



NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

Determination of Personal Jurisdiction

Rulings:

- *United States v. Hamdan*, 1 M.C. 6 (2007) (Decision and Order: Motion to Dismiss for Lack of Jurisdiction (Corrected Order))
- *United States v. Khadr*, 1 M.C. 152 (2007) (Order on Jurisdiction)
- *United States v. Khadr*, 1 M.C. 443 (2007) (Court of Military Commission Review, Opinion)
- *United States v. Hamdan*, 1 M.C. 10 (2007) (Decision on Motion to Reconsider Dismissal of Charges for Lack of Jurisdiction)
- *United States v. Hamdan*, 1 M.C. 22 (2007) (On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction)
- *United States v. Khadr*, 1 M.C. 171 (2007) (Ruling on Defense Motion for a Fair Status Determination)

The Military Commissions Act (“MCA”) of 2006 grants jurisdiction to military commissions over “alien unlawful enemy combatants.” “Lawful enemy combatants” are not subject to commissions – they can be prosecuted by court-martial. The term ‘unlawful enemy combatant’ is defined as:

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

10 U.S.C. §948a.

According to the language of the MCA, a finding by a “Combatant Status Review Tribunal or another competent tribunal...that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission.”

Personal jurisdiction was the first issue litigated in *U.S. v. Hamdan*, 1 M.C. 6 (2007), and *U.S. v. Khadr*, 1 M.C. 152 (2007). In *Hamdan*, Judge Allred dismissed charges without prejudice because the commission lacked personal jurisdiction over Hamdan. *Hamdan*, 1 M.C. 2 (2007). While the Combatant Status Review Tribunal (“CSRT”) received evidence and determined that Hamdan was a part of or associated with al-Qaeda forces, and was properly detained as an “enemy combatant,” it did not determine whether the commission had proper jurisdiction. *Id.* Under the law of war, ruled Judge Allred, a military commission could not try the accused until a competent tribunal determined his status. *Id.* at 8.

Definition of “Enemy Combatant,” Wolfowitz Memorandum, Order Establishing Combatant Status Review Tribunal, July 2004:

For purposes of this Order, the term “enemy combatant” shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Judge Allred ruled that the CSRT and the President’s 2002 determination that members of the Taliban were “unlawful combatants” did not amount to a finding that the accused was subject to the commission’s jurisdiction. *Id.* The CSRT determination, which employed a different and less exacting standard for “enemy combatant” than the one found in the MCA, was made for the limited purpose of determining whether or not Hamdan was properly detained. *Id.* Further, Judge Allred found it significant that the “CSRT finding preceded the MCA by two years.” *Id.*

Similarly, the President’s determination of unlawful combatancy did not establish the commission’s jurisdiction. “The President’s determination, carefully read, was that members of the Taliban were unlawful combatants, and that the Geneva Conventions do not apply to al-Qaeda because al-Qaeda ‘is not a High Contracting Party to Geneva.’ Further, the President’s determination applied to members of the Taliban and al-Qaeda as a group, and did not represent an individualized determination that this accused actually supported or engaged in hostilities.” *Id.*

In *U.S. v. Khadr*, 1 M.C. 152 (2007), Judge Brownback issued an opinion similar to Judge Allred’s. He found that the MCA contemplates a two-part system. “First, it anticipates that there shall be an administrative decision by the CSRT which will establish the status of a person for purposes of the MCA. The CSRT can find, for MCA purposes, that a person is a lawful enemy combatant or an unlawful enemy combatant.” *Khadr*, 1 M.C. 152 (2007). “Second, once the CSRT finds that a person is an unlawful enemy combatant, the provisions of the MCA come into play.” *Id.* A strict reading of the MCA requires that, until a person is determined to be an unlawful enemy combatant, the provisions of the MCA do not apply. *Id.* Since the CSRT did not find Khadr to be an *unlawful* enemy combatant, Judge Brownback dismissed the charges. *Id.*

Both judges held the military commission was not a “competent tribunal” to determine jurisdiction. Judge Brownback provided two reasons for this ruling. “First, in order to make the determination, the military judge would have to conduct a mini-trial to decide if the person is an unlawful combatant.” *Id.* This raised the question of whether the judge or the panel should make the decision. The MCA, however, does not anticipate this issue. Judge Brownback found additional support for his position in a quote from Justice Stevens: “A person has a right to be tried only by a court which he knows has jurisdiction over him.” *Id.* at 153. At the time his CSRT was conducted, Khadr did not know it could play a role in any future prosecution by military commission. While he had the opportunity to participate in the CSRT, he likely would have approached it differently if he had known it could establish jurisdiction for the military commission.

In courts-martial proceedings, military judges can easily determine the appropriateness of jurisdiction. There, a judge can use the basic information on the charge sheet, such as unit, rank, and dates of service for the accused to form the basis for jurisdiction. In military commissions, the military judge is only told the name of the accused and the last four digits of an unidentified acronym (“ISN”). This did not provide Judge

Brownback enough information to determine that the commission properly exercised jurisdiction over Khadr. *Id.*

In *U.S. v. Khadr*, 1 M.C. 443 (2007), the Court of Military Commission Review considered the government's appeal of Judge Brownback's ruling. The CMCR identified two important issues. The first was "whether the military judge erred in ruling that Mr. Khadr's September, 2004 C.S.R.T. classification as an 'enemy combatant' was insufficient to satisfy" jurisdiction. *Khadr*, 1 M.C. 443, 449 (2007). If the answer to the first question was negative, the second issue had to be answered: whether the "military judge erred in ruling that neither the military commission nor the military judge were empowered under the M.C.A. to receive evidence, and thereafter" assess the status of the accused as a potential "alien unlawful enemy combatant" for purposes of answering the jurisdictional issue. *Id.*

Addressing the first question, the CMCR affirmed the commission's decision that Khadr's 2004 CSRT classification as an "enemy combatant" failed to meet the MCA's jurisdictional requirements since it did not categorize him as an "unlawful enemy combatant." *Id.* at 457.

