

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

-----x  
:  
OMAR AHMED KHADR, :  
:  
Petitioner, :  
:  
v. : No. 07-1405  
:  
UNITED STATES OF AMERICA, ET AL: :  
:  
Respondents. :  
:  
-----x

Tuesday, April 15, 2008  
Washington, D.C.

The above-entitled matter came on for oral argument,  
pursuant to notice.

BEFORE:

CHIEF JUDGE SENTELLE AND CIRCUIT JUDGES ROGERS  
AND BROWN

APPEARANCES:

ON BEHALF OF RESPONDENTS:

JOHN F. DePUE, ESQ.

ON BEHALF OF PETITIONER:

KARL R. THOMPSON, ESQ.

*Deposition Services, Inc.*  
6245 Executive Boulevard  
Rockville, MD 20852  
Tel: (301) 881-3344 Fax: (301) 881-3338  
info@DepositionServices.com www.DepositionServices.com



COPY

C O N T E N T S

ORAL ARGUMENT:

Oral Argument of John F. DePue, Esq.  
On Behalf of the Respondents 3

Oral Argument of Karl R. Thompson  
On Behalf of the Petitioner 9

REBUTTAL ARGUMENT:

Rebuttal Argument of John F. DePue, Esq.  
On Behalf of the Respondents 24

P R O C E E D I N G S

1  
2 THE CLERK: Case number 07-1405, Omar Khadr,  
3 Petition, versus United States of America, et al. Mr. DePue  
4 for the respondents, Mr. Thompson for the petitioner.

5 ORAL ARGUMENT OF JOHN F. DePUE, ESQ.

6 ON BEHALF OF THE RESPONDENTS

7 MR. DePUE: Good morning, Your Honor, may it please the  
8 Court. My name is John DePue. I'm an attorney with the National  
9 Security Division of the Department of Justice.

10 This case presents the question whether considered  
11 individually or collectively the successive orders of a military  
12 judge of a military commission dismissing a case for lack of in  
13 personam jurisdiction, and the ensuing decision of the U.S. Court  
14 of Appeals for military commissions reversing that decision and  
15 remanding the case back to the military judge for fact finding  
16 is an appealable order under the military commissions act.

17 As the Supreme Court explained long ago in Abney versus  
18 United States, in a criminal case the right to prosecute an  
19 appeal is purely a creature of statute. Thus the defendant must  
20 be able to bring himself within the terms of that statute in  
21 order to seek redress in an appellate court.

22 The statutes that the defendant relies upon in this  
23 case neither afford him that right nor vested this Court with  
24 jurisdiction over this particular interlocutory matter. In this  
25 respect it's our submission that three separate statutes in the

1 military commissions act are germane to this Court's  
2 jurisdiction.

3 First and most importantly, under section 950G  
4 subparagraph A(1)a this Court has the exclusive jurisdiction to  
5 review the final judgments of a military commission as reviewed  
6 by the convening authority.

7 THE COURT: What's the wording exactly of the section?

8 MR. DePUE: Except as provided in subparagraph B United  
9 States Court of Appeals for the District of Columbia Circuit  
10 shall have exclusive jurisdiction to consider the vitality of a  
11 final judgment rendered by a military commission (as approved by  
12 the convening authority under this chapter).

13 THE COURT: Thank you. Okay.

14 MR. DePUE: That jurisdiction, however, is limited by  
15 the ensuing subparagraph that requires the defendant to exhaust  
16 all prior appeals or waive them. Finally, under section 950G  
17 subparagraph B, except as provided elsewhere in the statute, that  
18 is section 950G; and notwithstanding any other provision of law,  
19 no Court, judge or justice may review or pass on any claim or  
20 cause of action relating to a prosecution, trial or judgment or  
21 conviction in a case involving any military commission  
22 proceeding.

23 In applying these statutes to this particular case, I  
24 must confess I am somewhat at a loss because the defendant has  
25 taken three different positions throughout this litigation as to

1 what order he thinks is appealable and is subject to this Court's  
2 appellate jurisdiction under this regime. So out of an abundance  
3 of caution I am going to address all three very briefly.

4 First, when last October 9th, the defendant filed a  
5 petition for review, he identified as the order to be reviewed  
6 the decision of the Court, the Appellate Court. That decision  
7 did three things.

