PREFERRING DEFECTS: THE JURISDICTION OF MILITARY COMMISSIONS

MADELINE MORRIS†
ALLISON HESTER-HADDAD‡

Table of Contents

I. INTRODUCTION 537
II. MILITARY COMMISSION JURISDICTION UNDER THE INTERNATIONAL LAW OF WAR 540
III. THE JURISDICTIONAL RULINGS OF THE GUANTANAMO MILITARY COMMISSIONS AND THE COURT OF MILITARY COMMISSIONS REVIEW 547
IV. MILITARY COMMISSION JURISDICTION UNDER THE MCA 561
V. THE CURRENT POSTURE 566
VI. CONCLUSION 567

I. INTRODUCTION

On September 11, 2001, Al Qaeda operatives attacked civilian and military targets on US territory, causing thousands of deaths and billions of dollars of economic loss. On September 12, the United Nations (UN) Security Council unanimously adopted Resolution 1368 characterizing the attack by Al Qaeda as a "threat to international peace and security" and reiterating the right of states to use armed force in self defense under Article 51 of the UN Charter.[1] The North Atlantic Treaty Organization (NATO), for the first time in its history, invoked the obligation of collective self defense under Article 5 of the NATO Treaty.[2] On September 14, the US Congress passed the Authorization for the Use of Military Force (AUMF), authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks

† Professor of Law, Duke Law School. B.A., 1986, *summa cum laude*, Yale University; J.D., 1989, Yale Law School.

‡ Lecturing Fellow, Duke Law School. J.D., 2008, *magna cum laude*, Duke Law School.

1. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

2. Statement by the North Atlantic Council, North Atlantic Treaty Organization (Sept. 12, 2001).

. . . ."[3] Terrorism, conceived until then as crime, was reconceptualized—as war.

On November 13, 2001, invoking the law of war, President Bush announced that enemy combatants in the US war on terror would be subject to trial by military commission—a form of military tribunal last convened under US auspices in the aftermath of World War II. Issuing a Presidential Military Order (PMO), he said:

> To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals . . . .
>
> The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:
>
> (1) there is reason to believe that such individual, at the relevant times,
>
> (i) is or was a member of the organization known as al Qaida;
>
> (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
>
> (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
>
> (2) it is in the interest of the United States that such individual be subject to this order.[4]

---

3. Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) §§ 1-2.

4. President's Military Order of November 13, 2001 on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57831, 57834, § 4 (Nov. 16, 2001).

The military commissions set in place pursuant to that military order were struck down by the Supreme Court's decision in *Hamdan v. Rumsfeld* on June 24, 2006.[5] Three months later, under great pressure from the White House, Congress passed the Military Commissions Act of 2006 (MCA)[6] establishing a new set of military commissions, this time with Congressional sanction. The MCA established and governs the military commissions now in operation at the US Naval Station, Guantanamo Bay, Cuba.[7]

The MCA provisions defining the personal jurisdiction of military commissions are not nearly as breezy as the provision of the PMO that would have allowed military commission jurisdiction over any alien to be determined "from time to time" by the president. The MCA's provisions governing personal jurisdiction, in fact, are exigent, specific, and faithful to the law of war—when properly interpreted. The problem is that they are also remarkably opaque in their wording. At the present writing, a year and a half after passage of the MCA, the regime governing the personal jurisdiction of military commissions is as controversial as it is unclear.

None of the parties to the controversy have called into question the *Charming Betsy* canon of statutory construction, which requires that, "[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[8]Indeed, the Court of Military Commissions Review (CMCR), established under the MCA as the military commissions' appellate body, invoked the *Charming Betsy* doctrine in its first (and, to date, only) opinion construing the MCA.[9]

But, oddly, none of the opinions rendered by the military commissions or the CMCR actually has offered a comprehensive analysis of the substantive and procedural requirements for the exercise of personal jurisdiction by military commissions under the international law of war.[10] Without such an articulation of the international law in question, attempts to interpret the MCA's jurisdictional provisions "consistently" with international law have been something of a muddle. The result has been not only a degree of disarray in the functioning and jurisprudence of the military commissions but, also, damage to the

5. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

6. 10 U.S.C. §§ 948-950.

7. BBC News, Q&A: Guantanamo Tribunals, Feb. 12, 2008, *available at* http://news.bbc.co.uk/2/hi/americas/5134328.stm (last visited Sept. 30, 2008).

8. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

9. U.S. v. Khadr, CMCR 07-001, 25 (2007).

10. *See, e.g., id.*

integrity of the international law of war—including, particularly, prisoner-of-war (POW) protections.

The present article will seek, in Section II, to delineate the international law of war governing the personal jurisdiction of military commissions. Section III will examine the relevant opinions rendered by the Guantanamo military commissions and the CMCR to date in the light of the law of war as delineated in Section II. Section IV will parse the jurisdictional language of the MCA and will argue that, properly construed, the personal jurisdiction framework of the MCA is both internally coherent and entirely consistent with the law of war. Section V will demonstrate that, in each case brought under the MCA to date, military commission jurisdiction has been exercised over an individual entitled to presumptive POW status, in violation of both the MCA and the law of war. The article will conclude by suggesting that the remedy for this continuing violation of both US and international law is both easy and urgent.

This article will not question the wisdom of seeking to apply the traditional law of war to the context of modern jihadist terrorism—though there is much to question. Rather, the present article will assume the applicability of the law of war and then ask what that law demands if detained 'combatants' are to be prosecuted before military commissions for offenses arising out of the 'hostilities.'

II. MILITARY COMMISSION JURISDICTION UNDER THE INTERNATIONAL LAW OF WAR

The law of war exists to reduce human suffering in armed conflict. Those taken prisoner by the enemy are vulnerable to profound brutality by their captors. The law of war, to the extent it is effective, provides protection for those held in enemy control.

All persons held in the control of enemy forces in an armed conflict are entitled, under the law of war, to a minimal standard of humane treatment.[11] Only "lawful combatants," however, are entitled, if they fall into the control of the enemy, to be deemed "prisoners of war" (POWs)

11. Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter "GC III" or "POW Convention"]; Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims on International Armed Conflicts, art. 75, Dec. 7, 1978, 1125 U.N.T.S. 3 [hereinafter "Protocol I"]; *see also Hamdan*, 548 U.S. at 562-63.

and accorded the additional rights and privileges attending that legal status.[12]

In addition to the other rights afforded to those with POW status, "[a] prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power. . . ."[13] In accordance with this requirement, the MCA provides that the military commissions established under the Act shall have jurisdiction only over *unlawful* combatants.[14] Lawful enemy combatants detained by the United States, the Act specifies, are entitled to trial by court martial.[15] The jurisdictional structure delineated by the MCA, properly interpreted and applied, ensures compliance with both the trial rights of POWs and the procedural requirements for combatant status determinations under the law of war.

POWs benefit from POW rights only when POW status is acknowledged. The safeguards and procedures governing combatant status determinations under the law of war, therefore, form the linchpin of all POW protections.

The core safeguard for POW rights under the law of war turns on a presumption. All combatants held in the control of the enemy are presumed to be entitled to all POW rights and protections unless and until they are determined, through specified legal procedures, to lack POW status.[16]

The law of war permits of only one means through which the presumption of entitlement to POW rights may be rebutted: a determination of *unlawful* combatant status made by a "competent tribunal." Article 5 of the POW Convention states:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [defining lawful combatants], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[17]

---

12. *See* GC III, *supra* note 11.
13. *Id.*, at art. 102.
14. 10 U.S.C. § 948d(a).
15. 10 U.S.C. § 948d(b).
16. *See* GC III, *supra* note 11.
17. *Id.*

A combatant who is held as a non-POW—that is, who has been duly determined by a competent tribunal to be an unlawful combatant—*and who is to be prosecuted by enemy forces for crimes arising out of the hostilities*—is entitled to a second, *de novo* status determination, made by a judicial body. The law of war thus mandates a two-tiered status determination process if a detained combatant *who is not held as a POW* is to be tried for an offense arising out of the hostilities.

