

2007

# The Hamdan v. Rumsfeld Decision

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## Recommended Citation

Berndt, Thomas F.; Friction, Josiah Ramsey; and Huyser, Alethea M. (2007) "The Hamdan v. Rumsfeld Decision," *William Mitchell Law Review*: Vol. 33: Iss. 5, Article 11.

Available at: <http://open.mitchellhamline.edu/wmlr/vol33/iss5/11>

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**THE *HAMDAN V. RUMSFELD* DECISION**

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I. BACKGROUND ..... 1683

II. THE DECISION ..... 1685

    A. *The Power of the Court: Jurisdiction over Hamdan v. Rumsfeld*..... 1685

    B. *Executive Power: The President’s Enactment of Military Commissions* ..... 1687

        1. *The Power to Enact Military Commissions* ..... 1687

        2. *The Power to Try Hamdan for Conspiracy*..... 1687

    C. *Legislative Power: The Limits Placed on Military Commissions* ..... 1688

        1. *Uniformity Requirements of the UCMJ* ..... 1688

        2. *Regularly Constituted Court Under the Geneva Conventions* ..... 1689

III. CONCLUSION ..... 1690

I. BACKGROUND

Seven days after the attacks of September 11, 2001, Congress authorized President Bush “to use all necessary and appropriate force against those . . . persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”<sup>1</sup> The war in Afghanistan, led by the CIA, began shortly thereafter. In response to the growing number of captured Taliban and al Qaeda forces, the Department of Defense opened Camp X-Ray at Guantanamo Bay, Cuba, where detainees would be interrogated and tried by military commissions.

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1. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. IV 2004)).

On November 13, 2001, President Bush issued an executive order setting up a system of military commissions to try detainees.<sup>2</sup> The commissions consisted of a presiding officer along with at least three other commissioned officers.<sup>3</sup> The defendant was entitled to a copy of the charges and a presumption of innocence.<sup>4</sup> However, the order also allowed “the accused and his civilian counsel [to] be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that . . . the presiding officer decides to ‘close.’”<sup>5</sup> Furthermore, all reasonably probative evidence was admissible, including hearsay, evidence gathered by coercion, and unsworn testimony.<sup>6</sup> Finally, for all but the most serious cases, the defendant had no right of appeal outside the executive branch of the government.<sup>7</sup>

In November 2001, a Yemeni national named Salim Ahmed Hamdan was captured, and held by U.S. forces in Afghanistan.<sup>8</sup> In June 2002, Hamdan was transported to the U.S. Naval Base at Guantanamo Bay, Cuba.<sup>9</sup> More than a year later, Hamdan was deemed eligible for trial by military commission.<sup>10</sup> Hamdan was charged with one count of conspiracy “to commit . . . offenses triable by military commission.”<sup>11</sup> The charge alleged that Hamdan knowingly conspired with al Qaeda from 1996 until November 2001 to attack civilians and civilian objects, to murder as an unprivileged belligerent, and to commit acts of terror.<sup>12</sup>

Before his hearing, Hamdan filed a petition for writs of habeas corpus and mandamus challenging the legitimacy of the military

2. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

3. Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9.4(a)(2)–(4) (2006).

4. *Id.* §§ 9.5–6. The defendant was also either appointed counsel or allowed to hire a civilian counsel. *Id.* § 9.4(c).

5. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786 (2006). Grounds for closure include: protection of classified information, the physical safety of participants or witnesses, the protection of intelligence or law enforcement sources, methods, or activities, and “other national security interests.” 32 C.F.R. § 9.6(b)(3) (2006). Although the accused’s counsel may be privy to these closed sessions, he or she may be forbidden, at the presiding officer’s discretion, from disclosing to his or her client information gained from such sessions. *Id.*

6. *See* 32 C.F.R. § 9.6(d) (2006); *see also Hamdan*, 126 S. Ct. at 2786–87.

7. *Id.* at 2787.

8. *Id.* at 2759.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 2761. In addition, the charges specifically alleged that Hamdan’s duties in al Qaeda were the general transportation of persons and supplies. *Id.*

commission that was to try him.<sup>13</sup> The District Court for the District of Columbia ruled in favor of Hamdan, and held that, based on the Uniform Code of Military Justice (UCMJ) and its codification of the Geneva Conventions, the military commissions did not have the power to try Hamdan.<sup>14</sup> The Court of Appeals for the District of Columbia reversed, dismissing Hamdan's challenge based on the grounds that: (1) Congress has specifically authorized the creation of the tribunals, (2) the Geneva Conventions were not judicially enforceable, and (3) Hamdan was not entitled to their protections.<sup>15</sup> The Supreme Court granted *certiorari* on November 7, 2005.<sup>16</sup>

## II. THE DECISION

Hamdan's appeal presented a series of complex constitutional issues, and resulted in a splintered plurality decision. The Court had to decide whether it had the power to hear the case, whether the executive branch had the power to convene military commissions, and whether the commissions exceeded Congressionally imposed limitations.

