Corps Trial Judiciary Eastern Judicial Circuit 23 July 2013 <<http://fas.org/sgp/jud/clement-uci.pdf>>.

⁵⁰ Rowan Scarborough, 'Marine Corps Drops Taliban Urination Desecration Case; Commandant Saves Face', *Washington Times* (online), 7 September 2013 <<http://www.washingtontimes.com/news/2013/sep/7/marine-corps-retreats-court-martial-charges-taliba/>>.

⁵¹ Tom Bowman, 'Case Of Marines Desecrating Taliban Bodies Takes A New Twist', *National Public Radio* (online), 31 October 2013 <<http://www.npr.org/sections/parallels/2013/10/31/241880851/a-marine-controversy-in-afghanistan-takes-a-new-twist>>.

⁵² Dan Lamothe, 'IG Investigations Marine Generals Remain at Odds Over Sniper Video Scandal', *Washington Post* (online), 30 December 2014 <<https://www.washingtonpost.com/news/checkpoint/wp/2014/12/30/ig-investigation-marine-generals-remain-at-odds-over-sniper-video-scandal/>>.

⁵³ Hodge, 'Marine 4-Star General', above n 47.

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- *Maj Jason Brezler* <<http://www.washingtontimes.com/news/2014/dec/30/federal-judge-orders-marine-corps-answer-charges-i/>>

In December, a US District Court Judge ordered the United States Marine Corps to respond to allegations that officials had 'negatively manipulated' the service record of Brezler, a reserve commissioned officer (major), who previously disclosed classified information of an Afghan police chief's corrupt practices.

In 2012, Brezler sent classified information over a non-secure network to Marines stationed in Garmsir, Afghanistan, warning them about a local police chief at the base who was believed to have ties to the Taliban. After another officer raised questions about classified information being introduced to an unsecured network, Brezler self-reported. The base later came under attack by a teenager who worked for the police chief, resulting in the death of three Marines.⁵⁴

In December, 2013, the Marine Corps Marine Forces Reserve commander, Lieutenant General Richard Mills, convened a BOI to consider whether Brezler's mishandling of classified information precluded his continued service in the Marine Corps. The BOI recommended that Brezler be administratively separated from the Marine Corps. While the Marine Corps prepared the transcript of the BOI's proceedings, in August 2014, the Department of Defense initiated an investigation into whether General Mills, in convening the board, violated DoD directives guaranteeing protection to military members who report misconduct. The investigative agency found Mills did take adverse administrative action against Brezler, but that these actions were not motivated by retaliation, clearing the general of the reprisal allegation.⁵⁵

The Marine Corps did not provide Brezler with a transcript of the BOI proceedings until October 2014. In December 2014, General Mills approved the BOI's recommendation, leaving the final decision to the Secretary of the Navy, which, as of this entry, has not been made.

And in the civil action Brezler filed referenced at the beginning of this entry, the US District Court Judge directed that the Marine Corps submit a written response to allegations of wrongdoing in Brezler's BOI by 16 January 2015 and to appear in court on 23 January 2015.⁵⁶

⁵⁴ Ibid. The family of the one of the slain Marines, Lance Corporal Greg Buckley Jr, also filed a lawsuit against the Marine Corps in 2014, alleging 'a coordinated, illegal effort to suppress details about the insider attack that claimed three Marines' lives in Afghanistan.' Hope Hodge, 'Fallen Marine's Family Sues Corps Over Insider Attack Secrecy,' *Marine Corps Times* (online), 18 October 2014 <<http://www.marinecorpstimes.com/story/military/2014/10/16/fallen-marines-family-sues-corps-over-insider-attack-secrecy/17387179/>>.

⁵⁵ Hope Hodge, 'Marine 3-star cleared in reprisal investigation', *Marine Corps Times* (online), 5 November 2014 <<http://www.marinecorpstimes.com/story/military/2014/11/05/marine-3-star-cleared-in-reprisal-investigation/18556971/>>.

⁵⁶ Ibid.

Overview – United States Detention Practice

- *US Military nurse refuses to participate in Guantanamo detainee force-feeding* [2014] <<http://www.cnn.com/2014/07/15/world/americas/guantanamo-forced-feedings-nurse-refuses/>>

In July, Pentagon officials confirmed that a US military nurse had refused to conduct forced feeding of inmates held at Guantanamo Bay prison.⁵⁷ It is believed to be the first time US medical personnel have refused to carry out the feeding regime, referred to by officials as 'enteral feeding.'⁵⁸ Reports of the refusal emerged in relation to a lawsuit, filed on behalf of Guantanamo detainee Abu Wael Dhiab, challenging the force-feeding policy in federal court.⁵⁹ Other than being male and a member of the US Navy, the identity of the nurse has not been disclosed, and it is unclear whether he will face prosecution or administrative action.⁶⁰ In 2013, more than 100 detainees were refusing to eat, and at one point 46 of them were designated for tube feedings. While the US Department of Defense has called the tube feeding practice humane, defense lawyers for Dhiab and others alleged their clients consider it to be torture.⁶¹ On 16 May, a federal judge issued an order restraining the DoD from force-feeding Dhiab, but lifted that order on 22 May.⁶² In December, the US transferred Dhiab to Uruguay.⁶³

- *US Senate Select Committee on Intelligence Report on CIA Detention/Interrogation Program* <<http://www.intelligence.senate.gov/sites/default/files/press/findings-and-conclusions.pdf>>

On 9 December, following a five-year investigation, the US Senate Select Committee on Intelligence (SSCI) released a 525 page redacted executive summary of the Committee Study of the Central Intelligence Agency's (CIA) Detention and Interrogation Program.⁶⁴ The executive summary detailed brutal interrogation practices used at secret prisons, harsh confinement conditions, and misrepresentations by CIA officials of the nature and purpose of

⁵⁷ Shimon Prokupez and Bill Mears, 'U.S. Navy nurse won't force-feed Guantanamo detainees', *CNN* (online), 16 July 2014 <<http://www.cnn.com/2014/07/15/world/americas/guantanamo-forced-feedings-nurse-refuses/>>.

⁵⁸ *Ibid.*

⁵⁹ Carol Rosenberg, 'Navy nurse refuses to force-feed Guantanamo captive,' *Miami Herald* (online), 15 July 2014 <<http://www.miamiherald.com/news/nation-world/world/americas/article1975643.html>>.

⁶⁰ See Janet Bolvin, 'Viewpoint: Nurse's Refusal to Force Feed Gitmo Prisoners Triggers Debate,' (2014) 9 *American Nurse Today* 12 <<https://americannursetoday.com/viewpoint-nurses-refusal-force-feed-gitmo-prisoners-triggers-debate/>>.

