



U.S. Department of Justice

National Security Division

October 19, 2007

VIA HAND DELIVERY

Mark Langer
Clerk of the Court
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: *Omar Ahmed Khadr v. United States*, No. 07-1405

Dear Mr. Langer:

Pursuant to D.C. Cir. R. 27, I enclose for filing in the above-captioned matter the original and four paper copies of Respondent's Motion to Dismiss Petition for Review for Lack of Jurisdiction.

I also note that this Court's docket incorrectly states that petitioner's appeal is from the Combatant Status Review Tribunal. The appeal is from a decision of the Court of Military Commission Review. Thank you.

Respectfully submitted,

JOHN F. DE PUE
Attorney, U.S. Department of Justice

Enclosures

cc: William C. Kuebler, LCDR, JAGC, USN

NOT YET SCHEDULED FOR ORAL ARGUMENT

**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.

No. 07-1405

CMCR Docket No. 07-001

**RESPONDENT'S MOTION TO DISMISS PETITION FOR REVIEW
FOR LACK OF JURISDICTION**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and D.C. Cir. R. 27(g), respondent the United States¹ hereby moves to dismiss for lack of subject matter jurisdiction the October 9, 2007 petition for review in the above-captioned matter. Congress authorized review by this Court only of "a final judgment rendered by a military commission," 10 U.S.C. § 950g(a)(1)(A). No such final judgment has been issued in this case. Thus, the petition should be dismissed.

¹ Although Khadr lists the United States Court of Military Commission Review as a respondent, that court is not a party but rather the tribunal whose decision Khadr seeks to appeal.

STATEMENT²

Petitioner Omar Ahmed Khadr was captured on the battlefield in Afghanistan in 2002. Khadr is currently being detained as an enemy combatant by the Department of Defense at the Guantanamo Bay Naval Base, Cuba.

On September 7, 2004, a three-member Combatant Status Review Tribunal (CSRT) determined that Khadr was properly classified as an “enemy combatant” and an individual who was “a member of, or affiliated with al Qaeda.” Pet. for Review Ex. A at 3.

In April 2007, the United States charged Khadr under the Military Commissions Act of 2006 (MCA), 10 U.S.C. § 948 et seq., with various offenses alleged to have been committed in or about June and July 2002. Pet. for Review Ex. A at 2, 17. The United States has alleged that Khadr received one-on-one “private al Qaeda basic training” in Afghanistan during June 2002, consisting of instruction in the use of rocket-propelled grenades, rifles, pistols, hand grenades, and various other explosives. Id. at 3. In July 2002, Khadr is also alleged to have participated in “land mine training,” which involved the conversion of landmines into improvised explosive

² A full discussion of the underlying facts and procedural history can be found in the opinion issued by the Court of Military Commission Review, which Khadr filed as an exhibit to the petition for review. This statement derives largely from that opinion and includes citations to relevant facts contained therein.

devices (IEDs) and their optimal placement as weapons to be deployed against U.S. military and coalition forces. Id. On or about July 27, 2002, at a compound near Abu Ykhiel, Afghanistan, Khadr was a member of a group of al Qaeda members that engaged U.S. military and coalition forces with small arms fire, killing two Afghan Militia Force members and throwing a hand grenade that killed Sergeant First Class Christopher Speer, U.S. Army. Id. Khadr, wounded in the engagement, was immediately treated on the scene by U.S. military medical personnel. He was thereafter taken into custody and ultimately transported to Guantanamo Bay. Id.

The United States has charged Khadr with murdering a U.S. soldier in violation of the law of war; attempting to murder U.S. military or coalition forces by making and planting IEDs in violation of the law of war; conspiring with Osama bin Laden, Ayman al Zawahiri, and other members of al Qaeda, an international terrorist organization, to attack civilians, destroy property, and commit murder, all in violation of the law of war; providing material support and resources to al Qaeda and in support of acts of terrorism; and spying. Id. at 2. Each charge and specification alleged against Khadr asserts the jurisdictional claim that he is “a person subject to trial by military commission as an alien unlawful enemy combatant.” Id. at 2-3.

On June 4, 2007, the military judge presiding over Khadr’s military commission trial dismissed all charges against him without prejudice. The military judge

determined, sua sponte, that the military commission lacked personal jurisdiction over Khadr because the United States had failed to determine properly Khadr's status as an "alien unlawful enemy combatant" at his CSRT, which the judge ruled was a prerequisite to the military commission's ability to exercise personal jurisdiction under the MCA. The military judge further ruled that "the military commission is not the proper authority, under the provisions of the M.C.A., to determine that Mr. Khadr is an unlawful enemy combatant in order to establish initial jurisdiction for this commission to try Mr. Khadr." Id. at 2.

