

MILITARY COMMISSION

UNITED STATES OF AMERICA

v.

**IHRAHM AHMED MOHMOUD
al QOSI**

**RULING: D-023 DEFENSE MOTION
FOR ARTICLE 5 STATUS
DETERMINATION, OR,
ALTERNATIVELY, DISMISSAL FOR
LACK OF PERSONAL JURISDICTION**

Dated: 3 December 2009

On 19 December 2008, the Defense filed a motion requesting the Commission order an Article 5 status determination, or, alternatively, dismiss the charges for lack of jurisdiction. On 9 January 2009, the Government filed a response to the motion. On 14 January 2009, the Defense filed a reply to the Government's response and, on 24 November 2009, the Defense filed an addendum to their original motion. Essentially, the Defense now asserts that the Commission lacks personal jurisdiction over the Accused under the Military Commissions Act (MCA) of 2009 as it has not yet been determined that the Accused is an alien unprivileged enemy belligerent. The Government opposed the original motion arguing, in part, that the military judge may determine the Accused's status at trial. No written response was provided by the Government as to the Defense amended motion. All documents submitted to the Commission, as well as arguments presented by both sides, were considered in making the following finding.

FACTS

1. On 8 February 2008, the Convening Authority referred the charges and specifications against the Accused to trial by military commission, alleging he was subject to trial by military commission as an alien unlawful enemy combatant under the Military Commission Act (MCA) of 2006.
2. On 28 October 2009, changes to the MCA were enacted and the MCA of 2009 changed the jurisdiction of a Military Commission to offenses committed by an alien unprivileged enemy belligerent.
3. On 24 November 2009, the Government requested that they be allowed to amend the charges to conform with the new jurisdictional requirements of the MCA of 2009. The Commission had ruled that the Government is allowed to make a change to the charge sheet by deleting the words "alien unlawful enemy combatant" and substituting therefore the words "alien unprivileged enemy belligerent." Thus, it is likely that the Government

will be alleging the Accused is subject to trial by military commission as an alien unprivileged enemy belligerent.

LAW AND DISCUSSION

4. The burden is on the Government to show by a preponderance of the evidence that the Accused is subject to the jurisdiction of this Commission.

5. As discussed above, 10 U.S.C. § 948c, MCA of 2009, states that Military Commissions have personal jurisdiction over any alien unprivileged enemy belligerent. 10 U.S.C. § 948a, MCA of 2009, defines as unprivileged enemy belligerent as an individual (other than a privileged belligerent) who (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposely and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the offense alleged. It further defines privileged belligerent as an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.

6. To date, no military commission or any other forum has found the Accused to be an alien unprivileged enemy belligerent. The Accused is within his rights to request such a determination. He is, in essence, properly challenging the personal jurisdiction of the Military Commission through this motion to dismiss.

7. 10 U.S.C. § 948d, MCA of 2009, states that a military commission is a competent tribunal to make a finding sufficient for jurisdiction. While the defense asserts that the only competent authority to make such a determination is an Article 5 hearing, applying the procedures set forth in Army Regulation (AR) 190-8, **Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees**, this Commission does not concur. While AR 190-8 may provide useful guidance, that regulation is not determinative of jurisdiction in a Military Commission. Additionally, this Commission does not concur with the Government's assertion that the military judge should defer determination on the Accused's status until conclusion of the presentation of the evidence at trial.

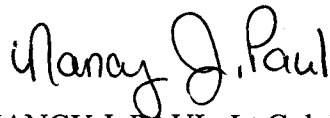
8. Under the MCA of 2009 and current Commission case law, the military judge has the power and authority to hear evidence concerning and ultimately decide the Accused's status and whether jurisdiction attaches. When challenged by the Accused, a determination regarding personal jurisdiction should be made by the military judge prior to presentation of any evidence on the merits. In addition, under Rule for Military Commissions 201, a military commission always has the authority to determine whether it has jurisdiction.

9. The determination of an individual's combatant status for purposes of establishing a commission's jurisdiction does not preclude him from raising any affirmative defenses, nor does it obviate the government's obligation to prove beyond a reasonable doubt the elements of each substantive offense. In other words, a pretrial finding by the military

judge by a preponderance of the evidence that the Accused is an alien unprivileged enemy belligerent does not eliminate the requirement for the Commission members to find beyond reasonable doubt the Accused's status if an element of the offense.

CONCLUSION

Wherefore, based on the above, the Defense position that an Article 5 status tribunal is a prerequisite to establishing the jurisdiction of this Commission is rejected, and the relief sought from that position is denied. The Government request that this Commission defer ruling on its personal jurisdiction over the Accused until after the presentation of proof at trial is also denied. A hearing will be held 6 Jan 2010 at which time the Government will be required to establish personal jurisdiction of the Accused by a preponderance of the evidence.



NANCY J. PAUL, Lt Col, USAF
Military Judge