in the "Global War on Terrorism"

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Summary

The Supreme Court ruled 5-3 that President Bush's military order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism exceeded his authority. The Court found that Congress did not strip the Court of jurisdiction to hear *Hamdan v. Rumsfeld* when it passed the Detainee Treatment Act of 2005 (title X of P.L.109-148), which limited federal court jurisdiction over habeas corpus petitions from detainees held at the Guantanamo Bay detention facility. Although the Court did not dispute the President's authority to hold the petitioner as an "enemy combatant ... for the duration of hostilities," it found the military tribunals convened to try detainees for violations of the law of war did not comply with the Uniform Code of Military Justice (UCMJ) or the law of war, as incorporated in the UCMJ and embodied in Common Article 3 of the Geneva Conventions, which the Court held applicable to the armed conflict. The three dissenters argued that the ruling would hamper the President's ability to fight terrorism. The majority left open the possibility that Congress could grant the necessary authority to create military commissions that depart from the UCMJ. One new bill, S. 3614, addresses the issue.

In *Hamdan v. Rumsfeld*, decided June 29, 2006, the Supreme Court reviewed the validity of military commissions established to try suspected terrorists of violations of the law of war, pursuant to President Bush's military order (M.O.).[1] The Court did not revisit its 2004 opinion in *Hamdi v. Rumsfeld*[2] upholding the President's authority to detain individuals in connection with antiterrorism operations, and did not resolve whether the petitioner could claim prisoner-of-war (POW) status, but held that "in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."[3]

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[1] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §1(a), 66 Fed. Reg. 57,833 (Nov. 16, 2001) (hereinafter M.O.).

[2] 542 U.S. 507 (2004).

[3] Hamdan v. Rumsfeld, No. 05-154, slip op. at 72 (U.S. June 29, 2006).

inherent authority in the President as Commander-in-Chief of the Armed Forces to create such tribunals outside of the existing statutory authority, with which the military commission rules did not comply. He also concluded that the Geneva Conventions apply to the whole of the conflict in Afghanistan, including under their protections all persons detained in connection with the hostilities there,[7] and that Hamdan was thus entitled to be treated as a prisoner of war until his status was determined to be otherwise by a competent tribunal, in accordance with article 5 of the Third Geneva Convention (prisoners of war).

The D.C. Circuit Court of Appeals reversed, ruling that the Geneva Conventions are not judicially enforceable. Judge Williams wrote a concurring opinion, construing Common Article 3 to apply to any conflict with a non-state actor,[8] without regard to the geographical confinement of such a conflict within the borders of a signatory state. The Circuit Court interpreted the UCMJ language to mean that military commission rules have only to be consistent with those articles of the UCMJ that refer specifically to military commissions, and therefore need not be uniform with the rules that apply to courts-martial. The Supreme Court granted review and reversed.

Jurisdiction

Before reaching the merits of the case, the Supreme Court declined to accept the government's argument that Congress had, by passing the Detainee Treatment Act of 2005 (DTA),[9] stripped the Court of its jurisdiction to review habeas corpus challenges by

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[4] 344 F.Supp.2d 152 (D. D.C. 2004), *rev'd* 415 F.3d 33 (D.C. Cir. 2005), *cert. granted* 2005 U.S. LEXIS 8222 (Nov. 7, 2005).

[5] 10 U.S.C. §§ 801 *et seq*.

[6] There are four Conventions, the most relevant of which is The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3317 (hereinafter "GPW").

[7] 344 F.Supp.2d at 161.

[8] GPW art. 3. For a discussion of Common Article 3, see CRS Report RL31367, *Treatment of "Battlefield Detainees" in the War on Terrorism*, by Jennifer K. Elsea.

[9] P.L. 109-148, §1005(e)(1) provides that "no court … shall have jurisdiction to hear or consider … an application for … habeas corpus filed by … an alien detained … at Guantanamo Bay." The provision was not yet law when the appellate court decided against the petitioner, Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), *rev'd* 548 U.S. __ (2006). At issue was whether this provision applies to pending cases. The Court found that the provision does not apply to Hamdan's petition, but did not resolve whether it affects other cases that fall under the DTA's provisions regarding final review of Combatant Status Review Tribunals. Slip op. at 19, and n.14.

the "law of war" into UCMJ article 21,[13] brought the Geneva Conventions within the scope of law to be applied by courts. Justice Scalia, joined by Justices Thomas and Alito, dissented, arguing that the DTA should be interpreted to preclude the Court's review.

