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# The Supreme Court Invalidates Military Commissions Under International Law

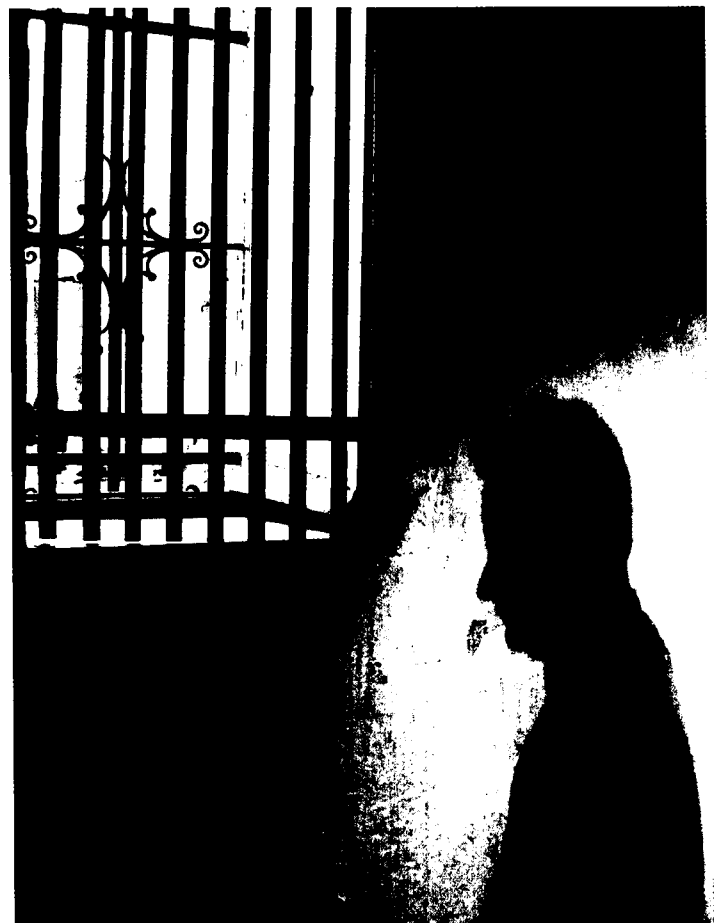
by Angela M. Scafuri

In the seminal decision of *Hamdan v. Rumsfeld*,<sup>1</sup> the United States Supreme Court specifically held that the military commissions set up to try the Guantanamo detainees are unauthorized by federal statute and violate international law. The ruling raises major questions about the legal status of over 400 men held and detained at Guantanamo and how, when and where charges will be pursued against them. One thing, however, is for sure—the Supreme Court demonstrated how fundamental tenets of international law are deeply embedded in American law.

**I**n what will likely be remembered as a defining moment in the ever-shifting balance of power among the branches of government, on June 29, 2006, Justice John Paul Stevens, writing for the five-to-three majority, in which moderate Anthony M. Kennedy joined, held that the president does not have the authority to set up military tribunals that violate the Uniform Code of Military Justice as well as the Geneva Convention. In reviewing the military commissions set up by President George W. Bush at the Guantanamo Bay Naval Base in Cuba, the majority held that these commissions violate both federal and international law. In reaching its decision, the Court upheld the Geneva Convention of 1949 as enforceable U.S. law. The plurality decision also enforced the critical partnership between international law and federal law.

## Salim Ahmed Hamdan

By way of background, the decision came in an appeal brought on behalf of Salim Ahmed Hamdan, a Yemeni who was captured in Afghanistan in Nov. 2001 and brought to Guantanamo in June 2002. According to the government, he was a driver and bodyguard for Osama Bin Laden.<sup>2</sup> In July 2003, he and five others were to be the first to face trial by military commission. It was not until July 2004, however, that



Hamdan was formally charged with the crime of conspiracy to commit terrorism from 1996 to Nov. 2001.<sup>3</sup> He has spent four years in the U.S. prison at Guantanamo.

Hamdan claims he is innocent, and worked as a driver for Osama Bin Laden in Afghanistan only to make a living for his family. He asserts that the military commissions established by the Pentagon on the president's executive order are flawed because they violate basic military justice protections.

The prison at Guantanamo Bay was erected in the months after the Sept. 11, 2001, terror attacks on the United States. It has been a sore point of international criticism ever since its creation. Hundreds of individuals suspected of ties to Al-Qaida and the Taliban have been shipped there since 2002. Scrutiny of the prison has been on the rise since three detainees committed suicide in June 2006.<sup>4</sup>

### Procedural History

The military commission proceeding began, but was interrupted when the United States District Court for the District of Columbia ruled in Nov. 2004 that the military commission was invalid. The court held that the United States never conducted a "competent tribunal" to make a proper determination regarding whether Hamdan was really an "unlawful combatant," or whether he should have been considered a prisoner of war or a civilian.<sup>5</sup> This is an obligation the United States is committed to under the 1949 Geneva Convention. Therefore, the court ruled in Hamdan's favor, concluding that the United States could not hold a military commission unless it was first shown that the detainee was not a prisoner of war.

