

UNITED STATES OF AMERICA v. Mohammed Jawad	Defense Motion to Dismiss for Lack of Personal Jurisdiction July 27, 2009
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1. **Timeliness:** This motion is based on new information received by the defense on Friday, July 24, 2009, which impacts the continuing jurisdiction of the military commissions. Jurisdictional challenges may be raised “at any stage of the proceedings.” Rule for Military Commission (R.M.C.) 907 (b)(1). Therefore, this motion is timely.
2. **Relief Sought:** Dismissal of the Charge and Specifications against Mr. Jawad with prejudice.
3. **Overview:** Personal jurisdiction under the Military Commissions Act of 2006 extends to alien unlawful enemy combatants. On 24 July 2009, the United States conceded in federal litigation that it no longer considers Mr. Jawad to be an enemy combatant, either lawful or unlawful. This concession, by the Department of Justice in *habeas corpus* litigation, supersedes the U.S.’ previous position that Mr. Jawad is an unlawful enemy combatant. This concession is binding on the United States in all litigation to which it is a party. The U.S. cannot maintain a contrary position in the military commissions. Having conceded that Mr. Jawad is not an unlawful enemy combatant, there can be no personal jurisdiction and the charges must be dismissed, with prejudice.
4. **Burden and Standard of Proof:** The burden of establishing that the accused is subject to the jurisdiction of the commissions is on the government, by a preponderance of the evidence.
5. **Facts** _____:
 - i. Charges were referred to trial on 30 January 2008, and the case was slowly proceeding

to trial throughout 2008. A personal jurisdiction hearing was scheduled for December 11-12, 2008 at which the government was to have the burden of establishing whether Mr. Jawad met the definition of an alien unlawful enemy combatant, however, all pretrial matters in the case were stayed on December 10, 2008 by the trial judge pending the outcome of an interlocutory appeal by the government to the Court of Military Commission Review (CMCR).

ii. The appeal was argued on January 13, 2009. On January 23, 2009, the government requested the CMCR stay its decision on the appeal until May 20, 2009. In granting this request, the CMCR noted that Mr. Jawad could continue to pursue his habeas corpus petition in U.S. District Court during the period of the stay.

iii. On March 13, 2009, in parallel filings in all habeas corpus litigation in U.S. District Court (including in *Al Halmandy et al v. Obama*, the petition to which Mr. Jawad is a party) the U.S. set forth its views of the legal standard for the District Court to apply to determine if a detainee was lawfully detained under the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, § 2(a), 115 Stat. 224 (2001) and the laws of war. According to the United States:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. *The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.* (Italics added)

iv. On May 15, 2009, the government requested that the CMCR extend the stay of decision until September 17, 2009. In their petition, the government noted that Mr. Jawad's habeas corpus case was continuing in U.S. District Court. The CMCR granted the stay request, again noting that Mr. Jawad could continue to pursue the habeas corpus petition during the stay.

v. On July 24, 2009, the United States informed the U.S. District Court that the U.S. had decided “not to contest the writ” of habeas corpus after determining that Mr. Jawad no longer met their proposed standard for detention. The U.S. advised the court that the U.S. “will no longer treat petitioner as detainable under the Authorization for Use of Military Force (“AUMF”), Pub. L. 107-40, § 2(a), 115 Stat. 224 (2001), as informed by the laws of war.” (Attachment 1) They further informed the court that “Consistent with this determination, the Department of Defense is taking steps to house petitioner at an appropriate camp facility at Naval Station, Guantanamo Bay, Cuba.” Defense counsel has since confirmed that Mr. Jawad has been moved to Camp Iguana, a camp for those eligible for transfer or release.

