Legal Backgrounder

WLF Washington Legal Foundation

Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

Vol. 19 No. 31 September 17, 2004

MILITARY COMMISSIONS FOR TERRORISTS ON SOLID CONSTITUTIONAL GROUNDS

by

Bradford A. Berenson and Christian M. L. Bonat

One effect of the Supreme Court's disappointing initial forays into the War on Terror, s*ee Rasul v. Bush*, 124 S. Ct. 2686 (2004), *Hamdi v. Rumsfeld*, 124 S. Ct. 2771 (2004), and *Rumsfeld v. Padilla*, 124 S. Ct. 2633 (2004), has been to magnify the importance of the Administration's plan to dispense military justice to terrorists through the use of military commissions. By limiting the ability of the government to detain and interrogate suspected terrorists free from interference by Article III courts, the Supreme Court has pushed the executive strongly in the direction of providing quasi-judicial process within the executive branch. To mitigate the pitfalls and disabilities that would result from *de novo* review in federal court of the enemy combatant status of suspected terrorists, the Administration has instituted Combatant Status Review Panels to provide an independent look — to which the habeas courts can then defer — at whether those we have captured were in fact fighting against us. Similarly, to avoid being forced to fit the square peg of a war crimes prosecution into the round hole of a federal criminal trial, the government will shortly begin prosecutions in military commissions of terrorists alleged to have committed violations of the laws of war.

Background. This development has been anticipated for some time. In the immediate aftermath of the 9-11 attacks, President Bush issued a Military Order providing for military commissions to try suspected terrorists. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001) ("Military Order"). Over the past two years, the Defense Department has developed and issued Commission Orders providing for a "full and fair trial," including notice of all charges, the presumption of innocence, access to evidence, a right to remain silent with no adverse inference being drawn, a right to counsel and cross-examination, and the requirement of proof beyond a reasonable doubt. U.S. Dep't of Defense, Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002), at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf. Currently fifteen detainees held at Guantanamo Bay, Cuba have been designated for trial before military commissions. Four have been formally charged, provided with defense counsel, and recently have appeared before preliminary commission hearings.

Bradford A. Berenson served as Associate Counsel to President George W. Bush from January, 2001 through January, 2003 and is currently a partner with the law firm Sidley Austin Brown & Wood LLP. **Christian M. L. Bonat** is an associate at Sidley Austin Brown & Wood LLP. The views expressed herein are their own.

Perhaps not surprisingly, even though no commission trial has yet taken place, a legal challenge to the commission proceedings has already been filed in federal district court by one of the designees. Salim Ahmed Hamdan has been designated for trial before a military commission on charges of terrorism-related war crimes based upon his work as a bodyguard and personal driver for Osama bin Laden. In April, appointed defense counsel, as "next friend" to Hamdan, brought a case challenging the lawfulness of the commission process in the Western District of Washington which has now been transferred to federal district court in Washington, D.C.[1] Although Hamdan raises a number of tenuous jurisdictional as well as procedural claims under inapplicable sources of law such as the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions, the thrust of his challenge to the commissions is that the President lacks authority, on separation of powers and equal protection grounds, to constitute and employ the commissions. The legal substance of this challenge is weak (even apart from this pre-trial petition's formidable exhaustion and ripeness problems), and the federal courts should readily dismiss it.[2] Nonetheless, this case provides a foretaste of the more difficult challenges to commission practices and procedures that undoubtedly lie ahead.

Authority to Establish Military Commissions. Hamdan's foremost constitutional claim is that the President lacks authority to convene military commissions absent express authorization by Congress. Hamdan claims that, as the lawmaking body empowered by the Constitution "To define and punish . . . Offenses against the Law of Nations," Congress alone has the power to authorize the military commissions. *See* U.S. CONST. art. I, § 8, cl. 10. This argument has two significant flaws: first, it has been clear for centuries that U.S. military commanders, deriving their powers from those of the Commander-in-Chief, have authority to convene military commissions as an inherent incident of their warmaking power; and second, Congress has expressly authorized these commissions through statutory language virtually identical to that the Supreme Court previously approved.