However, the United States Appeals Court of Appeals for the District of Columbia unanimously overturned the

ruling in July 2005. The three-judge panel, which included Chief Justice John Roberts, held that the Geneva Convention does not apply to members of Al-Qaida. The following reasons were cited for the legality of the military commission:

1. Military commissions have been approved by Congress, and therefore are legitimate forums to try enemy combatants;
2. The Geneva Convention, a treaty between nations, does not confer individual rights and remedies;
3. Even if the Geneva Convention could be enforced in U.S. courts, it would not be applicable to Hamdan, because the war against Al-Qaida is not between two countries; therefore, the Geneva Convention only guarantees a standard of judicial procedure—a "competent tribunal"—without speaking to the jurisdiction in which the prisoner must be tried;
4. Al-Qaida and its members are not covered under the terms of the Geneva Convention.<sup>6</sup>

Further, of critical note, the court ruled that the president of the United States has the constitutional authority to try Hamdan because Congress authorized such activity by statute.<sup>7</sup> In that vein, the court went further to say that the judicial branch of the United States government cannot enforce the Geneva Convention, thus invalidating Hamdan's argument that he cannot be tried until after his prisoner of war status is determined.

Prior to the overturning of the district court decision by the appeals court, the Department of Defense was forced to conduct combatant status review tribunals of all the Guantanamo detainees in light of the district court ruling that there was no proper determination made regarding the classification of the



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detainees. Due to the judicial challenge, the reviews were conducted from approximately July 2004 through March 2005.<sup>8</sup> In conducting the reviews, the Department of Defense ultimately avoided a determination of prisoner of war status under the Geneva Convention, and instead determined whether the detainees met the narrow definition of “enemy combatant,” as set forth in the president’s original executive order calling for the creation of the military commissions.<sup>9</sup>

Hamdan then appealed to the United States Supreme Court. On Nov. 7, 2005, the Supreme Court issued a *writ of certiorari* to hear the case. The case was argued before the Court on March 28, 2006.<sup>10</sup>

### **The Military Tribunals Violate Federal Law and the Geneva Convention**

No longer a legal black hole, the opinion negates the proposition that Guantanamo prisoners have limited rights. The Court reversed the ruling of the court of appeals, holding that the president did not have authority to set up the military tribunals, and finding the special military commissions illegal under both military justice law and the Geneva Convention.<sup>11</sup> No other Supreme Court decision in recent years has so fervently reaffirmed American obligations under international law. The Court did, however, recognize the future issue of creating a fair, suitable and constitutionally permissible tribunal statute.

Justice John Paul Stevens stated at the end of a 73-page opinion that “[T]he executive is bound to comply with the Rule of Law that prevails in this jurisdiction.” The majority ruled that the congressional “authorization for the use of military force,” passed in the days immediately following the Sept. 11, 2001, terrorist attacks, cannot be interpreted to legitimize the military commissions. In his concurring opinion, Justice Kennedy stated that “[T]rial by military commission raises separation-

of-powers concerns of the highest order.”

Justice Stevens also wrote that, in a historical context, military commissions were used as a “tribunal of necessity” under wartime conditions: “Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections.”

The Court specifically did not decide whether the president possessed the constitutional power to convene military commissions like the one created to try Hamdan. Justice Stevens stated that even if the president possessed such a power, such tribunals would either have to be sanctioned by the laws of war, as codified by Congress in Article 15 of the Uniform Code of Military Justice (UCMJ), or authorized by statute. With respect to the statutory authorization, Justice Stevens wrote that there is nothing in the authorization for use of military force (AUMF) “even hinting” at expanding the president’s war powers beyond those enumerated in Article 15. Instead, the Detainee Treatment Act of 2005 (DTA), the UCMJ and the AUMF “at most, acknowledge” the president’s authority to convene military commissions only where justified by the exigencies of war, but still operating within the laws of war.

As set forth in the majority opinion, the laws of war include the UCMJ and the Geneva Convention, each of which require more protections than those afforded by the military commissions. The Court held that the military commissions substantially deviate from UCMJ, Article 36(b), which requires that rules applied in courts-martial and military commissions be “uniform insofar as practicable.” Substantial deviations include limiting the defendant’s right to view evidence. To the extent of excluding the defendant’s own counsel, evidence judged to have any probative value whatsoever may be admitted, and appeals are to

be heard within the Defense Department and eventually by the president, instead of the courts.

