UNITED STATES OF AMERICA	)	Decision on
	)	Motion to Reconsider
v.	)	Dismissal of Charges
	)	for Lack of Jurisdiction
SALIM AHMED HAMDAN	)	

On 4 June 2007 this Court granted a Defense Motion to Dismiss all charges and specifications against the accused. The dismissal was without prejudice, and was based on the Court's determination that the Government had not shown, by a preponderance of the evidence, that this accused is an unlawful enemy combatant subject to the jurisdiction of this Court. In litigating the motion, the Government relied on the theory that, taken together, a 2002 Presidential determination that the Geneva Conventions do not apply to Al-Qaeda, combined with a 2004 Combatant Status Review Tribunal (CSRT) finding that this accused is an enemy combatant, are sufficient to prove that this accused is an unlawful enemy combatant. This Court rejected that argument, but did not rule conclusively that there is no jurisdiction over the accused.

The Government has now petitioned the Court to reconsider its dismissal, offering two arguments. First, the Government argues that the Court erred in its decision regarding the combined significance of the Presidential determination and the CSRT. In addition, the Government now urges the Court to hear evidence regarding the accused's activities in Afghanistan and determine for itself whether the accused is an unlawful enemy combatant subject to the jurisdiction of the Military Commission. The Defense opposes the Petition for Reconsideration, arguing that the Court ruled correctly the first time, that there has been no change in the law or the facts that would warrant reconsideration, that the Military Commissions Act (MCA) does not expressly authorize the Court to make this finding, and that the Court is not a "competent tribunal" within the meaning of the statute. Both parties have filed written briefs.

The Court invited supplemental briefings regarding this issue "Is there any evidence, in the legislative history or elsewhere, that Congress actually intended the term "alien unlawful enemy combatant" as used in the MCA to describe that group of persons who had been determined to be "enemy combatants" by Combatant Status Review Tribunals?" Both parties submitted supplemental briefs on this issue, including excerpts from the materials such as the Congressional Record. The Court has read and carefully considered these submissions, and did not find them helpful in resolving the issue.

At the request of the Defense, on or about 27 September, both parties were permitted to submit supplemental briefings in light of the decision of the Court of Military Commission Review in the case of *United States v. Omar Khadr.* The court has read and considered these supplemental briefings. The parties' positions were thoroughly argued in their written filings, and neither party requested, nor was there any need to hear, oral arguments. Having accepted this additional evidence and written argument electronically, the Court now decides this issue based on the parties' written submissions and its understanding of the law.

a. A Military Judge may, in the exercise of his sound discretion, reconsider a motion already decided, admit additional evidence, and allow a party to rely upon a theory not offered when the motion was first decided.

The Government's motion squarely raises this issue: may a military judge reconsider a motion that has been decided, allowing the parties to offer new or additional evidence, and to rely upon a theory not raised at the first litigation of the motion? If so, when, and under what circumstances, may a military judge do so?

i. Review of the issue under the Rules for Military Commissions:

RMC 905(f) answers the first half of the question in the following terms: "On request of any party or *sua sponte*, the military judge may, prior to authentication of the record of trial, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge."

RMC 801(e)(1)(B) provides further guidance: "The military judge may change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial."

Based on these MMC provisions alone, a military commission judge may reconsider (1) any ruling except one "amounting to" a finding of not guilty; (2) at any time during the trial or prior to authentication of the record of trial; (3) on request of a party of on his own initiative. In the case at bar, the granted motion to dismiss did not amount to a finding of "not guilty", the Court has not authenticated the record of trial, and there has been a motion from one of the parties. The Rules for Military Commissions, then, would clearly permit the Court to grant this motion for reconsideration.

ii. Evaluation of authorities cited by the Defense:

The Defense has invited the Court's attention to a number of civil cases from the federal courts of the United States that use a different standard for the grant of a motion to reconsider. Characteristic of these is *Brumark Corp v. Samson Resources Corp.,* 57 F.3d 941 (10th Cir 1995) where the Court of Appeals upheld a district court denial of a motion for reconsideration because, among other things " . . . a motion for reconsideration is an extreme remedy to be granted in rare circumstances; the decision to grant reconsideration is committed to the sound discretion of the district court; in exercising that discretion, courts consider whether there has been an intervening change in the law, new evidence, or the need to correct clear error or to prevent manifest injustice; none of these three factors has occurred or is present; and appellants have failed to present any rationale for reconsideration save their disagreement with the court's conclusion." *Ibid.*

For a number of reasons, this Court finds these authorities not controlling. First, the standard to be applied for reconsideration in military commissions is obviously more

flexible than the standard the federal courts apply. Both RMC 905(f) and RMC 801(e)(1)(B) expressly permit a military commission judge to reconsider any motion not amounting to a finding of not guilty, without condition and as a matter of discretion. Neither of these rules cites the "new facts or evidence" standard urged by the Defense. Second, the federal cases all acknowledge that reconsideration is within the discretion of a trial judge, the same standard that applies in military courts. *See, e.g. Cobell v Norton,* 226 F. Supp. 2d 175, 177 (D.D.C. 2002). Third, the Defense has cited federal civil cases, rather than criminal cases, and civil rules and presumptions are different in many ways from criminal rules, even in the federal courts. Fourth, the Defense concentrates on language in the federal cases emphasizing factors that oppose reconsideration (intervening change of the law, presence or absence of new evidence, and the need to correct manifest injustice) but minimizes or overlooks other factors (the discretion of the court, and the presence or absence of a rationale for reconsideration other than disagreement with the court's conclusion). Fifth, and perhaps most significantly, the federal courts are applying a well-established body of law and many years of federal practice in a system known for the crush of litigation and long backlogs. ('To preserve scarce judicial resources and to avoid piecemeal litigation, a motion for reconsideration is "narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court."' *United States v. RW Prof'l. Leasing Servs. Corp.*, 327 F. Supp. 2d 192 (EDNY)). But military commissions are a largely new system of tribunals, finding their way through the very first cases ever to be tried, with no body of controlling appellate case law peculiar to them, and only two cases presently referred for trial by two judges. In light of these many differences between military commissions and federal courts, most of the arguments against reconsideration that carry weight in the federal courts are simply not controlling in a military commission.