Presidential Authority

With respect to the authority to create the military commissions, the Court held that any power to create them must flow from the Constitution and must be among those "powers granted jointly to the President and Congress in time of war."[14] It disagreed with the government's position that Congress had authorized the commissions either when it passed the Authorization to Use Military Force (AUMF)[15] or the DTA. Although the Court assumed that the AUMF activated the President's war powers, it did not view the AUMF as expanding the President's powers beyond the authorization set forth in the UCMJ. The Court also noted that the DTA, while recognizing the existence of military commissions, does not specifically authorize them. At most, these statutes "acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the 'Constitution and laws,' including the law of war."[16]

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[10] *Id*. at 7. To resolve the question, the majority employed canons of statutory interpretation supplemented by legislative history, avoiding the question of whether the withdrawal of the Court's jurisdiction would constitute a suspension of the Writ of Habeas Corpus, or whether it would amount to impermissible "court-stripping." Justice Scalia, joined by Justices Alito and Thomas in his dissent, interpreted the DTA as a revocation of jurisdiction.

[11] *Id*. at 20. The court below had also rejected this argument, 413 F.3d 33, 36 (D.C. Cir. 2005).

[12] *See Hamdan*, slip op. at 23 (stating that the bodies established by the Department of Defense to review the decisions of military commissions "clearly lack the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces....").

[13] 10 U.S.C. § 821 ("The provisions of [the UCMJ] conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.")

[14] *Hamdan*, slip op. at 27 (citing Congress's powers to "declare War ... and make Rules concerning Captures on Land and Water," Art. I, §8, cl. 11, to "raise and support Armies," id., cl. 12, to "define and punish ... Offences against the Law of Nations," id., cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," id., cl. 14.).

[15] P.L. 107-40, 115 Stat. 224 (2001).

[16] *Hamdan*, slip op. at 30.

"apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" insofar as the President "considers practicable," but which "may not be contrary to or inconsistent" with the UCMJ. In addition, rules made pursuant to this authority "shall be uniform insofar as practicable." The President had determined with respect to the military commissions that "it is impracticable to apply the rules and principles of law that govern 'the trial of criminal cases in the United States district courts,'" but made no determination with respect to the practicability of applying rules different from those that apply in courts-martial.[17]

The Court interpreted article 36 to provide the President discretion to determine which federal court rules need not be applied by various military tribunals[18] due to their impracticability. However, the Court read the uniformity requirement as according less discretion to the President to determine what is practicable when providing different rules for courts-martial, military commissions, and other military tribunals.[19] Unlike the requirement for rules to track closely with federal court rules, which the President need follow only insofar as *he deems* practicable, the Court reasoned, the uniformity requirement applies unless its application is demonstrably impracticable. Thus, less deference was found owing, and the Court found that the government had failed to demonstrate that circumstances make any courts-martial rules impracticable for use in military commissions. Further, the Court found that some of the rules provided in the Defense Department rules set forth in Military Commission Order No. 1 (M.C.O. No. 1), in particular the provision allowing the exclusion of the defendant from attending portions of his trial or hearing some of the evidence against him, deviated substantially from the procedures that apply in courts-martial in violation of UCMJ article 36.[20]

The Geneva Conventions and the Law of War

Rejecting the D.C. Circuit's view that the Geneva Conventions are never enforceable in federal courts,[21] the Supreme Court found the Conventions to be part of the law of war

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[17] The government took the position that the "contrary to or consistent with" language applies only with respect to parts of the UCMJ that make specific reference to military commissions.

[18] The term "military tribunal" in the UCMJ should be interpreted to cover all forms of military courts, encompassing courts-martial as well as military commissions.

[19] *Hamdan*, slip op. at 59.

[20] *Id* at 61. Regarding the defendant's right to be present during trial, the Court stated, "[w]hether or not that departure technically is 'contrary to or inconsistent with' the terms of the UCMJ, 10 U. S. C. §836(a), the jettisoning of so basic a right cannot lightly be excused as 'practicable.'"