⁶¹ *Ibid.*

⁶² The Judge referred to the decision to lift the order as a Hobson's choice, pitting the potential that Dhiab might die without food versus the agony of the manner by which DoD forcibly administered food. *Dhiab v Obama*, US District Court of the District of Columbia, Case No 05-1457, 22 May 2014 <<https://www.documentcloud.org/documents/1172718-d-d-c-05-cv-01457-dckt-000224-000-filed-2014-05-22.html>>.

⁶³ 'Guantanamo Docket Timeline 2014,' *New York Times* (online), <<http://projects.nytimes.com/guantanamo/timeline/2014>>.

⁶⁴ President Barack Obama ended the detention and interrogation program in 2009.

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the program.⁶⁵ The Committee found that ‘enhanced interrogation techniques’, including waterboarding, sleep deprivation, and stress positions, were not effective means of acquiring intelligence or gaining cooperation from detainees.⁶⁶ The summary contended that, of the 119 individuals considered to have been CIA detainees, at least 26 were ‘wrongfully held’ as the result of mistaken identities and/or bad intelligence.⁶⁷

That same day, the director of the CIA, John Brennan, publicly disagreed with several of the executive summary’s central premises, arguing that the detention and interrogation program saved lives and that CIA officials did not intentionally mislead Congress about the program’s tactics.⁶⁸ The CIA also issued a 112-page response to the SSCI executive summary, acknowledging some program failings but denying intentionally misleading the public or policymakers.⁶⁹

The SSCI executive summary does not offer any formal recommendations or call for further investigations. President Obama had previously assured members of the CIA who ‘carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution.’⁷⁰

• *Periodic Review Board Process* <<http://www.prs.mil/Home.aspx>>

In 2014, the US military conducted eight periodic reviews of detention of enemy belligerents held at Guantanamo which are further described below. The periodic review board (PRB) process

is a discretionary, administrative interagency process to review whether continued detention of particular individuals held at Guantanamo remains necessary to protect against a continuing significant threat to the security of the United States. This [] process was established by the President’s March 7, 2011 Executive Order (EO) 13567 and will be conducted consistent with section 1023 of the National Defense Authorization Act (NDAA) for the Fiscal Year 2012.

⁶⁵ ‘Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program’, <<http://www.intelligence.senate.gov/sites/default/files/press/findings-and-conclusions.pdf>>. While the summary does not list the countries where secret prisons operated (or redacts the names), one newspaper claims that other details in the report indicate the prisons were in Afghanistan, Lithuania, Poland, Romania and Thailand - ‘The Senate Intelligence Committee’s Report on the CIA’s Detention and Interrogation Program,’ *Washington Post* (online), <http://www.washingtonpost.com/wp-srv/special/national/cia-interrogation-report/document/?tid=a_inl>.

⁶⁶ Committee Study, above n 65.

⁶⁷ *Ibid*, 12.

⁶⁸ Juliet Eilperin, ‘CIA director rebuts report, says interrogation techniques “saved lives”’, *The Washington Post* (online), 9 December 2014 <https://www.washingtonpost.com/politics/cia-director-rebuts-report-says-interrogation-techniques-saved-lives/2014/12/09/27a5f520-7fc6-11e4-81fd-8c4814dfa9d7_story.html>.

⁶⁹ Greg Miller, Adam Goldman and Julie Tate, ‘Senate report on CIA program details brutality, dishonesty,’ *The Washington Post* (online), 9 December 2014 <https://www.washingtonpost.com/world/national-security/senate-report-on-cia-program-details-brutality-dishonesty/2014/12/09/1075c726-7f0e-11e4-9f38-95a187e4c1f7_story.html?hpid=z1>.

⁷⁰ The White House, ‘Statement of President Barack Obama on Release of OLC Memos,’ (Statement, 16 April 2009) <<https://www.whitehouse.gov/the-press-office/statement-president-barack-obama-release-olc-memos>>. President Obama’s statement refers to prior legal opinions by the Department of Justice’s Office of Legal Counsel that countenanced enhanced interrogation techniques.

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The PRB includes a cross-section of the national security community. The PRB decision-making panel consists of one senior official from the Departments of Defense, Homeland Security, Justice, and State; the Joint Staff, and the Office of the Director of National Intelligence.

The PRB process does not address the legality of any individual's detention under the authority of the Authorization for Use of Military Force, as informed by the laws of war. Detainees have the constitutional privilege of the writ of habeas corpus to challenge the legality of their detention, and nothing in EO 13567 or its implementing guidelines is intended to affect the jurisdiction of federal courts to determine the legality of their detention. If, at any time during the PRB process, material information calls into question the legality of detention, the matter will be referred immediately to the Secretary of Defense and the Attorney General for appropriate action.

The PRB will consider the threat posed by each detainee under review. In particular, the PRB will be tasked with determining whether law of war detention remains necessary to protect against a "continuing significant threat to the security of the United States." In making this assessment, the Board will be given access to all relevant information in detainee disposition recommendations that have been produced by the Guantanamo Review Task Force (established by EO 13492), the work product of any prior PRB, and any additional relevant information that has become available. The PRB may also consider diplomatic considerations or security assurances related to the detainee's potential transfer, the detainee's mental and physical health, and other relevant information. The PRB will also receive and take into account all mitigating information relevant to whether the detainee poses a continuing significant threat. The PRB will not rely on information that has been obtained as a result of torture or cruel, inhuman, or degrading treatment to support a determination that continued law of war detention is warranted for a detainee.

The PRB process is intended to assist the executive branch in making informed decisions as to whether detainees held at Guantanamo Bay should remain in law of war detention. Informed decision-making will be aided by providing detainees an opportunity to participate in the process as appropriate. To this end, detainees will be provided an unclassified written summary of the information considered by the PRB and will be permitted to respond with statements written by themselves and witnesses. Detainees will also be afforded the opportunity to appear before the PRB via video or telephone conference. Detainees may request the presentation of testimony at the hearing by witnesses who are reasonably available and willing to offer relevant and material information regarding whether continued law of war detention is warranted.

In every PRB proceeding, the detainee will be provided with a uniformed military officer (referred to as a personal representative) to assist the detainee during the PRB process. The detainee's personal representative will have the security clearance necessary to review the information provided to the Board and will be responsible for advocating on behalf of the detainee, challenging the government's information, and introducing information on behalf of the detainee. The detainee will also have the ability to obtain private counsel, at no expense to the government, to assist the detainee in the review process.

