

by James H. Landman

Can Enemy Combatants Be Tried by Military Commissions?

This spring, the Supreme Court is expected to hear arguments in *Hamdan v. Rumsfeld* (Docket No. 05-184). The case asks the Court to consider the limits of executive power in trying enemy combatants captured in the war on terror. It also seeks clarification of the rights of enemy combatants under the Geneva Convention Relative to the Treatment of Prisoners of War, an international treaty that the United States ratified in 1955.

In *Hamdan v. Rumsfeld*, the Supreme Court will review a decision by the U.S. Court of Appeals for the District of Columbia Circuit. There, a panel of judges that included new Supreme Court Chief Justice John Roberts ruled that the President has the power to try enemy combatants before the military commissions, which were created pursuant to the President's Military Order of November 13, 2001. The panel also ruled that the Geneva Convention Relative to the Treatment of Prisoners of War is not enforceable in United States courts. Even if it were, two of the three panel members decided that the Convention does not apply to al Qaeda and its members. The Supreme Court has granted certiorari to review both the questions of whether the President has the authority to establish military commissions to try enemy combatants in the war on terror and whether rights protected under the Geneva Convention can be enforced in a federal court.

In November 2001, Salim Ahmed Hamdan was captured in Afghanistan and turned over to the American military. Hamdan, a citizen of Yemen, has admitted that he served as Osama bin

Laden's personal driver in Afghanistan from 1996 to 2001. Following his capture, he was transported to Guantánamo Bay, Cuba, where he was initially kept in the general detention facility known as Camp Delta. In July 2003, President Bush determined "that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States." Later that year, he was placed in solitary confinement in Guantánamo's Camp Echo.

Following his transfer to Camp Echo, Hamdan was appointed legal counsel. He filed a petition for a writ of habeas corpus, which asks a court to consider whether an individual has been wrongfully detained. While his petition was pending, the government formally charged Hamdan with conspiracy to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism. Hamdan was set to be tried before a military commission created pursuant to President Bush's Military Order of November 13, 2001.

Hamdan's petition for a writ habeas corpus was first heard in the U.S. District

Court for the District of Columbia. The district court ruled mostly in Hamdan's favor. It questioned the President's authority to establish the military commission that would try Hamdan. It also found that under the Geneva Convention, Hamdan must be tried by court-martial, the same trial that would be afforded members of the U.S. military charged with a crime, as long as his status as a "prisoner of war" under the Geneva Convention was in doubt. The U.S. government has argued that detainees such as Hamdan are "enemy combatants" who do not fall within the Geneva Convention's definition of "prisoner of war." But the district court found that the Combatant Status Review Tribunal, which was established to comply with the Supreme Court's requirement in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that detainees have an opportunity to challenge their classification as enemy combatants, was not competent to determine Hamdan's status under the Geneva Convention. The district court also rejected the government's argument that an individual's rights under the Geneva Convention are not enforceable in a United States court.

Separation of Powers and Executive Authority

A three-member panel of the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court's rulings in *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005). On the separation of powers issue involving the executive's authority to establish military commissions to try enemy combatants, the court of appeals relied on both Congress's Authorization for Use of Military Force (AUMF) (2001), S.J. 23, Public Law No. 107-40], passed in response to the September 11 attacks, and two federal statutes, 10 U.S.C. § 821 and 10 U.S.C. § 836, regulating the use of military commissions. (The President's

Military Order of November 13, 2001, had also cited these sources of authority, as well as the President's constitutional powers as Commander in Chief of the Armed Forces.)

The court of appeals noted that the AUMF "recognized the President's 'authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.'" It then turned to a Supreme Court precedent from World War II, *In re Yamashita*, 327 U.S. 1 (1946), which had also dealt with the validity of military commissions. That case held that an "important incident to the conduct of war is the adoption of measures by the military commander ... to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." Although Congress had formally declared war in World War II, the court argued that the AUMF went as far, or farther than, Congress had gone in such key conflicts as the Civil War, the Korean War, the Vietnam War, and the Gulf War. It also noted that the Supreme Court, in *Hamdi v. Rumsfeld*, had suggested that a military commission could determine whether an American citizen was an enemy combatant in the current war on terror, giving further support to the use of military commissions to try alien enemy combatants.

A World War II precedent also supported the court of appeals' reading of the two federal statutes regulating the establishment of military commissions. *Ex parte Quirin*, 317 U.S. 1 (1942), involved the case of German saboteurs captured and tried by military commission in the early years of World War II. The Articles of War passed by Congress had provided for the use of military commissions for crimes against the laws of war not ordinarily tried by court-martial. These articles supported the

Supreme Court's finding that President Roosevelt had been authorized in the use of military commission to try the saboteurs. The court of appeals found that the contemporary versions of the Articles of War, 10 U.S.C. §§ 821 and 836, which also provide for the use of military commissions to try offenders "that by statute or by the law of war may be tried by military commissions," similarly authorize the use of a military commission in Hamdan's case.

Enemy Combatants and the Geneva Convention

Having found that the President has authority to establish military commissions for enemy combatants, the court of appeals turned to the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. The district court had found that the treaty confers individual rights that are enforceable in a United States federal court. The court of appeals disagreed.