This two-step system is codified in Article 45 of Protocol I Additional to the Geneva Conventions of 1949.[18] The first paragraph of Article 45 reiterates and elaborates upon the core safeguard articulated in Article 5 of the POW Convention: the presumptive entitlement of all detained combatants to POW treatment unless and until a competent tribunal determines that they are not entitled to POW status. Paragraph 1 thus states:

> A person who takes part in hostilities and falls into the power of an adverse Party *shall be presumed to be a prisoner of war*, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. *Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status* and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a *competent tribunal.*[19]

Article 45, in its second paragraph, articulates the additional safeguard—the right to a combatant status adjudication before a *judicial* tribunal—to be afforded to a detained combatant who is "not held as a prisoner of war" and is to be "tried for an offense arising out of the hostilities." Paragraph 2 thus provides:

> If a person who has fallen into the power of an adverse Party *is not held as a prisoner of war* and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a *judicial tribunal* and to have that question adjudicated. Whenever

18. *See* Protocol I, *supra* note 11, art. 45(1).
19. *Id.* (emphasis added).

> possible under the applicable procedure, this adjudication shall occur before the trial for the offence.[20]

A detainee who is "not held as a [POW]"—as stated in paragraph 2 of Article 45—is, necessarily, either one who does not claim POW status or one who has been determined *by a competent tribunal* not to be entitled to POW status. A detainee who claims POW status may lawfully be held as a *non*-POW *only if* a competent tribunal had found him to be an unlawful combatant. In the absence of that determination by a competent tribunal, the presumptive entitlement to POW treatment remains in force. Consequently, the person, referred to in Article 45(2), who is "not held as a [POW] and is to be tried for an offense arising out of the hostilities" and who "assert[s] his entitlement to [POW] status" and, thereby, gains "the right to [a status adjudication]," is, necessarily, a person who has *already* been found, by a competent tribunal, to be an unlawful combatant.

The Article 45 status adjudication necessarily is, thus, a separate proceeding, additional to the competent tribunal determination that overcame the initial presumption of POW status and thereby permitted the detainee to be "not held as a POW." If a detainee "not held as a POW" is to be prosecuted by the detaining power for crimes arising out of the hostilities, then, in light of the heightened significance of the combatant status determination—which will now significantly define the applicable trial rights—that determination is to be made, *de novo*, by a judicial body.[21]

The US has long endorsed the two-tiered status determination procedure codified in Article 45 as a binding feature of the customary international law of war, and has advocated its recognition and enforcement. Protocol I was negotiated in the wake of the severe mistreatment of US soldiers who were wrongfully denied POW status and summarily convicted as war criminals in North Vietnam. "North Vietnam," as Howard Levie has written:

> [S]tated, in effect, that it would regard captured Americans as 'pirates,' people who have destroyed the property and massacred the population of the Democratic Republic of Vietnam, as major war criminals caught *in flagrante delicto* and liable for judgment

20. Protocol I, *supra* note 11, art. 45(2) (emphasis added).
21. *Id.*

> in accordance with the laws of the Democratic Republic of Vietnam.[22]

With the shadow of the US experience in North Vietnam still looming, Protocol I was promulgated, with US support and leadership, to bolster the efficacy of the law of war. Article 45 was fostered by the United States to strengthen POW protections by entitling any detainee to a public, judicial proceeding to determine combatant status—*de novo*—before that person could be tried for war crimes without full POW rights at trial.[23]

Because the United States opposed certain provisions of Protocol I as it was ultimately adopted, the United States did not become a party to the treaty.[24] Yet there were certain provisions adopted in Protocol I that the United States not only supported, but viewed as crucially important.[25] The US, therefore, in 1987, identified and endorsed specific provisions of Protocol I as customary international law, and urged other states also to recognize those provisions as binding.[26]

Article 45 of Protocol I featured prominently among the provisions that the United States so endorsed. Delineating the official US position on Protocol I, Michael Matheson, then-Deputy State Department Legal Adviser, specifically and unequivocally articulated the US endorsement of the presumption of entitlement to POW rights for all combatants held by the enemy; the requirement that the presumption may be rebutted only by a contrary status determination by a competent tribunal; and the right to a judicial adjudication of combatant status where an individual held as a non-POW is to be tried for crimes arising from the hostilities. As he stated:

> We do support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status has been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a prisoner or war and is to

---

22. Howard Levie, *The US Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks of H. Levie*, 2 AM. U. J. INT'L L. & POL'Y 419, 535 (1987).

23. *Id.*

24. *See* Michael Matheson, *The U.S. Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks before Session One of the Humanitarian Law Conference*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987).

25. *Id.*

26. *Id.*

be tried for an offense arising out of the hostilities, he should be have the right to assert his entitlement before a judicial tribunal and to have that question adjudicated. Those principles are found in Article 45.[27]

---

27. *Id.* at 425-26. The Government suggested in its Reply to Amicus Curiae Brief in *U.S. v. Khadr*, that, rather than endorsing Article 45 as customary international law, Mr. Matheson in fact "*affirmatively disclaimed* the 'customary' legal effect of Article 45." Prosecution Reply to Amicus Curiae at 4, U.S. v. Khadr, CMCR 07-001 (2007) (emphasis added). The Government quotes Mr. Matheson as saying:

> [W]e support the principle that persons entitled to combatant status be treated as [POW] in accordance with [GC III], as well as the principle that combatant personnel distinguish themselves from the civilian populations while engaged in military operations. Those statements are, of course, related to but different from the content of Article[] . . . 45.

Id. The Government's use of that quotation reflects a point of confusion. That confusion arises from an error (probably typographical) in the text of Matheson's remarks as published. To resolve that confusion we must look at the full quotation, without ellipses. Picking up where the Government's quotation leaves off, the statement reads as follows:

> [R]elated to but different from the content of articles 44 and 45, which relax the requirements of the Fourth Geneva Convention concerning prisoner-of-war treatment for irregulars, and, in particular, include a special dispensation allowing individuals who are said to be unable to observe this rule in some circumstances to retain combatant status, if they carry their arms opening during engagements and deployments preceding the launching of attacks.

Id. On the other hand, we do [at this point we pick up Matheson's statement about article 45, quoted above] support the principle that, should any doubt arise as to whether a person is entitled to combatant status, he be so treated until his status been determined by a competent tribunal, as well as the principle that if a person who has fallen into the power of an adversary is not held as a [POW] and is to be tried for an offense arising out of the hostilities, he should have a right to assert his entitlement to [POW] status before a judicial tribunal and to have that question adjudicated. Those principles are found in Article 45. Matheson, *supra* note 24, at 425-26 (emphasis added). Matheson's two statements, as reproduced in the published text, are contradictory. The first says that the US rejects the provisions of Article 45, and the second says that the US supports the provisions of Article 45. The contradiction was caused by the erroneous inclusion of the words "and 45" in the first paragraph of the quotation. The present authors have determined, through two means, that the reference to Article 45 in the first paragraph was inserted in error. The first is simply a reading of Articles 44 and 45. Article 45 contains nothing that "relax[es] the requirements . . . concerning prisoner-of-war treatment for irregulars," or that "allow[s] individuals who are said to be unable to . . . distinguish themselves from the civilian populations in some circumstances to retain combatant status." *Id.* Article 45, in fact, contains nothing relating to the requirements for prisoner-of-war status. In other words, the reference to Article 45 in the first paragraph quoted just makes no sense. By contrast, Article 44, which is also cited in the first paragraph of the quote, consists of eight paragraphs defining the requirements for prison-of-war status, including several that relax the requirements concerning prisoner-of-war treatment for irregulars. *See* Protocol I, *supra* note 11, art. 44.Subsection 3 of Article 44, in particular, states: "[W]here . . . an armed combatant cannot so distinguish himself [from the civilian population], he shall retain his status as a combatant . . . ."*Id.* at art. 44(3). The logical