The detainee's personal representative will receive full access to the information considered by the PRB, except in the rare instances where doing so would put the national security at risk. Any private counsel for the detainee possessing an appropriate security clearance will also receive access to the information the PRB considers, except in the exceptional circumstances above, or where necessary to protect law enforcement

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or privilege concerns. In cases where information considered by the PRB is withheld from a detainee's personal representative and/or private counsel, substitutes or summaries of the withheld information will be provided. The PRB will ensure that any such substitutes or summaries of information are sufficient to provide the personal representative or private counsel with a meaningful opportunity to assist the detainee during the review process.

Full reviews of each detainee, to include the hearings described above, will be conducted every three years. File reviews will be conducted for any detainee whom the PRB has determined that continued detention is necessary every six months in between full reviews, and will focus on any new information or changed circumstances that the PRB should consider.⁷¹

Although President Obama issued an executive order in 2011 on PRBs,⁷² the first one was not held until November, 2013. In 2014, the US conducted the following PRBs:

Detainee: Abdel Malik Ahmed Abdel Wahab Al Rahabi (ISN 037):

Nationality: Yemini

Date brought to Guantanamo: January, 2002

Notified of hearing: 7/25/2013

Hearing date: 1/28/2014

Determination date: 3/25/14

Determination: continued law of war detention of the detainee remains necessary to protect against a continuing significant threat to the security of the United States.

Detainee: Ali Ahmad al-Razihi (ISN 045)

Nationality: Yemini

Date brought to Guantanamo: January, 2002

Notified of hearing: 9/25/2013

Hearing date: 4/8/2014

Determination date: 4/23/2014

Determination: continued law of war detention of the detainee is no longer necessary to protect against a continuing significant threat to the security of the United States

Detainee: Ghaleb Nassar Al Bihani (ISN 128)

Nationality: Yemeni

Date brought to Guantanamo: January, 2002

Notified of hearing: 9/25/2013

Hearing date: 4/8/2014

Determination date: 5/15/2014

Determination: continued law of war detention of the detainee is no longer necessary to protect against a continuing significant threat to the security of the United States

Detainee: Salem Ahmad Hadi Bin Kanad (ISN 131)

⁷¹ Periodic Review Secretariat, 'The Periodic Review Board, US Department of Defense,' <<http://www.prs.mil/AboutthePRB.aspx>>.

⁷² 'Executive Order 13567 – Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force,' 7 March 2011 <<https://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba>>.

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Nationality: Yemeni

Date brought to Guantanamo: January, 2002

Notified of hearing: 1/28/2014

Hearing date: 4/21/2014

Determination date: 5/21/2014

Determination: continued law of war detention of the detainee remains necessary to protect against a continuing significant threat to the security of the United States.

Detainee: Muhammed Abd Al Rahman Awn Al-Shamrani (ISN 195)

Nationality: Saudi Arabian

Date brought to Guantanamo: January, 2002

Notified of hearing: 2/11/2014

Hearing date: 5/5/2014

Determination date: 10/03/2014

Determination: continued law of war detention of the detainee remains necessary to protect against a continuing significant threat to the security of the United States.

Detainee: Fouzi Khalid Abdullah Al Awda (ISN 232)

Nationality: Kuwaiti

Date brought to Guantanamo: February, 2002

Notified of hearing: 2/12/2014

Hearing date: 6/04/2014

Determination date: 7/14/2014

Determination: continued law of war detention of the detainee is no longer necessary to protect against a continuing significant threat to the security of the United States

Detainee: Faez Mohammed Ahmed Al-Kandari (ISN 552)

Nationality: Kuwaiti

Date brought to Guantanamo: May, 2002

Notified of hearing: 2/11/2014

Hearing date: 6/12/2014

Determination date: 7/14/2014

Determination: continued law of war detention of the detainee remains necessary to protect against a continuing significant threat to the security of the United States.

Detainee: Muhammad Murdi Issa Al-Zahrani (ISN 713)

Nationality: Saudi Arabian

Date brought to Guantanamo: May, 2002

Notified of hearing: 2/26/2014

Hearing date: 6/19/2014

Determination date: 10/3/2014

Determination: continued law of war detention of the detainee remains necessary to protect against a continuing significant threat to the security of the United States.

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☛ *GTMO Detainee Transfers* [2014]

<<http://projects.nytimes.com/guantanamo/timeline/2014>>

In 2014, the US transferred twenty-seven detainees from Guantanamo.⁷³ All but five had been recommended for transfer by the Guantanamo Review Task Force in 2010. The transfers included:

- Ahmed Belbacha to Algeria on 13 March. Belbacha, age 46, is a citizen of Algeria who the US transferred to Guantanamo in 2002.
- Abdul Haq Wasiq, Mullah Norullah Noori, Mullah Mohammad Fazl, Khirullah Said Wali Khairkhwa, and Mohammad Nabi Omari to Qatar on 31 May in exchange for United States Army Sgt Bowe Bergdahl. The men are all Afghan nationals and former high-ranking members of the Taliban government of Afghanistan who became known as 'The Taliban Five.'⁷⁴ The US initially transferred all five detainees to Guantanamo in 2002.
- Fouzi Khalid Abdullah al Awda to Kuwait on 5 November. Al Awda is a citizen of Kuwait who the US transferred to Guantanamo in 2002.
- Hisham Bin Ali Bin Amor Sliti and Hussein Salem Mohammed to Slovakia on 20 November. Sliti is a Tunisian national and Mohammed is from Yemen. The US initially transferred Sliti to Guantanamo in 2002 and Mohammed in 2003. Slovakia granted both men asylum.
- Abdul Khaled Ahmed Sahleh al Bedani, Salah Muhammed Salih al Zabe, and Abdel Ghalib Ahmad Hakim to Georgia on 20 November. All three men are Yemeni nationals who the US initially transferred to Guantanamo in 2002.
- Muhammed Murdi Issa al Zahrani to Saudi Arabia on 22 November. Zahrani is a Saudi national who the US transferred to Guantanamo in 2002.⁷⁵
- Jihad Ahmed Mujstafa Diyab, Mohammed Abdullah Tahamuttan, Abdul Bin Mohammed Abess Ourgy, Abd al Hadi Omar Mahmoud Faraj, Ali Husein Shaaban, and Ahmed Adnan Ahjam to Uruguay on 7 December. The men are Syrian, Tunisian, and Palestinian nationals who the US initially transferred to Guantanamo in 2002.
- Mohommod Zahir, Abdul Ghani, Khi Ali Gul, and Shawali Khan to Afghanistan on 20 December. All four men are Afghan nationals who the US transferred to Guantanamo in 2003.
- Lofti Bin Ali, Sabri Mohammed Ebrahim al Qurashi, Muhammed Ali Hussein Khnenah, Adel Bin Ahmed Bin Ibrahim Hkiml, and Asim Thahit Abdullah al Khalaqi to Kazakhstan on 30 December. Bin Ali and Bin Ibrahim Hkiml are Tunisian nationals, Khnenah, Al Khalaqi, and al Qurashi are Yemeni nationals. The US initially transferred Al Qurashi, Khenah, Hkiml, and al Khalaqi to Guantanamo in 2002 and Ali in 2003.