The United States appealed to the Court of Military Commission Review (CMCR). While that court agreed with the military trial judge that the determination of the CSRT did not satisfy the jurisdictional requirements of the MCA, it held that the military judge had the authority and obligation under 10 U.S.C. § 948a(1)(A)(I) to hear evidence concerning, and ultimately to decide, whether jurisdiction over Khadr exists—that is, whether Khadr is an "unlawful enemy combatant." The CMCR thus reversed the military judge's ruling that he lacked the authority to so decide and remanded the case for the military judge to conduct proceedings necessary to determine the military commission's jurisdiction over Khadr.³ Id. at 25. The military judge has since scheduled a hearing for just that purpose to be held on November 8,

³ The CMCR subsequently denied petitioner's motion for reconsideration.

2007. After Khadr filed the instant petition for review, the military judge also denied a request by petitioner to stay those proceedings pending this Court's resolution of the petition.

ARGUMENT

The MCA provides that this Court “shall have exclusive jurisdiction to determine the validity of a *final judgment* rendered by a military commission (as approved by the convening authority).”⁴ 10 U.S.C. § 950g(a)(1)(A) (emphasis added). In addition, this Court “may not review the final judgment until all other appeals under this chapter have been waived or exhausted.” *Id.* § 950g(a)(1)(B). Beyond the MCA's jurisdictional provisions, “no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . relating to the prosecution, trial, or judgment of a military commission.” *Id.* § 950j(b).

“It is the burden of the party claiming subject matter jurisdiction to demonstrate that it exists.” Georgiades v. Martin-Trigona, 729 F.2d 831, 833 n.4 (D.C. Cir. 1984).

A statutory final decision requirement serves to limit the jurisdiction of this Court.

⁴ The convening authority in the military commission context is analogous to the convening authority for courts martial. Under the MCA, the convening authority is responsible for overseeing many aspects of the military commission process and for supervising the Office of Military Commissions. Among other things, the convening authority reviews and approves charges before they are brought, appoints military commission members, and, as relevant here, reviews and approves military commissions' findings and sentences. See 10 U.S.C. § 950b.

See, e.g., North Am. Catholic Educ. Programming Found. v. FCC, 437 F.3d 1206, 1209 (D.C. Cir. 2006) (stating that the “absence of finality is sufficient to preclude our jurisdiction” under the Communications Act of 1934). See also Shaw v. United States, 209 F.2d 811, 813 (D.C. Cir. 1954) (“This court has only those powers which Congress by statute has conferred.”).

Khadr has no statutory right to petition for review in this Court because no military commission has issued a “final judgment,” much less has such a final judgment been approved by the convening authority.⁵

There is no “final judgment” for this Court to review. No court has adjudicated the charges against Khadr; indeed, no court has yet conclusively determined whether the military commission has jurisdiction over Khadr. The CMCR has simply remanded the case to the military commission for further proceedings; that order is unquestionably not a final judgment. See, e.g., San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 632-33 (1981) (holding there is no “final judgment” under 28 U.S.C. § 1257 for purposes of appellate jurisdiction when the intermediate appellate court remanded for further proceedings). Cf. Lakes Pilots Ass’n, Inc. v. United States Coast Guard, 359 F.3d 624, 625 (D.C. Cir. 2004) (“A remand order

⁵ The MCA does permit the government to file an interlocutory appeal in this Court. 10 U.S.C. § 950d(d). The government has not done so in this case, however.

usually is not a final decision.”) (quoting NAACP v. United States Sugar Corp., 84 F.3d 1432, 1436 (D.C. Cir.1996)); Smith v. Nicholson, 451 F.3d 1344, 1347 (Fed. Cir. 2006) (“We have determined that a remand order . . . is not considered a final judgment and hence is usually not appealable.”), cert. denied, 127 S. Ct. 1147 (2007). Given that there is no final judgment in this case, the convening authority obviously has not reviewed and approved it, as required to confer appellate jurisdiction upon this Court. See 10 U.S.C. §§ 950g(a)(1)(A), 950b(a).

Seemingly recognizing that the CMCR’s remand order cannot reasonably be called a final judgment, Khadr argues (Pet. 4) that the final judgment that provides appellate jurisdiction here is the military judge’s June 4, 2007 order dismissing the charges against him – even though Khadr is expressly seeking this Court’s review of the CMCR’s orders, not the military judge’s decision.⁶ Khadr’s argument borders on the frivolous. The military judge’s June 4, 2007 ruling is not a final judgment; it was reversed by the CMCR and is no longer in force, and the military commission proceedings are still pending.⁷ Moreover, even assuming the military judge’s order

⁶ Khadr could not in any event seek review by this Court of the military judge’s decision, as Section 950g does not permit an appeal directly from a military commission ruling to this Court. 10 U.S.C. § 950g(a)(1)(B); see RMC 1205(a).

