

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

OMAR AHMED KHADR,

Petitioner,

v.

UNITED STATES and UNITED STATES
COURT OF MILITARY COMMISSION
REVIEW,

Respondents.

PETITION FOR REVIEW

CMCR Docket No. 07-001

D.C. Circuit Docket No. _____

Petition For Review

Omar Ahmed Khadr, a Canadian citizen currently detained at the United States detention facility at Guantánamo Bay, Cuba, hereby petitions this Court, pursuant to 10 U.S.C.

§ 950g(a)(2)(A), Rule 1205 of the Rules for Military Commissions, and Federal Rule of

Appellate Procedure 15(a), for review of the following decisions of the United States Court of

Military Commission Review (“CMCR”):

1. The CMCR’s decision, entered on September 24, 2007, reversing a military judge’s dismissal of all charges against Mr. Khadr for lack of jurisdiction under the Military Commissions Act of 2006 (“MCA”) (attached hereto as Exhibit A);
2. The CMCR’s decision, entered on September 24, 2007, denying Mr. Khadr’s motion to abate the CMCR proceedings due to legal defects in the constitution of the CMCR (attached hereto as Exhibit B); and
3. The CMCR’s decision, entered on September 19, 2007, denying Mr. Khadr’s motion to dismiss the government’s appeal to the CMCR because it was not timely filed and because the CMCR’s rules had not been properly promulgated (attached hereto as Exhibit C).

10 U.S.C. § 950g(a) provides this Court with “exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission,” so long as all appeals to the CMCR have

been exhausted, and the accused files a petition for review “not later than 20 days after the date on which” he receives a written notice of the final decision of the CMCR. 10 U.S.C. § 950g(a)(1)(A) & (2)(A). Similarly, Rule 1205 of the Rules for Military Commissions (hereinafter “RMC”) provides that “[t]he accused may petition for review of [a] decision of the [CMCR] if such petition is filed within 20 days from the time the accused was” notified of the CMCR’s decision. RMC 1205 (attached hereto as Exhibit D). All appeals to the CMCR have been exhausted, and this Petition is being filed within 20 days of the date of the earliest CMCR decision under review, September 19, 2007. Accordingly, this Court’s jurisdiction is properly invoked.

To Petitioner’s knowledge, this is the first time this Court has been called upon to review military commission and CMCR judgments under the MCA. Accordingly, for the Court’s convenience, petitioner submits the following history of the case, and a more extended statement of this Court’s jurisdiction.

Factual and Procedural History

Petitioner Omar Khadr was captured on the battlefield in Afghanistan in 2002 at the age of 15. Shortly thereafter, he was transferred to the U.S. facility at Guantánamo Bay, where he has remained detained ever since. On September 7, 2004, a three member Combatant Status Review Tribunal (“CSRT”) classified Mr. Khadr as an “enemy combatant.” In April 2007, the United States charged Mr. Khadr with “war crimes” and referred him to trial pursuant to the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948a *et seq.*). Mr. Khadr is one of only three persons to have been charged under the MCA, and one of only two currently facing trial before a military commission. Each “war crime” charge against Mr. Khadr specifies as its jurisdictional basis that Mr. Khadr is “a person

subject to trial by military commission as an alien *unlawful* enemy combatant,” specifically invoking the jurisdictional prerequisite set forth in the MCA. *See* June 2007 Order on Jurisdiction (attached hereto as Exhibit E) (emphasis added); *see also* 10 U.S.C. § 948d(a) (“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.”) (emphasis added).

On June 4, 2007, the military judge assigned to preside over Mr. Khadr’s military commission trial dismissed all charges against him without prejudice, on the ground that the jurisdictional prerequisite set forth in the MCA had not been met. The judge explained 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 the purposes of the MCA. The CSRT can find, for MCA purposes, that a person is a lawful enemy combatant or an unlawful enemy combatant. Second, once the CSRT finds that a person is an unlawful enemy combatant, the provisions of the MCA come into play.” *See* June 2007 Order on Jurisdiction (Ex. E). Because Mr. Khadr’s CSRT established only that he was an “enemy combatant”—not an “*unlawful* enemy combatant”—the judge held that the military commission over which he was presiding lacked jurisdiction to try Mr. Khadr under the MCA. He further ruled that the commission was not the proper authority under the MCA to make the “unlawful enemy combatant” determination, and therefore dismissed all charges against Mr. Khadr.

On July 4, 2007, the Government filed an appeal with the CMCR under Section 950d of the MCA. Shortly thereafter, Mr. Khadr filed motions challenging both the timeliness of the appeal and the constitution of the tribunal (chiefly, the Secretary of Defense’s authority to delegate judicial appointment power to his Deputy).

