NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

Murder in Violation of the Law of War

Rulings:
- *United States v. Jawad*, 1 M.C. 331 (2008) (Ruling on Defense Motion to Dismiss – Lack of Subject Matter Jurisdiction)
- *United States v. Jawad*, 1 M.C. 347 (2008) (Ruling on Government Motion for Reconsideration)

"Murder in violation of the law of war" is defined by the Military Commissions Act ("MCA") of 2006 as intentionally killing "one or more persons, including lawful combatants, in violation of the law of war..." 10 U.S.C. § 950v(b)(15). In Part IV, paragraph 14, of the Manual for Military Commissions, the elements of the crime are listed: "(1) One or more persons are dead; (2) The death of the persons resulted from the act or omission of the accused; (3) The killing was unlawful; (4) The accused intended to kill the person or persons; (5) The killing was in violation of the law of war; and (6) The killing took place in the context of and was associated with an armed conflict." The comment in the Manual reads: "For the accused to have been acting in violation of the law of war, the accused must have taken acts as a combatant without having met the requirements for lawful combatancy. It is generally accepted international practice that unlawful enemy combatants may be prosecuted for offenses associated with armed conflicts, such as murder; such unlawful enemy combatants do not enjoy combatant immunity because they have failed to meet the requirements of lawful combatancy under the law of war."

The charges referred against Mohammed Jawad included attempted murder in violation of the law of war. He allegedly threw a hand grenade into the passenger compartment of a vehicle transporting U.S. forces with the intent to kill Sergeants First Class Michael Lyons, Christopher Martin, and their interpreter.

The definition of "in violation of the law of war" became an issue in Jawad's military commission. The government argued that the elements were satisfied if an unlawful combatant killed someone. The defense argued that status as an unlawful combatant, without more, was not enough to satisfy the elements. This definitional disagreement is an issue in several other military commissions.

Judge Henley agreed with the defense. *U.S. v. Jawad*, 1 M.C. 331 (2008). He found that there is a "dual requirement for the Government" that must be proved beyond reasonable doubt. *Id.* at 332. First, the government must prove that the killings, or attempted killings, were committed by an unlawful enemy combatant. *Id.* Second, the government must prove that the method, manner or circumstances used in the killing, or attempted killing, violated the law of war. *Id.* Status as an unlawful enemy combatant was not enough for guilt to be established.

Judge Henley's ruling relied on the plain language of the MCA. To read the statute without the dual requirement, ruled Judge Henley, would render part of the statute meaningless. "If Congress intended to make any murder committed by an unlawful enemy combatant a law of war violation, they could have said so. They did not and for this Military Commission to do so now would contradict the canons of statutory construction which dictate that a court must construe the language of a statute so as to avoid rendering any words superfluous." *Id.* Further, "The government has not cited any persuasive authority for the proposition that acting as an unlawful enemy combatant, by itself, is a violation of the laws of war in the context of non-international armed conflict. In other words, that the accused might fail to qualify as a lawful combatant does not automatically lead to the conclusion that his conduct violated the law of war and the propriety of the charges in this case must be based on the nature of the act, not simply on the status of the accused." *Id.*

On a motion for reconsideration, Judge Henley upheld his earlier ruling. *U.S. v. Jawad*, 1 M.C. 347 (2008). He reiterated that his ruling conformed with "case precedent, international law and Congressional intent." *Id.* at 348.