Detainee Challenges – United States Supreme Court

⁷³ Guantanamo Docket Timeline, above n 63. Since 2002, the US has sent approximately 780 suspected enemy belligerents to the detention facility at Guantanamo.

⁷⁴ 'The Taliban Five', *The Wall Street Journal* (online), 13 February 2012

<<http://www.wsj.com/articles/SB10001424052970204136404577209391708596680>>.

⁷⁵ Carol Rosenberg, 'Guantanamo board says Saudi captive can go home', *Miami Herald* (online), 20 October 2014 <<http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article3148911.html>>.

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- *Hedges v Obama*, 134 S Ct 1936 (2014) (cert. denied)
<http://www.supremecourt.gov/orders/courtorders/021913zor_19m1.pdf>

On 19 February, the US Supreme Court denied a certiorari petition, declining to hear a challenge of Section 1021 of the *National Defense Authorization Act 2012* (NDAA) which allows US armed forces to indefinitely detain those who aided in the 9/11 terrorist attacks and/or is a member of or substantially supports, al Qaeda, the Taliban or undefined 'associated forces.'⁷⁶ Section 1021 does not 'affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.'

Four plaintiffs — two American citizens (one of whom was Pulitzer Prize winning journalist Chris Hedges) and two non US citizens — filed suit in 2012, claiming that Section 1021 could subject them to indefinite detention for exercising constitutionally protected rights as journalists or members of advocacy organizations.⁷⁷ A US District Court agreed and granted a permanent injunction restraining the US government from detention pursuant to Section 1021, which the government appealed.

In 2013, the US Court of Appeals for the Second Circuit vacated the injunction, ruling that:

The American citizen plaintiffs lack standing because Section 1021 says nothing at all about the President's authority to detain American citizens. And while Section 1021 does have a real bearing on those who are neither citizens nor lawful resident aliens *and* who are apprehended abroad, the non-citizen plaintiffs also have failed to establish standing because they have not shown a sufficient threat that the government will detain them under Section 1021.⁷⁸

The potential import of Section 1021 remains unclear.⁷⁹

- *Hussain v Obama*, 134 S Ct 1621 (2014) (cert denied)
<http://www.supremecourt.gov/opinions/13pdf/13-638_7758.pdf>

On 21 April, the US Supreme Court denied a petition for certiorari by Abdul Al Qader Ahmed Hussain, a Yemeni national detained at Guantanamo since 2002. Breyer J issued a statement accompanying the denial in which he agreed with the decision but noted several questions regarding detention authority, but which Hussain's petition did not raise. The District Court and Court of Appeals had previously both agreed that the United States properly detained Hussain under the Authorization for Use of Military Force (AUMF), a US law enacted in September 2001, because Hussain was involved with al-Qaeda or the Taliban at the time of his apprehension.⁸⁰ US Courts have consistently held that that being part of al

⁷⁶ *National Defense Authorization Act* for Fiscal Year 2014, Legislative Text and Joint Explanatory Statement to accompany HR 3304, <<https://www.gpo.gov/fdsys/pkg/CPRT-113HPRT86280/pdf/CPRT-113HPRT86280.pdf>>.

⁷⁷ Lawrence Hurley, 'Supreme Court rejects hearing on military detention case', *Reuters* (online), 28 April 2014 <<http://www.reuters.com/article/us-usa-court-security-idUSBREA3R0YH20140428>>.

⁷⁸ *Hedges v Obama*, 724 F 3d 170 (2d Cir, 2013).

⁷⁹ See Chris Jenks, 'Civil Liberties and the Indefinite Detention of US Citizens', (2014) 38 *Harvard Journal of Law & Public Policy* 1.

⁸⁰ *Hussain v Obama*, 821 F Supp 2d 67, 76-79 (DDC, 2011).

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Qaeda or Taliban forces is sufficient for AUMF detention.⁸¹ Breyer J highlighted that the Supreme Court has not addressed whether the AUMF authorizes detention of individuals who are part of al Qaeda or the Taliban, but not engaged in armed conflict against the United States.⁸² Breyer also noted that the Supreme Court had not considered 'whether, assuming detention on these bases is permissible, either the AUMF or the Constitution limits the duration of detention.'

Detainee Challenges – United States Courts of Appeals

- *Aamer v Obama*, 742 F 3d 1023 (DC Cir, 11 February 2014)
<[https://www.cadc.uscourts.gov/internet/opinions.nsf/FFE0A48DE60BF3B985257C7C0053997D/\\$file/13-5223-1479439.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/FFE0A48DE60BF3B985257C7C0053997D/$file/13-5223-1479439.pdf)>

On 11 February, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) ruled that while challenges to the conditions of confinement at Guantanamo did properly sound in habeas corpus, three detainees' request to bar the government from forcibly feeding them failed to meet the requirements for preliminary injunctive relief.

The US military began force-feeding the three detainees (Shaker Aamer,⁸³ Ahmed Belbacha, and Abu Dhiab) in Guantanamo following their March 2013 hunger strike.⁸⁴ The hunger strikes came roughly three years after the GRTF approved all three detainees for transfer.

In June 2013, the three 'together with fellow Guantanamo detainee Nabil Hadjarab, who has since been released — invoked the district court's habeas jurisdiction and moved for a preliminary injunction prohibiting the authorities from force-feeding them. According to petitioners, the practice violated both their constitutional rights and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1.'⁸⁵ While noting that 'force-feeding is a painful, humiliating and degrading process,' in July 2013, the District Court denied the request for injunctive relief. From there the detainees petitioned the DC Circuit.⁸⁶

The DC Circuit ruled that the US government had legitimate penological interests in keeping the detainees alive and noted the 'overwhelming majority of courts have concluded ... that absent exceptional circumstances prison officials may force-feed a starving inmate actually facing the risk of death.' The Court contended that the detainees were attempting to

⁸¹ Marty Lederman, 'Justice Breyer's intriguing suggestions in Hussain: A sign of habeas challenges to come?', *Just Security* (online), 23 April 2014 <<https://www.justsecurity.org/9674/justice-breyers-intriguing-suggestion-hussain-sign-habeas-challenges-come/>>.