### A. *The Power of the Court: Jurisdiction over Hamdan v. Rumsfeld*

The Government asserted two major challenges to the Court's exercise of jurisdiction in *Hamdan v. Rumsfeld*. They first asserted that the Detainee Treatment Act of 2005 (DTA) foreclosed the Court's ability to hear habeas corpus petitions and other proceedings involving persons detained at Guantanamo Bay.<sup>17</sup> Second, the Government asserted that precedent dictated the Court should abstain from hearing an appeal from a military proceeding until there is a final decision by the military tribunal.<sup>18</sup> The plurality decision, written by Justice Stevens, rejected both arguments.

The DTA contains three jurisdiction-stripping provisions relating to aliens detained at Guantanamo Bay: suspension of writ of habeas corpus, limited appeal for decisions in the combatant status review tribunal, and limited appeal of decisions rendered by the military commissions.<sup>19</sup> A

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13. *Id.* at 2759.

14. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155, 158–72 (D.D.C. 2004).

15. *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

16. *Hamdan*, 126 S. Ct. at 2762.

17. *Id.*; *see also* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2741–44 (2005) (codified at 28 U.S.C.A. § 2241(e) (West 2006)).

18. *Hamdan*, 126 S. Ct. at 2769. *See also id.* at 2769–71 (discussing *Schlesinger v. Councilman*, 420 U.S. 738 (1975)).

19. *Id.* at 2763.

subsequent clause specifically denies jurisdiction over pending cases on appeal in the latter two situations, but does not include any reference to the habeas provision.<sup>20</sup>

The Government argued that the suspension of the writ was effective immediately upon enactment, precluding jurisdiction.<sup>21</sup> In his dissent, Justice Scalia agreed, pointing to precedent that found that an explicit suspension of the writ not only stopped jurisdiction of any future habeas petitions, but also repealed jurisdiction for all pending cases.<sup>22</sup> Hamdan countered that such a reading would raise “grave questions about Congress’ authority to impinge this Court’s appellate jurisdiction,” and would “unconstitutionally suspend[] the writ of habeas corpus.”<sup>23</sup>

The plurality dismissed the line of precedent relied on by Justice Scalia as a limited exclusion of the general presumption against retroactivity,<sup>24</sup> stating that jurisdiction-stripping provisions are treated differently.<sup>24</sup> The plurality interpreted the exclusion of the habeas provision as a deliberate omission, holding that the DTA did not strip jurisdiction for pending habeas petitions, like the one involved in *Hamdan*.<sup>25</sup>

The Government’s second grounds for dismissal relied on *Schlesinger v. Councilman*,<sup>26</sup> which held that courts should abstain from hearing an appeal from a military proceeding until there is a final decision.<sup>27</sup> *Councilman*’s abstention was based on two separate justifications. First, failure to abstain would impair the military’s ability to maintain discipline and efficiency.<sup>28</sup> Second, given that the military courts are not typical Article III courts, the civilian courts should not interfere with “the balance that Congress struck between military preparedness and fairness to individual service members.”<sup>29</sup>

20. *Id.* (citing DTA § 1005(e)(3)).

21. *Id.*

22. *Id.* at 2810–11 (Scalia, J. dissenting, Thomas, J. & Alito, J., joining) (citing *Bruner v. United States*, 343 U.S. 112 (1952), as an example of the Court restricting jurisdiction from pending cases where Congress has limited jurisdiction for a class of cases). Scalia also addressed and dismissed Hamdan’s argument that the DTA unconstitutionally suspended the writ. *Id.* at 2818–19 (citing *Swain v. Pressley*, 430 U.S. 372, 381 (1977), for the rule that an adequate and effective alternative to the writ of habeas corpus, such as appeal to the D.C. Circuit as provided by the DTA, does not constitute suspension of the writ).

23. *Id.* at 2764.

24. *Id.* at 2765.

25. *Id.* at 2765–66.

26. 420 U.S. 738 (1975).

27. *Id.* at 758.

28. *Hamdan*, 126 S. Ct. at 2770 (citing *Councilman*, 420 U.S. at 752).

29. *Id.* (citing *Councilman*, 420 U.S. at 758).

The Court found that neither justification applied.<sup>30</sup> First, Hamdan was not a member of the U.S. military, so military discipline and efficiency was not a concern. Second, the military commissions were not a part of the “integrated system of military courts,” so interference by the Court did not hamper the balance struck by Congress.<sup>31</sup> Because *Councilman* did not apply, the Court could reach the merits of Hamdan’s appeal.

