



**July 15, 2005**

## **COURT PERMITS TERRORISTS TO BE TRIED BY MILITARY COMMISSIONS**

*(Hamdan v. Rumsfeld)*

The U.S. Court of Appeals for the District of Columbia Circuit today upheld the Bush Administration's plan to convene military commissions to conduct trials of al Qaeda leaders accused of war crimes. The decision reversed a district court decision and was a victory for the Washington Legal Foundation, which filed a brief in the case, *Hamdan v. Rumsfeld*, urging that the plan be upheld.

The appeals court agreed with WLF that Congress has explicitly endorsed the creation of such commissions. WLF also argued in the alternative that even if Congress had not given its endorsement, the Constitution authorizes the President, as Commander in Chief of American military forces, to order military trials for enemy combatants. WLF argued that military commissions have been utilized throughout American history.

The propriety of military commissions was thrown into doubt last fall 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 federal law. Today's decision reversed Judge Robertson on every major point.

"Military commissions are an effective and constitutional means of bringing enemy combatants to justice, and there are at least some instances in which the federal courts' criminal justice system is not up to the task," said WLF Chief Counsel Richard Samp after reviewing the appeals court decision. "Because of the requirement that proceedings in federal court be totally open, recent criminal proceedings against international terrorists have set back our fight against terrorism by requiring disclosure of U.S. intelligence sources; using military commissions would lessen that problem," Samp said.

Attorneys challenging the use of military commissions have already announced plans to seek a rehearing in the appeals court and, if necessary, to seek U.S. Supreme Court review. Unless and until any such appeals are heard, the military will be able to go forward with the handful of war crimes trials that were under way before Judge Robertson's ruling.

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. A federal court challenge to that order was 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 have been filed. Hamdan admits that he served as a driver and close aide to Osama bin Laden for several years. He nonetheless insists that he worked as a civilian and was not part of the al Qaeda conspiracy to murder Americans. Hamdan contends that as a civilian, he is not subject to trial before a military commission. He also contends that the entire system of military commissions violates separation-of-power principles established by the Constitution because, he argues, only Congress is authorized to establish military commissions, and it has not done so.

The appeals court rejected Hamdan's separation-of-powers argument. The court held that Congress authorized use of military commissions both in 1950, when it adopted the Uniform Code of Military Justice, and in September 2001, when it adopted the Authorization for Use of Military Force (which authorizes the President to use "all necessary and appropriate force" against al Qaeda). WLF had also argued that the President has authority to establish military commissions even without Congress's blessing, noting that Executive Branch officials have used commissions to hear charges against enemy combatants for 230 years, often without seeking congressional authorization, and Congress has never objected to the practice. The appeals court also agreed with WLF that the rules adopted by the military for use in commission proceedings violate neither the Geneva Conventions nor the federal Uniform Code of Military Justice.

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.