



November 9, 2004

COURT BARS EFFORTS TO TRY TERRORISTS BEFORE MILITARY COMMISSIONS

(Hamdan v. Rumsfeld)

Judge James Robertson of the U.S. District Court for the District of Columbia yesterday held that the U.S. military may not try a suspected al Qaeda war criminal before a military commission, ruling that the regulations adopted by the Bush Administration for conducting military trials violate the suspect's rights under international law.

The decision was a setback for the Washington Legal Foundation (WLF), which filed a brief in the case, *Hamdan v. Rumsfeld*, in support of the military's right to proceed. WLF argued that Congress has explicitly endorsed the creation of military commissions; and that even if Congress had not done so, 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 federal government announced, following the decision, that it will appeal Judge Robertson's ruling to the federal appeals court. WLF has pledged to continue its support for the government in that appeal.

"Military commissions are an effective and constitutional means of bringing to justice enemy combatants, 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 court's ruling. "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.

The Bush Administration in November 2001 issued an order authorizing the establishment of military commissions to hear war crimes charges brought against those captured during the war against al Qaeda. To date, the military has filed charges against six individuals, including Salim Ahmed Hamdan, a citizen of Yemen who was captured during fighting in Afghanistan and is being detained at Guantanamo Bay, Cuba. Hamdan responded by filing a habeas corpus petition, alleging that the government was acting illegally in attempting to try him before a military commission.

Hamdan admits that he served as a driver and close aide to Osama bin Laden for several years. He nonetheless insists that he is a civilian and was not part of the al Qaeda conspiracy to murder Americans. He 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 district court largely rejected Hamdan's constitutional argument. In a victory for the government, Judge Robertson agreed with WLF that Congress explicitly authorized creation of military tribunals when it adopted the Uniform Code of Military Justice (UCMJ) in 1951. However, Judge Robertson also ruled that Hamdan is entitled to protection under the 1949 Third Geneva Convention and that, by virtue of that treaty, he is entitled to be treated as a prisoner of war -- at least until such time as a tribunal determines that Hamdan is not entitled to P.O.W. status. Robertson held that P.O.W.s are entitled under the UCMJ to a trial before a military commission that provides him with at least as many procedural protections as a U.S. serviceman would receive in a court-martial. Robertson had remarkably few objections to the procedures established by the Bush Administration for conducting war crimes trials before military commissions. But he said that those procedures are deficient in one critical respect: they permit the military, for security reasons, to exclude the defendant from some portion of commission proceedings. Judge Robertson said that that provision was inconsistent with a provision of the UCMJ that allows defendants in court-martial proceedings to be present at all times; he enjoined further prosecution of Hamdan until rules governing commission proceedings are revised.

In its brief, WLF also argued that Hamdan's challenge was premature. WLF argued that any federal court review must await exhaustion 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. Judge Robertson rejected that argument, saying that immediate judicial review is permitted whenever, as here, there is any doubt regarding the military's jurisdiction to hear a case.

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.

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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.