⁸² *Ibid.*

⁸³ Aamer is the last British legal resident to be held in Guantanamo Bay. Leo Benedictus, 'Shaker Aamer: Britain's last Guantanamo Bay prisoner', *The Guardian* (online), 14 December 2014, <<http://www.theguardian.com/world/shortcuts/2014/dec/14/shaker-aamer-britains-last-guantanamo-bay-prisoner>>.

⁸⁴ The Guantanamo Review Task Force approved all three detainees for transfer in 2010.

⁸⁵ *Aamer et al v Obama*, US Court of Appeals for the District of Columbia Circuit, Case No 13-5223 at 4-5, 11 February 2014 <[https://www.cadc.uscourts.gov/internet/opinions.nsf/FFE0A48DE60BF3B985257C7C0053997D/\\$file/13-5223-1479439.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/FFE0A48DE60BF3B985257C7C0053997D/$file/13-5223-1479439.pdf)>.

⁸⁶ *Ibid.*, 3. The US military identified those participating in the hunger strike 'based on the detainee's intent, purpose, and behavior...' and began force feeding when the detainee's '[w]eight loss to a level less than 85% of the detainee's Ideal Body Weight,' or the detainee's missing 'nine consecutive meals.'

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distinguish the many decisions upholding the lawfulness of force-feeding by tying their challenge to an attack on the legality of the fact of their detention itself, arguing that "[t]here cannot be a legitimate penological interest in force-feeding the Guantanamo Bay detainees to prolong their indefinite detention" because force-feeding then simply "facilitates the violation of a fundamental human right." Appellants' Br. 40. But this court has repeatedly held that under the Authorization for the Use of Military Force, Pub.L. No. 107-40, 115 Stat. 224 (2001), individuals may be detained at Guantanamo so long as they are determined to have been part of Al Qaeda, the Taliban, or associated forces, and so long as hostilities are ongoing.⁸⁷

- *Hatim v Obama*, 760 F 3d 54 (DC Cir, 1 August 2014)
<[https://www.cadc.uscourts.gov/internet/opinions.nsf/B1B9F1C3021DE9AA85257D27004F75E3/\\$file/13-5218-1505518.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/B1B9F1C3021DE9AA85257D27004F75E3/$file/13-5218-1505518.pdf)>

On 1 August, the DC Circuit held that the US militaries' policy of detainee genital searches at Guantanamo was rationally related to the US government's legitimate interest in prison security. Detainees had challenged the search policy, arguing that frisking of their anal and groin areas discouraged them from consulting with their lawyers.⁸⁸ The Court unanimously rejected a 2013 lower court ruling which ruled that the search policy would restrict detainee access to their lawyers.⁸⁹ The Court held that the lower court misunderstood the relevant burden, that '[t]he burden ... is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.' Additionally the DC Circuit noted that 'the detainees have pointed to no "ready alternative[]" to the new policies.'

Overview – US Military Commission

The US has utilized Military Commissions in various forms and fashions since the Revolutionary War, which led to the creation of the United States. As the DC Circuit explained in its 2014 en banc ruling in *Bahlul*, discussed below,

The Supreme Court has long recognized that unlawful enemy combatants may be prosecuted by military commission for their war crimes. There are three traditional bases for military commission jurisdiction: military government, martial law and the law of war. First, military commissions may try ordinary crimes—e.g., manslaughter or robbery—and violations of military orders committed by both soldiers and civilians in territories under U.S. military government. Second, military commissions may try ordinary crimes and violations of military orders committed by soldiers and civilians in territory under martial law—as much of our country was during the Civil War. Third, and "utterly different" from the first two categories, military commissions may try offenses against the law of war.⁹⁰

Prior to 2001, the last US Military Commissions were held following World War II. Interestingly the US engaged in a number of armed conflicts after World War II, including against non-state actors in the Vietnam War, without holding such tribunals. But following the September 11th attacks, the US decided to revive the Military Commission process.

⁸⁷ Ibid, 30.

⁸⁸ Lawrence Hurley, 'US appeals court upholds Guantanamo detainee frisk-search policy', *Business Insider*, 1 August 2014, <<http://www.businessinsider.com/r-us-appeals-court-upholds-guantanamo-detainee-frisk-search-policy-2014-01>>.

⁸⁹ Ibid.

⁹⁰ *Ali Hamza Ahmad Suliman al Bahlul v United States*, 767 F 3d 1, 6 (DC Cir, 2014) available at <<http://media.miamiherald.com/smedia/2014/07/14/13/23/184T1T.So.56.pdf>>.

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On 13 November, 2001, then President Bush issued an order establishing military tribunals to prosecute enemy belligerents who violated IHL.⁹¹ While the US has utilized Military Commissions at various times in its history, the implementing legislation and rules and procedures needed to actually conduct a tribunal did not exist. As a result, some years later, the US Congress passed, and President Bush signed into law, the Military Commissions Act of 2006, which detailed how such proceedings would operate.⁹² From there, the Military Commissions Act of 2009 further explained the proceedings and modified some portions of the 2006 Act.⁹³

The Military Commission provides for a qualified military judge to preside over panels of at least 5 military officers, except in the cases in which the death penalty is sought, in which case panels are to consist of 12 members. The accused is provided defense counsel at no cost. For information on the rights of the accused at a Military Commission please see the Congressional Research Service's publication, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, which explains, among other topics, the right to counsel, evidentiary matters, discovery, and admissibility of evidence.⁹⁴

Following a Military Commissions trial involving a finding of guilt, the accused may appeal an issue of law to the Court of Military Commission Review. Similar to the process under the Uniform Code of Military Justice when dealing with US service-members, a Military Commission finding or sentence will not be invalidated unless there is error which materially prejudiced the rights of the accused. If the CMCR approves the verdict, the accused may appeal to the DC Circuit. Decisions of the DC Circuit may then be reviewed by the US Supreme Court under writ of certiorari.

