NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

Defense Access to Resources

Rulings:

- *United States v. Hamdan*, 1 M.C. 70 (2008) (Ruling on Defense Motion for Employment of Expert Witness)
- *United States v. Hamdan*, 1 M.C. 72 (2008) (Ruling on Defense Motion for Employment of Expert Witness and Request for Continuance)
- *United States v. Mohammed et al.*, 1 M.C. 293 (2008) (Commission Ruling on Motion for Appointment of Defense Expert Consultant)
- *United States v. Jawad*, 1 M.C. 342 (2008) (Ruling on Defense Request for Employment of Defense Expert at Government Expense)
- *United States v. Jawad*, 1 M.C. 344 (2008) (Ruling on Defense Request for Expert Consultants)
- *United States v. Ghailani*, 1 M.C. 390 (2009) (Ruling on D-006: Defense Motion to Compel Discovery)

Access to resources to prepare adequately for courts-martial is rooted in the Due Process Clause of the United States Constitution, as codified in Article 46 of the Uniform Code of Military Justice ("UCMJ"). Article 46 provides that "the trial counsel, the defense counsel, and the court-martial shall have ***equal opportunity*** to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." (Emphasis added). Rule for Courts-Martial ("R.C.M.") 703 provides the procedure governing defense access under the UCMJ and is roughly paralleled with one significant difference in the military commissions by Rule for Military Commissions ("R.M.C.") 703. Under R.C.M. 703, both prosecution and defense are given ***equal opportunity*** to obtain witnesses and evidence, including the benefit of compulsory process. By contrast, R.M.C. 703 only affords the defense a ***reasonable opportunity*** to obtain witnesses and evidence.

The rules stipulate that, should the defense in a military commission need to obtain access to expert witnesses or investigations at government expense in order to ensure a fair trial, a request must be made by the defense to the convening authority. A military judge may only review such a request if the convening authority has previously denied it.
An issue of both scholarly and practical concern is that, in the military commissions, the convening authority – acting as it does on behalf of the United States – forms an integral part of the prosecution in every case. In comparison to civilian trials, this creates an anomaly whereby the defense is asking the opposing party for resources.

Once brought before the military judge, the military commission confronts the question of necessity: as with the R.C.M, under the R.M.C., defense counsel must show that the resources being requested are *necessary* to their case. At the barest minimum, this requires defense counsel to share their theory of the case with the prosecution prior to trial on the merits.

The interpretation of "necessity" was discussed in *U.S. v. Hamdan*, 1 M.C. 70 (2008), where the defense sought production of Dr. Brian Williams to "defeat several of the Specifications," "help the accused establish the affirmative defense of lawful combatancy," and help rebut testimony from an expert witness retained by the government on al-Qaeda's activities. *Id.* at 70-71. Judge Allred applied a two-pronged test he saw fit to adopt from court-martial procedure. *Id.* at 70. The first prong requires the accused to show that the expert would actually render – as opposed to the "mere possibility" of rendering – assistance to the defense, by demonstrating why the assistance was needed and what the expert would accomplish for the accused. *Id.* The second prong requires the accused show that a denial of expert assistance would result in a fundamentally unfair trial. *Id.*

The use of this two-pronged test was replicated with an addition in *U.S. v. Mohammed, et al.*, 1 M.C. 293 (2008). In that case, the defense moved that the convening authority appoint and fund Dr. Xavier Amador as an expert consultant to Mr. Bin al Shibh in the areas of clinical and forensic psychology. *Id.* at 293. While reiterating the requirements to demonstrate actual need and concreteness of accomplishment under the first prong, Judge Kohlmann also restated a rule laid down in courts-martial jurisprudence requiring defense counsel to additionally explain why "defense counsel were unable to gather and present evidence that the expert assistance would develop." *Id.*

In another *Hamdan* ruling, the defense sought to employ Dr. Emily Keram to testify about the effects of pretrial confinement and coercive interrogation techniques on the mental health of the accused. *U.S. v. Hamdan*, 1 M.C. 72 (2008). Judge Allred agreed with the convening authority that the burden of showing the necessity and relevance of Dr. Keram's testimony to the defense motion to suppress statements made by Hamdan while in confinement had not been met. *Id.* at 73. Judge Allred ruled "that the Defense has not shown how a generalized fear that arose in Afghanistan…rendered his subsequent statements to American interrogators…the product of coercion." *Id.* This, coupled with other rulings, seems to show that the correspondence between the assistance sought and the end goal of the defense must be narrowly tailored in order to justify a necessity for defense access to resources at the government's expense.

Another problem arises with respect to payment of experts whose employment had been denied by the convening authority, but was subsequently approved by the military judge. In *U.S. v. Jawad*, 1 M.C. 342 (2008), an expert witness whose production was denied by the convening authority was recognized and allowed to testify at a pretrial session. *Id.* at 342. The convening authority, however, refused to pay for the expert, relying on its decision to deny production. *Id.* When the defense filed a motion before the military judge to try to compel the convening authority to provide compensation, Judge Henley merely ruled that, while the military commission agreed that the expert should be paid, the military judge had no authority to compel any disbursement by the

United States government. *Id.* at 343. Thus the commission may overrule the finding of the convening authority with respect to the *necessity* for defense access to certain resources, but it remains solely within the power of the convening authority to *compensate* the defense.

Chief Defense Counsel for the Office of Military Commission-Defense, Colonel Peter R. Masciola, raised the issue of defense access to resources in several memoranda and congressional testimony. In his *Memorandum to the General Counsel for the Department of Defense* (13 July 2009), COL Masciola pointed to "the actual data regarding the extraordinary and routine denial of expert resources to the defense by the Convening Authority (CA) under the current system…Of 56 requests submitted to [the CA] for employment of expert consultants or investigators to date, [the CA] has denied 47 of them (thus approving less than 15% of all requests received)…" In a hearing before the members of the House Judiciary Committee on proposed amendments to the Military Commissions Act of 2006, COL Masciola stated that "[i]f the problems I identify [with respect to the lack of defense access to resources] are finally addressed…it will go a long way toward 'leveling the playing field' between the defense and prosecution in the military commissions in a way that finally brings this system into line with other American court systems…and thus makes its claim to fairness far more legitimate than it ever has been in the past."