Abraham Sofaer, then-State Department Legal Adviser, stated at the same meeting that, "[w]e therefore intend to consult with our allies to develop appropriate methods for incorporating these provisions . . . into rules that govern our military operations. . . ."[28]

The US has, indeed, incorporated the provisions of both Article 45(1) and (2) into its regulations and operational guidelines[29] and has identified those provisions as reflecting customary international law.[30]

Most recently, the Court of Military Commission Review (CMCR) cited the rights embodied in Article 45(2) as forming part of the customary international law of war.[31] As will be discussed shortly, however, the CMCR, even while endorsing compliance with that provision, failed to issue a holding actually in compliance with the law embodied therein.

In sum, under the international law of war—recognized and endorsed as such by the United States and implemented in US law and regulations—all combatants held by enemy forces are presumed to be

---

conclusion is that only Article 44, and not Article 45, was supposed to be included in the first paragraph. This conclusion is borne out by another aspect of the first paragraph of the Matheson quotation. Matheson states that "the executive branch regards *this provision* as highly undesirable . . . ." Matheson, *supra* note 24, at 425-26. Matheson apparently intended to refer to *one* article ("this provision"), not two, in the first paragraph. The authors confirmed this point by telephone with the State Department officials directly involved at the time. They confirmed that the reference to Article 45 in the first paragraph of the quotation was unintended.

28. Abraham Sofaer, *The U.S. Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 471 (1987).

29. *See* ARMY REGULATION 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES §§ 1-1(b), 1-6 (Oct. 1, 1997) (stating that in an army regulation with the express purpose of "implementing customary international law, both customary and codified relating to [Enemy Prisoners of War]," "a competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in the aid of enemy forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists"); *see also* DEPARTMENT OF THE NAVY, NWP 1-14M: THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 11-3 (1995), *available at* http://lawofwar.org/naval_warfare_publication_N-114M.htm (last visited Sept. 30, 2008) ("Should a question arise regarding a captive's entitlement to prisoner of war status, that individual should be accorded prisoner-of-war treatment until a competent tribunal convened by the captor determines the status to which that person is properly entitled. Individuals captured . . . as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated.").

30. JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK, JA 422 at 18-2 (1997); JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK, Ch. 2 (2002).

31. *Khadr*, CMCR 07-001 at 25 n.36.

entitled to POW rights and protections.[32] That presumption may be rebutted only through the determination of unlawful combatant status by a competent tribunal. A combatant who is held as a non-POW and is to be tried by enemy forces for crimes arising from the hostilities, has the right to assert POW status and to have a judicial adjudication of status, separate and distinct from the status determination earlier made by a competent tribunal.[33] The status adjudication provides one additional protection against the wrongful deprivation of POW rights to a combatant who is, in facing criminal prosecution by the enemy, in a singularly vulnerable position.

III. THE JURISDICTIONAL RULINGS OF THE GUANTANAMO MILITARY COMMISSIONS AND THE COURT OF MILITARY COMMISSIONS REVIEW

The law of war governing the intersection of combatant status determination procedures and military commission jurisdiction is, as described in the preceding section, quite clear. And, as we shall see in Section IV, the jurisdictional provisions of the MCA, when interpreted consistently with the law of war, become quite clear. The actual practice and rulings of the Guantanamo military commissions and the CMCR concerning personal jurisdiction, however, have not yet reached a point of equilibrium.

On June 4, 2007, the parties in *U.S. v. Khadr* convened in Guantanamo Bay for the arraignment of Omar Khadr before military commission Judge Colonel Peter Brownback.[34] Acting on his own motion, Judge Brownback dismissed Khadr's charges for lack of personal jurisdiction. Judge Brownback's remarkable ruling warrants reproduction in full. He ruled as follows:

> 1. A military commission is a court of limited jurisdiction. The jurisdiction is set by statute—the Military Commissions Act of 2006 (MCA).
>
> 2. Section 948d establishes the jurisdiction of a military commission. 948d(a) states:
>
> (a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this

32. *See* GC III, *supra* note 11.
33. *See* Protocol I, *supra* note 11.
34. *See Khadr*, CMCR 07-001.

chapter...when committed by an alien unlawful enemy combatant.

3. Section 948d(b) specifically states that military commissions "shall not have jurisdiction over lawful enemy combatants."

4. Thus, in the MCA, Congress denominates for the purpose of establishing jurisdiction two categories of enemy combatants—lawful and unlawful. A military commission only has jurisdiction to try an unlawful enemy combatant.

5. Further, in Section 948d(c), Congress stated that a finding by a Combatant Status Review Tribunal (CSRT) that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction by military commissions.

6. In considering Section 948d, it is clear that the MCA contemplates a two-part system. First, it anticipates that there shall be an administrative decision by the CSRT which will establish the status of a person for purposes of the MCA. The CSRT can find, for MCA purposes, that a person is a lawful enemy combatant or an unlawful enemy combatant.

7. Second, once the CSRT finds that a person is an unlawful enemy combatant, the provisions of the MCA come into play. Such person may have charges sworn against him, those charges may be referred to a military commission for trial, and a military commission may try him. A strict reading of the MCA would appear to require that, until such time as a CSRT (or other competent tribunal) makes a finding that a person is an unlawful enemy combatant, the provisions of the MCA do not come into play and such person may not be charged, charges may not be referred to a military commission for trial, and the military commission has no jurisdiction to try him.

8. There is, of course, the counter-argument. The military commission itself is a competent tribunal (948d(c)) to determine if a person brought before it is an unlawful enemy combatant. While appealing, this argument has two major flaws:

a. First, in order to make the determination, the military judge would have to conduct a mini-trial to decide if the person is an unlawful enemy combatant. Or would s/he? Perhaps, since this

determination might require factual determinations, the panel would have to make it. Congress provided in the MCA for many scenarios—none anticipated that the military commission would make the lawful/unlawful enemy combatant determination.

b. Second, a person has a right to be tried only by a court which he knows has jurisdiction over him. If the military commission were to make the determination, a person could be facing trial for months, without knowing if the court, in fact and in law, had jurisdiction.

9. Persons familiar with the court-martial system might state that jurisdiction is always assumed by the court-martial and it is attacked only by motion. That is true, but a court-martial is a different creature than a military commission. A soldier is in court in uniform with her first sergeant and company commander (who most likely preferred the charges) sitting in the courtroom. DD Form 458, the Charge Sheet, contains the following information in Block I—Personal Data: Name of accused, SSN, Grade or Rank, Pay Grade, Unit or Organization, Initial Date and Term of Current Service, Pay Per Month, Nature of Restraint of Accused, and Date(s) Imposed. So when a military judge at Fort Bragg looks at the Charge Sheet and the accused (Who is in uniform.), she knows that Private First Class William B. Jones is a member of Bravo Company, 3rd Battalion (Airborne), 325th Parachute Infantry Regiment, 82nd Airborne Division, Fort Bragg, North Carolina. She knows how much he is being paid, if he has been restrained, when he came on active duty this tour, and by comparing the unit to the name of the accuser in Block III—Preferral—she can see if it was PFC Jones' company commander who preferred the charges.