⁷ The pendency of petitioner’s military commission trial – and his recent unsuccessful request that the military judge stay proceedings pending the resolution of this attempt at obtaining review by this Court – further underscores the
(continued...)

is an appealable final judgment, it was a decision in Khadr's favor; his petition for review thus "run[s] afoul of the principle that prevailing parties lack standing to appeal." Sea-Land Service, Inc. v. Department of Transp., 137 F.3d 640, 647 (D.C. Cir. 1998); see also Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980) ("[a] party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it").

Finally, Khadr suggests (Pet. 5) that a final judgment is not required because Rule for Military Commissions (RMC) 908(c)(3), which provides that an accused may petition this Court for review after the CMCR has decided "any" appeal, authorizes his petition.⁸ Rule 908, however, speaks only to when an accused may bring an appeal, not to this Court's jurisdiction. In any event, the rule cannot supersede the requirements of 10 U.S.C. § 950g(a)(1)(A). The MCA does not charge the Secretary of Defense to interpret a statutory provision conferring jurisdiction on an Article III court. That matter may be addressed only by statute, and thus the clear terms of the

⁷(...continued)

inappropriateness of petitioner's invocation of this Court's jurisdiction at this time. If a true "final" judgment existed, petitioner would not have to ask the military judge to stay proceedings while he seeks relief in this Court. Moreover, the military judge may still determine that it lacks jurisdiction over Khadr under the terms of the CMCR's remand, a decision that would render this appeal moot.

⁸ Rule 908(c)(3) states, in relevant part, that "[a]fter the Court of Military Commission Review has decided any appeal, the accused may petition for review by the United States Court of Appeals for the District of Columbia Circuit"

MCA must control here. See, e.g., Murphy Exploration & Prod. Co. v. U.S. Dept. of the Interior, 252 F.3d 473, 478 (D.C. Cir. 2001) (“Chevron [U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984)] does not apply to statutes that . . . confer jurisdiction on the federal courts. It is well established that interpreting statutes granting jurisdiction to Article III courts is exclusively the province of the courts.”) (internal citations and alteration omitted). See also Murphy v. IRS, 493 F.3d 170, 176 n.* (D.C. Cir. 2007) (“statute clearly controls” where it conflicts with a regulation). Thus, RMC 908 does not and cannot obviate the need for a “final judgment,” which is a prerequisite for this Court’s jurisdiction under the MCA.

Nor does the CMCR’s remand order fall within the exception to the final judgment rule under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). See Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (to satisfy the limited collateral order exception to the final judgment rule, an order must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment). The scope of the collateral order doctrine is particularly narrow in the context of criminal trials, where “finality is normally defined by the imposition of the sentence.” Flynt v. Ohio, 451 U.S. 619, 620 (1981); see also id. (dismissing an appeal because “there has been no finding of guilt and no sentence imposed”). As the

Supreme Court has recognized, “[t]he rule of finality has particular force in criminal prosecutions because encouragement of delay is fatal to the vindication of the criminal law.” United States v. MacDonald, 435 U.S. 850, 853-54 (1978); see also DiBella v. United States, 369 U.S. 121, 126 (1962) (“[T]he delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law.”); United States v. Brizendine, 659 F.2d 215, 218 (D.C. Cir. 1981) (same).

The CMCR’s decision that the military judge has the obligation and authority to determine Khadr’s combatant status does not conclusively determine the question of the military commission’s jurisdiction over Khadr, let alone does it determine guilt or impose a sentence. In any event, the third necessary condition to the collateral order doctrine is not satisfied since a decision that the military commission has jurisdiction over Khadr is fully reviewable upon appeal from any subsequent final judgment against him. See Van Cauwenberghe v. Biard, 486 U.S. 517, 526-27 (1988) (denial of motion to dismiss for lack of personal jurisdiction not immediately appealable under collateral order doctrine); Rux v. Republic of Sudan, 461 F.3d 461, 474-75 (4th Cir. 2006) (same), cert. denied, 127 S. Ct. 1325 (2007).

In sum, no court in this case has issued a final judgment that has been approved by the convening authority. Thus, by the plain terms of 10 U.S.C. § 950g, this Court

lacks jurisdiction over this petition for review.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of jurisdiction.

Respectfully submitted,

KENNETH L. WAINSTEIN
Assistant Attorney General
National Security Division
U.S. Department of Justice

VIJAY SHANKER
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice


JOHN F. DE PUE

Attorney, Counterterrorism Section
National Security Division
U.S. Department of Justice
950 Pennsylvania Ave., NW, Room 1527
Washington, DC 20530
TEL 202.616.0725

October 19, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October 2007, I served the foregoing motion by causing a copy to be sent to the following counsel by Federal Express:

William C. Kuebler, LCDR, JAGC, USN
Rebecca Snyder, Esq.
Office of Military Commissions
Office of the Chief Defense Counsel
1099 14th Street, NW, Suite 2000 E
Washington, DC 20005


John F. De Pue