iii. Application to the case at hand:

The cited RMC's provide ample authority for the Court to grant the motion and reconsider its decision of 4 June 2007. This Court concludes that it may, as a matter of its discretion, not only reconsider its ruling of 4 June 2007, but may receive additional evidence regarding the issue of jurisdiction, and may permit the parties to argue a different theory.

b. A Military Commission may determine its own Jurisdiction, and need not await a new determination by a CSRT.

The discretion to reconsider its 4 June 2007 Ruling, hear additional evidence and reach a different conclusion is not helpful, of course, unless the Court can, under the Military Commissions Act of 2006, determine for itself that it has jurisdiction. This issue was resolved by the recent decision of the Court of Military Commissions Review (CMCR) decision in *United States v. Omar Khadr,* which held that military commission judges may hear the evidence and determine for themselves whether an accused is subject to the jurisdiction of a military commission.

The Defense argued for this very result in its 16 May 2007 Motion to Dismiss for Lack of Jurisdiction,[1] where it wrote "Although Congress has the authority to define the jurisdictional boundaries of military commissions, this Commission must determine for itself whether the facts of any case fit within those boundaries. [citations omitted]

c. A hearing to determine the facts regarding the accused's status would not pose insuperable complexities.

Arguing against the Court's holding a hearing to decide whether the accused is subject to its jurisdiction, the Defense posits a host of procedural difficulties that would be thrown up, and for which, it argues, there is no established procedure. The Court is not persuaded by this argument, as the Manual for Military Commissions (MMC) provides evidentiary rules and a procedural framework for the litigation of contested issues. RMC 703 addresses the production of witnesses and evidence; RMC 905(c) assigns the burden of proof and persuasion; MCRE 101 et. seq. provide rules of evidence, including special rules for the handling of classified material. Indeed, had the Government offered to prove jurisdiction in this manner at our 4 June hearing on the motion, rather than relying on the CSRT findings, it seems perfectly clear that the parties could have litigated the issue that day in accordance with these rules.

d. Factors considered in the Court's exercise of its discretion:

The Court now turns to the question of reconsideration. The Court does not intend to set a precedent of giving the parties two chances to present their evidence and argue their motions. Here, the higher standard that applies in the federal courts has some persuasive power. Yet the Court finds that deciding the issue of jurisdiction now will enhance judicial economy and the orderly administration of the trial. Because the accused has challenged the jurisdiction of the Court by his Motion to Dismiss and in light of the recent ruling of the CMCR making clear that a military commission may determine its own jurisdiction, the interests of justice are served by reopening the hearing and making that determination now.

e. Decision: The Motion to Reconsider is Granted in Part, and Denied in Part, as follows:

To the extent the Motion seeks to re-argue or re-litigate the issues resolved against the Government on 4 June 2007, the Motion for Reconsideration is DENIED;

To the extent the Motion seeks leave to present evidence of the accused's activities in Afghanistan and elsewhere from which the Court may determine whether he satisfies the standard set out in 10 USC §948d(a), the motion is GRANTED.

The Court will first hear evidence regarding whether Mr. Hamdan's participation in hostilities subjects him to the jurisdiction of a military commission under Section

[1] Dated 18 May 2007, Appellate Exhibit 008, at 10-11.

948d(a). Other issues raised by the parties in their briefs and not discussed or expressly ruled upon herein may be re-urged at an appropriate time after the resolution of that issue.

The invitation to stay the proceedings pending the outcome of other litigation is declined.

f. Allocation of Time

RMC 707 requires a case to be brought to trial within 120 days of service of charges, and permits the military judge to grant "departures" from this time limit in accordance with RMC 707(b)(E). Under that authority, this Court excludes the time between 4 June 2007, when the Court granted the Motion to Dismiss, and the date on which the parties reassemble in Guantanamo Bay for a re-opened hearing on the issue of jurisdiction.

In connection with this exclusion of time, the Court finds that the interests of justice were and are served by the need of the parties to research and brief an issue of first impression before a military commission, and by the Court's need to carefully read and understand the positions of the parties, conduct its own research, and carefully balance the competing demands in the case, and await a decision by the CMCR. The Court is fully aware of the public's and the accused's interest in the prompt trial of these charges, and believes that the correct resolution of this issue outweighs those interests. Indeed, re-opening the hearing and litigating the issue of jurisdiction in the trial court may ultimately be the best way to achieve the speedy trial of this case. The Court assumes responsibility for the delay.

Alternatively, the Court finds that the RMC 707 clock stopped on 4 June 2007 when the motion to dismiss was granted without prejudice, and will not start again until the Court hears the additional evidence and reviews its decision to dismiss.

g. Scheduling: The next session of Court will be set for 9 November 2007, at 9 a.m. in the Courtroom in Guantanamo Bay, Cuba. The Court will issue a further order regarding the conduct of that proceeding.

So Ordered this 17th day of October, 2007.

Keith J. Allred
Captain, JAGC, US Navy
Military Judge