The majority also held that the military commissions violate the Geneva Convention of 1949, of which the United States has been a signatory since 1955. The majority was unpersuaded by the court of appeals’ finding that the convention did not apply. The majority corrected an erroneous reading by the court of appeals of a footnote in *Johnson v. Eisentrager*,<sup>12</sup> which the lower court believed to mean that “the 1949 Geneva Convention does not confer on Hamdan a right to enforce its provisions in court.”<sup>13</sup> Correcting the lower court, the Supreme Court held that the rights conferred on Hamdan by the Geneva Convention are undisputedly “part of the law of war,” and that Article 21 of the UCMJ requires that a military commission’s authority lies in compliance with the law of war.

Specifically, the Court determined that the appeals court erred in each of its three justifications:

1. It erroneously relied on inapplicable case law, which did not legally control in Hamdan’s case (*Johnson v. Eisentrager* found to be unpersuasive because there was no deviation between the procedures used in the tribunal and those used in courts-martial);
2. It erroneously ruled that the Geneva Convention does not apply because Article 3, in fact, affords minimal protection to combatants “in the territory of” and signatory; and
3. The minimal protections afforded under the Geneva Convention include being tried by a “regularly constituted court,” which the military commission is not.

The main issue looming throughout the Hamdan litigation is whether

Article 3 of the Geneva Convention applies to Hamdan's case. While the district court concluded yes, the court of appeals concluded Article 3 does not apply because Al-Qaida is not a "high contracting party" of the Geneva Convention. Article 3 requires that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties," there are still minimum protective provisions that must be provided to "persons taking no active part in the hostilities...and placed hors de combat by ... detention." Hamdan would qualify for that designation provided that Article 3 applies.

Article 3 of the Geneva Convention also requires humane treatment of captured combatants, and prohibits trials and the passing of sentences except by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people."<sup>14</sup>

The Supreme Court concluded that the reading of Article 3 by the court of appeals (and the government) was flawed, based on a view that it must only apply to internal conflicts—a view long abandoned in the international community. A conflict under Common Article 3 is one that may be either internal or transnational; it is not between nations, *per se*. The critical factor is that the legal status of the entities opposing each other may be very divergent. Common Article 3 provides blanket protection regardless of the character of the conflict.

Therefore, the majority held that Common Article 3 applies to the Afghanistan conflict (where Hamdan was captured in 2001), and that Hamdan must be tried by a court with the judicial guarantees "recognized as indispensable by civilized peoples." Similarly, the Court relied on the Geneva Convention to further hold that a "regularly constituted court" includes "ordinary

military courts," which in America are courts martial.

The plurality also briefly reviewed Article 75 of the 1977 Protocol I to the Geneva Convention, which was intended to further amplify the "fundamental guarantees" under Common Article 3 for those who may not earn prisoner of war status under Article 4 of the Geneva Convention. The plurality determined that the president's order establishing the military commissions dispenses with "the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him."

The opinion crystallized the sentiment that while Article 3 does not require the full range of protections of a civilian court or a military court martial, it does, in fact, require observance of protections for defendants that are missing from the rules issued for military commissions. In particular, the flaws the Court cited were: 1) the failure to guarantee the defendant the right to attend the trial; and 2) the prosecution's ability under the rules to introduce hearsay evidence, unsworn testimony and evidence obtained through coercion. Thus, while "a great deal of flexibility" is afforded by Article 3, it still has *requirements* that must be honored. The military commission set up to try Hamdan "does not meet those requirements."

Justice Stevens, stated that:

[E]xecutive imprisonment has been considered oppressive and lawless since [King] John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed or exiled save by the judgment of his peers or by the law of the land.

Significantly, in ruling that Article 3 applies to the Guantanamo detainees,

the Court rejected the view that the article does not cover followers of Al-Qaida. The decision has the potential to open the doors to a variety of challenges by those individuals held anywhere in the world by the United States, that their treatment could be regarded under Article 3 as inhumane.

The opinion indicates that finding a legislative solution will not be easy, particularly considering the ruling that Article 3 of the Geneva Convention applies to the Guantanamo detainees and is enforceable in federal court for their protection.

Justice Stephen G. Breyer wrote a brief concurring opinion, focusing on the role of Congress. He stated:

[T]he court's conclusion ultimately rests upon a single ground: Congress has not issued the executive a blank check...[I]ndeed, Congress had denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

### **Conspiracy is Not a War Crime**

Justice Stevens further commented on the use of military commissions in a plurality opinion where Justice Kennedy did not join. He commented that because the conspiracy charge against Hamdan was not a violation of the law of war, it could not be the basis for a trial before a military commission. Therefore, Justice Stevens concluded that military commissions are inherently unable to try conspiracy charges.