8 First, it reversed the decision of the military judge  
9 saying there was no, or some jurisdiction over the defendant.  
10 Second, it established a regime for determining whether in  
11 personam jurisdiction exists, that being whether the  
12 defendant is in fact an unlawful alien enemy combatant with  
13 statutory language that vests a military court commission with  
14 jurisdiction.

15 And finally, it remanded that case back to the military  
16 judge for fact finding, to determine whether in fact the  
17 defendant was an unlawful alien enemy combatant.

18 Now, as the defendant has subsequently conceded at page  
19 seven of his response to our brief, this wasn't the final  
20 judgment of a military Commission at all, that being the trial  
21 body, much less the final judgment as reviewed by the convening  
22 authority, language that I will address presently.

23 Indeed, there is nothing final about this decision.  
24 It's an interlocutory order that remands the case for fact  
25 finding, as I said earlier. Now, in an apparent attempt to

1 circumvent these threshold issues, the defendant has cited  
2 section 908 of the manual for military commissions, an executive  
3 order drafted by the secretary of defense that in somewhat  
4 broader terms explains how a defendant is to assert his appellate  
5 right after any decision of the Court of Military Commission  
6 Review.

7           The problem with this is that the last time I checked  
8 with the constitution, Article 3, section 1, that's the Congress  
9 with the exclusive authority to determine the jurisdiction of  
10 this Court, and not the Secretary of Defense. Therefore --

11           THE COURT: Well, I understood the argument to be that  
12 simply the regulations are some indication of the Department of  
13 Defense's interpretation of the statute. I didn't think it was  
14 going any further than that.

15           MR. DePUE: Well, of course, I can't expand the very  
16 narrow precise language of the statute. It's got to be  
17 harmonized with that language. The language of the statute is  
18 very explicit. It talks about final judgments as approved by the  
19 convening authority.

20           Now, when we pointed out some of these problems in our  
21 motion to dismiss, the defendant filed another brief and he said,  
22 well, it wasn't the decision of the Court of Military Commission  
23 Review, we want at all, rather the now reversed decision of the  
24 military judge.

25           THE COURT: Doesn't that have to be the one that's

1 appealed under that fairly unusual wording of the statute?

2 MR. DePUE: Yes, it does, Your Honor. That's our  
3 submission.

4 THE COURT: Yes.

5 MR. DePUE: And it's a very confined and limited scope  
6 of decisions by that judge that get appealed, notwithstanding the  
7 reversal problem which I'll address momentarily.

8 Now, military jurisprudence, the convening authority  
9 is an unusual animal, one you don't run into in practice before  
10 the Article 3 courts. He's the officer that determines in the  
11 first instance whether a case will be referred to trial and tried  
12 by a court marshal.

13 Second, after the court marshal proceeding is over,  
14 it's the military -- it's the convening authority who, with the  
15 assistance of his staff, Judge Advocate, who writes a post-trial  
16 review, determines whether the findings are correct in law and  
17 fact, and approves the sentenced. Now, that's exactly the same  
18 regime that's been applied under the military commissions act.

19

20 So when the military commissions act in this section  
21 talks about a final judgment as approved by the convening  
22 authority, they mean exactly the same thing as we generally  
23 understand a final judgment to mean in the criminal contest, a  
24 sentence.

25 Of course, there was no sentence issued in this

1 particular case. Indeed, the order here is, has now been  
2 reversed and vacated. So it has no continuing validity  
3 whatsoever.

4 Defendants third tach here is, well, it doesn't fit  
5 with any of these things. It falls within the collateral order  
6 doctrine. Unfortunately for the defendant, the collateral order  
7 doctrine as the Supreme Court explained at Abney, is based on the  
8 specific wording of 28 USC section 1291, that being a final  
9 decision issued by a District Judge.

10 The Abney Court explained, however, that the phrase  
11 final decision was broader and not co-terminus with the term  
12 final judgment, the language used in the military commissions  
13 act. So we don't have the latitude here that we do under 1291  
14 to engraft upon the MCA a collateral order doctrine.