Military Commission Cases US Court of Appeals for the DC Circuit

- *Ali Hamza Ahmad Suliman al Bahlul v United States*, 767 F 3d 1 (DC Cir, 2014)
<https://www.justsecurity.org/wpcontent/uploads/2014/07/https___ecf.cadc_.uscourts.pdf>

On 14 July, the DC Circuit, sitting en banc, vacated Bahlul's conviction for material support and solicitation but affirmed his conviction for conspiracy.⁹⁵

In 2008, a military commission found Bahlul, a Yemeni national detained at Guantanamo since 2002, guilty of conspiracy to commit war crimes, providing material support for terrorism and solicitation of others to commit war crimes for his role and participation as Osama Bin Laden's personal assistant and al Qaeda's public relations secretary.⁹⁶ In 2011, the Court of Military Commission Review (CMCR) approved the findings and sentence, following which Bahlul appealed to the DC Circuit.

⁹¹ White House, 'President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,' (Statement, 13 November 2001)

<<https://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html>>.

⁹² *Military Commissions Act 2006*, <https://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf>.

⁹³ *Military Commissions Act, 2009* <<http://www.mc.mil/portals/0/mca20pub20law200920.pdf>>.

⁹⁴ Congressional Research Service, 'The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues', 4 August 2014 <<https://www.fas.org/sgp/crs/natsec/R41163.pdf>>.

⁹⁵ Charlie Savage, 'A Federal Appeals Court Sidesteps How to Prosecute Detainees', *New York Times* (online), 14 July 2014 <<http://www.nytimes.com/2014/07/15/us/politics/court-sidesteps-how-to-prosecute-detainees.html>>.

⁹⁶ *al Bahlul*, above n 90.

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On 25 January 2013, the DC Circuit vacated Bahlul's convictions based on the ruling in *Hamdan v US* that the 2006 MCA does not authorize prosecution for pre-MCA conduct that did constitute an international war crime at the time. The DC Circuit then granted the government's petition for rehearing en banc, which led to this 'deeply fractured' opinion, which involves four separate opinions (in the addition to the Court's opinion) from the seven-judge panel.⁹⁷ The Courts' conclusions flow from the application of plain error, as opposed to de novo, review. As one commentator summarized

In a nutshell, the DC Circuit vacated Bahlul's conviction for material support and solicitation, but affirmed his conviction for conspiracy against an *ex post facto* challenge. While the ruling takes material support and solicitation off the table for commission prosecutions (at least for prosecutions of current Guantanamo detainees), it does not resolve the viability of charging conspiracy as a stand-alone offense because the en banc holding is based on the application of plain error review to Bahlul's case (due to its conclusion that Bahlul failed to preserve his *ex post facto* challenge below). The decision thus leaves open the viability of the US government's domestic war crimes theory not only in respect of other commission cases charging conspiracy (including the ongoing prosecution of the 9/11 defendants), but also with respect to Bahlul's other legal challenges to his conspiracy conviction, which the en banc court remanded to the original DC Circuit panel.⁹⁸

US Military Commissions Cases – Court of Military Commission Review

- *United States v. Ibrahim Ahmed Mahmoud al Qosi* [2014] USMCR, CMCR 13-001 & 13-006, 24 April 2014
<[http://www.mc.mil/Portals/0/pdfs/AI%20Qosi%20Decision%2013-001%20%2013-006%20\(Apr%2024%202014\).pdf](http://www.mc.mil/Portals/0/pdfs/AI%20Qosi%20Decision%2013-001%20%2013-006%20(Apr%2024%202014).pdf)>

On 24 April, the CMCR denied al Qosi's requests for a new trial and extraordinary writs because appointed defense counsel lacked client permission to file them.

In 2010, al Qosi, a Sudanese national detained at Guantanamo since 2002, pleaded guilty to conspiracy to commit terrorism, providing material support for terrorism, and to providing material support to al Qaeda.⁹⁹ In 2011, a Military Commission sentenced al Qosi to confinement for 14 years, and in 2012 he was transferred to his native Sudan. Also in 2012, the Military Commission Chief Defense Counsel (CDC) appointed US Navy Captain Mary McCormick as appellate counsel to represent al Qosi.¹⁰⁰ In 2014, CAPT McCormick filed writ applications to compel travel funds, an appeal of the Military Commission Convening Authority's denial of petition for a new trial, and a writ application concerning a potentially privileged email between al Qosi's defense counsel inadvertently being provided to opposing counsel.

⁹⁷ Jonathan Hafeetz, 'Guest Post: The D.C. Circuit's En Banc Ruling in Al: Legal Innovation, Tradition, and America's Domestic Common Law of War,' *Opinio Juris*, 22 July 2014 <<http://opiniojuris.org/2014/07/22/guest-post-d-c-circuits-en-banc-ruling-al-bahlul-legal-innovation-tradition-americas-domestic-common-law-war/>>. Three of the four additional opinions concur in part and dissent in part with the majority opinion, further complicating matters.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *United States v Ibrahim Ahmed Mahmoud Al Qosi*, (US Military Commission Review, Court of Military Commission Review 13-001 & 13-006, 24 April 2014) <[http://www.mc.mil/Portals/0/pdfs/AI%20Qosi%20Decision%2013-001%20%2013-006%20\(Apr%2024%202014\).pdf](http://www.mc.mil/Portals/0/pdfs/AI%20Qosi%20Decision%2013-001%20%2013-006%20(Apr%2024%202014).pdf)>.

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The CMCR denied each of the writ applications and affirmed the denial of the petition for a new trial due to the lack of evidence that an attorney-client relationship existed between CAPT McCormick and al Qosi; thus, McCormick could not initiate litigation, file pleadings, or seek any relief on al Qosi's behalf. The CMCR held that the CDC appointment of CAPT McCormick was alone not enough to establish an attorney-client relationship, and that because McCormick had not met, spoken with, or made written contact with al Qosi, there was no indication the appellate petitions had been filed with the accused's knowledge or consent.¹⁰¹

- *United States v David Matthew Hicks* [2014] USMCR, CMCR 13-004 2 September 2014 <[http://www.mc.mil/Portals/0/pdfs/hicks13004/Hicks%20Court%20Order%20\(Sept%202%202014\).pdf](http://www.mc.mil/Portals/0/pdfs/hicks13004/Hicks%20Court%20Order%20(Sept%202%202014).pdf)>

On 2 September, the CMCR continued a previously-issued stay on Hicks' motion to vacate his 2007 Military Commission conviction for providing military support to terrorism.