6. **Law and Argument**

The U.S. has now determined and conceded in Federal Court that there is no lawful basis for Mr. Jawad’s continued detention at Guantanamo Bay, Cuba. He is no longer deemed to be part of the group of “*persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.*” This standard, which the United States previously asserted applied to Mr. Jawad, but has now conceded does not apply, is virtually identical to the standard for establishing personal jurisdiction in the military commissions. Military Commissions have jurisdiction over alien unlawful enemy combatants, defined in the MCA as: “a person who has engaged in hostilities of who has purposefully and materially supported hostilities against the United States or its co-belligerents . . .(including a person who is part of the Taliban, al Qaeda, or associated forces).”

The Military Commissions Act states that a finding by a Combatant Status Review

Tribunal or another competent tribunal that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction by military commission. Conversely, a determination by a CSRT or other competent tribunal that a detainee is not an unlawful enemy combatant or not an enemy combatant at all would also be dispositive. Mr. Jawad was never determined to be an unlawful enemy combatant by a CSRT or by the commission itself, but he was determined to be an enemy combatant by a CSRT on November 4, 2004. This decision was reaffirmed in two annual Administrative Review Boards (“ARB”) conducted by the Office of Administrative Review for Detained Enemy Combatants held on December 8, 2005, and November 8, 2006, respectively. In *Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008) the U.S. Supreme Court determined that the appropriate forum for challenging the determination of a CSRT was in Federal District Court through a petition for habeas corpus. In his Executive Order of January 22, 2009,¹ President Obama affirmed that this was an appropriate forum for detainees to challenge “the lawfulness of their detention,” stating: “The individuals currently detained at Guantánamo have the constitutional privilege of the writ of habeas corpus.”

On 13 January 2009, counsel for Mr. Jawad, including detailed defense counsel (admitted *pro hac vice* in the U.S. District Court for the District of Columbia), filed an amended habeas corpus petition, challenging the determination of the CSRT that Mr. Jawad was an enemy combatant and the legality of his continued detention. On 24 July 2009, the U.S. conceded that the previous determination by the CSRT that Mr. Jawad was an enemy combatant was incorrect, determined that Mr. Jawad was not detainable under the law of war and informed the court that it was no longer contesting the writ. An order granting the writ is expected to be issued shortly by the U.S. District Court. Such a ruling will be a dispositive ruling by a competent tribunal

¹ EXECUTIVE ORDER -- REVIEW AND DISPOSITION OF INDIVIDUALS DETAINED AT THE GUANTÁNAMO BAY NAVAL BASE AND CLOSURE OF DETENTION FACILITIES

which will deprive the military commissions of jurisdiction. However, there is no reason to wait for the District Court to rule. Clearly, if Mr. Jawad is no longer considered an enemy combatant by the United States, then he cannot, by definition, be an unlawful enemy combatant. The U.S., having revised its legal position in the *habeas corpus* litigation, is collaterally estopped from asserting a contrary position before the military commissions.

7. Request for Oral Argument: No oral argument is required. The defense respectfully requests expedited review and ruling from the military judge.

8. Conference with Opposing Counsel: We have attempted to reach opposing counsel by electronic mail (Attachment 2) and telephone and have received no response.

9. Request for Immediate Public Release: The defense requests immediate public release of this motion and any government response thereto.

10. Special Request for Expedited Review: The defense requests that the ordinary time limits for responding to such a motion be suspended and the government be ordered to reply to this motion in 24 hours in order to facilitate an expedited ruling from the military judge.

Respectfully submitted,

//signed//

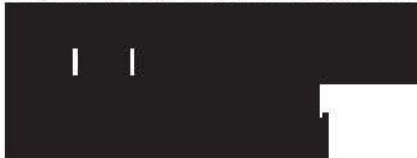
By: DAVID J. R. FRAKT, Major, USAFR
Defense Counsel

//signed//

KATHARINE DOXAKIS
LCDR, JAGC, USNR
Assistant Defense Counsel

//signed//

ERIC MONTALVO
Major, USMC
Assistant Defense Counsel
Office of the Chief Defense Counsel



Attachments:

1. Filing by the U.S. in habeas litigation dated 24 July 2009
2. E-mail to opposing counsel dated 26 July 2009