As to the first point, commissions, as a recognized creature of military law, have existed as an incident of prosecuting war since before the Founding, and long before any congressional authorization. The Supreme Court has previously explained that, "[s]ince our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts." *Madsen v. Kinsella*, 343 U.S. 341, 346-47 (1952). Unlike Article III courts, their powers are derived not from statute but from the laws of war. *See Ex parte Vallandigham* 68 U.S. (1 Wall.) 243, 249-53 (1863).

As the Court explained in *Johnson v. Eisentrager*, "[t]he first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, the grant of war power includes all that is necessary and proper for carrying these powers into execution." 339 U.S. 763, 788 (1950) (citation omitted). The Founders clearly recognized that one of the powers inherent in military command was the authority to establish military tribunals to punish offenses

[1] *Swift v. Rumsfeld*, No. C04-0777L (W.D. Wa. filed Apr. 6, 2004). On May 11, 2004, the court granted the government's motion for a stay in the proceedings pending the Supreme Court's disposition of *Rasul*/*Odah* and *Padilla*. The stay has since been lifted, and on August 9, 2004 the case was transferred to the District Court for the District of Columbia, where Guantanamo challenges are being consolidated. No. 04-CV1519(JR) (D.D.C. filed Sept. 2, 2004).

[2] Hamdan has also presented similar claims in pre-trial motions filed before the military commission itself. Oddly, he has requested that the commission not rule on these motions, abstaining in favor of the federal habeas court. In addition, Hamdan has raised a series of other challenges to the composition and procedures of the commission by way of pre-trial motion. For example, he has claimed conflicts of interest taint most of the members of the commission; he has challenged the role of the Presiding Officer as both fact-finder and de facto military judge; he has challenged the role of the other (non-lawyer) members of the commission in making legal determinations; and he has attacked the participation of the Assistant to the Presiding Officer on the ground that the position is not provided for in the commission orders and that the assistant is inappropriately providing legal advice.

  ISBN 1056 3059

against the laws of war. Indeed, during the Revolutionary War, the foremost Founder himself, General George Washington, appointed just such a tribunal to try British Major John Andre as a spy in connection with Benedict Arnold's treason. Surely the Framers, in vesting the President with Commander-in-Chief powers, intended to grant him at least the same powers that General Washington had exercised during the Revolutionary War.

Subsequent history bears this out: even though Congress did not make its first mention of military commissions in statute law until 1863 (and then only to recognize the President's existing authority to use such commissions to try members of our own military for certain offenses),[3] military commanders, including other Presidents such as Andrew Jackson, tried war crimes violators before military commissions in the Indian Wars, the Mexican War, and in the Civil War. Indeed, the assassins of President Abraham Lincoln and their accomplices, individuals who, in essence, committed an act of terroristic violence on U.S. soil, were all tried and convicted by military commissions, rather than civilian courts. Thus, "[i]n general . . . [Congress] has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of the laws of war." *Madsen*, 343 U.S. at 346 n. 9 (internal citation omitted).

Even were the power to establish military commissions not an inherent incident of military command, Congress has already provided statutory approval for military commissions. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Supreme Court confronted an identical challenge to the authority of military commissions. The Court pretermitted the question whether the President had inherent authority to establish them, holding that through Article 15 of the then-existing Articles of War, "Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war . . . ." *Id.* at 28. What Hamdan overlooks is that President Bush has the exact same statutory authority to convene military tribunals as President Roosevelt had in World War II and upon which the Court rested its holding in *Quirin*: Article 15 of the Articles of War was codified as Section 821 of Title 10 of the U.S. Code in 1950 when the Articles of War were replaced by the UCMJ. Section 821 states, "The provisions of this chapter conferring jurisdiction upon courts-martial *do not deprive military commissions . . . 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*." 10 U.S.C. § 821 (2000) (emphasis added). This provision recognizes the existence and authority of military commissions in terms virtually identical to those approved by the Supreme Court during World War II.[4]