Hicks, an Australian national detained at Guantanamo since 2002, was the first person to be convicted at the current US Military Commissions.¹⁰² Hicks pleaded and was found guilty in 2007 of providing material support to terrorism.¹⁰³ On 5 November 2013, Hicks motioned CMCR to vacate his conviction due to the 2012 DC Circuit ruling, in *Hamdan v US*, that material support for terrorism is not a war crime and thus that the offense was beyond the jurisdiction of military commissions.¹⁰⁴ The CMCR stayed Hicks' motion pending the ruling in *Al-Bahlul v United States*, which, as discussed above, held that material support is not a war crime and cannot be tried by military commission.¹⁰⁵ On 20 August, Hick filed a motion with the CMCR to lift the stay on his motion. In response, the CMCR issued an order stating '[a]lthough our superior court has issued its en banc decision in *Bahlul v United States*, No. 11-1324 (D.C. Cir., July 15, 2014), that court's mandate has not been issued, and the parties may seek certiorari to the US Supreme Court. Holding the case in continued abeyance is warranted pending further order of this court.'

US Military Commissions Cases

- *United States v Ahmed Mohammed Ahmed Haza al Darbi* [2014] Military Commissions, Guantanamo, 20 February 2014, <[http://www.mc.mil/Portals/0/pdfs/alDarbi2/Al%20Darbi%20II%20\(TRANS20February2014-AM\).pdf](http://www.mc.mil/Portals/0/pdfs/alDarbi2/Al%20Darbi%20II%20(TRANS20February2014-AM).pdf)>

On 20 February, al Darbi, a Saudi national detained at Guantanamo since August 2002, pleaded guilty at a Military Commission to charges of conspiracy, attacking civilian objects, hazarding a vessel, attempting to hazard a vessel, terrorism, and aiding the enemy stemming from an attempt to carry out terrorist attacks in the Strait of Hormuz, and for a completed

¹⁰¹ Ibid.

¹⁰² Kimberly Bennett, 'Ex-Guantanamo detainee appeals conviction', *Jurist.org*, 21 August 2014 <<http://jurist.org/paperchase/2014/08/ex-guantanamo-detainee-appeals-conviction.php>>.

¹⁰³ Ibid.

¹⁰⁴ *Hicks v United States*, (Brief on Behalf of Appellant, US Court of Military Commission Review, 5 November 2013) <<http://www.mc.mil/Portals/0/pdfs/hicks13-004/Hicks%20Appeal%20Brief%20-%20FINAL.PDF>>.

¹⁰⁵ *Ali Hamza Ahmad Suliman Al Bahlul v United States*, Petition for Rehearing En Banc, <https://www.justsecurity.org/wp-content/uploads/2014/07/https___ecf.cadc_.uscourts.pdf>.

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attack in October 2002 against the MV Limburg, a French flagged civilian oil tanker, off the coast of Yemen.¹⁰⁶

Though al Darbi was already in custody when the attack on the MV Limburg occurred, he admitted his involvement in the planning and arrangement of an al Qaeda operation to sink petroleum tankers near the Strait of Hormuz.¹⁰⁷ Under a 2013 pretrial agreement with the Military Commission Convening Authority, al Darbi will spend three and a half more years at Guantanamo before sentencing, upon which he will most likely be eligible to transfer to Saudi Arabia to serve out the remainder of a nine to 15 year term.¹⁰⁸ In the interim, al Darbi has agreed to cooperate with Commission prosecutors and testify against another Guantanamo detainee, Abd al-Rahim al Nashiri, whose case is discussed below. Al Darbi is the sixth detainee to plead guilty since the inception of the current Military Commission system in 2001.¹⁰⁹

- *United States v Abd Al Rahim Hussayn Muhammad Al Nashiri* [2014] Military Commissions, Guantanamo, 11 August 2014
<[http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20\(AE241C\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20(AE241C).pdf)>

On 11 August, a Military Commission dismissed the charges and specifications against Al Nashiri related to a 2002 attack on a French flagged civilian oil tanker ship, MV Limberg, off the coast of Yemen, finding that the government had not met its burden to establish subject matter jurisdiction.

Nashiri, a Yemeni national, was captured in the United Arab Emirates and placed in US custody in 2002, but not transferred to Guantanamo until 2006.¹¹⁰ On 28 September 2011, the Military Commission Convening Authority referred charges against Al Nashiri alleging perfidy (treachery), murder in violation of the law of war, attempted murder in violation of the law of war, terrorism, conspiracy, intentionally causing serious bodily injury, attacking civilians, attacking civilian objects, and hazarding a vessel.¹¹¹ The charges arose out of an attempted attack on a US warship, USS The Sullivans, in January of 2000, an attack on another US warship, the USS Cole, in October 2000 that killed 17 US Navy Sailors and

¹⁰⁶ *United States v Almed Mohammed Ahmed Haza al Darbi*, (US Office of Military Commission, 'Unofficial/Unauthenticated Transcript: Proceedings of Military Commission', 20 February 2014) <[http://www.mc.mil/Portals/0/pdfs/alDarbi2/AI%20Darbi%20II%20\(TRANS20February2014-AM\).pdf](http://www.mc.mil/Portals/0/pdfs/alDarbi2/AI%20Darbi%20II%20(TRANS20February2014-AM).pdf)>.

¹⁰⁷ Charlie Savage, 'Guantanamo Detainee Pleads Guilty in 2002 Attack on Tanker Off Yemen,' *New York Times* (online), 20 February 2014 <http://www.nytimes.com/2014/02/21/us/guantanamo-detainee-ahmed-muhammed-haza-al-darbi.html?_r=1>.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid. 'Military Commissions History,' Office of Military Commissions <<http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx>>.

¹¹⁰ Nashiri is considered one of 17 high-value detainees, and was previously held in a secret site at Guantanamo from September 2003 until March 2004, according to the previously discussed SSCI Executive Summary on the CIA's detention and interrogation program. Guantanamo Docket Timeline, above n 63. Nashiri is also one of three detainees whom the former director of the CIA acknowledged were subjected to waterboarding.

¹¹¹ *United States v al Nashiri*, (Referred Charge Sheet, US Military Commissions, 15 September 2011) <[http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20\(Referred%20Charges\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/AI%20Nashiri%20II%20(Referred%20Charges).pdf)>

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wounded 39 more, and the attack on MV Limburg that killed one crewmember and wounded 12 more.¹¹²

Regarding the charges related to the MV Limburg attack, the defense successfully argued that the prosecution failed to establish, among other things, that 'France was a coalition partner and the United States had an interest to vindicate or protect in a prosecution based on the alleged attack of the MV Limburg.' While the prosecution proffered facts in support of its assertion of jurisdiction, the Military Commission found there was never any evidence offered in support of the proffer. The Commission denied the defense motion to dismiss the charges related to USS The Sullivans and the USS Cole.