15 There are other reasons why you can't apply the  
16 collateral order doctrine here, even if that were not the case.  
17 First, there is nothing final about this order, as I have said  
18 before. And second, it's susceptible to remedy in connection  
19 with the final judgment.

20 It's not like, it's not like a question raising a  
21 double jeopardy claim, speech and debate cause claim, or a ad  
22 barram title and claim, the three categories of cases that in the  
23 criminal context are viewed as being susceptible to review under  
24 the collateral order doctrine.

25 The Courts have repeatedly rejected claims that in



1 personam jurisdiction is subject to similar review. I will  
2 reserve the remainder of my time for rebuttal. Thank you, Your  
3 Honors.

4 THE COURT: We'll hear from -- it's rather hard to put  
5 the terminology on it this morning as to who is the  
6 petitioner/respondent. I guess the respondent for the purposes  
7 of this -- the other party. We'll hear from you, counsel.

8 ORAL ARGUMENT OF KARL R. THOMPSON, ESQ.

9 ON BEHALF OF THE PETITIONER

10 MR. THOMPSON: Thank you very much, Your Honor. My  
11 name is Karl Thompson. I am representing petitioner, but we're  
12 defending against the government's motion to dismiss.

13 Congress passed the MCA in the wake of the Supreme  
14 Court's decision in *Hendon*, which emphasized the importance of  
15 putting military commission proceedings on a sound legal footing  
16 before they take place, and recognized the compelling interest  
17 in knowing in advance whether a detainee may be tried by a  
18 military commission that is arguably without any basis in law.

19 If the government's reading of this statute is correct,  
20 a fundamental jurisdictional question whether the military  
21 commission can determine for itself whether a detainee is an  
22 unlawful enemy combatant subject to its jurisdiction, or if that  
23 determination has to be made by an independent tribunal, that  
24 question will not be heard until after a military commission  
25 trial takes place. That doesn't make sense --

1 THE COURT: That brings us to where the issue is, all  
2 right, counsel. Try to remember that you are here only on the  
3 motion and not on the merits.

4 MR. THOMPSON: That's correct, Your Honor.

5 THE COURT: All right. Go ahead.

6 MR. THOMPSON: Okay. Under section 950G of the MCA  
7 there are two prerequisites to this Court's jurisdiction that  
8 apply in every case, military commissions must issue a final  
9 judgment and all other appeals under the MCA must be waived or  
10 exhausted. And there is a third prerequisite, approval by the  
11 convening authority that applies when the judgment involves  
12 findings and a sentence.

13 The first two prerequisites for jurisdiction have been  
14 met here. The military commission issued a final --

15 THE COURT: Really? Is there a final judgment extant  
16 at this time?

17 MR. THOMPSON: We believe --

18 THE COURT: Grant you there was a judgment entered, but  
19 wasn't it vacated?

20 MR. THOMPSON: The CMCR, the Court of Military  
21 Commission Review revoked the final judgment, reversed the  
22 judgment of the military commission. However, for example, in  
23 the federal court system, a District Court enters a judgment  
24 dismissing charges against a defendant, the Court of Appeals  
25 reverses, and then the Supreme Court reverses the Court of

1 Appeals, the District Court's --

2 THE COURT: Yes, but there the Supreme Court generally  
3 is acting under a writ of certiorari. Your procedural status is  
4 not, not only are not the same, it is not even parallel.

5 MR. THOMPSON: We argue that it's analogous in that if  
6 this Court asserts jurisdiction now, that final judgment of the  
7 military commission can, as it were, be reactivated. So it --

8 THE COURT: That may have the problem for you right  
9 there in that sentence. We don't assert jurisdiction. The  
10 Supreme Court does. They have the right to exercise certiorari  
11 and call up a case to them. We have only those jurisdictions  
12 that are given us by statute and this one does not unambiguously  
13 give us that jurisdiction where there is not extant a final  
14 judgment.

15

16 MR. THOMPSON: That reading of final judgment,  
17 respectfully, is state in what the government proposes, is  
18 essentially a way of saying that there is an implicit  
19 requirements that the CMCR's decision be final. That is, if the  
20 CMCR's reversal of the military commission can destroy finality,  
21 that means that the CMCR's decision has to be final. It has to  
22 affirm the military commission's dismissal rather than reversing  
23 it.

