



## NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

### ***The Right to Indictment by Grand Jury and Trial by Jury***

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Rulings:

- *United States v. Hamdan*, 1 M.C. 141 (2008) (Ruling on Motion for Indictment and Trial by Jury)

The United States Constitution provides the basis for an accused's right to indictment by grand jury and trial by jury. Under the Fifth Amendment, a person cannot be held accountable for a crime, absent "presentment or indictment of a Grand Jury." Under the Sixth Amendment, the accused in a criminal prosecution is entitled to a "speedy and public" trial by an impartial jury, to be informed of the charges against him, and to confront adverse witnesses.

Salim Hamdan sought to obtain an indictment by grand jury and a jury trial, arguing that his military commission did not satisfy either. His argument was based on the extraterritorial application of the Constitution.

The Supreme Court addressed the extraterritorial application of the Constitution in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), where it determined that the right to seek the Writ of Habeas Corpus applied to Guantanamo detainees. However, the Court has previously limited the applicability of the Fifth and Sixth Amendments, stating that the rights to indictment by grand jury and trial by petit jury are not fundamental and do not apply extraterritorially to non-citizens. Judge Allred cited a long list of cases for this proposition. *U.S. v. Hamdan*, 1 M.C. 141, 142-143 (2008).

Based on the Supreme Court's historical approach to determining extraterritoriality of the Constitution, Judge Allred examined six factors to be considered in Hamdan's case: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; (3) whether practical considerations and exigent circumstances counsel against application of the constitutional right; (4) whether the Executive has provided the accused an adequate substitute for the Constitutional right being sought; (5) whether there is "necessity" for the Constitution to apply to prevent injustice, and (6) whether application of the Constitutional right would be "impractical and anomalous." *Id.* at 143.

Because Hamdan was a citizen of Yemen, and his unlawful enemy combatant status was determined after a "public, two-day, adversarial hearing," Judge Allred ruled that the first factor weighed against application of the Constitution in Hamdan's case. *Id.* at 144. The second factor weighed against extraterritorial application of the Constitution because the sites of Hamdan's apprehension and current detention were outside the sovereign territory of the United States. *Id.* at 144.

**Rule 502, R.M.C.  
Qualifications and duties of  
personnel of military  
commissions**

(a) *Members*

(1) *Qualifications.* The members detailed to a military commission shall be those active duty commissioned officers, who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission when such member is the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case.

The defense argued that there were “few practical barriers” to providing Hamdan with the protection of Constitutional provisions, given the “complete jurisdiction and control” of Guantanamo Bay by the United States. *Id.* However, Judge Allred ruled that, since the offenses were not committed in any state or district of the United States, and because there was no law compelling civilians to report for jury duty outside their home state or district, it would be impractical to apply the Sixth Amendment. *Id.* at 144-145. Furthermore, Judge Allred ruled that, in the case of a military commission hearing war crimes, the Fifth Amendment exception for “cases arising in the land or naval forces” was triggered, and, thus, indictment by grand jury was not required. *Id.* at 145. Even if the exception did not apply, Judge Allred ruled that practical barriers, such as finding a grand jury with jurisdiction over war crimes committed outside the United States, weighed against the applicability of the Fifth Amendment to Hamdan. *Id.*

Regarding the adequacy of alternative rights provided, Judge Allred highlighted the qualifications of the panel of officers presiding over detainee trials (as outlined under Rule for Military Commissions (“R.M.C.”) 502(a)(1)), the right to voir dire and challenges (R.M.C. 912), and the two-thirds majority vote required for a determination of guilt (R.M.C. 921) as evidence that Hamdan had been provided with an adequate substitute to the Sixth Amendment jury trial. *Id.* With respect to indictment by grand jury, Judge Allred relied upon R.M.C. 406 and 407 which require all charges and evidence to be reviewed by a legal officer before any charge can be referred to trial by military commission. *Id.* Judge Allred acknowledged that these alternative remedies are less protective than the Fifth and Sixth Amendments, but found them adequate and acceptable. *Id.* at 146. This conclusion was further supported by a finding that both the U.S. Senate and the international community, through the Uniform Code of Military Justice and Common Article 3 of the Geneva Convention, respectively, have previously ratified less protective procedures for trying certain combatants. *Id.* at 147.

Regarding the fifth factor, Judge Allred ruled that the substitutes provided for grand and petit juries were identical to the protections accorded to American troops, and, thus, Hamdan was, in effect, being treated as a prisoner of war. *Id.* Judge Allred noted that the Geneva Conventions permit the trial of unlawful combatants in less protective forums than those to be accorded to prisoners of war. *Id.* As such, the Fifth and Sixth Amendments were not required to prevent injustice in Hamdan’s case. *Id.*

Taking into consideration the sixth and final factor, Judge Allred ruled that holding jury trials outside the United States would be impractical for some of the same reasons discussed above, including lack of jurisdiction over Guantanamo Bay. *Id.* Furthermore, applying grand jury and petit jury guarantees to Hamdan would lead to the “anomalous” effect of “[g]ranting him greater rights than he could claim as a prisoner of war.” *Id.*

Judge Allred ultimately ruled that all six factors weighed against the constitutional right to grand and petit juries in Guantanamo Bay. *Id.* at 148.