On September 19, 2007 and September 24, 2007, the CMCR issued rulings denying Mr. Khadr's motions. *See* CMCR Ruling on Motion to Dismiss (Ex. C); CMCR Ruling on Motion to Abate (Ex. B). Also on September 24, 2007, the CMCR issued its opinion addressing the Government's appeal, reversing in part the military judge's decision that the military commission lacked jurisdiction to try Mr. Khadr. The CMCR agreed that the determination of "lawful" or "unlawful" enemy combatant was a critical one, and it held that the military judge was correct to find that the CSRT's determination of "enemy combatant" status was insufficient to support military commission jurisdiction under the MCA. *See* CMCR Opinion of the Court and Action on Appeal by the United States at 8-9 (Ex. A). It further held, however, that the military judge himself was empowered under the MCA to receive evidence and assess Mr. Khadr's status as an "unlawful enemy combatant." *Id.* at 18.

Mr. Khadr now petitions this Court for review of that CMCR decision, insofar as it holds that the military judge possessed authority under the MCA to determine whether he is an alien unlawful enemy combatant for purposes of establishing jurisdiction. He also renews his objections to the constitution of the CMCR tribunal as expressed in his motion to dismiss the government's appeal and motion to abate the proceedings.

This Court's Jurisdiction Under the MCA

As noted above, this Court has exclusive jurisdiction under the MCA to "determine the validity of a final judgment rendered by a military commission." 10 U.S.C. §950g(a)(1)(A). The military judge's June 4, 2007 order dismissing all charges against Mr. Khadr for lack of jurisdiction is a "final judgment" rendered by a military commission. *Id.*; *see, e.g., Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the

judgment.”) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)); *Tootle v. Sec’y of the Navy*, 446 F.3d 167, 172 (D.C. Cir. 2006). And the prerequisites for jurisdiction under Section 950g—exhaustion of appeals with the CMCR and the filing of a timely petition for review—have both been met. *See id.* § 950g(1)(B) & (2)(A).

The Rules for Military Commissions and the Regulation for Trial by Military Commissions promulgated by the Office of the Secretary of Defense confirm this Court’s jurisdiction over Mr. Khadr’s appeal. Rule 908 specifies that “[a]fter the Court of Military Commissions Review has decided *any* appeal”—including an appeal, like the one at issue here, filed by the Government under Section 950d of the MCA—“the accused may petition for review by the United States Court of Appeals for the District of Columbia Circuit.” RMC 908(c)(3) (emphasis added) (attached hereto as Exhibit F). And, as noted earlier, Rule 1205 similarly provides that “[t]he accused may petition for review of the decision of the [CMCR] if such petition is filed within 20 days from the time the accused was in fact notified of the decision of the [CMCR].” RMC 1205 (Ex. D). Likewise, the Regulation for Trial by Military Commissions notes that under 10 U.S.C. § 950g(a), this Court has exclusive jurisdiction to determine the validity of final judgments rendered by military commissions. *See* Reg. 26-1; *see also* Reg. 25-9a (“[a] copy of each CMCR decision (opinion or order disposing of an appeal or petition) must be served” on the accused); Reg. 25-9e1 (service of CMCR decisions must be accompanied by a form for petitioning this Court and a postage paid envelope addressed to this Court) (regulations attached hereto as Exhibit G).¹

¹ Unlike appeals by the United States under 10 U.S.C. § 950d(d), which the MCA expressly leaves to “the discretion of the Court of Appeals,” review under § 950g is not discretionary. Even if review were discretionary, however, there would be little doubt that it should be granted here, given the centrally important questions this appeal raises about the proper interpretation of the MCA. Perhaps most significantly, this case raises the fundamental issue of whether a

The Rules and Regulation also make clear that the existence of ongoing proceedings before the military commission does not preclude review by this Court. *See* Reg. 25-10a (Ex. G) (“Further proceedings in CMCR cases need not be delayed, however, solely to permit an accused to petition USCADCC”); RMC 908(c)(3) (Ex. F) (“If the decision by the [CMCR] permits it, the military commission trial may proceed as to the affected charges and specifications pending further review by the United States Court of Appeals for the District of Columbia Circuit, unless either court orders the proceedings stayed.”).

WHEREFORE, Petitioner Omar Khadr respectfully petitions this Court for review of the aforementioned decisions of the U.S. Court of Military Commission Review.

military commission itself can determine that a detainee is an “alien unlawful enemy combatant” subject to military commission trial under the MCA, or whether this determination must be made by a CSRT. This question has wide-ranging practical implications, since not a single detainee at Guantanamo Bay has been held to be an “*unlawful* enemy combatant”—as opposed to an “enemy combatant”—under existing CSRT regulations. Resolution of this question will thus determine whether those detainees are subject, without more, to trial under the MCA. Further, as Petitioner argued to the CMCR, both international and U.S. law prohibit military commissions from themselves making an initial determination of unlawful enemy combatant status. Accordingly, if (as contemplated by the CMCR’s decision) trials proceed in which military commissions determine unlawful enemy combatant status for themselves, those trials will violate U.S. and international law. The question at issue in this appeal is thus central to the mechanics and validity of military commission trials. Review of that question is particularly appropriate here because Petitioner is one of only two people facing trial before a military commission—review in this case will thus permit this critical question to be resolved before other detainees are charged and tried under the MCA.

Dated: October 9, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 9th 2007, two true copies of this Petition for Review were mailed to:

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