

Guest Blogger Jonathan Hafetz: A Question of Values: Why Hamdan Should Win

by Jonathan Hafetz, Associate Counsel at the Brennan Center for Justice and co-author of an amicus brief filed in Hamdan v. Rumsfeld.

On March 28, the Supreme Court heard arguments in the high-stakes legal challenge to the military commissions established by the President to try suspected terrorists at Guantanamo. The case, Hamdan v. Rumsfeld, raises a plethora of complex questions of constitutional, military, and international law. If Petitioner Salim Ahmed Hamdan wins, which he should, it will not just be because he is right on the law. It will also be because the administration has offended deeply rooted values in its continuing quest for unchecked executive power.

Judicial Independence. The threshold question in the case is whether the Supreme Court still has the power to hear Hamdan's appeal in light of the recently enacted Detainee Treatment Act of 2005 ("DTA"). That act purports to eliminate jurisdiction over habeas corpus petitions filed by detainees at Guantanamo, while providing for limited review of "final decisions" of military commissions. Hamdan argues that Congress did not divest the Supreme Court of jurisdiction over his case and, moreover, could not do so without raising a serious constitutional problem under the Suspension Clause.

The Supreme Court has resisted previous assertions of executive power that threaten its jurisdiction. In Rasul v. Bush, decided almost two years ago, the Court squarely rejected the government's claim that federal courts lacked habeas jurisdiction over detentions at Guantanamo. It affirmed that detainees there, including Hamdan, have the right to test the legality of their confinement.

After Rasul, a district court granted Hamdan's challenge to the military commissions. The District of Columbia Circuit reversed that decision. Then, two days after the Supreme Court announced it would hear Hamdan's appeal, Senator Lindsey Graham, with the Bush administration's backing, introduced legislation in Congress intended to strip the Supreme Court of jurisdiction over the case. The ensuing skirmish evoked the specter of Ex parte McCardle, a much-criticized Reconstruction-era case in which Congress eliminated the Court's jurisdiction over a pending habeas appeal.

The legislation that emerged, while not a model of clarity, supports the conclusion that Congress did not intend to eliminate habeas corpus in Hamdan or any other pending case by a Guantanamo detainee. But canons of statutory construction aside, the Court will likely view the DTA as an attempted assault on its independence, an effort by the administration to take away its power to decide a case it feared it might lose, just like the President's

eleventh hour decision to indict Jose Padilla after more than three years of military detention in an effort to short-circuit Supreme Court review of his case. Further, if jurisdiction in Hamdan were limited to the DTA, it could forever foreclose review of the very questions now before the Court: whether the commissions are authorized and whether they violate the Geneva Conventions. Because the DTA constitutes such an affront to the Court's institutional role in preserving the separation of powers, the Court should reject the government's jurisdictional and abstention arguments, and reach the merits.

Rule of Law. The government's main contention in Hamdan rests on a fundamental contradiction. The government claims that the laws of war authorize military commissions, but refuses to acknowledge that those same laws impose constraints on such commissions. The government relies on a provision of the Uniform Code of Military Justice (UCMJ) which preserves the jurisdiction of military commissions concurrent with courts-martial. That provision, however, expressly limits a military commission's jurisdiction to "offenders or offenses that by statute or the law of war may be tried by military commissions."

The President has charged Hamdan only with conspiracy. Yet, both the War Crimes Act of 1996 and every war major war crime tribunal in the past half-century make clear that conspiracy alone does not violate the laws of war. The reason is simple: conspiracy is a notoriously elastic charge and, if used as the basis for war crimes trials, would inevitably lead to prosecutorial abuses.

The President similarly seeks to avoid the procedural safeguards of the laws of war. The Geneva Conventions (and the military's own regulations implementing them) require that a prisoner be afforded a hearing before a competent tribunal to determine his status. If he is determined to be a prisoner of war, he may not be tried by a military commission. Hamdan, however, has not been provided that threshold hearing. In addition, the laws of war mandate that if Hamdan is to be tried, it must be by "a regularly constituted court" that "affords all the judicial guarantees which are recognized as indispensable by civilized people." The commissions flunk that test because, among other things, they deny Hamdan and other defendants the right to be present throughout their trial and to confront the witnesses and evidence against them.

Hamdan's arguments on these points appeared to have significant traction with a number of Justices, and for good reason. The President cannot invoke the laws of war to accrete power but discard them whenever they impose constraints on the exercise of that power. The rule of law, in short, means that the President cannot make up or bend the law to serve his purposes.

Fairness. Hamdan argues that the military commissions violate the UCMJ because they do not conform to the procedures of courts-martial. The government asserts that only those procedures specifically made applicable in the UCMJ to military commissions apply to those commissions. The Court's construction of the UCMJ's text will likely be colored by its underlying assessment of whether Hamdan (or any one else) can ever get a fair trial before these tribunals.

The commissions are flawed in numerous respects, but perhaps most significantly by denying a defendant the right to be present for his trial and to confront the witnesses against him. The Court, through Justice Scalia, has previously described the right of confrontation as a "principle of the common law, founded on natural justice." That right is guaranteed not only in civilian trials but in military trials under the UCMJ as well. Further, Justice Scalia explained that this right was designed to prevent the use of *ex parte* statements made during custodial interrogations, precisely the type of evidence the government seeks to use to bolster its case against Hamdan and others.

In a speech he gave two weeks ago in Switzerland that prompted calls for his recusal from Hamdan, Justice Scalia said combatants captured during wartime are not entitled to a jury trial in civilian courts. The appropriateness of those comments aside, they miss the mark. The question is not whether Hamdan must necessarily be tried by jury in a civilian court instead of by military commission; rather, it is whether he can lawfully be tried by the current military commissions at Guantanamo which, among other failings, deny Hamdan the right of confrontation. The district court believed Hamdan could not be tried before such a commission, and the Supreme Court should not uphold a trial that deprives any defendant of a right it has said is founded on natural justice.

Tradition. The commissions also offend tradition. The history of military commissions is relevant in Hamdan because it provides evidence of what the laws of war have authorized over time. But history is important for another reason, one that cannot help but escape the Court's notice. Military commissions have typically been used as emergency measures, gap-fillers for occupied territory or situations when the civilian courts were not open and functioning. On the rare occasion in which military commissions have exceeded those narrow limits, as in *Ex parte Quirin*, they have been severely criticized. The current commissions forebode something very different: the unilateral creation by the President of a new, *ad hoc*, and open-ended military justice system, unfettered by the established protections of civilian criminal trials or courts-martial, with jurisdiction to try a virtually limitless class of non-citizens in an amorphous "war on terrorism" that the administration says could last generations. With the rest of the world watching, the Court should be very reluctant to sanction such a dramatic break with tradition, at least not

without the inter-branch checks, procedural safeguards, and other guarantees that the commissions lack.