10. Contrast this with the information on MC Form 458 in this case. The military judge is told that the name of the accused is Omar Ahmed Khadr. Three aliases are given. And, the last four of an unidentified acronym, the ISN, are given. There is nothing on the face of the charge sheet to establish or support jurisdiction over Mr. Khadr, except for a bare allegation in the wording of the Specifications of the Charges

11. The military judge is not ruling that no facts could be properly established concerning Mr. Khadr which might fit the definition of an unlawful enemy combatant in Section 948a(a) of

the MCA. The military judge is ruling that the military commission is not the proper authority, under the provisions of the MCA, to determine that Mr. Khadr is an unlawful enemy combatant in order to establish initial jurisdiction for this commission to try Mr. Khadr.

12. The military judge is not ruling that Mr. Khadr may not, if his case is referred to trial after a proper determination, attack those facts in the elements of the offenses referred which might combine to show him to be an unlawful enemy combatant. Such an attack is a proper part of a military commission.

13. The military judge is not ruling that the charges against Mr. Khadr must be resworn. That would seem to be the more prudent avenue to take, but that issue is not currently before this commission.

14. If there were no two-step process required to try a person under the MCA, then a prosecutor could swear charges, the convening authority could refer charges, and a military commission could try a person who had had no determination as to his status whatsoever. That is not what Congress intended to establish in the MCA.

16. The charges are dismissed without prejudice.

Peter E. Brownback III

COL, JA, USA

Military Judge[35]

In response to Judge Brownback's dismissal of the charges, the Government moved for reconsideration. When the motion for reconsideration was denied, the Government appealed Judge Brownback's decision to the Court of Military Commission Review (CMCR).[36]

On September 24, 2007, the CMCR issued its first opinion, in which it overturned in part and upheld in part Judge Brownback's ruling

35. *See generally Khadr*, CMCR 07-001.

36. *See* Khadr v. U.S., 529 F.3d 1112, 1114 (D.C. Cir. 2008) (outlining the procedural history of the case).

dismissing the charges against Khadr.[37] The CMCR affirmed the ruling insofar as it held that a determination of "enemy combatant status" by a competent tribunal is not equivalent to a determination of "*unlawful* enemy combatant status" and, so, cannot suffice as a basis for military commission jurisdiction under the MCA.[38]

The CMCR reversed Judge Brownback's ruling insofar as its held that a military commission may not exercise even initial jurisdiction absent a prior finding of unlawful combatant status by a competent tribunal.[39] The CMCR opined that Judge Brownback had erred "in concluding that a C.S.R.T. (or other competent tribunal) determination of 'unlawful enemy combatant' status was a prerequisite to referral of charges to a military commission and [in concluding] that . . . he lacked authority under the MCA to determine whether Mr. Khadr is an 'unlawful enemy combatant' for purposes of establishing the military commission's initial jurisdiction to try him."[40]

The relevant portion of the CMCR opinion is as follows:

> In our opinion, the M.C.A. is clear and deliberate in its creation of a bifurcated methodology for establishing an accused's "unlawful enemy combatant" status so as to permit that individual's trial before a military commission. These two methods are laid out in M.C.A. § 948a(1)A where an "unlawful enemy combatant" is defined as:
>
> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); *or*
>
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.
>
> (emphasis added). The disjunctive "or" between subsections (i) and (ii) clearly sets forth alternative approaches for establishing

37. *See Khadr*, CMCR 07-001.
38. *Id.* at 16.
39. *Id.* at 18.
40. *Id.* at 18-20.

military commission jurisdiction. The military judge did not apply the disjunctive separation of these two provisions, and erroneously interpreted the distinct provisions as if written in the conjunctive; that is, as if joined by the word "and" rather than "or." Such an interpretation would render subsection (i) nothing more than a definition in aid of a C.S.R.T. (or other competent tribunal) determination of combatant status under subsection (ii), and is contradictory to the statute's clear structure, wording, and overall intent.

Upon challenge, the first method by which the M.C.A. contemplates jurisdiction being established is by evidence being presented before the military judge factually establishing that an accused meets the definition of "unlawful enemy combatant" as contained in subsection (i). . . . There is a long and well-developed tradition in U.S. federal courts and, specifically, throughout military court-martial jurisprudence of military judges deciding matters of personal jurisdiction. Congress . . . would not have deprived military commissions of the ability to independently decide personal jurisdiction absent an express statement of such intent. No such statement is contained anywhere in the M.C.A.

The military judge's reliance on M.C.A. § 948a(1)(A)(ii) for the proposition that a military commission itself cannot determine personal jurisdiction is misplaced. This provision supports Appellant's position rather than detracts from it. Although Congress assigned a jurisdictional "safe harbor" for prior C.S.R.T. (or other competent tribunal) determinations of "unlawful enemy combatant" status by statutorily deeming them "dispositive" of jurisdiction, it did not in any way preclude Appellant from proving jurisdiction before the military commission in the absence of such a determination. Indeed, the existence of a statutorily recognized path to achieve a "dispositive" determination of jurisdiction suggests that pretrial procedures and pleadings alleging jurisdiction should simply be viewed as "nondispositive." Subsection (ii) does not eliminate traditional methods of proving jurisdiction before the commission itself. We agree with Appellant's suggestion that Congress, through subsection (ii), merely carved out an exception to the military commission's authority to itself determine jurisdictional matters. As Appellant notes, subsection (ii) makes it clear that the military judge is not at liberty to

revisit a C.S.R.T.'s (or other competent tribunal's) finding of "unlawful enemy combatant" status *when there is such a finding*. However, nothing in the M.C.A. *requires* such a finding in order to establish military commission jurisdiction. Had they so intended, Congress could have clearly stated in the M.C.A. that the only way to establish military commission jurisdiction is through a prior C.S.R.T. (or other competent tribunal) determination of "unlawful enemy combatant" status. It did not. Accordingly, we may properly find—as clearly indicated in the language of M.C.A. §§ 949a(a) and 948b(c)—that Congress intended for military commissions to "apply the principles of law" and "the procedures for trial [routinely utilized] by general courts-martial . . . ." This would include the common procedures used before general courts-martial permitting military judges to hear evidence and decide factual and legal matters concerning the court's own jurisdiction over the accused appearing before it.

This view is supported in the Rules for Military Commissions, which provide exactly such procedures. . . . Clearly, these rules contemplate potential litigation of personal jurisdictional issues by the military commission, and provide the procedures necessary to address such a challenge. If the only avenue to achieve military commission jurisdiction was through a previously rendered C.S.R.T. (or other competent tribunal) determination of "unlawful enemy combatant" status, all of these rules would be superfluous, as "dispositive" jurisdiction would have attached before the fact.

The text, structure, and history of the M.C.A. demonstrate clearly that a military judge presiding over a military commission may determine both the factual issue of an accused's "unlawful enemy combatant status" and the corresponding legal issue of the military commission's *in personam* jurisdiction. A contrary interpretation would ignore the bifurcated structure of M.C.A. § 948(1)(A) and the long-standing history of military judges in general courts-martial finding jurisdictional facts by a preponderance of the evidence, and resolving pretrial motions to dismiss for lack of jurisdiction. The M.C.A. identifies two potential jurisdiction-establishing methodologies based upon an allegation of "unlawful enemy combatant" status. The first, reflected in § 948a(1)(A)(i), involves the clear delineation of the jurisdictional standard to be applied by a military commission in determining its own

> jurisdiction. The second, contained in § 948a(1)(A)(ii), involves a non-judicial related jurisdictional determination that is to be afforded "dispositive" deference by the military commission. Either method will allow the military commission's exercise of jurisdiction where "unlawful enemy combatant" status has been established by a preponderance of the evidence. This interpretation is consistent with the requirements of both the M.C.A. and with international law. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (acts of Congress will generally be construed in a manner so as not to violate international law, as we presume that Congress ordinarily seeks to comply with international law when legislating).[41]

The CMCR opinion, thus, envisions a system in which a competent tribunal determination, if one has been made, preempts a determination of combatant status by the military commission. In the system envisioned, the existence of a determination of unlawful combatant status by a competent tribunal precludes a military commission's making a determination of combatant status to confirm or disconfirm its own jurisdiction.

