

The Legal Inadequacy of U.S. Military Commissions for Trying Omar Khadr

DENIAL OF DUE PROCESS

- Use of Evidence Obtained Through Cruel, Inhuman, and Degrading Treatment

The Military Commissions Act of 2006 (MCA) sanctions the introduction of evidence obtained through the use of cruel, inhuman, and degrading treatment. While the MCA stipulates that admission of such evidence is subject to a reliability and “interests of justice” test, it ignores the fact that international, U.S., and Canadian law prohibit such practices. Finally, the “interests of justice” test may not effectively constrain the commissions from admitting evidence obtained through torture or cruel, inhuman, and degrading treatment.

- Failure to Adequately Exclude Unreliable Hearsay Evidence

The MCA allows conviction based on unsubstantiated and unreliable hearsay evidence. The MCA permits exclusion of hearsay evidence, but places the burden on the defendant to demonstrate that the evidence is “unreliable or lacking in probative value.” Making such a challenge, however, is extremely difficult because the defendant may be denied access to classified information necessary to test the reliability of hearsay evidence, such as sources, methods or activities by which the information was obtained. Additionally, given the defendant’s limited access to attorneys and conditions of confinement, conducting a proper investigation of hearsay evidence is very difficult.

- Denial of Access to Evidence and the Right of Confrontation

The MCA affords the U.S. government wide latitude to restrict a defendant’s access to classified information. The government is permitted to withhold exculpatory evidence it has classified as confidential based on purported national security concerns. Moreover, a defendant is limited in his ability to receive information about the government’s “sources, methods, or activities,” which is information essential to testing the reliability or sufficiency of the government’s evidence. Finally, these limitations on access to classified evidence extend to the discovery stage, preventing the defendant and his attorney from obtaining production of evidence from the government.

- Restrictions on a Defendant’s Right to Counsel

The MCA restricts a defendant’s right to choose a particular attorney. Defendants may only be represented by U.S. civilian attorneys and their assigned military defense attorney. Many detainees, including Omar Khadr, are suspicious of U.S. attorneys and would prefer to be represented by counsel from their countries of nationality. Additionally, the MCA only provides a right to counsel after the swearing of charges. This means that the Government is free to delay charging a defendant so it may

conduct extensive interrogation without the presence of counsel. Finally, defense counsel are restricted in their ability to see and discuss classified information with their clients. Omar Khadr's requests to be represented by Canadian attorneys have been denied, and U.S. military officials at Guantanamo have taken a number of steps to interfere with his right to consult with his attorneys.

CREATION OF EX POST FACTO LAWS

- The MCA Violates the Prohibition of Ex Post Facto Laws by Creating New Substantive Crimes and Applying them Retroactively

Many of the substantive crimes defined in the MCA have never been considered offenses triable under the international law of war or U.S. law in a military tribunal. These include all of the charges against Omar Khadr. The MCA permits trial of a defendant for conspiracy, murder, attempted murder, providing material support for terrorism, and spying. None of these offenses have ever been considered war crimes and, thus, constitute new crimes.

- An Unprivileged Killing or Attempted Killing Committed by an Unlawful Enemy Combatant Has Never Been Considered a War Crime

The U.S. has attempted to charge Omar Khadr with murder and attempted murder as a war crime, alleging that he threw a grenade that killed a U.S. soldier. While an unlawful enemy combatant may be tried for the killing or attempted killing of an enemy soldier they are not war crimes. Rather, the individual must be tried based on the domestic criminal law of the territorial state in which the act occurred or based on the domestic criminal law of the occupying or capturing nation. Regardless, all prosecutions must comport with the minimum fair trial guarantees recognized in the Geneva Conventions. Only crimes traditionally entailing individual criminal responsibility are prosecutable as war crimes

- The MCA's Restriction of Procedural and Evidentiary Rules Constitutes Ex Post Facto Law

As discussed above, the MCA has eliminated a number of essential procedural due process safeguards, and fails to comply with the protections provided in military courts-martial. Because those procedural protections and evidentiary standards are long-standing features of war crimes prosecutions, the MCA procedures are essentially new law invented after the fact to ensure conviction of defendants tried in the military commissions.

- The MCA Constitutes an Unconstitutional Bill of Attainder Imposing Collective, Extra-Judicial Punishment

The MCA singles out a specific group, "alien unlawful enemy combatants," for prosecution under entirely new and unprecedented laws, and thus violates constitutional prohibitions on such legislation. Moreover, the MCA strips this specific

group of fundamental rights such as habeas corpus as well as the right to assert arguments based on the Geneva Conventions. In that sense, the MCA is less a framework for prosecution of crimes, than a tool for extra-judicially punishing disfavored groups. Before even being allowed to proceed to trial, Omar Khadr has already been stripped of important rights based on the extrajudicial labeling of him as an “alien unlawful enemy combatant.”

DENIAL OF HABEAS CORPUS

- The MCA Eliminates the Fundamental Right to Habeas Corpus

The MCA strips detainee rights to seek a speedy determination of the lawfulness of their confinement through the writ of habeas corpus. The MCA attempts to abolish the statutory protection of all persons’ right to file a habeas petition, one of the most fundamental rights in U.S. and international law. Going even further, the U.S. government argues that habeas protections enshrined in the Constitution are also suspended. These provisions ensure that detainees may be held in indefinite detention without charges. Based on the MCA’s habeas stripping provisions, Omar Khadr has repeatedly been denied the fundamental right to test the lawfulness of his confinement through a writ of habeas corpus.

RESTRICTIONS ON APPLICATION OF THE GENEVA CONVENTIONS

- The MCA Denied Judicial Enforceability of Rights Under the Geneva Conventions

The MCA provides that, “No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.” This is an attempt to undermine the rule of law and the Supreme Court’s June 2006 *Hamdan* holding that the military commissions illegal, ruling they failed to comply with the Geneva Conventions.

- The MCA Impermissibly Delegates to the President the Authority to Reinterpret the Geneva Conventions in Violation of Separation of Powers Principles

The MCA explicitly authorizes the President to determine the “meaning and application” of the Geneva Conventions. This in effect prevents the judiciary from fulfilling its proper role to interpret and apply domestic U.S. law and international law. Justice Anthony Kennedy has expressed serious concerns about military commissions collapsing the separation of powers: “Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review.”