24 But there is no CMCR finality requirement in the  
25 statute. And if you look at section 950GD which governs Supreme

1 Court review, you'll see that it expressly confers Supreme Court  
2 jurisdiction only over a final judgment of the Court of Appeals.  
3 And it cites the statute that governs Supreme Court review of  
4 State Court, judgments from State Courts rather than Federal  
5 Courts.

6           So it expressly states that there is this finality  
7 requirement. There is no such requirement for the CMCR. So the  
8 real question is, what did Congress mean by final judgment here?  
9 Did it mean final judgment as opposed to interlocutory judgment  
10 as is covered in 950D, or did it mean to impose this oblique  
11 indirect requirement that the CMCR's decision be final? And we  
12 would submit that's the former.

13           THE COURT: It would seem to mean that the decision of  
14 the commission has to be final, as approved by the intervening  
15 authority. Is that decision final when it has been vacated, at  
16 least in part, by the CMCR?

17           MR. THOMPSON: I believe the best construction of the  
18 statute is that for purposes of what this statutory language  
19 means, yes, it is final. There is no dispute, I don't take the  
20 government to dispute, and as Your Honor cited, it was clearly  
21 final at the time it was issued.

22           So, does language in the statute intend to say final  
23 so long as it hasn't been reversed by the CMCR or does it mean  
24 final as opposed to --

25           THE COURT: Well, it does state that second clause that

1 all other appeals having been waived or exhausted.

2 MR. THOMPSON: Correct, Your Honor.

3 THE COURT: Arguing that posture, where you still have  
4 a remand and presumably a second round of appeals if you lose  
5 there, I mean, you could win on remand.

6 MR. THOMPSON: Just to clarify, the issue that was  
7 before -- on which the military judge dismissed was not as my  
8 colleague said, whether or not petitioner is an unlawful enemy  
9 combatant, it's which tribunal, which body has the authority to  
10 make that determination. So that's not an issue that we think  
11 really survives final judgment.

12 The language, though, that Your Honor is referring to,  
13 provides that other appeals under this chapter have been waived  
14 or exhausted. And we take that as a reference to appeals under  
15 the CMCR which have been exhausted because the government took  
16 that appeal.

17 And with respect to the language requiring approval by  
18 the convening authority --

19 THE COURT: Won't there be a potential second round of  
20 appeal at the time that goes back to the MC? I realize you are  
21 not planning on being back before the CSRT but --

22 MR. THOMPSON: Your Honor --

23 THE COURT: If you ever get through the commission the  
24 second time, can't one of you appeal again?

25 MR. THOMPSON: Yes, Your Honor, we could appeal,

1 and --

2 THE COURT: Which ever one of you loses.

3 MR. THOMPSON: -- I draw a collateral argument there.

4 There are reasons why we thing that the question, the threshold  
5 jurisdictional question, who has the authority to make this  
6 determination would not survive in tact for that post-trial.

7 THE COURT: That may be getting us where we need to go.

8 MR. THOMPSON: Okay.

9 THE COURT: Why is that? We're jumping to the ground  
10 of your argument in the collateral order.

11 MR. THOMPSON: The collateral order doctrine, as you  
12 know, there are three requirements, the order that's on review  
13 has to conclusively determine the disputed question; the question  
14 has to be separate from the merits of the action; and then it has  
15 to be effectively unreviewable.

16 THE COURT: That's the one we are coming to is the  
17 third.

18 MR. THOMPSON: Okay. And there are at least two  
19 reasons why this question is effectively unreviewable on appeal.  
20 The first is, this Court itself recognized in Hondon in the  
21 military commission context setting aside a judgment after trial  
22 and conviction insufficiently redresses the defendant's right not  
23 to be tried by a tribunal that has no jurisdiction.

24 So this is unlike a civilian District Court context  
25 where the interest in a personal jurisdiction challenge is being

1 subject to a judgment by a Court that has no jurisdiction.

2 Both this Court and the Supreme Court in Hondon and the  
3 Supreme Court in Queren recognize that because military tribunals  
4 have very limited jurisdiction over only a specific status of the  
5 person, the injury in being subjected to trial before a body that  
6 doesn't have jurisdiction cannot be sufficiently redressed post-  
7 trial. There is also a public harm that would, that can't be  
8 undone after the fact.