Turning to the second issue, the CMCR held that the military judge erred in two respects. First, Judge Brownback erred by not affording the government an opportunity to present evidence that the commission could exercise jurisdiction over the accused. *Id.* at 459. Second, the military judge erred in concluding that a CSRT (or another competent tribunal) "determination of 'unlawful enemy combatant' status was a prerequisite to referral of charges to a military commission. The trial judge also erroneously held that the military commission lacked the power to independently consider and decide this important jurisdictional matter under the M.C.A." *Id.*

According to the CMCR, the unambiguous language of the MCA, in conjunction with a clear and compelling line of federal precedent, establishes that a military judge can decide the critical jurisdictional prerequisite. The CMCR cited the Supreme Court for the proposition that federal courts always have jurisdiction to determine their own jurisdiction. A military commission should be viewed no differently, held the CMCR. *Id.* at 461. In fact, Rule for Military Commission 201(b)(3) says as much: "A military commission always has jurisdiction to determine whether it has jurisdiction."

The CMCR explained that "any alien unlawful enemy combatant engaged in hostilities against the United States or its cobelligerents is subject to trial by military commission for violations of the law of war and other offenses triable by military commission." *Id.* at 461. Jurisdiction attaches after an individual subject to the Uniform Code of Military Justice avers under formal oath that the charges are "true in fact." *Id.* at 462. An appointed legal officer then prepares pretrial advice for the Convening Authority. If "reasonable grounds [exist] to believe that an offense triable by a military commission has been committed and that the accused

committed it,” the charge may be referred to a military commission by the Convening Authority. The CMCR held that each of these steps was followed in the Khadr case. *Id.*

“[T]he M.C.A. is clear and deliberate in its creation of a bifurcated methodology for establishing an accused’s ‘unlawful enemy combatant’ status so as to permit that individual’s trial before a military commission.” *Id.* “The text, structure, and history of the M.C.A. demonstrate clearly that a military judge presiding over a military commission may determine both the factual issue of an accused’s ‘unlawful enemy combatant status’ and the corresponding legal issue of the military commission’s *in personam* jurisdiction.” *Id.* at 465.

“The M.C.A. identifies two potential jurisdiction-establishing methodologies based upon an allegation of ‘unlawful enemy combatant’ status. The first, reflected in § 948a(1)(A)(i), involves the clear delineation of the jurisdictional standard to be applied by a military commission in determining its own jurisdiction. The second, contained in § 948a(1)(A)(ii), involves a non-judicial related jurisdictional determination that is to be afforded ‘dispositive’ deference by the military commission. Either method will allow the military commission’s exercise of jurisdiction where ‘unlawful enemy combatant’ status has been established by a preponderance of the evidence.” *Id.* This process, held the CMCR, is consistent with the MCA and international law.

After the CMCR decision, Judge Allred issued two subsequent rulings in *U.S. v. Hamdan*, at 1 M.C. 10 (2007) and 1 M.C. 22 (2007). In the first ruling, he determined he could reopen the issue of personal jurisdiction on his own initiative or at the request of a party under the Rules for Military Commissions (“R.M.C.”). Under R.M.C. 905(f) and 801(e)(1)(B), he could reconsider “(1) any ruling except one ‘amounting to’ a finding of not guilty; (2) at any time during the trial or prior to authentication of the record of trial; (3) on request of a party or on his own initiative.” *Hamdan*, 1 M.C. 10, 11 (2007). Here, the ruling at issue did not amount to a finding of “not guilty” and the trial was still in progress.

The CMCR decision made it clear that a “military commission may determine its own jurisdiction, and need not await a new determination by a CSRT.” Therefore, Judge Allred held a hearing to determine whether Hamdan met the jurisdictional requirements in the MCA. *Hamdan*, 1 M.C. 22 (2007). Under R.M.C. 905(c)(1), the burden is on the Government to demonstrate jurisdiction over the accused by a preponderance of the evidence. *Hamdan*, 1 M.C. 10, 13 (2007). Judge Allred ruled that the accused “drove a vehicle to and towards the battlefield, containing missiles that could only be used against the United States and its co-belligerents.” *Hamdan*, 1 M.C. 22, 27 (2007). Hamdan’s participation met the definition of unlawful enemy combatant. Therefore, the accused could be tried by military commission.

Based on the CMCR decision, Judge Brownback ruled in *U.S. v. Khadr*, 1 M.C. 171 (2007), that the government’s “facial compliance with all the

pre-referral criteria contained in the Rules for Military Commissions, combined with an unambiguous allegation in the (charges and specifications in this case)... entitled the military commission to initially and properly exercise *prima facie* personal jurisdiction over the accused until such time as...jurisdiction was challenged by a motion to dismiss for lack thereof, or proof of jurisdiction was lacking on the merits.” *Khadr*, 1 M.C. 171 (2007).

Under President Obama’s proposed changes, Rule for Military Commission 202 would specify that a military commission is competent to determine whether the commission has personal jurisdiction over an individual. This would incorporate the CMCR *Khadr* decision into the Manual for Military Commissions.