The Court pointed out that it has traditionally held that offenses against the law of war are triable by military commission only when they are clearly defined by statute, or strong common law precedent for such commissions exists. The Court found that there is no statutory or precedential support for

law-of-war military commissions trying charges of conspiracy under either the Geneva Convention or the Hague Convention—the major treaties on the law of war.

The four justices making up the plurality confirmed what the court had recognized in *Ex parte Quirin*,<sup>15</sup> that “commissions convened during time of war but under neither martial law nor military government may try only offenses against the law of war.” Issuing some cautionary advice, the Court stated that “the incremental development of common-law crimes by the judiciary is...all the more critical when reviewing development that stem from military action.” In other words, the intent, itself, to commit a war crime falls short of the overt acts that a military commission would indeed have authority to prosecute under U.S. law.

The plurality went on to say that “international sources confirm that the crime charged here is not a recognized violation of the law of war.” They further observed “none of the major treaties governing the law of war identifies conspiracy as a violation thereof,” and that the only conspiracy charges recognized by international war crimes tribunals are conspiracy to commit genocide and conspiracy in a common plan to wage aggressive war. For further support, the plurality looked to Nuremberg precedents and two appeals chamber decision of the International Criminal Tribunal for the Former Yugoslavia, which has adopted a “joint criminal enterprise” theory of liability as a species of liability for the substantive offense and not as a stand-alone crime.

Criticizing Justice Clarence Thomas’ dissent, in a footnote, the plurality commented “conspiracy is not a violation of the law of war triable by military commissions does not mean the Government may not, for example, prosecute by court-martial or in federal court those caught ‘plotting terrorist activities like

the bombing of the Khobar Towers.’”

### High Court Not Stripped of Jurisdiction to Hear *Habeas Corpus* Petitions

Among the dissent were Justices Thomas, Antonin Scalia, and Samuel A. Alito Jr. Each wrote a dissenting opinion. Justice Scalia focused on the jurisdictional issue, relying heavily on the language of the DTA:

[N]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.<sup>16</sup>

In citing the quoted language, Justice Scalia argued that Congress had stripped the court of jurisdiction to proceed with the instant case when it passed the DTA, finding that the act specifically provides that “no court, justice or judge” has jurisdiction to hear *habeas corpus* petitions filed by detainees at Guantanamo Bay. Further, the DTA gave the D.C. Circuit Court of Appeals “exclusive” jurisdiction to review decisions of cases being tried before military commissions at the law’s passage.

The question was whether the “withdrawal” of jurisdiction applied to pending cases. The majority held that it does not apply to pending cases. Justice Scalia said that the consequence of the majority’s opinions enabled “an alien captured in a foreign theater of active combat to petitioner the Secretary of Defense,” thereby bringing the “cumbersome machinery of our domestic courts into military affairs.”

Suspending *habeas corpus* is an action, limited by the Constitution, to “cases of rebellion or invasion.” *Habeas corpus* is the means by which prisoners can get to court to challenge the lawfulness of their confinement. Congress has taken this serious step only four times in

the country’s history.<sup>17</sup> It is a mechanism by which to protect innocent individuals from wrongful imprisonment.

At oral argument in March 2006, Solicitor General Paul D. Clement advanced the position that Congress had not, in fact, suspended *habeas corpus*, but that Congress may validly suspend it inadvertently. Justices Souter and Breyer found the argument difficult to accept, with Justice Breyer asking the solicitor general to provide an alternative approach that would allow the Court to avoid “the most terribly difficult and important constitutional question of whether Congress can constitutionally deprive this court of jurisdiction in *habeas corpus* cases.”<sup>18</sup>

The alternative was offered by Hamdan’s attorney, Neal Kayal. His suggestion was to interpret the DTA as applying only prospectively, prohibiting federal courts from hearing detainee cases in the future, but allowing the Court to continue with the instant action. In fact, this is the conclusion of the majority in holding that the act will not apply to pending cases before the Court.<sup>19</sup>

In the majority opinion, Justice Stevens denied the U.S. government’s motion to dismiss under Section 1005 of the DTA. The Court determined Congress’s failure to include language in the DTA that might have precluded Supreme Court jurisdiction made the government’s argument unpersuasive.

Justice Scalia also wrote that a petitioner, such as Hamdan, who is being held outside the territorial jurisdiction of the United States, lacks the right to the writ of *habeas corpus*.

Justice Thomas drafted a strongly worded dissent, part of which he read from the bench—something which he had never done in his 15 years on the Court. He stated that the Court’s decision would

...sorely hamper the president’s ability

