



NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

Bill of Attainder

Rulings:

- *U.S. v. Hamdan*, 1 M.C. 22, (2007) (On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction)
- *U.S. v. Khadr*, 1 M.C. 173 (2008) (Ruling on Defense Motion to Dismiss for Lack of Jurisdiction (Bill of Attainder))

Article I, Section 9, of the United States Constitution prohibits the legislature from enacting bills of attainder. A bill of attainder is defined as a law that declares a person or group of persons guilty of a crime and punishes them without benefit of a trial. In effect, the Constitution's Bill of Attainder Clause is intended to protect against a legislative exercise of judicial functions.

At his military commission, detainee Salim Hamdan argued that the Military Commissions Act ("MCA") of 2006 violated the Bill of Attainder Clause by "authorizing a non-judicial finding of unlawful combatant status." *U.S. v. Hamdan*, 1 M.C. 22, 31 (2007). Arguing before Judge Allred, the defense asserted that the MCA permitted detainees at Guantanamo Bay to be categorized as "alien unlawful enemy combatant[s]" without benefit of trial. *Id.* Judge Allred ruled that the two-day public evidentiary hearing held to adjudicate Hamdan's status as an alien unlawful enemy combatant mooted the issue. *Id.* At the adversarial hearing, the government and defense introduced evidence and cross-examined witnesses. *Id.* After the hearing, Judge Allred issued a judicial finding of Hamdan's unlawful combatant status. *Id.* Congress did not legislate Hamdan's membership in a group; his membership was determined by a military judge after the introduction of evidence. *Id.*

When Omar Khadr made a similar argument, Judge Brownback ruled that the MCA was not a bill of attainder. *U.S. v. Khadr*, 1 M.C. 173 (2008). The effect of the MCA on Khadr did not amount to "legislative punishment." *Id.* "Nothing in the MCA directs that any person or any subset of persons be punished without a trial. Nothing in the trial procedures established by the MCA can be properly viewed as 'punishment,' as that term is used in the cases cited by the Defense." *Id.* at 173-174.