9 The Supreme Court has recognized that when there is a  
10 public interest in avoiding a trial altogether, that that's an  
11 interest that satisfies the collateral order doctrine. Here if  
12 this Court would wait --

13 THE COURT: The doctrine is a very limited one, and  
14 laying aside the question of public interest for the moment,  
15 what's the closest analogy you have to a case where it's been  
16 considered effectively unreviewable on circumstances paralleling  
17 yours.

18 MR. THOMPSON: Well, let me just point to the core  
19 principal recognized by the Supreme Court that statutory finality  
20 requirements should be construed so as to preserve fundamental  
21 issues for appeal that will not be preserved on appeal. So that  
22 means --

23 THE COURT: That gets us to where we are, but we've  
24 already gotten to where we are. What is the closest case you  
25 have that says that collateral order is available in a

1 circumstance like yours?

2 MR. THOMPSON: We don't have a direct parallel. I can  
3 refer specifically to the practice under the court marshal which  
4 I think was the model for the statute, where if a court marshal  
5 dismissed charges against a defendant and they appeal to the  
6 intermediate level Appellate Court, the Court of Criminal  
7 Appeals, then, and the government prevails at that level, then  
8 the defendant has a right to take an immediate appeal to the  
9 Court of Appeals for the armed forces.

10 THE COURT: But is that a statutory right or is he  
11 invoking a doctrine of collateral order?

12 MR. THOMPSON: That one is a statutory right. The  
13 collateral order doctrine, as we know, is a general principal  
14 that can apply --

15 THE COURT: So you can throw aside that one. That's  
16 not analogous at all. That's a statutory right. You have, you  
17 are looking here for a collateral review.

18 MR. THOMPSON: Correct.

19 THE COURT: And that's not parallel where you have a  
20 statutory right.

21 MR. THOMPSON: The collateral order doctrine is an  
22 interpretation of statutory finality requirements. And we would,  
23 we would argue that that provides a basis for interpreting a  
24 finality requirement in this statute broadly in order to permit  
25 reviewing this in this situation.



1 THE COURT: Well, we don't review finality broadly.  
2 We review that exception narrowly. And the Supreme Court says  
3 that interlocutory review on a collateral order basis is to be  
4 narrowly construed. And I'm looking for, I'm looking for a case  
5 that's something like this where there has been a collateral  
6 review granted.

7 MR. THOMPSON: I don't have a direct analog. And I  
8 think part of the reason is that it is an unusual situation where  
9 you do not have an Article 3 Court hearing a criminal trial in  
10 the first place. You have a military commission and a military  
11 tribunal. And that raises the kinds of special problems that the  
12 Court talked about in Hondon and to an extent in Queron. And  
13 again, the MCA was enacted directly in the wake of Hondon which  
14 made it very clear that it is important to get all of the  
15 procedures in place before these commission trials take place.

16  
17 If the Court had reversed them afterwards and said that  
18 the military commission itself did not have authority to make the  
19 unlawful enemy combatant determination, every single trial that  
20 had gone forward would have to be undone and redone, and the  
21 public's confidence in the whole process can be undone.

22 THE COURT: Is there any reason to believe there is a  
23 large number of cases in which the military commission made that  
24 determination as opposed to the CSRT making the determination and  
25 then the trial proceeding? I don't know the answer to that

1 question.

2 MR. THOMPSON: Your Honor, the CSRT proceedings as they  
3 are convened simply determine that detainees were enemy  
4 combatants and didn't take the additional step of determining  
5 that they were unlawful enemy combatants.

6 So what the military judge determined in this case was  
7 that that CSRT determination was insufficient to provide a  
8 jurisdictional basis for a military commission trial. So the  
9 question before us now is whether the military judgment --

10 THE COURT: Yes, I understand that.

11 MR. THOMPSON: Okay.

12 THE COURT: But is that the norm, is that going to be  
13 the same question in lots of cases, or were there other cases in  
14 which the CSRT did make the determination of unlawful enemy  
15 combatant status?

16 MR. THOMPSON: My understanding --

17 THE COURT: You are parading a horrible here, that all  
18 of these other cases are going to have to be reviewed. I don't  
19 know whether that's true or not. And this is not a got you  
20 question. This is informational.