Such a system would be beset with problems. Would a military commission presented with new evidence proving the lawful combatant status of the accused be required nevertheless to treat as dispositive the status determination made by the competent tribunal and proceed to exercise jurisdiction over a demonstrably lawful combatant? Would a court deprived of the "inherent jurisdiction to determine its own jurisdiction" be a "regularly constituted court?"

The CMCR itself poses the question "whether this 'dispositive jurisdiction' provision deprives a military commission accused of a critical 'judicial guarantee[] . . . recognized as indispensable by civilized people' under Common Article 3 of the Geneva Conventions (i.e., the right to affirmatively challenge the commission's *in personam* jurisdiction over him)."[42]

In addition to posing those serious difficulties, the prohibition on a military commission's adjudicating combatant status in cases where a status determination had been made by a competent tribunal would violate Article 45 of Protocol I (which the CMCR opinion cites, in footnote 38, as customary international law, with which it must rule consistently, if possible). For a competent tribunal determination to be

41. *Id.* at 21-25 (citations omitted).
42. *Id.* at 10 n.12.

dispositive—in the sense that it would preclude adjudication of status by a military commission—would deny the very right to a judicial adjudication of status that Article 45 promises. Footnote 38 of the CMCR opinion states:

> [Article 45(2) of Protocol I to the Geneva Conventions] suggests that a detained individual who is not being held as a POW has the right to assert an entitlement to POW status before a judicial tribunal, and that judicial adjudication of combatant status shall occur before trial for any alleged substantive offense. Following the M.C.A. procedures, as we interpret them here, would allow an accused to assert a claim of POW (i.e., lawful combatant) status at a pretrial motion session before the military judge. This pretrial determination of status would be fully in accord with Article 45(2) of Protocol I.[43]

But that cannot be right. Following the CMCR interpretation of the MCA procedures, the "pretrial determination of status" referred to in footnote 38 could *not occur*—much less be "fully in accord with Article 45(2)"—if the military commission was precluded from adjudicating combatant status because of a pre-existing "dispositive" determination made by a competent tribunal.

Creating a "safe harbor" for competent tribunal determination by "carv[ing] out an exception to the military commission's authority to itself determine jurisdictional matters"[44] clearly would create enormous legal difficulties. Why would Congress have chosen to produce such an anomalous situation?

Even while holding that "the military judge is not at liberty to revisit a C.S.R.T.'s (or other competent tribunal's) finding of 'unlawful enemy combatant' status when there is such a finding,"[45] the CMCR opinion does express some discomfort with that arrangement (for example, asking whether such a limitation on the commission's powers would infringe the rights prescribed by Common Article 3 of the Geneva Conventions, as mentioned above).[46] The opinion even flirts, at one point, with the suggestion that the word "dispositive" in the MCA should not be understood really to mean dispositive, saying, "Congress intended that properly made individual C.S.R.T. determinations of 'unlawful

43. *Id.* at 10 n.38.
44. *Id.* at 23.
45. *Id.* at 23-24 (emphasis deleted from original).
46. *See* discussion and accompanying text, *supra* note 21.

enemy combatant' status established by a preponderance of the evidence should be afforded great deference by the military commission."[47]

But a move in that direction does not offer a solution either. If a military commission may make its own combatant status determination notwithstanding a prior determination by a competent tribunal (with whatever degree of "deference"), and a competent tribunal determination is not a prerequisite to military commission jurisdiction, then the entire reference in the MCA to a competent tribunal determination is superfluous. That is, if a military commission may exercise jurisdiction even if there is no competent tribunal determination and may make its own combatant status determination even if there is a competent tribunal determination, then the competent tribunal provision of the MCA is meaningless. The determination of combatant status by a competent tribunal makes absolutely no difference: regardless of the action—or existence—of a competent tribunal, a military commission may exercise jurisdiction and may make a combatant status determination in order to determine its own jurisdiction.

Either interpretation—"dispositive" means dispositive, or "dispositive" does not mean dispositive—leads to an absurd result. None of the anomalous outcomes, absurd results, or violations of the law of war is necessary. The jurisdictional provisions of the MCA, properly interpreted, are logical, coherent, and, as we shall see in Section IV below, fully consistent with the law of war.

Before coming to that, however, we turn to the most recent ruling on the personal jurisdiction of military commissions and the only commission ruling thus far to apply the CMCR's *Khadr* precedent. Omar Khadr's was the first of two military commission cases to be dismissed on June 4, 2007. The charges against Salim Hamdan—the only other military commission defendant then charged—were dismissed, also for lack of personal jurisdiction, by Judge Keith Allred (Capt. USN) on that same day.[48]

The Government moved for Judge Allred to reconsider his dismissal of the charges against Hamdan.[49] Judge Allred ruled, granting the motion for reconsideration, after the CMCR issued its decision in *Khadr*.[50]

---

47. *Khadr*, CMCR 07-001 at 10 n.14.

48. *See* U.S. v. Hamdan, Decision on Motion to Reconsider Dismissal of Changes for Lack of Jurisdiction (Oct. 17, 2007), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2007/10/hamdan-ruling-10-17-07.pdf (last visited Sept. 30, 2008) [hereinafter "Hamdan Decision"].

49. *Id.* at 1.

50. *Id.*

Hamdan thereupon made a motion requesting an Article 5 status determination.[51]

On December 5, 2007, Judge Allred heard oral argument on the motion for an Article 5 determination and, on December 6, held an evidentiary hearing on Hamdan's combatant status.[52] He did so in order that, if he decided to grant the motion for an Article 5 determination—and if he decided, further, that he himself could serve as that competent tribunal—he would be prepared to render the combatant status determination forthwith.

Hamdan's motion made no mention of Article 45; and it made no mention of the requirement, discussed earlier,[53] that a competent tribunal be composed of more than one person. Indeed, at oral argument, Joe McMillan, civilian counsel for Hamdan, conceded that Judge Allred could, sitting alone, serve as the Article 5 tribunal.

Judge Allred ruled on December 17, 2007, on Hamdan's motion for an Article 5 status determination. The ruling is marred by two points of confusion.

First, the ruling confuses Article 5 of the Geneva Convention III of 1949 with Article 45 of Protocol 1 to the 1977 Additional Protocols to the Geneva Conventions of 1949 (Article 45), treating the provisions as though they were one and the same—that one being Article 5 of GC III (Article 5).[54] Second, the ruling erroneously concludes that, based on the concession made in oral argument, Hamdan had effectively waived the requirement that an Article 5 competent tribunal be composed of more than one person.[55]

The December 17 ruling conflates Article 5 of the POW Convention with Article 45 of Protocol I. Article 5, recall, provides for a presumption of POW rights and for a combatant status determination by a competent tribunal in case of doubt. Article 45, in paragraph 1, reiterates the presumption and the right to a competent tribunal determination and, in paragraph 2, articulates the right to a judicial adjudication of combatant

---

51. *U.S. v. Hamdan*, Ruling on Defense Motion for Article 5 Status Determination (Dec. 17, 2007), *available at* http://www.defenselink.mil/news/Dec2007/hamdan%-20article%205%20ruling%2017%20Dec%202007.pdf (last visited Sept. 30, 2008 [hereinafter "Hamdan Ruling"].