## B. Executive Power: The President’s Enactment of Military Commissions

### 1. The Power to Enact Military Commissions

While there was little dissent on the executive’s power to convene commissions in this case,<sup>32</sup> the scope and extent of that power proved controversial. Justice Thomas strongly advocated that the President’s commander-in-chief powers mandates deference to his decisions on the military necessity of the commissions as convened.<sup>33</sup>

The plurality refused to extend such deference to the President. The Court cited *Ex parte Quirin* as support for their reading that Article 21 of the UCMJ placed an express condition that the President’s use of military commissions must comply with the laws of war.<sup>34</sup> It also pointed to the DTA’s language, which expressly reserved judgment on the constitutionality and legality of the “standards and procedures” of the commission.<sup>35</sup> Ultimately, it concluded that acts of Congress, such as the UCMJ and laws of war, limit any Presidential action.<sup>36</sup>

### 2. The Power to Try Hamdan for Conspiracy

The Court next examined common law requirements for the executive’s power to convene military commissions. The power of the

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30. *Id.* at 2770–71.

31. *Id.* at 2771. The Court relied on *Ex parte Quirin*, in which the Court did not abstain from hearing a challenge to the legitimacy of military commissions. *Id.* at 2771–72 (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942)).

32. The Court found that Congress had impliedly authorized military commissions through Article 21 of the UCMJ. *Id.* at 2774. Congress incorporated Article 15 of the Articles of War into Article 21 of the UCMJ. Compare 14 U.S.C.A. § 2308a art. 15 (West 1916), with UCMJ art. 21, 10 U.S.C. § 821 (2000).

33. *Hamdan*, 126 S. Ct. at 2823–25 (Thomas, J., dissenting, joined by Scalia, J.).

34. *Id.* at 2774 (citing *Ex Parte Quirin*, 317 U.S. at 28).

35. *Id.* at 2775 (citing DTA § 1005(e)(3)).

36. *Id.*

executive branch to convene military commissions was largely defined at common law and later incorporated into Article 21 of the UCMJ.<sup>37</sup> At common law, an offense must be committed within the “theater of war,” within the “period of the war,” and the offense must allege a violation of the laws of war.<sup>38</sup> The Court concluded that Hamdan’s conspiracy charge did not meet these requirements in that it was not a violation of the laws of war.<sup>39</sup> Although conspiracy charges had been heard by civil war commissions, which tried both martial law and law of war violations at the same time, conspiracy was “not a stand-alone offense against the law of war.”<sup>40</sup>

### C. *Legislative Power: The Limits Placed on Military Commissions*

The Court next examined what substantive limitations Congress placed on the military commissions. The UCMJ “conditions the President’s use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself . . . and with the ‘rules and precepts of the law of nations.’”<sup>41</sup> Such compliance with the UCMJ and laws of war, however, would prove problematic for President Bush’s military commissions.

#### 1. *Uniformity Requirements of the UCMJ*

Article 36 of the UCMJ places two restrictions on the President’s power to promulgate rules of procedure for military commissions.<sup>42</sup> First, any procedural rule adopted must comply with the UCMJ.<sup>43</sup> Second, the procedural rules governing the military commissions must be uniform with those governing courts-martial proceedings, unless the government could show that such uniformity was impracticable.<sup>44</sup> The

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37. *Id.* at 2777.

38. *Id.*

39. *Id.* at 2778.

40. *Id.* at 2783. The Court supported this by referencing the Nuremberg Tribunal, which refused to allow conspiracy as a triable charge, and the Hague and Geneva Conventions, neither of which mention conspiracy as a violation of the laws of war. *Id.* at 2784–85. Justice Thomas countered that any indictment need not be stated with precision, and that the Government had charged Hamdan with two distinct violations of the laws of war—namely, “membership in a war-criminal enterprise and conspiracy to commit war crimes.” *Id.* at 2830 (Thomas, J., dissenting).

41. *Id.* at 2786 (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

42. UCMJ art. 36, 10 U.S.C. § 836 (2000).

43. *Id.* § 836(a).

44. *Id.* § 836(b) (requiring procedural rules adopted for military commissions to be “uniform insofar as practicable” with those governing courts-martial proceedings).

