

**UNITED STATES
OF
AMERICA**

v

OMAR AHMED KHADR
a/k/a “Akhbar Farhad”
a/k/a “Akhbar Farnad”
a/k/a “Ahmed Muhammed Khahi”

**Order
on
Jurisdiction**

04 June 2007

1. A military commission is a court of limited jurisdiction. The jurisdiction is set by statute – the Military Commissions Act of 2006 (MCA).
2. Section 948d establishes the jurisdiction of a military commission. 948d(a) states:

(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter...when committed by an alien unlawful enemy combatant.
3. Section 948d(b) specifically states that military commissions “shall not have jurisdiction over lawful enemy combatants.”
4. Thus, in the MCA, Congress denominates for the purpose of establishing jurisdiction two categories of enemy combatants – lawful and unlawful. A military commission only has jurisdiction to try an unlawful enemy combatant.
5. Further, in Section 948d(c), Congress stated that a finding by a Combatant Status Review Tribunal (CSRT) that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction by military commissions.
6. In considering Section 948d, it is clear 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.
7. Second, once the CSRT finds that a person is an unlawful enemy combatant, the provisions of the MCA come into play. Such person may have charges sworn against him, those charges may be referred to a military commission for trial, and a military commission may try him. A strict reading of the MCA would appear to require that, until such time as a CSRT (or other competent tribunal) makes a finding that a person is an unlawful enemy combatant, the provisions of the MCA do not come into play and such person may not be charged, charges may not be referred to a military commission for trial, and the military commission has no jurisdiction to try him.

8. There is, of course, the counter-argument. The military commission itself is a competent tribunal (948d(c)) to determine if a person brought before it is an unlawful enemy combatant. While appealing, this argument has two major flaws:

a. 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 enemy combatant. Or would s/he? Perhaps, since this determination might require factual determinations, the panel would have to make it. Congress provided in the MCA for many scenarios – none anticipated that the military commission would make the lawful/unlawful enemy combatant determination.

b. Second, a person has a right to be tried only by a court which he knows has jurisdiction over him. If the military commission were to make the determination, a person could be facing trial for months, without knowing if the court, in fact and in law, had jurisdiction.

9. Persons familiar with the court-martial system might state that jurisdiction is always assumed by the court-martial and it is attacked only by motion. That is true, but a court-martial is a different creature than a military commission. A soldier is in court in uniform with her first sergeant and company commander (who most likely preferred the charges) sitting in the courtroom. DD Form 458, the Charge Sheet, contains the following information in Block I – Personal Data: Name of accused, SSN, Grade or Rank, Pay Grade, Unit or Organization, Initial Date and Term of Current Service, Pay Per Month, Nature of Restraint of Accused, and Date(s) Imposed. So when a military judge at Fort Bragg looks at the Charge Sheet and the accused (Who is in uniform.), she knows that Private First Class William B. Jones is a member of Bravo Company, 3rd Battalion (Airborne), 325th Parachute Infantry Regiment, 82nd Airborne Division, Fort Bragg, North Carolina. She knows how much he is being paid, if he has been restrained, when he came on active duty this tour, and by comparing the unit to the name of the accuser in Block III – Preferral – she can see if it was PFC Jones' company commander who preferred the charges.

10. Contrast this with the information on MC Form 458 in this case. The military judge is told that the name of the accused is Omar Ahmed Khadr. Three aliases are given. And, the last four of an unidentified acronym, the ISN, are given. There is nothing on the face of the charge sheet to establish or support jurisdiction over Mr. Khadr, except for a bare allegation in the wording of the Specifications of the Charges

11. The military judge is not ruling that no facts could be properly established concerning Mr. Khadr which might fit the definition of an unlawful enemy combatant in Section 948a(a) of the MCA. The military judge is ruling that the military commission is not the proper authority, under the provisions of the MCA, to determine that Mr. Khadr is an unlawful enemy combatant in order to establish initial jurisdiction for this commission to try Mr. Khadr.

12. The military judge is not ruling that Mr. Khadr may not, if his case is referred to trial after a proper determination, attack those facts in the elements of the offenses referred which might combine to show him to be an unlawful enemy combatant. Such an attack is a proper part of a military commission.

13. The military judge is not ruling that the charges against Mr. Khadr must be resworn. That would seem to be the more prudent avenue to take, but that issue is not currently before this commission.

14. If there were no two-step process required to try a person under the MCA, then a prosecutor could swear charges, the convening authority could refer charges, and a military commission could try a person who had had no determination as to his status whatsoever. That is not what Congress intended to establish in the MCA.

16. The charges are dismissed without prejudice.

Peter E. Brownback III
COL, JA, USA
Military Judge