52. *U.S. v. Hamdan*, On Reconsideration Ruling On Motion to Dismiss for Lack of Jurisdiction (Dec. 19. 2007), *available at* http://www.defenselink.mil/news/Dec2007/-HamdanJurisdiction%20After%20Reconsideration%20Ruling.pdf (last visited Sept. 30, 2008).

53. *See* discussion *supra* Part II.

54. *See* Hamdan Ruling, *supra* note 51, at 2.

55. *See id.* at 4.

status for a detainee, not held as a POW, who is to be tried for crimes arising out of the hostilities.[56]

After quoting Article 5 in full, the December 17 ruling states,

> Referring to Article 5, Howard S. Levie writes, '[t]he present article was an attempt to eliminate, or at least to reduce, the number of instances in which military personnel in the field make an arbitrary decision that a captured individual is an illegal combatant and impose summary justice . . . [it] assures the accused not only of a determination by a competent tribunal, but of a further *judicial tribunal*—but only if the detaining power proposes to try him for an offense arising out of the hostilities.'[57]

Article 5, of course, says nothing of the sort. And Howard Levie has not suggested that it does. The Levie passage, cited as referring to Article 5, refers not to Article 5 but to Article 45.

Article 45 is not referred to by name—or identified as being a provision distinct from Article 5—anywhere in the body of the ruling. The words "Article 45" do, however, appear in a citation. Following a paragraph discussing Article 5 competent-tribunal determinations, appears a paragraph stating:

> When the drafters [of Article 5] sought to clarify *when* such a determination should be made, there was disagreement. "In view of the great differences in national justice procedures, it was not thought possible to establish a firm rule that this question [an accused's status] must be decided before the trial for the offense, but it should be so decided if at all possible, because on it depends the whole array of procedural protections accorded to Prisoners of War, by the Third Convention, and the issue may go to the jurisdiction of the tribunal."[58]

Although presented in the text of the ruling as relating to Article 5 of the POW Convention, the passage quoted is actually from the Commentary to Protocol I (as the citation in the ruling, reproduced above, indicates)—and it concerns, of course, Article 45(2) of that

---

56. *See* discussion and accompanying text, *supra* notes 18-21.

57. Hamdan Ruling, *supra* note 51, at 2 (citing HOWARD S. LEVIE, CODE OF INTERNATIONAL ARMED CONFLICT 504–6 (1986)) (emphasis in original).

58. *Id.* (quoting INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 556 (Yves Sandoz et. al, eds., 1987)).

Protocol. The passage quoted in the ruling is, in fact, critically important when read with recognition that it concerns Article 45. The status determination discussed in the quotation is the Article 45(2) judicial adjudication of status. Even it, the Commentary suggests, should be conducted prior to trial if possible. Since there is no question that the individual entitled to the judicial adjudication of status has already had a competent-tribunal status determination by time Article 45(2) comes into play, it is utterly clear that the drafters of Article 45 intended that the competent tribunal determination of status would always occur prior to trial.

The conflation of Articles 5 and 45 leads Judge Allred to the untenable conclusion that: (1) two separate status determination proceedings are required, and (2) he can fulfill that requirement by holding just one status determination proceeding.[59] The ruling states, first, that, "the United States is bound not only to perform an initial status determination, such as that provided for under Army Regulation 190–8 [which implements Article 5], but a second, judicial determination when it proposes to try an [sic] detainee for his participation in hostilities."[60] Second, the ruling states: "The hearing [that] the Commission will undertake to determine whether the accused is an alien unlawful enemy combatant, and therefore subject to the Commission's jurisdiction will also determine his status for the purposes of Article 5."[61]

The two-for-one solution that Judge Allred reaches is not consistent with the requirements of the law of war, which require two separate proceedings. A POW may not be subjected to military commission jurisdiction; and a detainee is a presumptive POW until a competent tribunal determines otherwise.[62] The judicial adjudication of status is designated as a second process, intended to afford a second look, brining judicial scrutiny to the status determination in cases where the significance of that determination is going to be elevated by criminal proceedings.

If the two proceedings are combined and conducted by a military commission then, obviously, a presumptive POW will be well along in a criminal prosecution by military commission before the first status determination procedure ever occurs. This is exactly what has happened to Salim Hamdan. When Judge Allred issued his December 17th decision granting Hamdan an Article 5 status determination, Hamdan had been under military commission jurisdiction for well over three years. No

59. *See id.*
60. *Id.*
61. *Id.* at 4.
62. Protocol I, *supra* note 11, at art. 45(1).

proceeding whatsoever had been conducted prior to that time to determine whether he was a lawful or an unlawful combatant.[63] As will be discussed *infra*, the attachment of military commission jurisdiction is a significant event, burdensome to the accused, even where the process moves more quickly than has Hamdan's.[64] Judge Allred's decision to combine "[t]he hearing [that] the Commission will undertake to determine whether the accused is an alien unlawful enemy combatant, and therefore subject to the Commission's jurisdiction"[65] with a status determination procedure "for purposes of Article 5" presumably arises from the failure, reflected in the ruling, to distinguish between the requirements of Article 5 and those of Article 45.

Concerning the number of people required to constitute an Article 5 tribunal, the December 17 ruling notes that the official Commentary to Article 5 indicates that the text of Article 5 was amended to employ the term "military tribunal" in place of the original language of "competent authority." As Judge Allred observes, "[t]his amendment was based on the view that decisions which might have the gravest consequences should not be left to a single person."[66] Indeed, the negotiating history of Article 5 makes clear that establishment of a system requiring a tribunal of several people rather than an individual decision-maker was a primary—perhaps the primary—goal motivating the promulgation of Article 5. This requirement that an Article 5 tribunal be composed of more than one person is reflected in US Army Regulation 190-8 ("AR 190-8"), which implements US obligations under Article 5. AR 190-8 defines a "competent tribunal" as "composed of three commissioned officers."[67]

Judge Allred, thus, accurately identifies the composition requirement for an Article 5 tribunal. He fails to observe, however, that the requirement is non-waivable. The ruling states that the "parties have conceded that this Commission is a competent tribunal within the meaning of Article 5."[68] Of course, Judge Allred knows that it is not—at least not as to its number of members. But, apparently taking Hamdan's "concession" at oral argument to be an effective waiver of Article 5's

63. Military commission jurisdiction first attached to Hamdan when he was charged for trial by military commission in July of 2004. Those charges became null when the Supreme Court struck down the first military commissions system in 2006. Hamdan was then re-charged under the MCA in 2007.

64. *See* discussion, *infra* Part IV.

65. *Hamdan*, 548 U.S. at 690.

66. Hamdan Ruling, *supra* note 51, at 2.

67. US Army Regulation 190-8, ch. 1, § 1-6(c).

68. Hamdan Ruling, *supra* note 51, at 4.

composition requirement, Judge Allred concludes that he may sit as an Article 5 tribunal.[69]

In fact, however, Judge Allred may not sit as an Article 5 tribunal because Hamdan may not waive or renounce his rights under the Geneva Conventions. Article 7 of GC III, entitled "Non-Renunciation of Rights," provides that, "[p]risoners of war may in *no circumstances* renounce *in part or in entirety* the rights secured to them by the present convention."[70] Recall that Hamdan, at the relevant time, having had no competent-tribunal determination to the contrary, was entitled to the rights secured by the POW Convention—a point which Judge Allred himself makes in the ruling. Such an absolute rule barring waiver of rights was considered necessary by the drafters of the POW Convention because to permit the waiver of POW rights would render those rights nearly meaningless, given the ease with which duress may be applied to detainees.[71] To give effect, then, to a "concession" by Hamdan ostensibly waiving a part of Article 5 creates an undesirable inroad into the rules erected to safeguard POW rights.