The court of appeals began its analysis with the statement of the principle that "this country has traditionally negotiated treaties with the understanding that they do not create judicially enforceable individual rights." Treaties are primarily compacts between independent nations, the court reasoned, and violations of those treaties are subjects for international negotiation, not individual lawsuits. And again, precedent from World War II supported the court of appeals' reasoning. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Supreme Court had considered the provisions of the 1929 Geneva Convention in a case involving the trial of German nationals by an American-controlled military commission in China. The Court found that the 1929 Geneva Convention had not created *judicially* enforceable rights; instead, it created rights that the *political* and *military* authorities of the parties to

the treaty were responsible for enforcing. Although the court of appeals noted some differences between the 1929 Geneva Convention and the 1949 Convention, none of those differences altered the *Eisentrager* Court's analysis of the judicial enforceability of the rights specified in the 1949 treaty.

The court of appeals also found that even if the Convention had created judicially enforceable rights, Hamdan would not be protected by those rights. First, he would not meet the definition of "prisoner of war" in the treaty: a member of a group wearing a "fixed distinctive sign recognizable at a distance" and who conducted "their operations in accordance with the laws and customs of war." Moreover, the court held that the Convention does not apply to al Qaeda and its members. The court reasoned that the Convention protects only two kinds of combat: international conflict between "High Contracting Parties" (nations that signed the treaty) or civil war ("armed conflict not of an international character occurring in the territory of one of the High Contracting Parties ...").

The Convention does provide an exception to the case of international conflicts if one of the "powers" in the conflict is a signatory nation to the treaty but the other is not. In this case, however, the signatory nation is bound to observe the provisions of the Geneva Convention only if the other "power" accepts and applies the provisions of the treaty. "Even if al Qaeda could be considered a Power, which we doubt," the court stated, "no one claims that al Qaeda has accepted and applied the provisions of the Convention."

More controversial was the court of appeals' decision that "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" is limited to civil

war. The district court had noted that the capture of Hamdan had occurred in the midst of an internal conflict within Afghanistan, a “High Contracting Party” to the Convention. This conflict was between the governing Taliban and its al Qaeda allies, on one side, and the United States and its Afghan allies, on the other, and fit within the Convention’s language. In making this decision, the district court rejected the President’s view that the fighting in Afghanistan involved two separate conflicts. The first, a conflict against the Taliban for control of Afghanistan, was a conflict that would fit within the Convention’s definition of “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” Captured Taliban members would thus be entitled to the protections of the Convention. The second conflict was a broader struggle against al Qaeda, which transcends the territorial limitations of the Convention’s language and leaves captured al Qaeda members outside the Convention’s protections.

The court of appeals overruled the district court and adopted the President’s view that the Convention does not apply to the conflict against al Qaeda and its members. The conflict against al Qaeda began well before Hamdan’s capture in November 2001, the court of appeals noted, and in other nations besides Afghanistan, including the United States on September 11, 2001. Moreover, “the President’s decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political-military decision constitutionally committed to him.... To the extent there is ambiguity about the meaning of [the Convention] as applied to al Qaeda and its members, the President’s

reasonable view of the provision must therefore prevail.”

One member of the panel, Senior Circuit Judge Williams, disagreed with this reasoning. Judge Williams argued that the Convention’s description of conflicts “not of an international character” should be understood to include conflicts between nations that have signed the Convention and nonstate actors such as al Qaeda. Members of al Qaeda would thus be entitled to the most modest protections of the Convention, which include humane treatment and “the judicial guarantees which are recognized as indispensable by civilized peoples.” But Judge Williams agreed with his colleagues that the Convention is not enforceable in United States courts. Any claims that the trial Hamdan receives by military commission does not conform to the Convention’s minimal requirements cannot be raised until the trial is finished. Judge Williams thus concurred in the court of appeals’ judgment.

Hamdan v. Rumsfeld arrives at the Supreme Court in a time of transition. Chief Justice Roberts, who was a member of the panel on the court of appeals, recused himself from the Court’s decision, leaving eight justices to decide the case. The case was heard in March, by which time retiring Justice Sandra Day O’Connor had left the Court and been replaced by Samuel Alito. His views on the extent of the President’s authority are likely to have a significant impact on the Court’s decision. If the eight members of the Court who decide the case split 4-4, the decision of the court of appeals will be upheld, even though constitutional and international issues involved in the case will not be fully resolved. If the court of appeals’ decision is upheld, whether by a split or

New Legislation Poses Additional Challenges for Hamdan Case

In December, President Bush signed into law the Detainee Treatment Act of 2005. Provisions of the Act severely limit the jurisdiction of the federal courts over habeas corpus petitions by detainees at the Guantánamo Bay detention facility. When signing the Act, the President issued a signing statement that in part read, “the executive branch shall construe section 1005 [of the Act] to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus [by detainees].”

Hamdan v. Rumsfeld is based on Hamdan’s petition for a writ of habeas corpus. A series of new briefs filed with the Supreme Court in the case are arguing whether or not the Court’s jurisdiction over Hamdan has been eliminated by the Detainee Treatment Act. Also at issue is the constitutionality of suspending the writ of habeas corpus. According to Article I, Section 9, of the Constitution, the writ of habeas corpus can only be suspended “in cases of rebellion or invasion.”

majority decision of the Court, the trial of Hamdan by military commission is expected to go forward.

James H. Landman is associate director of the ABA Division for Public Education.