Court found that the procedural rules adopted for the military commissions, such as the denial of a defendant's right to be present during trial, were not uniform with those governing courts-martial proceedings.<sup>45</sup> It also rejected arguments that the danger posed by international terrorism made deviation impracticable.<sup>46</sup> Thus, it held the UCMJ prohibited the use of such military commissions.<sup>47</sup>

## 2. Regularly Constituted Court Under the Geneva Conventions

The Court also invalidated the military commissions on the grounds that the procedures violated the laws of war, in particular, the Geneva Conventions.<sup>48</sup> The Court of Appeals had held that the Geneva Conventions were not judicially enforceable, and that Hamdan was not entitled to their protections.<sup>49</sup> The Court, however, found that the Geneva Conventions were judicially enforceable in this case,<sup>50</sup> based on its interpretation of Article 21 of the UCMJ, which required that military commissions be authorized by statute or by the laws of war.<sup>51</sup> Because no congressionally-enacted statute specifically authorized the use of the commissions, compliance with all laws of war—including the Geneva Conventions—was a necessary precondition to the executive establishing the military commissions.<sup>52</sup>

The Court of Appeals had found that Hamdan was not protected under Common Article 3 of the Geneva Conventions because the U.S.'s conflict with al Qaeda crossed national borders, and therefore, did not fit within Common Article 3's scope of "armed conflicts not of an international character."<sup>53</sup> The Court disagreed with this reasoning, stating "[t]he term 'conflict not of an international character' is used here in contradistinction to a conflict between nations."<sup>54</sup> The Court construed the phrase "not of an international character" according to its

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45. *Hamdan*, 126 S. Ct. at 2791–92. Thomas argued that any uniformity requirement in Article 36 was intended to apply across the branches of the military rather than to military commissions. *Id.* at 2842–43 (Thomas, J., dissenting). The Court did not reach the conclusion of whether any procedures of the military commissions were inconsistent with the UCMJ, an Article 36 requirement. *Id.* at 2791–92.

46. *Id.* at 2792. Thomas believed the executive branch should be given deference on the determination of impracticability. *Id.* at 2839–40 (Thomas, J., dissenting).

47. *Id.* at 2793.

48. *Id.*

49. *Id.*

50. *Id.* at 2794–98.

51. *Id.* at 2794.

52. *Id.*

53. *Id.* at 2795.

54. *Id.*



literal meaning—a conflict not between two nations.<sup>55</sup> Hamdan was therefore entitled to the protections of Common Article 3 because the war with al Qaeda was not a war between nations.<sup>56</sup>

Common Article 3 prohibits the “passing of sentences and the carrying out of executions without previous judgment pronounced by a *regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*”<sup>57</sup> The Court held the military commission violated this provision in two ways.<sup>58</sup> First, the plurality concluded that military commissions were not “regularly constituted court[s].”<sup>59</sup> Instead, “the regular military courts in our system are the courts-martial established by congressional statutes.”<sup>60</sup>

Second, the military commissions did not afford “all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>61</sup> Although this phrase was not defined by the Geneva Conventions, the plurality found it must include at least the “barest of those trial protections that have been recognized by customary international law,” including the right of an accused to be tried in his presence and to be privy to the evidence against him.<sup>62</sup> Thus, in not affording the accused these barest trial protections, the military commissions violated Common Article 3.<sup>63</sup>

### III. CONCLUSION

In prohibiting the type of military commission used to try Hamdan, the Court did not question the Government’s ability to hold detainees for the duration of the conflict.<sup>64</sup> Rather, the Court merely held that the

55. *Id.* at 2796.

56. *See id.*

57. *Id.* at 2795 (emphasis added). The dissenting opinions argued that because no sentence or execution had been carried out, this term had not been activated. *Id.* at 2846–47 (Thomas, J., dissenting).

58. *Id.* at 2797–98.

59. *Id.* at 2797. Justice Alito’s dissent argued that even if a military commission is different from a court-martial, it still forms a regularly constituted court if consistent with the “domestic law” of the convening country. *Id.* at 2851 (Alito, J., dissenting).

60. *Id.* at 2797. Without a “practical need” to deviate from a courts-martial proceeding, the military commissions can not be regularly constituted within the meaning of Common Article 3. *Id.*

61. *See id.* at 2797–98. Justice Kennedy declined to join this section of the opinion.

62. *Id.* at 2797. These rights are protected by Protocol I, Article 75(4)(e). Although the U.S. has not ratified Protocol I, its objection was not as to Article 75. *Id.* (citing William H. Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 322 (2003)).

63. *See id.* at 2797–98.

64. *Id.* at 2798.

military commissions' deviation from courts-martial procedures was not justified—and, without Congressional approval, the President lacks authority to establish military commissions that do not comply with all laws of wars.<sup>65</sup> As Justice Breyer stressed in his concurrence, the Court was simply forcing the President to ask Congress for additional authority.<sup>66</sup> Taking these words to heart, on September 6, 2006, the President addressed the nation, asking Congress to pass legislation approving a new military commissions system and to “clarify” the requirements of Common Article 3.<sup>67</sup>

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65. *See id.*

66. *See id.* at 2799 (Breyer, J., concurring).

67. President George W. Bush, Address to the Nation (Sept. 6, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

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