The practice of and jurisprudence on personal jurisdiction under the MCA clearly has not come to a resting place. Judge Brownback's June 4, 2007 ruling dismissing the charges against Omar Khadr correctly applied the MCA. It did not, though, provide a full articulation of the reasons or the legal support for the outcome and, in particular, did not present the analysis in relation to the international law of war. The subsequent decisions on personal jurisdiction under the MCA, issued by the CMCR and by Judge Allred, continue to grapple with a set of issues that have yet to be resolved.

IV. MILITARY COMMISSION JURISDICTION UNDER THE MCA

The jurisdictional puzzle of the MCA should be readily put together. When read alongside the pre-existing international law of war governing military commission jurisdiction and combatant status determinations, the MCA becomes far more transparent and, indeed, perfectly coherent.

The MCA could not be clearer in limiting the jurisdiction of military commissions to unlawful combatants. The purpose of the MCA is to establish "procedures governing the use of military commissions to try alien unlawful enemy combatants . . . ."[72] The act provides "[a] military commission under this chapter shall have jurisdiction to try any offense

69. *Id.*
70. GC III, *supra* note 11, art. 7 (emphasis added).
71. *See* Commentary to GC III, *supra* note 11, at 89.
72. 10 U.S.C. § 948b(a) (2006).

made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant . . . ."[73] In an abundance of caution, the Act further states that, "military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to [courts martial]."[74] The MCA is, unmistakably, fully consistent with the law of war in this respect: lawful combatants (POWs) may be prosecuted only before the same courts—courts martial—as US service members would be.

The MCA, properly interpreted, provides for the lawful determination of combatant status by a competent tribunal prior to the attachment of military commission jurisdiction. The MCA articulates two definitions of the term "unlawful combatant." The act states:

> The term 'unlawful enemy combatant' means –
>
> i) A person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
>
> ii) A person who, before, on, or after the date of the enactment of the Military Commission At of 2006 has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[75]

As the CMCR pointed out in its *Khadr* opinion, the two definitions are posed disjunctively. One *or* the other may apply. What the Act does not make adequately clear on its face is that the definition properly to be applied depends on the phase and posture of the case.

The definition based on a status determination by a "competent tribunal" is applicable at the outset, as a threshold requirement for *any* exercise of military commission jurisdiction. Only after the presumptive right to POW treatment has been lawfully rebutted through a determination of unlawful combatant status by a competent tribunal, may military commission jurisdiction attach in the first instance.

Once military commission jurisdiction has lawfully attached, the military commission may adjudicate its own jurisdiction—exercising the

---

73. 10 U.S.C. § 948d(a) (2006).
74. 10 U.S.C. § 948d(b) (2006).
75. 10 U.S.C. § 948a(1) (2006).

inherent jurisdiction of all courts to do so. When the commission thus adjudicates combatant status to determine its own jurisdiction in the course of the criminal litigation, the substantive definition of unlawful combatant status found in 10 U.S.C. § 948a(2) is to be applied.

A military commission may not make the *initial* determination of unlawful combatant status that is prerequisite to the exercise of military commission jurisdiction. Other courts, by contrast, routinely exercise jurisdiction to determine their own jurisdiction as an initial matter—even while recognizing that the jurisdictional inquiry may result in a determination that the court has (and, in some sense, *had*) no jurisdiction over the case. Military commissions are unlike other courts in this respect because of the *presumption* of POW status, which excludes potential defendants from military commission jurisdiction unless and until that presumption is lawfully rebutted by a competent tribunal. The operation of the presumption is utterly clear in the law of war—as is the sole lawful means for rebutting that presumption.

The MCA provides that, "[a] finding . . . by a [CSRT] or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for the purposes of jurisdiction for trial by a military commission."[76] The competent-tribunal finding is "dispositive" in that nothing additional is required to rebut the presumptive POW status, there is no further prerequisite to establishing initial military–commission jurisdiction, and there is no appellate review of the tribunal's determination for purposes of military commission jurisdiction. As stated in the Rules for Military Commissions:

> A finding . . . by a . . . competent tribunal . . . that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by a military commission under the M.C.A. The determination by the tribunal shall apply for purposes of military commission jurisdiction without regard to any pending petitions for review or other appeals."[77]

It makes perfect sense that Congress would have stated that a competent tribunal determination is "dispositive for purposes of jurisdiction for trial by military commission."[78]That is because, elsewhere in the MCA, provision is made for federal appellate review of competent-tribunal combatant status determinations. To ensure that the

76. 10 U.S.C. § 948d(c) (2006).
77. R.M.C. § 202(b).
78. 10 U.S.C. § 948d(c) (2006).

federal review would not delay the exercise of initial jurisdiction by military commissions, Congress specified that the competent tribunal determination shall be dispositive "for purposes of *jurisdiction for trial* by military commission."[79] This does not mean that, at that trial, the court is prohibited from making such findings as are required to determine its own jurisdiction. It means, rather, that no pending appeal or review will prevent the competent-tribunal finding from forming the basis for the initial exercise of military commission jurisdiction.

The determination of unlawful combatancy by a competent tribunal is thus dispositive of military commission jurisdiction under the MCA in that "the determination by the tribunal shall apply for purposes of military commission jurisdiction without regard to any pending petitions for review or other appeals."[80] But the finding of the competent tribunal is not—and could not be—dispositive of military commission jurisdiction in the sense that it would divest the military commission of jurisdiction to determine its own jurisdiction. The jurisdiction to determine its own jurisdiction has long been recognized as fundamental among the necessary and inherent powers of a court.[81] The Rules for Military Commissions make the point succinctly, stating: "[a] military commission *always* has jurisdiction to determine whether it has jurisdiction."[82]

A military commission, as a regular part of its functions in conducting criminal proceedings, may hear motions challenging its jurisdiction over the accused.[83] A motion challenging military commission jurisdiction may be based upon an assertion of POW status.[84] The second definition of unlawful combatancy under the MCA, which provides the substantive elements of unlawful combatant status,[85] is to be applied by the military commission in adjudicating combatant status to determine its own jurisdiction.

---

79. *Id.* (emphasis added).

80. R.M.C. § 202(b).

81. *See* United States v. Mine Workers, 330 U.S. 258, 291 (1947); Cargill Ferrous Intern. v. Sea Phoenix MV, 325 F.3d 695, 704 (5th Cir. 2003) ("[A] bedrock principle of federal courts is that they have jurisdiction to determine jurisdiction."); Nestor v. Hershey, 425 F.2d 504 (D.C. Cir. 1969) ("we always have jurisdiction to determine our jurisdiction"); United States v. Harmon, 63 M.J. 98, 101 (C.A.A.F. 2006); U.S. v. Melanson, 53 M.J. 1, 2 (C.A.A.F. 2000). *See also* Government's Brief on Behalf of Appellant at 20, in *Khadr*, CMCR 07-001.

82. R.M.C. § 201(b)(3) (emphasis added).

83. R.M.C. § 907(b)(1)(A).

84. *See* R.M.C. § 901(b)(1)(A); 10 U.S.C. § 948d(c) (2006).

85. 10 U.S.C. 948a(1)(ii) (2006).

Read in this way, the MCA's jurisdictional regime, which might otherwise seem to pose a conundrum, is perfectly logical and legally sound. The MCA requires, as a prerequisite for the initial exercise of military commission jurisdiction, a finding of unlawful combatancy by a competent tribunal. And it treats that finding as dispositive for establishing initial military commission jurisdiction. The MCA provides, further, that a military commission, *once lawfully seized of a case*, may hear motions challenging jurisdiction and may adjudicate combatant status to confirm or disconfirm its own jurisdiction. There is no contradiction between these two prongs of the jurisdictional regime established by the MCA.