[21] *See* 415 F.3d at 39 (citing Johnson v. Eisentrager, 339 U.S. 763, 789, n. 14).

peoples."[23] While recognizing that Common Article 3 "obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict," and that "its requirements are general ones, crafted to accommodate a wide variety of legal systems," the Court found that the military commissions under M.C.O. No. 1 do not meet these criteria. In particular, the military commissions are not "regularly constituted" because they deviate too far, in the Court's view, from the rules that apply to courts-martial, without a satisfactory explanation of the need for such deviation.[24]

Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, explored the history of military commission practice in the United States and internationally to conclude that conspiracy, the only charge lodged against the defendant, is not universally recognized as a war crime and thus does not conform to the UCMJ requirement in article 21 that permits jurisdiction only over "offense[s] ... that by the law of war may be tried by military commission."[25] Justice Kennedy did not join in this part of the opinion, finding the discussion unnecessary in light of the Court's determination that the military commissions do not conform to the UCMJ. Justice Alito, joined by Justices Scalia and Thomas, dissented, arguing that the Court is bound to defer to the President's plausible interpretation of the treaty language.

Analysis

While the *Hamdan* Court declared the military commissions as currently constituted to be "illegal," it left open the possibility that changes to the military commission rules could cure any defects by bringing them within the law of war and conformity with the UCMJ. The Court also suggested, as emphasized in a concurrence by Justice Ginsburg, that the President retains the option of asking Congress to authorize or craft rules tailored

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[22] *Hamdan*, slip op. at 63.

[23] GPW art. 3 § 1(d). The identical provision is included in each of the four Geneva Conventions and applies to any "conflict not of an international character." The majority declined to accept the President's interpretation of Common Article 3 as inapplicable to the conflict with al Qaeda and interpreted the phrase "in contradistinction to a conflict between nations," which the Geneva Conventions designate a "conflict of international character". *Hamdan*, slip op. at 67.

[24] *Id*. at 70 (plurality opinion); *Id.* (Kennedy, J., concurring) at 10. Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, further based their conclusion on the basis that M.C.O. No. 1 did not meet all criteria of art. 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). While the United States is not party to Protocol I, the plurality noted that many authorities regard it as customary international law.

[25] *Id*. at 70 (plurality opinion)(citing art. 21, UCMJ; 10 U.S.C. § 821).

who have laid down their arms or been incapacitated by capture or injury, are to be treated humanely and protected from "violence to life and person," torture, and "outrages upon personal dignity, in particular, humiliating and degrading treatment." Insofar as these protections are incorporated in the UCMJ and other laws, it would seem the Court is ready to interpret and adjudicate them, to the extent it retains jurisdiction to do so. It is not clear how the Court views the scope of the GWOT, however, because its decisions on the merits have been limited to cases arising out of hostilities in Afghanistan.

The opinion reaffirms the holding in *Rasul v. Bush*[26] that the GWOT does not provide the President a "blank check," and, by finding in favor of a noncitizen held overseas, seems to have expanded the *Hamdi* comment that

> Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[27]

The dissenting views also relied in good measure on actions taken by Congress, seemingly repudiating the view expressed earlier by the Executive that any efforts by Congress to legislate with respect to persons captured, detained, and possibly tried in connection with the GWOT would be an unconstitutional intrusion into powers held exclusively by the President.[28] Expressly or implicitly, all eight participating Justices applied the framework set forth by Justice Jackson in his famous concurrence in the *Steel Seizures* case,[29] which accords greater deference to the President in cases involving national security where he acts with express congressional authority than when he acts alone. The differing views among the Justices seems to have been a function of their interpretation of the AUMF and other acts of Congress as condoning or limiting executive actions.

For information about relevant legislation, see CRS Report RL31600, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*.

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[26] 124 S.Ct. 2686 (2004).

[27] 542 U.S. 507, 535 (2004).

[28] *See, e.g.* O*versight of the Department of Justice: Hearing Before the Senate Judiciary Committee*, 107th Cong. (2002) (testimony of Attorney General John Ashcroft) (arguing that a statute that could be read to interfere with the executive power to detain enemy combatants must be interpreted otherwise to withstand constitutional scrutiny).

[29] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).