



NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

Ex post facto

Ruling:

United States v. Khadr, 1 M.C. 203 (2008) (Ruling on Defense Motion to Dismiss Charge II for Failure to State an Offense and for Lack of Subject Matter Jurisdiction)

Several military judges have wrestled with arguments that certain aspects of the Military Commissions Act (“MCA”) of 2006 violate the prohibition against *ex post facto* laws found at Article I, Section 9, of the U.S. Constitution. An *ex post facto law* is one that retroactively changes the legal consequences of acts committed prior to the enactment of the law. The ruling referenced here is a representative example of several military commission rulings which discussed the issue in nearly identical terms.

As with other issues where the accused cited the Constitution as a source of protection, the military judge in *Khadr*, Peter E. Brownback III, assumed, without deciding, that the accused was entitled to “specific, partial or limited protections of the Constitution.” *U.S. v. Khadr*, 1 M.C. 203, 205 (2008).

The defense argued that the offense of “Attempted Murder in Violation of the Law of War” codified in the MCA did not exist in 2002 when Omar Khadr allegedly committed the act that formed the basis of the charge. In denying the motion, Judge Brownback relied on *Ex Parte Quirin*, 317 U.S. 1 (1942), for the proposition that Congress has the authority to criminalize violations of the law of war. *Khadr*, 1 M.C. 203, 210. “An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.” *Id.*, quoting *Quirin* at 10.

Judge Brownback ruled that the Congressional decision to criminalize attempted murder in violation of the law of war was not a decision to “create a new crime.” *Id.* Congress may define offenses against the law of nations, which include war crimes. “The Supreme Court recognized that Congress has and has had the choice of allowing military commissions to determine for themselves what are violations of the law of war or of setting out specifically certain violations of the law of war. ‘Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts....’” *Id.*, quoting *Quirin*, at 12. Therefore, according to Judge Brownback, the offense of attempted murder in violation of the law of war does not violate *ex post facto* standards.