As Judge Brownback stated in his order of June 4, 2007:

> [I]t is clear that the MCA contemplates a two-part system. First, it anticipates that there shall be an administrative decision by [which the CSRT] will establish the status of a person for purposes of the MCA . . . .
>
> Second, once the CSRT finds that a person is an unlawful enemy combatant, the provisions of the MCA come into play.[86]

That two-step jurisdictional structure established by the MCA is consistent with—indeed, as we have seen, is precisely what is required by—the law of war. Under the MCA, the competent tribunal determination of unlawful combatant status rebuts the presumptive entitlement to POW rights—consistent with Article 5 of the POW Convention and Article 45(1) of Protocol I. And, as required by Article 45(2), the MCA provides that a detainee who is held as a non-POW pursuant to a competent-tribunal determination, and is to be tried for an offense arising out of the hostilities, is entitled to a *de novo*, judicial adjudication of status upon submission of a motion challenging the personal jurisdiction of the military commission.

The MCA, properly interpreted, defines a process fully in keeping with the two-step status-determination procedure mandated by the law of war. Fundamental canons of statutory interpretation require that the MCA be so construed. As the Supreme Court stated in the *Charming Betsy* case, "[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,"[87] and

86. Judge Brownback's Order Dismissing Charges, *U.S. v. Khadr*, 6–7, June 4, 2007, *available at* http://www.defenselink.mil/news/jun2007/khadrJudgesDismissalOrder(June-%204).pdf (last visited Sept. 30, 2008).

87. *Charming Betsy*, 6 U.S. (2 Cranch) at 118.

statutory ambiguity should be resolved in favor of compliance with international law.[88] Ingrained in US jurisprudence, the *Charming Betsy* canon has thus guided US courts for over two centuries.[89] In the case of the MCA, the mandate that courts interpret a statute to render its provisions coherent and avoid absurdity in the law's application favors—perhaps necessitates—the same reading.

V. THE CURRENT POSTURE

The procedures currently applied by the US military commissions violate the plain language and clear intent of the MCA and the law of war. In every case brought under the MCA, charges have been sworn, jurisdiction asserted, and powers exercised without essential prerequisite for jurisdiction—a finding of unlawful combatant status by a competent tribunal.

Rule for Military Commission 202(c) states: "the jurisdiction of a military commission over an individual attaches upon the swearing of charges."[90] The presumptive POW status of a detainee must, therefore, be rebutted—through a finding of unlawful combatancy by a competent tribunal—*before* charges may lawfully be sworn. Absent an unlawful-combatancy finding by a competent tribunal, the detainee is entitled to POW treatment which, under the MCA as under the law of war, precludes the attachment of military commission jurisdiction.

The "premature" attachment of jurisdiction under the MCA is not a trifling matter to be cured *nunc pro tunc* in some later proceeding. The attachment of jurisdiction begins the process of prosecution. The accused is now informed that he is to be tried by military commission for specified crimes.[91] The sequence of pretrial proceedings begins and its timetables start running.[92] A defense lawyer appears[93] and discovery is begun. And, at each step, power is exercised by the personnel of the

88. McCulloch v. Sociedad Nacional de Marinos de Honduras, 372 U.S. 10 (1963); *see also* F. Hoffman-La Roche, Ltd v. Empagran S.A., 542 U.S. 155, 164 (2004).

89. *See, e.g.*, F. Hoffman – La Roche Ltd. v. Empagram S.A., 542 U.S. 155, 166 (2004) (looking to customary international law in interpreting the Sherman Act and concluding that it did not apply to a foreign price-fixing claim); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953) (relying upon customary international law in determining the statutory construction of the Jones Act in a maritime tort case); *Charming Betsy*, 6 U.S. (2 Cranch) at 118.

90. R.M.C. 202(c).

91. 10 U.S.C. § 948q(b) (2006).

92. R.M.C. 707.

93. 10 U.S.C. § 948k(3) (2006) ("Military defense counsel for a military commission under this chapter shall be detailed as soon as practicable after the swearing of charges against the accused.").

military commissions system. The prosecutor, the defense counsel, and the convening authority begin actively making decisions and taking actions with potentially profound consequences for the detainee.

Among the several serious consequences of the attachment of military commission jurisdiction is the exclusion of the detainee from the Administrative Review Board (ARB) process. The ARB is tasked with conducting "an administrative review process to assess annually the need to continue to detain each enemy combatant."[94] ARB review entails the possibility of release, repatriation, or amelioration of the conditions of custody for detainees deemed "no longer a threat to the United States and its allies."[95] Upon attachment of military commission jurisdiction, the accused are "excepted from the procedures established in [the ARB] Order until the disposition of any charges against them or the service of any sentence imposed by a military commission."[96]

The MCA prohibits the attachment of military commission jurisdiction over lawful combatants. Yet, in each case brought before the military commissions in Guantanamo, the defendant—having had no status determination by a competent tribunal—has been entitled to a presumption of lawful combatant status and to all of the accompanying rights *including* the right to trial not by military commission but by court martial.

In each of those cases, then, the charges were jurisdictionally defective when sworn, having been sworn against an individual statutorily exempted from military commission jurisdiction under the MCA.[97] Neither action by the convening authority nor by the military commission judge can cure the defect. Unless and until the presumption of POW rights is lawfully rebutted by a competent tribunal, the accused is presumptively a lawful combatant to whom, the MCA explicitly states, jurisdiction may not attach.

VI. CONCLUSION

The jurisdictional provisions of the MCA are not as clear as they might be; and this has caused serious problems. In violation of both the MCA and the law of war, the prosecutions brought under the MCA have

94. Paul Wolfowitz, *Order for Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba* (May 11, 2004), *available at* http://www.defenselink.mil/news/May-2004/d20040518gtmoreview.pdf (last visited Sept. 30, 2008).

95. *Id.*

96. *Id.* at 4.

97. *See* R.M.C. 905(b)(1) on jurisdictional defects in preferral and referral.

been brought without a prior determination of the defendants' status by a competent tribunal. Each, therefore, has constituted an unlawful exercise of military commission jurisdiction over a presumptively lawful combatant who is, by virtue of that status, exempted from military commission jurisdiction under the MCA and the law of war. The military commission proceedings in the cases brought to date, having thus been conducted without legislative authorization and outside the scope of the commissions' lawful authority, are legally void.

The jurisdictional scheme of the MCA is greatly clarified when read in conjunction with a close and detailed reading of the relevant law of war. Indeed, the jurisdictional structure delineated in the MCA is revealed to be both logically consistent and consistent with the law of war governing the personal jurisdiction of military commissions.

It may well be that the law of war—and, in particular, the law of war governing combatant status, detention, and prosecution—is not well suited to the "war on terror." If, however, that body of law is to be invoked and is to serve as the basis for the detention of "combatants"—a choice that Congress has made in enacting the MCA—then it must be applied faithfully. To do otherwise will do damage to the law of war, the welfare of future POWs including US service members, the international reputation of the US, and the integrity of our own polity.

This should be an easy call. The MCA provides for compliance with the relevant features of the law of war and, indeed, demands it. What is required to achieve a coherent interpretation of the MCA's personal jurisdiction framework, to attain compliance in military commissions practice with that interpretation, and to fulfill US obligations under the relevant law of war is to conduct a handful of combatant status determinations before competent tribunals. The cost of erosion of the law is high; and, in this instance, the cost of compliance is miniscule.