21 MR. THOMPSON: I understand. My understanding is that  
22 the CSRT's did not ever make the unlawful enemy combatant  
23 determination partly because the definition of unlawful enemy  
24 combatant wasn't promulgated until after most of the CSRT  
25 proceedings had taken place, and that the central language

1 convening the CSRT's, I believe, uses the phrase enemy combatant,  
2 rather than unlawful enemy combatant. So this is a core  
3 jurisdiction.

4 Let me just point out that the government read the  
5 statute in its rules in exactly the same way as we are proposing  
6 to read it, as permitting an interlocutory appeal in exactly the  
7 situation we're in, which is the same thing that happens under  
8 the court marshal procedures which are the model for the MCA.

9 And the government's rules, with all respect, they do  
10 not simply set forth the prerequisites for appeal. They clearly  
11 state that when the CMCI decides any appeal, that the petitioner,  
12 if it is adverse to the accused, that the accused can take an  
13 immediate appeal.

14 THE COURT: So is your position that this language  
15 approved by the convening authority then doesn't apply here  
16 because it's a collateral, you are under the collateral order  
17 doctrine, and so you don't have to --

18 MR. THOMPSON: Well, Your Honor, even under the statute  
19 we think, we think that it doesn't apply because we think that  
20 that phrase has to be read in light of the language of the  
21 statute as a whole. And if you look at section 950B, which is  
22 the section that gives power to the convening authority to  
23 approve and modify sentences, that language, that provision  
24 consistently uses the phrase findings in the sentence, findings  
25 in the sentence, and never uses the phrase final judgment.

1           If you turn to 950G, this Court's jurisdictional  
2 provision, it uses the phrase final judgment. So we need, in  
3 light of language as a whole, the convening authority's approval  
4 or decision to commute a sentence is only implicated in  
5 situations where there are findings in the sentence. And there  
6 weren't findings in the sentence in this case.

7           The function of the language in the context of this  
8 Court's jurisdictional provision is simply to clarify what it is  
9 that this Court determines the validity of. So if the military  
10 commission finds a detainee guilty on a particular charge, and  
11 the convening authority commutes it, the Court would determine  
12 the validity of that lesser included charge.

13           THE COURT: Could that not be read, counsel, or  
14 reasoned that that is precisely why you do not have a final  
15 judgment for review here, because it has not been through the  
16 convening authority?

17           MR. THOMPSON: Again, we think that if you look at the  
18 statute as a whole, 950B does not give the convening authority  
19 the power to modify or approve every final judgment. It only  
20 refers, consistently, never refers to the final judgments, and  
21 it only refers to findings in the sentence.

22           THE COURT: And so we should not be reviewing this, can  
23 it not be reasoned, from 950B, taken in conjunction with 950G,  
24 that we should not be reviewing it until there are findings in  
25 a sentence.

1 MR. THOMPSON: Well, Your Honor --

2 THE COURT: Finality, in other words.

3 MR. THOMPSON: -- 950G does not use the phrase findings  
4 in a sentence in a jurisdiction provision. The --

5 THE COURT: No, but it uses the phrase, as approved by  
6 the convening authority.

7 MR. THOMPSON: That it does use.

8 THE COURT: And if we look back to 950B, the convening  
9 authority issues its approval or not, there has to be a report,  
10 at least, noticed in the convening authority, findings in the  
11 sentence. That is sub-A 950B.

12 MR. THOMPSON: Correct.

13 THE COURT: So under sub-A of 950B, should we not think  
14 Congress was contemplating a commission order that had in it the  
15 findings and sentence, everything you could possibly have in it  
16 before we would be getting it on final review?

17 MR. THOMPSON: As 950B demonstrates, Congress was  
18 capable of using the phrase findings and sentence when it wanted  
19 to. And it could very easily have written this provisions with  
20 findings and sentence.

21 THE COURT: It could have, or it could have used  
22 incorporation by reference. Congress is capable of that, too.  
23 If you don't think so, go back and do your taxes.