On 19 September, the government appealed the dismissal of charges to the CMCR.¹¹³

- *United States v Ramzi Bin Al Shibh* [2014] Military Commissions, Guantanamo, 13 August 2014
<[http://www.mc.mil/Portals/0/pdfs/alShibh/Al%20Shibh%20\(AE312C\(RBS\)\).pdf](http://www.mc.mil/Portals/0/pdfs/alShibh/Al%20Shibh%20(AE312C(RBS)).pdf)>

On 13 August, a Military Commission granted the government's emergency motion to reconsider a July 2014 order that severed Bin al Shibh's case from four other jointly referred cases.¹¹⁴ Ramzi Bin al Shibh, a Yemeni national detained at Guantanamo since 2006, is, along with those four other detainees, charged with conspiracy, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking or hazarding a vessel or aircraft, and terrorism in connection with the September 11th 2001 attacks.¹¹⁵

The Military Commission, 'concerned about inordinate delays attributable to issues impacting only the case against Mr bin al Shibh, [had] directed the severance to provide the other Accused "some modicum of timely justice."' The issues the Military Commission referred to as only impacting Bin al Shibh included 'complaints about disturbances in his cell, competency to participate in his own defense, and a potential conflict regarding his Defense Team still required resolution.' Bin al Shibh supported severance while the government opposed the action. The government acknowledged that while lengthy delays were possible, the time necessary to resolve the issues unique to Bin al Shibh would be encompassed by the time required to provide classified discovery to all the Accused.' The Military Commission agreed to hold the severance order in abeyance.

- *United States v Khalid Shaikh Mohammad, et al* [2014] Military Commissions, Guantanamo, 3 September 2014
<[http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(AE283B\).pdf](http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE283B).pdf)>

¹¹² US Office of Military Commissions, '2014 Cases, Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri' <<http://www.mc.mil/CASES.aspx>>.

¹¹³ *United States v al Nashiri*, (Government Notice of Appeal, US Court of Military Commission Review, 19 September 2014) <[http://www.mc.mil/Portals/0/pdfs/Nashiri14-001/Nashiri%2014-001%20Notice%20of%20Appeal%20\(Sept%2019%202014\).pdf](http://www.mc.mil/Portals/0/pdfs/Nashiri14-001/Nashiri%2014-001%20Notice%20of%20Appeal%20(Sept%2019%202014).pdf)>.

¹¹⁴ *United States v Ramzi Al Shibh*, (US Military Commission, 'Order Government Emergency Motion to Reconsider Severance Order', 13 August 2014), <[http://www.mc.mil/Portals/0/pdfs/alShibh/Al%20Shibh%20\(AE312C\(RBS\)\).pdf](http://www.mc.mil/Portals/0/pdfs/alShibh/Al%20Shibh%20(AE312C(RBS)).pdf)>.

¹¹⁵ The US military has charged Bin al Shibh, along with Khalid Shaikh Mohammed, Walid Muhammad Salih Mubarek Bin 'Attash, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi with conspiracy, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, murder in violations of the law of war, destruction of property in violation of the law of war, hijacking or hazarding a vessel or aircraft, and terrorism all in connection to the September 11th attacks.

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On 3 September, a Military Commission denied a motion by Jason Wright, a former military defense lawyer for Khalid Shaikh Mohammed (KSM), that requested the Military Commission order the Convening Authority to hire Wright as a either a government or contracted attorney and allow him to continue to represent KSM.¹¹⁶ The Military Commission found there was no authority for such a request.

Wright was previously a Major in the US Army JAG Corps and detailed to KSM's defense team. In February 2014, the Army JAG Corps informed Major Wright that he was being removed from KSM's defense team in order to allow him to attend a required graduate program in military law for all US Army Judge Advocates. Wright was initially scheduled to attend the course the year before, but the Army deferred his attendance. The Army denied Wright's 2014 request for a second deferral, following which Wright filed the motion for relief described above. Prior to the Military Commission's ruling on his motion, Wright resigned his commission and left active duty military service in August 2014, severing the attorney-client relationship with KSM.¹¹⁷

This issue highlights the challenges of balancing detailed military counsel to long running cases against the professional development and assignment needs of those attorneys and the military.¹¹⁸

- *United States v Abd al Hadi al-Iraqi* [2014] Military Commissions, Guantanamo
<[http://www.mc.mil/Portals/0/pdfs/allIraqi/al%20Iraqi%20\(AE020B\).pdf](http://www.mc.mil/Portals/0/pdfs/allIraqi/al%20Iraqi%20(AE020B).pdf)>

On 19 November, a Military Commission denied a defense motion to dismiss the case against al Hadi, an Iraqi national detained at Guantanamo since 2007, charged with denying quarter, attacking protected property, using treachery or perfidy, and attempted use of treachery or perfidy in a series of attacks in Afghanistan and Pakistan between 2003 and 2004, and conspiracy to commit law of war offenses.¹¹⁹

The defense had motioned to dismiss for lack of subject matter jurisdiction and to compel a status determination pursuant to Article 5 of the Third Geneva Convention. The Military Commission, in denying the motion, held that 'this Commission is a competent tribunal to determine whether the government has proven by a preponderance of the evidence the Commission does have personal jurisdiction over the accused... [and that] [t]he [p]rosecution will be given an opportunity to prove the Commission's personal jurisdiction over the accused at a future hearing date.'

¹¹⁶ KSM is one of the five detainees being prosecuted by Military Commission for their alleged role in the 9/11 attacks.

¹¹⁷ *United States v. Khalid Shaikh Mohammed et al.*, (US Military Commission, 'Notice of Governmental Directed Severance of the Attorney-Client Relationship', 13 March 2014); (US Military Commission, 'Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. Motions Hearing', 14 August 2014) 8239-8246; See also Gabriel Uzra, 'Why Khalid Sheikh Mohammed's lawyer is leaving the defense team – and the Army', *Slate* (online), 26 August 2014 <http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/khalid_sheikh_mohammed_s_guantanamo_defense_lawyer_jason_wright_is_departing.html>.

¹¹⁸ MSNBC, 'Impossible Conflict Traps Guantanamo Attorney', *The Rachel Maddow Show*, 26 June 2014 <https://www.youtube.com/watch?v=XLSV2NVi_oc>.

¹¹⁹ *United States v Abd al Hadi al-Iraqi*, (US Military Commission, 'Military Judge Ruling on Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction and to Compel a Status Determination pursuant to Article 5 of the Geneva Conventions', 19 November 2014) <[http://www.mc.mil/Portals/0/pdfs/allIraqi/al%20Iraqi%20\(AE020B\).pdf](http://www.mc.mil/Portals/0/pdfs/allIraqi/al%20Iraqi%20(AE020B).pdf)>.

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