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Finding a Remedy for Gitmo

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Yesterday, judges in the military commissions established by the 2006 Military Commissions Act at Guantánamo dismissed charges against two detainees charged with "war crimes" -- Omar Khadr and Salim Hamdan. According to the *Times*, the rulings, which were both on highly technical grounds, threw the commissions into "turmoil." In fact, the Government can circumvent the rulings relatively easily and without dealing with the many, deeply serious problems implicated by the military commissions -- and the whole question of Guantánamo.

Speed bumps are nothing new for President Bush's military commissions. The White House first issued rules for the commissions in November 2001, but trials didn't follow quickly. Detainees began arriving in Guantánamo only two months later. And the government did not move expeditiously to identify war criminals and to charge them. Lead defendant Salim Hamdan -- who was accused of being Osama bin Laden's driver -- was not even found eligible for trial by the President until July 2003, and was not even charged until July 2004. (Incidentally, in between these dates the military kept Hamdan into solitary confinement and so putting him under not-so-subtle pressure to cop a plea). Thanks to phenomenal lawyers, Hamdan fought the president's military commissions, and in June 2006 won: The Supreme Court, in the now landmark case of Hamdan v. Rumsfeld invalidated the commissions as beyond the President's authority.

The White House's response was swift and furious -- and took the form of the Military Commissions Act of September 2006, which reinstituted a system of "military commissions," or trial courts that are only for cases related to terrorism and that only operate at Guantánamo.

But even these new congressionally-authorized bodies have floundered. Proposing the new law, Bush proclaimed "The need for this legislation is urgent," but it wasn't for months before the first prosecutions were brought.

In the first case before the new commissions, Australian detainee David Hick entered a plea bargain. On the surface, this was a coup for the government because it could finally -- after more than five years -- proclaim a victory. But look more closely and the government's victory slips from view. Hicks was convicted of "material support" for terrorism (which, incidentally, is a federal crime first legislated in the early 1990s--it is not now and never has been a "war crime"). But Hicks' plea agreement stipulated a sentence of not more than nine months. By point of comparison, a person can be sentenced up to five years if they lie to a federal officer (a point to remember the next time you're bringing unpasturized French cheese through U.S. customs ....) -- and eight years if the lie has some connection to terrorism. Stated otherwise, Hicks got just more than a tenth of the sentence he could have received had he lied in the course of a counter-terrorism investigation.

Hicks entered his deal after five years' in Guantánamo, and after his military lawyer conducted a magnificently effective public relations campaign in the United States and Australia. Especially in Australia, the John Howard came under heavy fire for its failure to intervene in Hicks' case (see, for example here). And, rather conveniently, Hicks will be unable to speak to the press until well after the next Australian election. The Hicks sentence, in short, is little more than convenient cover for an international political embarrassment.

Yesterday's rulings are further evidence of how compromised the military commissions are. The ruling did not address the real and substantial concerns raised by the structure of the military commissions, or the summary bodies (called "combatant status

review tribunals" or CSRTs) that declare individuals to be enemies of the nation. Rather, both rulings rested on a relatively minor, but telling, procedural point.

The point is worth describing in brief: A detainee is first classified as a properly detained by a CSRT. Only then can he be brought before a military commission. The Military Commissions Act (in 10 U.S.C. §948(c) for those of you want to follow along) says that any "alien unlawful enemy combatant" can be tried by a military commissions, and the statute (in 10 U.S.C. §948(a)) defines "unlawful enemy combatant." So far so good, right?

Well, no. The problem arises because the CSRTs function under a set of Defense Department Rules that long predate the Military Commissions Act. Those Defense Department rules do not use the term "unlawful enemy combatant." They talk about "enemy combatant" -- and they define this slightly differently from the terms used in the Military Commission Act (Professor Robert Chesney has an excellent and detailed explanation here).

What happened yesterday was that the military commissions noticed the mismatch between the CSRT definition and the military commissions definition -- and stopped the trial until the two defendants were properly re-classified.

The government now has a couple of options. It could do a new CSRT (although this would mean also issuing new CSRT rules). Or it could ask the commission itself to make a finding that the Khadr and Hamdan are "unlawful enemy combatants." The latter would get the trials back on track relatively quickly. Yesterday's events would end up being yet one more hiccup in the rough road that the military commissions have been traveled.

So what's the broader significance of yesterday's events? It's not so much that these developments will derail the commissions. Nor is it that the rulings yesterday address the larger, structural issues raised by the commissions. Khadr, for example, is being denied the counsel of his choice because they happen to be Canadian and not American. (A silly and arbitrary rule). Moreover, Khadr was only fifteen when he was seized. Under international law and the military's own rules -- enacted into law in the Uniform Code of Military Justice -- he cannot be held culpable for his acts. This sort of systemic problem won't be solved by this kind of technical glitches and slip-ups of the kind we saw yesterday. For that we need a broader remedy -- most importantly the restoration of habeas corpus and the reimposition of the rule of law on the "law-free zone" that is Guantánamo.

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