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## COURT REJECTS MILITARY TRIBUNALS FOR WAR CRIMES TRIALS

*(Hamdan v. Rumsfeld)*

The U.S. Supreme Court yesterday struck down the Bush Administration's plan to convene military commissions to conduct trials of al Qaeda leaders accused of war crimes. The 5-3 decision was a setback for the Washington Legal Foundation (WLF), which filed a brief in the case, *Hamdan v. Rumsfeld*, urging that the plan be upheld.

The Court held that while the President has the authority to convene military commissions, the commissions that the Bush Administration established were improper because they did not provide defendants with all of the procedural rights required under the Uniform Code of Military Justice (UCMJ). The Court said that if the Administration wishes to employ its proposed procedures, it would have to go to Congress and ask it to amend the UCMJ. Alternatively, the Court ruled, the Administration could conduct trials before military commissions but using the same procedural rules commonly employed in military courts martial.

"The Court's decision signals a total abandonment of the deference normally accorded by courts to the Executive Branch in foreign policy and military matters," said WLF Chief Counsel Richard Samp after reviewing the Court's decision. "Such judicial second-guessing is wholly unwarranted; the Court has no expertise in waging war and simply has no basis for determining what measures are necessary for fighting Islamic terrorists," Samp said.

The Bush Administration issued an order in November 2001 authorizing the establishment of military commissions to hear war crimes charges brought against those captured during the war against al Qaeda. Yesterday's ruling was the result of a federal court challenge to the November 2001 order filed by Salim Ahmed Hamdan, a citizen of Yemen who was captured during fighting in Afghanistan and is being detained at Guantanamo Bay, Cuba. Hamdan is one of a handful of al Qaeda operatives against whom war crimes charges were been filed.

Hamdan admitted that he served as a driver and close aide to Osama bin Laden for several years. He nonetheless insisted that he worked as a civilian and was not part of the al Qaeda conspiracy to murder Americans. Hamdan contended that as a civilian, he is not subject to trial before a military commission. He also contended that the entire

system of military commissions violates separation-of-power principles established by the Constitution because, he argued, only Congress is authorized to establish military commissions, and it has not done so.

The propriety of military commissions was thrown into doubt in November 2004 when U.S. District Judge James Robertson issued an injunction against all commission proceedings. Robertson held that the rules established for such commissions by the Bush Administration violated the Geneva Conventions as well as the UCMJ. The U.S. Court of Appeals for the District of Columbia reversed that ruling in July 2005 and sided with the Administration on all issues. Yesterday's Supreme Court decision largely reinstated Judge Robinson's decision.

The Court's decision does not affect the military's authority to continue to detain Hamdan and all other foreigners being held at Guantanamo Bay. Whether those detentions may continue is an issue that will be decided in a case now pending in the U.S. Court of Appeals for the District of Columbia Circuit.

WLF's brief argued that Congress has explicitly endorsed the creation of military commissions and that federal law does not prescribe the procedural rules that commissions must follow. WLF argued that military commissions have been utilized throughout American history. Although agreeing with WLF that some commissions are permissible, the Court held that the rules established for these commissions are not.

WLF devoted much of its brief to arguing that Hamdan's challenge is premature. WLF argued that the federal courts should abstain from hearing Hamdan's claims until after completion of the military commission proceedings. WLF argued that, although civilians are not subject to trial before military commissions, it is up to the commission hearing Hamdan's case to make the initial determination regarding whether he is, in fact, a civilian. The Court rejected that argument (over a vigorous dissent from Justice Scalia), finding that judicial "abstention" is unwarranted when the commission's propriety is subject to challenge. The Court also rejected arguments that the Detainee Treatment Act (DTA), a law passed by Congress last December, stripped the federal courts of jurisdiction over the case. The Court held that the DTA should not be applied to cases pending on the date of its enactment.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 states. It devotes a considerable portion of its resources to promoting America's national security. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site.