Hamdan's analogous claim that the President has infringed on Congress' "define and punish" powers by defining the offenses that may be tried before the commissions is equally misplaced. One of the longstanding functions of military commissions is to try individuals (typically enemy combatants) for violations of the laws of war, which are defined in large measure by customary international law. In attempting to set forth and describe those violations in writing, the Administration conferred a gratuitous benefit on the detainees by providing them greater notice and clarity concerning the nature of the charges that may be brought than they would have had if the government had simply relied on the vaguer dictates of customary international law. The commission Instruction setting out particular offenses states that "[n]o offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war." U.S. Dep't of Defense, Military Commission Instruction No. 2, Crimes and

[3]Act of March 3, 1863, § 30, 12 Stat. 731, 736.

[4]The same fallacy infects Hamdan's claim that the President has infringed on Article III and the Suspension Clause by denying those subject to trial by military commission access to a habeas corpus remedy in the federal courts. Administration officials repeatedly and publicly confirmed that the Military Order was not intended to cut off habeas corpus review, and indeed, the language the President employed in the Order was identical to that which the Supreme Court had already construed to *permit* habeas corpus review in the *Quirin* case. *See* 317 U.S. at 22-24.

Elements for Trials by Military Commission (Apr. 30, 2003), *at* http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf. By its own terms, the Order is merely "declarative of existing law," *id.*, and, as such, neither encroaches on congressional authority nor subjects Hamdan to ex post facto laws. While the Constitution gives Congress power to define and punish offenses against the laws of nations, it does not purport to give Congress the exclusive authority to do so: war crimes have been punishable, and punished, by military commissions since the birth of the Republic.

Hamdan's most novel challenge to the authority of the commissions is based on the Equal Protection Clause. He claims that since U.S. citizens are not subject to the Military Order, it cannot constitutionally be applied to enemy aliens. This assertion, too, is unsound. To be sure, the Court has extended certain constitutional provisions to aliens, including the Equal Protection Clause, s*ee, e.g.*, *Plyler v. Doe*, 45 U.S. 202 (1982); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and Fifth and Sixth Amendments. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights). But it has never done so in the context of aliens fighting against us militarily, a setting in which the extension of such rights would be anomalous, to say the least.

Traditionally, during a time of war, whatever constitutional protections apply to aliens have been significantly curtailed. According to the Supreme Court, "The government's power to terminate its hospitality [to aliens] has been asserted and sustained by this Court since the question first arose. War, of course, is the most usual occasion for extensive resort to the power." *Harisiades v. Shaughnessy*, 342 U.S. 580, 587 (1952). Significantly, most constitutional protections only apply to aliens in the first instance as a result of the alien's physical location in and connection to the United States, circumstances obviously not applicable to aliens captured in foreign theaters of battle. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272, 273 (1990) ("aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country" or have "accepted some societal obligations"). The Supreme Court held in 1950 that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States." *Johnson v. Eisentrager*, 339 U.S. 73 (1950). The fact that the President decided to exempt U.S. citizens from the Military Order, at least for the time being, surely should not alter the fundamental constitutional calculus or the dictates of common sense that underlie it.

Conclusion. Thus, it is clear that the Constitution, the U.S. Code, and the Supreme Court's precedents support President Bush's authority to convene military tribunals; the government should handily win this first round of legal dispute over the legality of commission trials. But the fact that the President has authority to convene commissions does not answer the more difficult questions that will arise related to the process by which those commissions will reach and carry out judgments, some of which have also been raised by the detainees in the commission proceedings. These questions will undoubtedly be brought before the federal courts shortly after the military commissions hand down their first convictions. Although it is settled that commission proceedings are not subject to the dictates of Article III or the Fifth and Sixth Amendments, *see Quirin*, 317 U.S. at 40, the Court's decisions last Term suggest that they will be subject to the basic demands of Due Process. What that means in the context of military trials of suspected terrorists leaves ample room for interpretation and invention by the courts in the modern era of due process jurisprudence. If the *Hamdan* challenge tells us anything about this next wave of litigation in the War on Terror, it is that, in that task, the federal courts will be aggressively assisted by the detainees and their advocates.

  ISBN 1056 3059