24 MR. THOMPSON: Yes, Your Honor.

25 THE COURT: This is April 15.

1 MR. THOMPSON: I've luckily filed them.

2 THE COURT: Congress, it says in the G section, as  
3 approved by the convening authority. Taking that in light of the  
4 B section, the convening authority approves when there has been  
5 findings and sentence.

6 MR. THOMPSON: Well, again, the wording is different.  
7 We don't see any direct indication that the parenthetical phrase,  
8 which is akin to saying, as modified on rehearing, and has the  
9 function I described earlier, means to undo and change the  
10 definition of final judgment, which is a different phrase that's  
11 used.

12 Further, we would say that the --

13 THE COURT: What would be the office of that  
14 parenthetical in your construction, counsel?

15 MR. THOMPSON: To clarify to this Court, so for  
16 example, if the military commission found a detainee guilty on  
17 a particular charge, the convening authority, it doesn't just  
18 have authority to approve a sentence. It can also modify it in  
19 whole or in part.

20 So let's say that we have a finding of guilt on a  
21 particular charge, the convening authority then knocks that down  
22 to a finding of guilt on a lesser included charge. That would  
23 clarify to this Court in this Court determining the validity of  
24 that military commission judgment whether it was to determine the  
25 validity of the original military commission judgment or the one

1 on the lesser included charge. And it would say, do it on the  
2 lesser included charge.

3 THE COURT: Yes. We have kept you way past the end of  
4 your allotted time, so unless my colleagues have further  
5 questions, I'm going to finally subside and we'll hear again from  
6 the government. Thank you, counsel.

7 MR. THOMPSON: Thank you, Your Honor.

8 THE COURT: How much time does he have left?

9 THE CLERK: The government has one minute remaining.

10 MR. DePUE: I'll be very brief.

11 THE COURT: We'll round you up to two minutes, counsel.

12 REBUTTAL ARGUMENT OF JOHN F. DePUE, ESQ.

13 ON BEHALF OF THE RESPONDENTS

14 MR. DePUE: Thank you, Your Honor. I'll be very brief.

15 Having been at one time in an earlier life the Chief Judge of the  
16 U.S. Army Court of Criminal Appeals, I know a little bit about  
17 that system. And it's entirely different from the system that's  
18 involved here.

19 The defendant can draw no benefit from the distinctive  
20 language of the uniform code of military justice relating to a  
21 review to assist him. With respect to cases going from the  
22 Intermediate Court, that is the Service Court of Criminal  
23 Appeals, to the Court of Appeals for the Armed Forces, that's the  
24 Court that sits right across the street, the provision provides  
25 as follows --

1 THE COURT: They sit in our old building.

2 MR. DePUE: Pardon me, Your Honor?

3 THE COURT: They sit in our old building. Go ahead.

4 MR. DePUE: Yes, that is exactly right. It provides  
5 as follows. The accused my petition the Court of Appeals for the  
6 Armed Forces for review of a decision on the Court of Criminal  
7 Appeals within 60 days.

8 Well, the language, the jurisdiction vested language  
9 here doesn't speak of decision of the Intermediate Appellate  
10 Court. It talks about the final judgment of the military  
11 commission as approved by the convening authority.

12 Now, the defendant would love to read that language out  
13 of the statute or read it to mean when it's appropriate to  
14 review, or something like that. But just to paraphrase Rosella  
15 versus United States, that's not the way the statute was written.  
16 And it, that provision tells us exactly what Congress was  
17 thinking when it used the phrase, final judgment, because what  
18 the convening authority approves, just as it does under the  
19 Uniform Code of Military Justice, is sentences.

20 Indeed, the language of final judgment is used there  
21 in exactly the same context as it is with respect to the Article  
22 3 Courts and is recognized in the Supreme Court's jurisprudence  
23 on the collateral order doctrine.

24 THE COURT: Thank you, counsel. Seeing no questions,  
25 the case is submitted.



- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25

(Recess.)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

DIGITALLY SIGNED CERTIFICATE

DEPOSITION SERVICES, INC., hereby certifies that the foregoing is a correct transcription of the electronic sound recording of the proceedings before the U.S. Court of Appeals in the matter of:

CASE NO. 07-1405

OMAR KHADR

V.

UNITED STATES OF AMERICA, ET AL.



---

Teresa S. Hinds, Transcriber April 17, 2008