NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

Defense Access to Legal Counsel

Rulings:

- *United States v. Khadr*, 1 M.C. 257 (2009) (Order)

The right to counsel is embedded in the Sixth Amendment of the United States Constitution. Among other protected rights, it states, "[i]n all criminal prosecutions, the accused shall enjoy the right [. . .] to have the Assistance of Counsel for his defense." U.S. Constitution, Amend. VI. This right is paralleled in courts-martial through Rule 506 of the Rules for Courts-Martial ("R.C.M"); defendants are afforded the choice of military-appointed counsel, military counsel of the accused's own selection, or may seek civilian counsel. Civilian counsel in these cases must: 1) be a member of the bar of a Federal court or of the bar of the highest court of a State; or 2) if not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has the appropriate training and familiarity with the general principles of criminal law which apply in a court martial, R.C.M. 502(d). This affords military judges greater discretion in the allowance of outside counsel.

In contrast, Rule 502(d)(3) of the Rules for Military Commissions ("R.M.C.") limits the choice of civilian defense counsel. They must meet five criteria: 1) is a member of the bar of a Federal court or of the bar of the highest court of a state, the District of Columbia, or U.S. possession 2) is a United States citizen 3) has not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority 4) has been determined to be eligible for access to classified information that is classified at the level Secret or higher and 5) has signed the agreement prescribed by the Secretary of Defense pursuant to 10. U.S. § 949c(b)(3)(E). Consequently, these criteria do not allow for a wide exercise of judicial discretion and are harder to meet. In effect, it means that an accused from Yemen will not be able to choose a Yemeni attorney for his defense. Instead, the detainee will need to rely on a U.S. attorney.

Forbidding an accused from choosing a foreign attorney is not the rule in courts-martial. In *Soriano v. Hosken*, 9 M.J. 221 (1980), an accused military member was facing a court-martial and wished to exercise his right to choose his counsel. The attorney he wished to use was a Philippine citizen and a member of the Philippine Bar. *Id.* While the U.S. Court of Military Appeals upheld the military judge's decision to bar that particular attorney from representing the accused, it did not preclude the possibility that a foreign attorney could be qualified to represent an accused in a court-martial. The court stated that the presiding judge must determine if the attorney, "demonstrate[ed] that he possesse[d] a

requisite degree of appropriate training or familiarity with the general principles of law in operation at courts-martial in order to undertake the defense of a military accused on trial for a crime." *Id*. at 222. In fact, the Court noted that members of foreign bars had appeared as defense counsel in the past. *Id.* at 223. In a dissenting opinion, Judge Cook further elaborated on the appropriateness of allowing foreign attorneys to represent accused military members. After researching the legislative history, Judge Cook believed members of Congress never intended to have foreign counsel treated differently than members of the American bar. *Id.* at 229. As a result of the fact that the U.S. military is spread across the globe, it is likely that courts-martial will take place in foreign countries. *Id.* at 230. He stated, "To impose restraints on an accused's selection of a civilian lawyer from the local bar in effect would be taking from him in practice what ostensibly had been given to him by law." *Id.*

The ability to choose a foreign attorney has been an issue in the Khadr commission. Omar Khadr, a Canadian citizen, was captured by U.S. forces at the age of 15 in Afghanistan. *United States v. Khadr*, 1 M.C. 257 (2009). In the beginning, he was represented by appointed military counsel, as well as civilian counsel. R.M.C. 502(d)(3) does not allow Khadr to use the attorney of his choice, Canadian Attorney Dennis Edney, because he is not a United States citizen. However, the Pentagon has allowed Edney to act as a "foreign attorney consultant" for Khadr. At one point in the proceedings, Khadr, frustrated with his representation, wished to discharge all of his defense counsel pursuant to R.M.C 505(d)(2)(i), but he did not want to continue *pro se*. *Id.* at 257. Judge Parrish ruled that Khadr could not proceed completely unrepresented and that Edney could not be his attorney for purposes of the Military Commissions Act ("MCA") of 2006. *Id.* Faced with no options, Khadr agreed to allow LCDR William Kuebler, one of his detailed defense counsel, to continue his representation. *Id.*

While the systems of courts-martial and military commissions share similarities, they differ greatly in regards to defense representation. Accused individuals facing military commissions are restricted far more in their choice of representation than those facing courts-martial.