

UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

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Decision and Order --
Motion to Dismiss for
Lack of Jurisdiction

The Defense has moved this Military Commission to dismiss all charges and specifications against the accused on the basis that the Commission lacks Jurisdiction over him. The Government opposes the motion. Both parties have filed written briefs and attached various documents to their briefs without objection. These documents attached to the motions have been admitted without objection by either side. The Commission heard oral argument in open court on 4 June 2007.

The Court finds that the following facts are true:

1. Mr. Hamdan (hereinafter "the accused") was captured in Afghanistan in November of 2001 and thereafter came into the custody of the United States. The accused has been held by the United States, either in Afghanistan or in Guantanamo Bay, since that time.
2. On February 7, 2002 the President issued a Memorandum entitled "Humane Treatment of al Qaeda and Taliban Detainees" in which he concluded that "Taliban detainees are unlawful combatants and therefore do not qualify as Prisoners of War under Article 4" of the Geneva Conventions.
3. On 7 July 2004, the Deputy Secretary of Defense published an Order Establishing Combatant Status Review Tribunals (CSRT). This Order defined "enemy combatant" as "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."
4. The Order directed that a Tribunal be held for each detainee to determine whether he was an "enemy combatant" using that definition. The Tribunals were also directed to determine whether "the detainee is properly detained as an enemy combatant."
5. On 2 October, 2004, the accused appeared before a CSRT at Guantanamo Bay and participated in such a hearing. The Tribunal received evidence and determined that he was a part of or associated with Al-Qaeda forces, and was properly detained as an "enemy combatant." The CSRT was not charged with determining, and therefore did not determine that the accused is an "alien unlawful enemy combatant."
6. Charges under the MCA were referred against this accused on 10 May 2007, alleging that he is subject to the jurisdiction of this tribunal as an "alien unlawful enemy combatant".

7. The accused challenges the jurisdiction of the Court on the basis that the Government cannot show, nor has it determined in a competent tribunal, that the accused is subject to the jurisdiction of the Commission. He claims, therefore that he is entitled to the protections that are accorded to a Prisoner of War until such a determination is made.

SUMMARY OF THE LAW

1. On 17 October, 2006, the Military Commissions Act (MCA) became law. The MCA limits the jurisdiction of Military Commissions to offenses made punishable by that Act or the law of war when committed by “an alien unlawful enemy combatant”. 10 USC §948d(a). RMC 201(b)(1) is in accord.

2. The MCA defines “unlawful enemy combatant” to mean “(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 the United States.” 10 USC §948a(1).

3. The MCA makes a CSRT determination, whenever made, that a detainee is an “alien unlawful enemy combatant” dispositive of that issue for purposes of determining whether a detainee is subject to the jurisdiction of a Military Commission. Such a determination must be made by a CSRT or another competent tribunal established by the President or the Secretary of Defense. 10 USC §948d(c).

4. A Military commission is a court of limited jurisdiction. RMC 201(a)(1).

5. The burden is on the Government to show by a preponderance of the evidence that the accused is subject to the Jurisdiction of this Tribunal. RMC 905(c)(1);(2)(B).

DISCUSSION AND DECISION

The Government invites the Court to find that the 2004 determination that the accused is an “enemy combatant”, coupled with the President’s 2002 determination that members of al-Qaeda or the Taliban are unlawful combatants, amount to a finding that the accused is subject to the jurisdiction of this court. The Court declines to do so for the following reasons:

1. The 2004 CSRT determination that the accused is an “enemy combatant” was made for the purposes of determining whether or not he was properly detained, and not for the purpose of determining whether he was subject to trial by military commission.

2. The CSRT finding was made using a different standard than the one the MCA establishes for determining unlawful enemy combatant status. The definition of "enemy combatant" used by the 2004 CSRT is less exacting than the definition of "unlawful enemy combatant" prescribed in the MCA. The CSRT could have found a civilian not taking an active part in hostilities, but "part of" or "supporting" Taliban or al Qaeda forces engaged in hostilities to be an "enemy combatant". Yet the MCA limits this Court's jurisdiction to those who actually "engaged in hostilities or who . . . purposefully and materially supported hostilities." The CSRT did not apply this definition, and its finding therefore does not support the jurisdiction of this Tribunal.

3. The CSRT finding preceded the MCA by two years. The accused's participation in the CSRT may well have been much different had he realized its finding would be used to impose criminal jurisdiction upon him before a Military Commission.


4. The President's determination applied to members of al-Qaeda as a group, and did not represent an individualized determination that this accused supported or engaged in hostilities.

The MCA offers another route to a finding of jurisdiction: a finding by a CSRT "before, on, or after" the enactment of the MCA, that an accused is an alien unlawful enemy combatant. The October 2004 CSRT finding was before the enactment of the MCA, but it found only that the accused was an enemy combatant.

There may well be evidence in the Government's possession that could readily support a determination that the accused is subject to the jurisdiction of this Court. The Government may be able to easily demonstrate that jurisdiction by reopening the 2004 CSRT, or by organizing a different one, and directing it to clearly decide the accused's status. He is either entitled to the protections accorded to a Prisoner of War, or he is an alien unlawful enemy combatant subject to the jurisdiction of a Military Commission, or he may have some other status. The Government having failed to determine, by means of a competent tribunal, that the accused is an "unlawful enemy combatant" using the definition established by Congress, it has not shown, by a preponderance of the evidence, that the accused is subject to the jurisdiction of this Commission.

The Defense Motion to Dismiss all Charges and Specifications, for lack of jurisdiction, is GRANTED, without prejudice.

So Ordered this 4th day of June, 2007.


Keith J. Allred
Captain, JAGC, US Navy
Military Judge